EXHIBIT CC 47

AFFIDAVIT & ANNEXURES

OF

AZWIHANGWISI FAITH MUTHAMBI

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

CHAIRPERSON'S DIRECTIVE IN TERMS OF REGULATION 10(6) OF THE REGULATIONS OF THE COMMISSION

TO	:	**MS FAITH MUTHAMBI**
ADDRESS	:	**1633 BLOCK J EXTENSION 1 THOHOYANDOU 0950**
TEL	:	**011 781 0099**
FAX	:	**011 781 0526**
EMAIL	:	**faith.muthambi@yahoo.com / info@lungisanimantshaattorneys.co.za**

1. By virtue of the powers vested in me in my capacity as Chairperson of the above-mentioned Commission by Regulation 10(6)* of the Regulations of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In the Public Sector Including Organs of State, I hereby direct you, **MS FAITH MUTHAMBI**, to deliver on or before **19 MARCH 2021** to the Secretary of the

*Regulations 10(6) of the Regulations of the Commission reads: "For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

Commission at the address given above an affidavit or affirmed declaration in which you admit or deny the averments made against or about you in the affidavit of Ms Stefanie Fick which is attached to this affidavit.

2. If you need assistance from the Commission in order to prepare the affidavit or affirmation, you must, within three days (excluding weekends and public holidays) of receipt of this directive, contact, or, communicate with the Secretary of the Commission and indicate that you would like such assistance in which case the Commission will provide someone to assist you with the preparation of the affidavit or affirmed declaration. In such a case you will not pay anything for such assistance. Should you have difficulty in reaching the Secretary or should the Secretary not return your call or respond to your letter or emails, you may contact Ms Rushaan Lewis at 060 770 1518 or at rushaanl@commissionsc.org.za.

3. If, in order to prepare the affidavit, or affirmation, you do not need any assistance from the Commission, you must, with or without the assistance of a lawyer of your own choice, prepare the affidavit or affirmed declaration and have it delivered to the Secretary of the Commission on or before the date given above for the delivery of the affidavit. If you make use of a lawyer of your own choice to assist you to prepare such affidavit or affirmed declaration, the Commission will not be responsible for the payment of your lawyer's fees or costs.

4. This directive is issued for the purpose of pursuing the investigation of the Commission.

5. Your attention is drawn to Regulations 8(2), 11(3)(a) and (b) and 12(2)(c) and (d) of the Regulations of the Commission, as amended.

Regulation 8(2) reads:

"8 (1) . . .

(2) A self-incriminating answer or a statement given by a witness before the Commission shall not be admissible as evidence against that person in any criminal proceedings brought against that person instituted in any court,

except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947)."

Regulation 11(3)(a) and (b) reads:

"11 (1) . . .

(2) . . .

(3) No person shall without the written permission of the Chairperson–

(a) disseminate any document submitted to the Commission by any person in connection with the inquiry or publish the contents or any portion of the contents of such document; or

(b) peruse any document, including any statement, which is destined to be submitted to the Chairperson or intercept such document while it is being taken or forwarded to the Chairperson."

Regulation 12(2)(c) and (d) reads:

"12 (1) . . .

(2) Any person who

(a) . . .

(b) . . .

(c) wilfully hinders, resists or obstructs the Chairperson or any officer in the exercise of any power contemplated in regulation 10(1) or (2);

(d) refuses or fails, without sufficient cause, to submit, within a period fixed by the Chairperson or at all, an affidavit or affirmed declaration pursuant to a directive issued by the Chairperson under regulation 10(6); or

(e) . . .

is guilty of an offence and liable on conviction -

(i) in the case of an offence referred to in paragraph (a), (c), (d) or (e), to a fine, or to imprisonment for a period not exceeding 12 months; or

(ii) in the case of an offence referred to in paragraph (b), to a fine, or to imprisonment for a period not exceeding six months."

DATED IN JOHANNESBURG ON THIS 8th DAY OF MARCH 2021.

JUSTICE RMM ZONDO
DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

and

CHAIRPERSON: JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

AFFIDAVIT

I, the undersigned,

STEFANIE FICK

do hereby make oath and state:

1.

I am an adult female employed as Head of Legal Affairs by the Organisation Undoing Tax Abuse ("OUTA") with its business address as 10th Floor, O'Keeffe & Swarts Building, 318 Oak Street, Ferndale, Randburg, Gauteng.

2.

The contents of this affidavit fall within my personal knowledge, unless stated otherwise and are in all aspects true and correct.

MANDATE

3.

The Organisation Undoing Tax Abuse ("OUTA") is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate

about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority with regards to taxpayers' money in South Africa.

4.

In recent months, South Africa has been rocked by the Gupta emails and documents ("Gupta emails") which were retrieved from the server of SAHARA Computers Pty (Ltd). These Gupta emails have substantiated most of the allegations pertaining to state capture and have unveiled evidence of misconduct by the Gupta family and many high-ranking government officials. OUTA received a copy of these emails from an unknown source, established the authenticity of such and released an extensive report on State Capture titled "No Room To Hide – A President Caught in the Act."

5.

Amongst the Gupta emails were evidence of misconduct on the part of Azwihangwisi Faith Muthambi ("Muthambi") that constitutes crimes of Corruption and High Treason. Muthambi is the Minister of Public Service and Administration of the Republic of South Africa. This misconduct occurred during Muthambi's tenure as Minister of Communication.

BACKGROUND

SABC

6.

On 25 May 2014, President Jacob Zuma appointed Muthambi to the Cabinet as Minister of Communications. In the Cabinet reshuffle of 30 March 2017, President Jacob Zuma retained Muthambi as a member of Cabinet, appointing her as Minister of the Public Service and Administration.

7.

On 24 February 2017, the National Assembly's *ad hoc* Committee (headed by the Hon. Mr Vincent Smith MP) found that Muthambi *"...displayed incompetence in carrying out* her *responsibilities as Shareholder Representative* [of the SABC]". The Committee noted that the evidence suggested *"major shortcomings"* in Muthambi's conduct, particularly in relation to the amendment of the SABC's Memorandum of Incorporation (MOI) and her role in Hlaudi Motsoeneng's ("Hlaudi") permanent appointment as Chief Operating Officer (COO). It concluded that *"...the Minister interfered in some of the Board's decision-making and processes and had irregularly amended the MOI to further centralise power in the minister..."* and condemned all political interference in the SABC Board's operations by Muthambi.

8.

The Committee recommended that: *"The President should seriously reconsider the desirability of this particular Minister retaining the Communications portfolio".*

9.

The Final Report of the *ad hoc* Committee into the Fitness of the SABC Board is annexed hereto and marked **"SF1"**.

10.

In *Democratic Alliance v South African Broadcasting Corporation SOC Ltd and Others 2016 (3) SA 468 (WCC)*, the High Court found that Muthambi acted irrationally and unlawfully in appointing Hlaudi as Chief Operations Officer of the SABC in the face of the Public Protector's damning findings against him of abuses of power, fraud and maladministration. The court held that *"the [Minister's] decision to appoint Mr Motsoeneng, when there was a manifest need for a transparent and accountable public institution such as the SABC to exhaustively examine all of the disputes raised about his integrity and qualifications, cannot be considered as a rational decision"*.

11.

The aforementioned judgement is annexed hereto and marked as **"SF2"**.

12.

In *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others 2016 (2) SA 522 (SCA)*, the Supreme Court of Appeal made the same (albeit *prima facie*) findings against the Minister. It also criticised Muthambi for "treat[ing] with disdain" the allegation that Hlaudi's appointment was irrational and unlawful, and for raising technical objections rather than furnishing the court with an explanation of her actions. The Court advised both the Minister and the SABC that

"the overriding public interest obliged them to make full and frank disclosure rather than shield themselves from scrutiny by resorting to technical points in opposition.

13.

The aforementioned judgement is annexed hereto and marked as **"SF3"**.

14.

In Electronic Media Network Limited and Others v E.TV (Pty) Limited and Others 2017 (1) SA 17 (CC), the Constitutional Court expressed its concern at Muthambi's "evasive" and 'suspicious' responses or lack thereof to pertinent questions raised by E.TV, as regards consultations that she had with undisclosed parties. Chief Justice Mogoeng stated:

> *"We live in a constitutional democracy, whose foundational values include openness and accountability. It is thus inappropriate for the Minister to not have volunteered the identities of those she consulted with and what the consultation was about, as if she was not entitled to solicit enlightenment or did so in pursuit of an illegitimate agenda. This conduct must be frowned upon and discouraged..."*

15.

The aforementioned judgement is annexed hereto and marked as **"SF4"**.

THE SAHARA EMAIL LEAKS

16.

The Gupta emails obtained from the Sahara computer server show that between July and August 2014 – shortly after President Zuma appointed her to the Cabinet as Minister of Communications – Muthambi sent a series of emails to Tony Gupta on confidential matters of executive policy and matters in the scope of her ministerial powers. The correspondence suggests either –

a. that the transfer of powers to her national portfolio in 2014 was influenced and vetted by the Guptas; or
b. that Minister Muthambi used her relationship with the Guptas to influence the manner in which the President transferred powers into her portfolio.

17.

These emails were either sent directly from Muthambi to Tony Gupta or indirectly, from Muthambi to the Sahara company's CEO, Mr Ashu Chawla. Mr Chawla, in turn, forwarded Muthambi's correspondence to Tony Gupta and Duduzane Zuma, President Zuma's son. The latter appears to have acted as a conduit between the Guptas and President Zuma.

18.

On 18 July 2014, Muthambi emailed a copy of the President's Proclamation on the transfer of administration and powers to certain Cabinet members (published as

Proclamation 47 of 2014 in Government Gazette No. 37839 of 15 July 2014) to Ashu Chawla who, in turn, forwarded the email to Tony Gupta

19.

Proclamation 47 of 2014 provided *inter alia* that all powers under the Electronic Communications Act 36 of 2005 and the Sentech Act 63 of 1996 were to be assigned to the Minister of Telecommunication and Postal Services, Minister Cwele. Previously, it was assigned to the Minister of Communications.

20.

A few minutes after emailing the Proclamation 47 of 2014 to Mr Chawla, Muthambi sent him a second email attaching a document describing the effect of the proclamation. The document contained the following statement:

> *"The ability to make broadcasting policy and issue broadcasting policy directions are set out in section 3 of this Act. These powers have been transferred from the Minister of Communications to the Minister of Telecommunications and Postal Services. It is therefore the Minister of Telecommunications and Postal Service who will make policy and issue policy directives to ICASA for broadcasting, including public service broadcasting."*

21.

On 25 July 2014, Muthambi sent two emails to Mr Chawla. In the first e-mail, with the subject line "Proclamation New July 18", she wrote: *"These sections must be*

transferred to the Minister of Communications." A document describing the statutory provisions to which she referred was attached to the e-mail under the file name "proclamtion (sic) new 18 July 2014 (clean).docx".

22.

The document named "proclamtion (sic) new 18 July 2014 (clean).docx" proposed the re-transfer of certain powers under the Electronic Communications Act 36 of 2005 from the Minister of Telecommunications and Postal Services to the Minister of Communications.

23.

In a second e-mail sent minutes later, with the subject line *"Responsibility for InfraCo and Sentech"*, Muthambi wrote: *"Sentech's signal distribution must rest with the Ministry of Communications"*. The attached document motivates for the transfer of powers and functions over Sentech (which is responsible for broadcasting signal distribution to the SABC and commercial broadcasters) from the Minister of Telecommunications and Postal Services to the Minister of Communications (under the Sentech Act No. 63 of 1996).

24.

Both e-mails of 25 July 2014 were subsequently forwarded by Ashu Chawla to Tony Gupta and Duduzane Zuma, in separate emails.

25.

The use by Muthambi of the word "must" in both of her emails is particularly disturbing. It suggests one of two possibilities:

a. Either she was conveying to Tony Gupta that these changes had to take place if the interests of the Gupta family were to be protected; or,
b. She was instructing Tony Gupta and / or Duduzane Zuma to use his influence with President Zuma (the only person who could reassign the functions in question) to ensure that the proposed changes did take place.

26.

Included in the powers which "proclamation new 18 July 2014 (clean).docx" proposed to have retransferred to Muthambi, was the power under section 3 of the Electronic Communications Act to make national policy for the information, communications and technology sector *"to the extent that it deals in any way with a broadcasting service or an electronic communications network service used for or in the provision of broadcasting service."*

27.

On 6 December 2013, Muthambi's predecessor as Minister of Communications, Minister Carrim had started the process of exercising his power under section 3 of the Electronic Communications Act 36 of 2005, by issuing for public comment draft amendments to the broadcast digital migration technology under Government Notice

954 of 2013.194 For present purposes, we emphasize two features of the amendments proposed by Minister Carrim:

a. The first is that it proposed fixed dates for certain stages in the digital migration process; and,

b. The second is that it proposed that the Government would subsidise set top boxes capable of receiving encrypted signals. This proposal was in accordance with ANC policy on the issue.

28.

As pointed out in the document that Muthambi had forwarded to Mr Chawla on 18 July 2014, in terms of the assignment of functions in Proclamation 47 of 2014, responsibility for broadcast digital migration policy now lay not with Muthambi, but with Minister Cwele. On 29 July 2014, Muthambi sent an e-mail to Chawla, with the following message: *"Despite my request, the cde is determined to table the matter in cabinet tomorrow ... He called me that he was coming to Cape Town this morning ... I hope he still on his way."*

29.

Muthambi attached a memorandum that she had sent, as Minister of Communications, to the Minister of Telecommunications and Postal Services, to Mr Cwele. In the memorandum, Muthambi noted that Minister Cwele proposed to table final amendments to the Broadcasting Digital Migration Policy in Cabinet and expressed concerns about the proposed amendments.

30.

The forwarding of this document to Mr Chawla was a gross violation of Cabinet confidentiality. Mr Chawla forwarded the e-mail and the document to Tony Gupta later that day.

31.

Minister Cwele did not obtain Cabinet approval for his proposed final amendments to the Broadcasting Digital Migration Policy, either at the cabinet meeting of 30 July 2014 or at any time thereafter.

32.

On 1 August 2014, Muthambi sent an email to Mr Chawla, to which she attached a draft of a proclamation in the name of the President for the transfer of administration, powers and functions under the Electronic Communications Act from the Minister of Telecommunications and Postal Services to the Minister of Communications. The emailed message was: "See attached Proclamation that President must sign". Again, the use of the word "must" in the email from Muthambi relating to the proposed exercise of a presidential power is disturbing.

33.

On 8 August 2014, "Ellen" of Fortune Holdings emailed Muthambi in reply, thanking her for the proposed proclamation that the President "must" sign. The email was signed by "Zandile". "Zandile" is presumably Zandile Ellen Tshabalala, the Chairperson of the SABC at the time. "Zandile" copied Mr Chawla and a certain Khumalo at the SABC on this correspondence.

34.

The draft Presidential proclamation was never promulgated in the self-contained form attached to the emails between Muthambi, Mr Chawla and Tony Gupta. However, on 2 December 2014 the President Promulgated Proclamation 79 of 2014 which transferred to the Minister of Communications a range of powers including the power to make national policy on information, communications and technology under section 3 of the Electronic Communications Act insofar as it relates to broadcasting.

35.

The aforementioned emails and the related promulgations are attached in a bundle and marked as **"SF5"**.

36.

With policy on Broadcast Digital Migration safely now under her control, Muthambi published her amendments to the policy on 18 March 2015 under Government Notice 232 of 2015. The final policy included neither of the two features mentioned above in Minister Carrim's published draft of December 2013:

a) The policy no longer tied the Government to any dates for the digital migration process; and,

b) The policy provided that Government subsidised set top boxes would not be capable of receiving encrypted signals. It thus reversed Minister Carrim's proposal which had been in accordance with ANC policy, and replaced it with a decision that was contrary to ANC policy. In changing

the policy in this manner, Muthambi provoked criticism in a public statement issued by the Tri-Partite Alliance in February 2015.

37.

As pointed out above, when Muthambi was taken to Court by e-TV for her failure to consult publicly in relation to the changed provisions regarding encryption, the Constitutional Court commented on her "evasive and suspicious" responses relating to the identity of the persons with whom she had consulted in relation to the changes that she made (see paragraph 14 *supra*). In the light of the emails described above, the reasons for this evasiveness are evident.

38.

The communications described above between Muthambi, Mr Chawla and Tony Gupta amount to an abuse of her office. There is no reasonable explanation for communications of this nature between the Minister of Communications and members of the Gupta group who control a television station subject to her regulatory jurisdiction.

THE MINISTER'S APPOINTMENT OF HLAUDI MOTSOENEG AS COO OF THE SABC

39.

On 8 July 2014, Muthambi appointed Hlaudi as permanent COO of the SABC, despite the Public Protector's findings and remedial action. The High Court and Supreme Court of Appeal found that the Minister's decision was, on the face of it, irrational and unlawful.

40.

The Public Protector's Report, *"When Governance and Ethics Fail"*, is annexed hereto and marked as **"SF 6"**.

41.

The explanation for Muthambi's protection and promotion of Hlaudi – notwithstanding his abuses of power at the SABC – appears to lie, at least in part, in the Minister and Hlaudi shared improper relationship with the Guptas.

42.

As Group Chief Executive of Stakeholder Relations at the SABC (April 2011-November 2011), and later as acting COO (November 2011-July 2014) and permanent COO (July 2014 – November 2015) of the SABC, Hlaudi promoted the SABC's so-called "business relationship" with the Gupta's media company, TNA Media Group (Pty) Ltd.

43.

Under Hlaudi, the SABC concluded agreements with TNA Media in terms of which the SABC would broadcast the New Age "Business Breakfasts" at a loss to the SABC, while TNA Media amassed considerable profits and media exposure from the broadcasts.

44.

Parliament's *ad hoc* Committee on the SABC noted in its report that –

a. SABC producer, Mr Vuyo Mvoko gave evidence that SABC resources were diverted to fund ANN7, the Gupta-owned news channel. He indicated that the SABC's Morning Live resources were diverted to pay for the production costs associated with the TNA Business Breakfasts. The SABC did not generate any revenue from the briefings.

b. The former acting Group CEO of the SABC (between July 2011 to January 2012), Mr Phil Molefe *"corroborated evidence that the SABC bore costs associated with the Business Breakfasts. In his submission he indicates that the shows came at a huge cost to the SABC. Technical equipment for one production could cost R1 million or more. In addition, the SABC had to cover the flights, accommodation and subsistence of its production staff when the briefings took place outside of Johannesburg. Mr Molefe confirms that while the SABC carried the production costs, the TNA Media Group earned the revenue exclusively."*

45.

In addition, the SABC paid huge subscriptions to the Gupta-owned New Age newspaper. This escalated from R238,356 in 2011 to close to a R1 million in 2015/2016.

46.

During the Parliamentary inquiry into the SABC, Mr Molefe made a serious allegation that, in November 2011, he was pressured by Hlaudi and then Chairperson of the SABC, Dr Ben Ngubane to increase Hlaudi's salary by R500,000. When he refused, Hlaudi allegedly said to Dr Ben Ngubane: *"Chair, I told you that this is not our man. So*

I'm going to Pretoria tonight". This reported conversation suggests that Hlaudi was protected not only by Muthambi, but also by President Zuma.

47.

Hlaudi's gross abuses of power at the SABC – which included diverting public resources vested in the SABC to benefit the Gupta's rival media company – appear to have been sanctioned by both Muthambi and President Zuma.

CHARGES

High Treason

48.

In terms of **Section** 96 of our Constitution:

"*(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.*

(2) Members of the Cabinet and Deputy Ministers may not-

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

49.

Furthermore, each Minister must swear/affirm before the Chief Justice or another judge designated by the Chief Justice, as follows:

*"I,_____, swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with honour and dignity; to be a true and faithful counsellor; **not to divulge directly or indirectly any secret matter entrusted to me**; and to perform the functions of my office conscientiously and to the best of my ability."*

50.

We allege that Muthambi's conduct, as detailed above, constitutes high treason as it violated, threatened and endangered the existence, independence and security of the Republic of South Africa, or had the effect or potential effect of changing the Constitutional structure of the Republic of South Africa.

51.

Muthambi, as a citizen of the Republic of South Africa and Minister of Communications, unquestionably owed her allegiance to the Republic. She intentionally and unlawfully participated in email exchanges with Ashu Chawla, Tony

Gupta and Duduzane Zuma which violated, threatened and endangered the existence, independence and security of the Republic.

52.

In terms of **Section 51(1)** of the Criminal Law Amendment Act 105 of 1997 (subject to subsections (3) and (6)), a Regional Court or a High Court shall sentence a person it has convicted of High Treason, to imprisonment for life.

Corruption

53.

We allege that Muthambi's conduct, as detailed above, constitutes contraventions of the following sections of The Prevention and Combating of Corrupt Activities Act 12 of 2004 ("POC"):

1. **Section 3** of the POC, which states:

"Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation,

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption."

2. **Section 4** of the POC, which states:

"(1) Any-

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers.

(2) *Without derogating from the generality of section 2 (4), 'to act' in subsection (1), includes-*

(a) *voting at any meeting of a public body;*

(b) *performing or not adequately performing any official functions;*

(c) *expediting, delaying, hindering or preventing the performance of an official act;*

(d) *aiding, assisting or favouring any particular person in the transaction of any business with a public body;*

(e) *aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;*

(f) *showing any favour or disfavour to any person in performing a function as a public officer;*

(g) *diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or*

(h) *exerting any improper influence over the decision making of any person performing functions in a public body."*

3. **Section 7** of the POC, which states:

"(1) Any-

(a) member of the legislative authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the legislative authority, whether for the benefit of that member or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to members of the legislative authority.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-

(a) absenting himself or herself from;

(b) voting at any meeting of;

(c) aiding or assisting in procuring or preventing the passing of any vote in;

(d) exerting any improper influence over the decision making of any person performing his or her functions as a member of; or

(e) influencing in any way, the election, designation or appointment of any functionary to be elected, designated or appointed by, the legislative authority of which he or she is a member or of any committee or joint committee of that legislative authority."

4. **Section 21** of the POC, which states:

"Any person who-

(a) attempts;

(b) conspires with any other person; or

(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act,

is guilty of an offence."

5. **Section 34 of the POC**, which states:

"(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more;

must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act 68 of 1995)."

54.

In terms of **Section 26** of POC:

"(1) Any person who is convicted of an offence referred to in-

(a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable-

(i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;

(ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or

(iii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years.

(3) In addition to any fine a court may impose in terms of subsection (1) or (2), the court may impose a fine equal to five times the value of the gratification involved in the offence."

55.

With reference to the contents of this affidavit, I humbly request that the elements of criminal activities such as, but not limited to, high treason and corruption be thoroughly investigated by the SAPS and other relevant law enforcement authorities.

Signed at **RANDBURG** on this **17TH** day of **JULY 2017**.

STEFANIE FICK

I certify that the deponent has acknowledged that she understands the contents of the above declaration and has no objections to taking the prescribed oath or affirmation and that she considers the prescribed oath or affirmation binding on her conscience.

Signed and sworn before me, at Randburg on this 17th day of July 2017.

Commissioner of Oaths

Name: _____

Office: _____

Address: _____

LERISSA GOVENDER
Commissioner of Oaths / Kommissaris van Eds
Practising Attorney / Praktiserende Prokureur RSA
9 Loumyn Place, Glen Lauriston
P.O. Box 1117, Pretoria, 0001

1. FINAL REPORT OF THE AD HOC COMMITTEE ON THE SABC BOARD INQUIRY INTO THE FITNESS OF THE SABC BOARD, DATED 24 FEBRUARY 2017

The ad hoc Committee on the SABC Board Inquiry,having inquired into the fitness of the SABC Board as per the National Assembly resolution of 3 November 2016, reports as follows:

Part A

1. Introduction

1.1 The National Assembly (NA) established the ad hoc Committee on the SABC Board Inquiry (the Committee) to inquire *inter alia* into the fitness of the SABC Board to discharge its duties as prescribed in the Broadcasting Act, No 4 of 1999 and any other applicable legislation.

1.2 This followed after widespread concern from the public about the SABC's ability to exercise its mandate as the public broadcaster. In addition, the Board could no longer convene quorate meetings as several non-executive Board members had been removed or had resigned.

1.3 There is*prima facie* evidence that the SABC's primary mandate as a national public broadcaster has been compromised by the lapse of governance and management within the SABC, which ultimately contributed to the Board's inability to discharge its fiduciary responsibilities.

1.4 The SABC has consequently deviated from its mandate as the public broadcaster, and from providing a platform and a voice to all South Africans to participate in the democratic dispensation of the Republic. The SABC has also failed to provide an important platform for community involvement, education and entertainment, reflecting the rich and diverse cultural heritage of South Africa.

1.5 Instead, there appears to have been flouting of governance rules, laws, codes and conventions, including disregard for decisions of the courts and the Independent Communications Authority of South Africa (ICASA), as well as the findings of the Public Protector of South Africa (Public Protector). This collective conduct:

- rendered the SABC potentially financially unsustainable due to mismanagement as a result of non-compliance with existing policies and irregular procurement;
- interference in as far as editorial independence which is in direct conflict with journalistic ethics; and
- saw the purging of highly qualified, experienced and skilled senior staff members in violation of recruitment/human resource policies and procedures; purged staff have in many instances been replaced without due consideration for, or compliance with established recruitment policies.

Part B: Background and Methodology

2. Background

2.1 Terms of reference

2.1.1 The inquiry was instituted on 3 November 2016 per a resolution of the NA.

2.1.2 In line with section 15A(1)(b) of the Broadcasting Act the Committee was charged with inquiring into the ability of the SABC Board to discharge its duties as prescribed in that Act. Its terms of reference were limited to considering the:

- SABC's financial status and sustainability;
- SABC's response to *Public Protector Report No 23 of 2013/14:When Governance and Ethics Fail;*
- SABC's response to recent court judgements affecting it;
- SABC's response to ICASA's June 2016 ruling against the decision of the broadcaster to ban coverage of violent protests;
- current Board's ability to take legally-binding decisions following the resignation of a number of its non-executive Board members;
- Board's adherence to the Broadcasting Charter;
- Board's ability to carry out its duties as contemplated in section 13(11) of the Broadcasting Act (No 4 of 1999);
- human resource-related matters such as governance structures, appointments of executives; and the terminations of services of the affected executives; and
- decision-making processes of the Board.

2.1.3 In terms of the resolution the Committee must complete its business, and report to the NA by 28 February 2017.

2.2 Membership

2.2.1 The membership of the multi-party Committee comprised eleven members in total—the African National Congress (six members), the Democratic Alliance (two members); the Economic Freedom Fighters (one member); and other parties (two members).

2.2.2. The following members were selected to serve on the Committee[1]:
Hon. HP Chauke, MP (ANC); Hon. MB Khoza, MP (ANC); Hon. JD Kilian, MP (ANC); Hon. FS Loliwe, MP (ANC); Hon. JL Mahlangu, MP (ANC); Hon. VG Smith, MP (ANC); Hon. P van Damme, MP (DA); Hon. M Waters, MP (DA); Hon. MQ Ndlozi, MP (EFF); Hon. LG Mokoena*,MP (EFF); Hon. N Singh, MP (IFP);Hon. NM Khubisa, MP (NFP); Hon. S Swart*, MP (ACDP); and Hon. NL Kwankwa*, MP (UDM).

2.3 Process

2.3.1 The Committee unanimously elected Hon VG Smith, MP as its chairperson on 15 November 2016, and adopted the approach and the process that the inquiry would follow.

2.3.2 The Committee committed to conduct its hearings in compliance with the requirements of fairness and strict adherence to sections 56, 58 and specifically section 59 of the Constitution and the relevant rules of the NA. To this end, it agreed to adopt an inquisitorial approach, with evidence being gathered from the relevant state institutions, interest groups and other relevant witnesses (including the Shareholder Representative), and from relevant information/documentation. The inquisitorial approach allowed for a process where members wereactively involved in determining facts and deciding the outcome in the matter.

2.3.3 The Committee conducted its processes in an open and transparent manner in line with NA Rule 184(1) pursuant to section 59(1)(b) of the Constitution of the Republic of South Africa (the Constitution). Section 59(1)(b) of the Constitution provides that the NA must conduct its business in an open manner, and hold its

[1]The asterisks denote alternate members

sittings and those of its committees in public, but that reasonable measures may be taken to regulate public access, including access to the media. NA Rule 253(5) as envisaged in section 57(1)(a) and (b) of the Constitution further informed the Committee's processes.

2.3.4 Section 56 of the Constitution, read with the provisions of sections 14, 15 and 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 (the Privileges Act) was followed in relation to the swearing in and summoning of witnesses.

2.3.5 Adv. Nthuthuzelo Vanara had conducted a series of interviews with potential witnesses in anticipation of an inquiry that would have been conducted by the Portfolio Committee on Communications (the Portfolio Committee). The Committee therefore agreed to appoint him as its Evidence Leader.

2.4 Witnesses

2.4.1 The Committee invited briefings from certainChapter 9 institutions and evidence from former and current Board members and chairpersons, former and current SABC employees, the Minister of Communications (the Minister), as well as civil society organisations. The hearings took place from 7 to 15 December 2016 and on 13 January 2017.

2.4.2 The Committee received briefings from the following Chapter 9 institutions:

- Auditor-General of South Africa (Auditor-General), on the SABC's financial performance and audit outcomes for the period 1 April 2013 and 31 March 2016;
- ICASA, on the Complaints and Compliance Committee's 3 July 2016 decision in relation to the Media Monitoring Project Benefit Trust, SOS Support Public Broadcasting Coalition and the Freedom of Expression Institute's complaint regarding the SABC's decision not to cover violent protests, and the SABC's response to the decision; and
- Public Protector, on *Public Protector Report No 23 of 2013/14: When Governance and Ethics Fail*, and the SABC's response to the remedial actions contained in it.

2.4.3 The following former Board members were invited to give evidence relating to their tenure:

- Prof. Bongani Khumalo;
- Mr Tembinkosi Bonakele;
- Ms Rachel Kalidass;
- Ms Nomvula Mhlakaza;
- Mr Ronny Lubisi;
- Mr Vusi Mavuso;
- Dr Aaron Tshidzumba; and
- Mr Krish Naidoo.

2.4.4 Dr Tshidzumba, Ms Mhlakaza and Mr Bonakele declined to participate for various reasons: Dr Tshidzumba was unavailable on the dates on which the hearings were scheduled owing to prior commitments; Ms Mhlakaza declined to participate as she did not wish to testify against a Board she had served on since September 2013; and Mr Bonakele declined to participate as he had resigned from the Board in October 2014 when he was appointed as a commissioner on the Competition Commission.

2.4.5 The following eight journalists who have become known as the "SABC 8" gave written and oral evidence:

- Ms Thandeka Gqubule-Mbeki;
- Mr Vuyo Mvoko;
- Mr Lukhanyo Calata;
- Ms Krivani Pillay;
- Ms Suna Venter;
- Ms Busisiwe Ntuli;
- Mr Foeta Krige; and
- Mr Jaques Steenkamp.

Ms Gqubule-Mbeki, Mr Mvoko, Ms Pillay and Mr Calata represented them at the hearing. Their evidence related, in the main, to the SABC's editorial policy and the victimisation and intimidation of journalists in particular.

2.4.6 Ms Sophie Mokoena (acting SABC Political Editor) would have appeared as a witness but later decided against doing so following consultations with the Evidence Leader. Mr Vuyani Green had initially declined to participate as he did

not wish to given evidence against his employer. When he subsequently expressed interest in doing so, the Committee was no longer able to accommodate oral evidence in its programme.

2.4.7 The following former SABC employees were invited to give evidence on the SABC's human resource management and compliance with the Public Finance Management Act, No 1 of 1999 (PFMA) with regard tofinancial and supply chain management:

- Mr Phil Molefe (former acting Group CEO, July 2011 to January 2012);
- Ms Lulama Mokhobo (former Group CEO, January 2012 to February 2014);
- Mr Itani Tseisi (former Group Executive: Risk and Governance, 2013 to 2016);
- Mr Jabulani Mabaso (former Group Executive: Human Resources, June 2013 to June 2016);
- Ms Madiwe Nkosi (former General Manager: Labour Relations, July 2011 to September 2016);
- Mr Sipho Masinga (Former Group Executive: Technology);
- Mr Madoda Shushu (Former Head of Procurement, April 2013 to October 2016); and
- Mr Jimi Matthews (former Head of News and Group CEO).

2.4.8 Mr Matthews originally declined to participate, and could not be accommodated when he indicated willingness to give oral evidence later in the proceedings.

2.4.9 The Group Executive: Governance and Assurance, Ms Theresa Geldenhuys, was invited to give evidence related to her tenure as Company Secretary, from May 2012 to September 2016.

2.4.10 Prof. Mbulaheni Maguvhe was invited to give evidence in his capacity as Chairperson of the Board. In addition, he was requested to furnish the Committee with certain documents relevant to the inquiry. After several delaying tactics including an application to interdict the inquiry, which was later dismissed, Prof. Maguvhe was summoned to provide evidence and to produce the documents referred to above. He resigned subsequent to his appearance before the Committee.

2.4.11 The Minister of Communications, Hon. Faith Muthambi, MP gave evidence related to her role as Shareholder Representative. The Committee was specifically interested in her interpretation of the applicability of the Broadcasting Act and the Companies Act, No 71 of 2008 in respect of the appointment and termination procedures of Board members.

2.4.12 The following civil society organisations gave evidence, in the main related to the SABC's legal mandate and role as a public broadcaster:

- Media Monitoring Africa;
- Right2Know Campaign; and
- SOS Support Public Broadcasting Coalition.

2.4.13 In the course of the hearings allegations were made relating to the governance failures of previous boards chaired by Dr Ben Ngubane (January 2010 to March 2013) and Ms Ellen Tshabalala (2013 to December 2015), some of which had affected subsequent boards too. Both were therefore invited to give evidence related to their tenures.

2.5 Documentation

2.5.1 The Committee requested the documents listed below from the SABC Board, in preparation for the inquiry:

- Delegation of Authority Framework (DAF);
- minutes and transcripts of sub-committee and Board meetings, if any, at which decisions to procure services from *SekelaXabiso*, *PriceWaterhouseCoopers* and *Vision View* were taken;
- minutes and transcripts of the sub-committee and Board meetings related to the consideration and approval of:
    - presentation documents to the relevant parliamentary committees,
    - the *MultiChoice* agreement,
    - the Implementation Plan responding to the above-mentioned Public Protector's report,
    - the 90/10 per cent local content for radio and 80/20 per cent local content for television plan/strategy,

- the removal of Mr R Lubisi, Ms R Kalidass and the late Ms H Zinde as Board members,
- the permanent appointment of Mr Hlaudi Motsoeneng as Chief Operating Officer,
- Mr Motsoeneng's appointment as Group Executive: Corporate Affairs,
- the bonuses and salary increases paid to Mr Motsoeneng,
- the amended Editorial Policy of 2016, and board decisions taken through a round robin process;

- Articles of Association prior to September 2014;
- Board's quarterly reports to the Minister of Communications;
- Governance Review Report prepared by *Sizwe Ntsaluba-Gobodo Auditors;*
- Recruitment Policy of the SABC;
- management report in response to the Auditor-General's findings;
- Chief Audit Executive reports submitted to the Audit Committee and Board; and
- SABC Skills Audit report conducted by *PriceWaterhouseCoopers*.

2.5.2 The Committee was severely constrained by the SABC Board's failure to comply with the request for information. The documentation was expected to reach the Committee by 21 November 2016 but this deadline was not met. A summons had to be issued for the Chairperson of the SABC Board and the former Company Secretary to produce the documents. Section 56(a) of the Constitution read with section 14 of the Privileges Act makes provision forsummoninga person to produce documents and to appear before the NA or its committees. The summons to produce documents was challenged before the Western Cape High Court on 2 December 2016. Judge Desai ordered that the application be dismissed with costs.

2.5.3 At this stage there was partial compliance with the summons for the delivery of documentation. A second summons was issued which sought to compel the Chairperson of the SABC Board to appear as a witness before the inquiry and to produce the documents which were not delivered in terms of the first summons.

It should be noted the Chairperson of the SABC Board through his legal representative informed the Committee that certain documents could not be delivered because they were commercially sensitive. The SABC eventually, on the weekend after the hearings had commenced (9th and 10th December 2016), submitted in excess of 500 electronic documents purporting to be the documents that had been requested. These documents were not indexed and were very voluminous to sort and reconcile. This, in the Committee's view amounted to malicious compliance aimed at frustrating the Committee's progress.

2.5.4 It should be noted that the Committee does not consider any of the documents it has received as being commercially sensitive as Prof. Maguvhe has alleged.

2.5.5 In addition to the documentation referred to in paragraph 2.5.1 the Committee received written input from several witnesses and interested/affected parties. The transcripts of proceedings are available upon request.

3. Interim Report

3.1 The ad hoc Committee on the SABC Board Inquiry adopted its interim report on 27 January 2017. The Committee agreed that the report would be published on Parliament'swebsite and sent to all witnesses who had appeared before the Committee as soon as was practicable.

3.2 The report was sent to the SABC Board on 27 January 2017 and to all witnesses who had appeared before the Committee on 30 January and 1 February 2017. All affected parties were requested to submit their comment/responses by 17h00 on 16 February 2017.

3.3 The Committee received comments/responses from the 18 individuals/organisations/interest groups in the table below:

Name	Description
SABC	• Comprehensive response to report in its entirety.
Dr B Ngubane	• Response to aspects of the report dealing with: ○ Dr Ngubane's term of office; ○ the Committee's mandate; ○ supply chain management and in particular Ms N Dlamini's evidence;

	○ the Board's response to the Public Protector's report; and ○ Suspicious transactions.
Ms E Tshabalala	• No substantive comment, other than that the evidence that was presented during the hearing had not been adequately 'ventilated', and that an affidavit of the written submission provided after thehearing would not be submitted.
Ms R Kalidass	• No substantive comment –agreement with the contents of the report.
Shareholder Representative (Ms F Muthambi)	• Comprehensive response focussing on: ○ the amendment of the MOI; ○ the amendment of the Broadcasting Act; ○ the removal of non-executive Board members; ○ the appointment of Mr H Motsoeneng as Chief Operating Officer (COO); ○ the alleged breaches of the law, the Executive Code of Ethics, and Constitution; and ○ the *MultiChoice* agreement.
Mr P Molefe	• Response contradicting Dr B Ngubane's evidence, in particularclaims that Mr Molefe had approved the TNA Business Breakfast-arrangement and the New Age Newspaper-subscription, and that he was involved in the attempts to rebrand the SABC; and that the SABC did not bear any costs associated with the breakfasts.
"SABC 8"	• "Black Paper on the SABC" (proposals for how public broadcasting may be strengthened); • Evidence in support of Mvoko-evidence regarding the SABC's financial involvement in the TNA Business Breakfasts; and • Suna Venter-submission.
Mr S Masinga	• Board minutes: 29 January 2015 re: the amendment of the MOI and the reservations that the Board had raised; and

	• email communication regarding the 2013 plans to re-brand the SABC (including the proposed contract for the proposed news channel).
Mr I Tseisi	• No substantive response - agreement with the content, and proposedrecommendations.
Mr M Shushu	• Substantial proposals with regards to the sections dealing with supply chain management.
Auditor General of South Africa	• Proposes the following: o that paragraph 5.3.2 be replaced; o that paragraph 5.6.1 be amended (and offers amendment); and o that the table on p19 be replaced.
SOS Coalition	• Proposes recommendations regarding: o the dissolution of the Board; o urgent actions to be taken by the Interim Board; o the *MultiChoice* agreement; o human resource-management including the "SABC 8"; o procurement including the *MultiChoice*, *Vision View* and *New Age Media* agreements; o editorial policies and censorship; o legislative amendments; o amendments to the Constitution; and o accountability, political interference and parliamentary oversight.
Right2Know	• Proposes recommendations relating to: o the interim Board; o financial management; o the shareholder representative; o governance; o intimidation of journalists; o State Security Agency (SSA) activity; o *MultiChoice* and *New Age Business Breakfasts* contracts; o legislative amendments; and o local content quotas.

Media Monitoring Africa	• Proposes recommendations relating to: ○ the "SABC 8"; ○ editorial independence and censorship; ○ *MultiChoice* agreement; and ○ legislative amendments.
Mr D Mateza	• Input related to the TNA Business Breakfasts, and supporting the evidence that the SABC bore costs associated with them; • input regarding an Insurance Policy for SABC Executives and Board Members covering them in case of litigation [The Committee received the Directors and Officers Liability Insurance-document via the Portfolio Committee]
Mr D Foxton	• Correction: a requestthat evidence contained in the report be "corrected" [The Committee received the Foxton-SABC contract from the SABC]
TNA Media	• Response from Mr N Howa, former CEO of TNA plus the most recent statistics regarding subscriptions and advertising procured by the SABC; • Mr Howa's response commenting on the following paragraphs in particular: 6.3.5; and 7.2.1 to7.2.4.
Mr H Motsoeneng	• Submission highlighting concern that Mr Motsoeneng was not requested to give evidence before the Committee (no substantive comment on the report).

3.4 The Committee considered the responses in detail. The salient points of each response are summarised in paragraphs 13.1.1to 21.3.5below. It should be noted that this section does not reflect the Committee's views, or offer an evaluation of the responses.

4. Regulatory Framework

Both the Broadcasting Act and the Companies Act govern the affairs of the SABC. The extent and scope of the applicability of each piece of legislation was considered by the Committee, with particular regard to the issue of the removal of Board members.

4.1 Removal of Board members in terms of the Broadcasting Act

4.1.1 Section 15 of the Broadcasting Act deals with the issue of the removal of Board members and provides for two distinct processes in this regard.

4.1.2 The first process is in terms of section 15(1)(a) ("section 15(1)(a) removal process"). In terms of this process, the President may remove a member of the SABC Board on account of misconduct or inability to perform his or her duties efficiently after due inquiry and recommendation by the SABC Board. In terms of the section 15(1)(a) process the President has exclusive and discretionary powers and the role of the SABC Board is limited to conducting an enquiry and making a recommendation for the removal of a particular Board member.

4.1.3 The second process is outlined in section 15(1)(b) of the Broadcasting Act ("section 15(1)(b) removal process"). In terms of this section, the President must remove a member of the SABC Board from office after a recommendation for removal by a committee of the NA is adopted by a resolution of that House. In terms of the section 15(1)(b) removal process the President is obliged to remove a Board member on the recommendation of the NA and does not enjoy the discretionary powers provided for in the section 15(1)(a) process.

4.2 Removal of Directors in terms of the Companies Act

4.2.1 Section 71 of the Companies Act provides for the removal of directors subject to specific procedural requirements in subsection 71(2). The procedure is set out in the relevant memorandum of incorporation (MOI).

4.3 Resolving the apparent conflict between the Broadcasting Act and the Companies Act

4.3.1 It is clear that the Broadcasting Act and the Companies Act provide apparently conflicting requirements and processes for the removal of Board members. The question thus arises as to which piece of legislation must be applied.

4.3.2 The common law provides that where a conflict between legislation emanating from the same legislature occurs, the later and more specific act must prevail. In the past the Broadcasting Act prevailed over the 1973 Companies Act in so far as it was both the later act and the more specific act. However, the promulgation of the 2008 Companies Act altered this position as the Companies Act became the later legislation.

4.3.3 The Broadcasting Act makes specific reference to the applicability of the Companies Act. Section 8A(5) of the Broadcasting Act states that "With effect from the date of conversion the Companies Act applies to the Corporation as if it had been incorporated in terms of the Companies Act on that date, save to the extent stipulated in this Act.". In other words, the Companies Act applies to the affairs of the SABC except in respect of the sections of the Companies Act which are specifically listed in the Broadcasting Act as not being applicable. The issue of the removal of directors is not listed as an exclusion.

4.3.4 Notwithstanding that the term "stipulated" as used in section 8A(5) lends itself to a limited interpretation in so far as it appears to only refer to the specific sections that are excluded in terms of section 8A(6), this interpretation would give rise to legal absurdities.

4.3.5 A more liberal interpretation is that the effect of section 8A(5) of the Broadcasting Act is that it provides for the applicability of the Companies Act to the extent that the Broadcasting Act makes no provision in respect of a specific matter that is otherwise generally dealt with in the Companies Act. In other words, if a matter is dealt with specifically in the Broadcasting Act then notwithstanding that such a matter is also dealt with generally in the Companies Act, the Broadcasting Act will apply.

4.3.6 This more liberal interpretation is supported by common law principles of legislative interpretation including legislative purpose. The common law provides that the starting point in reconciling two pieces of legislation is to avoid conflict where possible through a systematic interpretation. There are two maxims that find application in this regard:

- *Lex posterior derogat priori*: in terms of this maxim, a later law amends or repeals an earlier law to the extent of such conflict or inconsistency*; and*
- *Generalia specialibus non derogant*: in terms of this maxim later general law does not amend or repeal an earlier specific law except to the extent that such conflict or inconsistency allows for the earlier special law to operate as an exception to the later general law.

4.3.7 In terms of these principles the starting point is that where a conflict exists the later law will trump the earlier law. This general rule must however be applied with the proviso that unless the later law is the specific law, the earlier law must be applied. In the matter at hand the special or specific law is the Broadcasting Act and it therefore takes

precedence over the general law being the Companies Act, notwithstanding that the Broadcasting Act is the earlier law. This is supported by the fact that the Broadcasting Act, on the question of the removal of Board members, is specific, more concrete and takes better account of the particular features of the context in which it is to be applied than the Companies Act.

4.3.8 The application of the special law does not extinguish the relevant general law. The general law will remain valid and applicable and will, in accordance with the principle of harmonisation, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.

Part C: Summary of Evidence

5. Governance

5.1 Separation of Powers

Roles and Responsibilities of the Minister of Communications

5.1.1 The SABC has since 1994 become an important medium through which freedom of expression is realised as envisaged in the Constitution and the Charter of the Corporation contained in Chapter IV of the Broadcasting Act. The SABC plays an important role in contributing to democracy, the development of society, gender equality, nation-building, the provision of education and strengthening the spiritual and moral fibre of society by ensuring a plurality of news, views and information and providing a wide range of entertainment and education programmes. The SABC has over the last ten years however experienced a plethora of challenges resulting from a collapse of good governance.

5.1.2 The Minister's role, responsibilities and authority are derived from sections 91(2), 92(3)(b) and 96(2) of the Constitution, sections 2.1, 2.2 and 2.3 of the Executive Ethics Code, and sections 13(b), 17(1)(c)(i)(ii), 17(2)(e) and 17(3) of the Privileges Act.

5.1.3 Witnesses suggested that the Minister at times interfered in the Board's business underthe guise of holding the SABC accountable to the Shareholder Representative, and in so doing disregarded the Board as the primary mechanism to promote accountability. This was most notable in the circumstances surrounding the permanent

appointment of Mr Motsoeneng as COO soon after the Minister took office in July 2014.

5.1.4 Evidence from witnesses including the Minister, revealed that in many instances the Broadcasting Act was disregarded as the principal act governing the affairs of the public broadcaster. Notwithstanding section 8A(5) of the Broadcasting Act, provisions of the Companies Act were in some instances given preference. This was seemingly done to empower the Minister to become involved in the SABC's operational matters. Many witnesses also gave evidence to illustrate how the MOI had been used to trump the Broadcasting Act for the same purpose as mentioned above.

5.1.5 According to section 13 of the Broadcasting Act the appointment of the board chairperson and the deputy chairperson, as well as that of the executive and non-executive directors rests with the President on the recommendation of the NA. Section 15(1) of the Act empowers the President to remove a member from office on account of misconduct or inability to perform his or her duties. This section also empowers the President to remove Board members in the event that a committee of the NA makes an adverse finding and recommends that a member be removed from office. These provisions were disregarded in the dismissal of Ms Kalidass, Mr Lubisi and the late Ms Hope Zinde.

5.2 Broadcasting Amendment Bill [B39-2015]

5.2.1 The Broadcasting Amendment Bill(the Bill)was tabled in the NA on 4 December 2015, and is being processed.

Objects of the Bill

5.2.2 The main objective of the Bill is to amend the principal Act so as to:

- delete the definition of "appointing authority";
- amend the procedure for the appointment and removal of non-executive members of the Board;
- reduce the number of non-executive directors in the Board;
- provide for the appointment of a nomination committee to make recommendations to the Minister of Communications ("the Minister") for the appointment of non-executive members of the Board;
- reconstitute committee of the SABC;
- amend the procedure regarding the removal and resignation of non-executive members of the Board; and

- amend the procedure for the dissolution of the Board, and for the appointment of an interim Board.

New procedure for appointment of non-executive Board members

5.2.3 Clause 3 of the Bill seeks to amend section 13 of the Act by introducing a new procedure for the appointment of Board members. Should the amendments be passed, the Minister will take over the role the NA currently plays in the appointment of non-executive Board members.

5.2.4 The Bill proposes that a nomination committee be appointed to make recommendations to the Minister for the appointment of non-executive Board members. In appointing the members of the nomination committee, the Minister must ensure that the committee is broadly represented and that members have the necessary skills, knowledge, qualifications and experience to serve on the committee.

5.2.5 The Bill further provides for the re-appointment of non-executive Board members to maintain institutional stability and continuity. Non-executive members will be eligible for re-appointment to the Board for a further period not exceeding three years.

5.2.6 The change in the composition of the Board necessitates the proposed amendment of the quorum for decision-making purposes and for voting of the chairperson.

Dissolution of the Board and appointment of an interim Board

5.2.7 Clause 6 of the Bill seeks to substitute section 15A of the Act in order to provide a new procedure for the dissolution of the Board and the appointment of an interim Board. The proposed amendments provide that the President may, after due enquiry and on the recommendation of the panel contemplated in section 15(3), dissolve the Board if it fails to discharge its fiduciary duties, fails to adhere to the Charter referred to in section 6 or fails to carry out its duties contemplated in section 13(11).

5.2.8 The Bill further provides for a panel to investigate the grounds for the dissolution of the Board, compile a report of its findings and make recommendations to the President. Upon the dissolution of the Board, the President must appoint an interim Board, consisting of persons referred to in section 12(b) of the Act and five other persons to manage the affairs of the corporation for a period not exceeding six months. The President must designate one of the members of the interim Board as the chairperson

and the other as the deputy chairperson, both of whom must be non-executive members of the interim Board. A quorum for any meeting of the interim Board is seven members.

5.3 Fiduciary duties

5.3.1 The mission of the SABC Board is to fulfil the requirements of the SABC Charter in accordance with the strategic objectives of the Government and the requirements of the Broadcasting Act, whilst achieving its commercial and public mandate.

5.3.2 The Board is ultimately accountable and responsible to the Shareholder for the performance and affairs of the SABC. The Board must therefore retain full and effective control of the SABC and must give strategic direction to the SABC's management. It is responsible for ensuring that the SABC complies with all relevant laws, regulations and codes of business practice.

5.3.3 In addition, the Board has a responsibility to the broader stakeholders, which include the present and potential beneficiaries of its products and services, clients, lenders and employees. The Board therefore constitutes the fundamental base of corporate governance in the SABC.

5.3.4 Individual directors and the Board as a whole, both executive and non-executive, carry full fiduciary responsibility in terms of:

- sections 77, 214 and 215 of the Companies Act;
- sections 10(4) and 25 of the Broadcasting Act; and
- sections 49, 50, 51, 83, 84, 85 and 86 of the PFMA.

5.3.5 The common law principle, *lex specialis derogate legi generalis* is applicable with the Broadcasting Act being the applicable and specific law over the Companies Act which is the general law.

5.3.6 The current MOI cannot be used as basis for interpretation as it is under dispute. Accepting the MOI would be tantamount to giving it the status of having repealed provisions of the Broadcasting Act. Moreover, during evidence gathering, the Committee received three MOIs: one undated and unsigned; a second, dated 20 September 2013 and signed by the Minister; and a third, dated 20 September 2013 and signed by the Minister and Prof. Maguvhe.

5.3.7 The Broadcasting Act is undoubtedly specific to the SABC, and is therefore the primary law applicable to the public broadcaster.

5.3.8 The duties of the SABC board are generally covered in several sections of the Broadcasting Act. Section 13(11) in particular, states that "…the board controls the affairs of the Corporation and must protect matters referred to in section 6(2) of this Act." Section 6(2) relates to the enforcement of the SABC Charter.

5.3.9 The Broadcasting Act is silent on the detail of the fiduciary duties of the board, and what action must be taken should a board not fulfil such duties. Sections 50 and 51 of the PFMA however details the fiduciary duties of boards (accounting authorities) of public entities such as the SABC. Sections 83 to 86detail what action must be taken against a board that fails to discharge its duties. Sections 76, 77, 214, 215, 216 and 217 of the Companies Act are also applicable.

5.3.10 Evidence during the inquiry confirmed and in some instances revealed that the challenges faced by the Board which included instability, dysfunction and political interference, had impeded the Board's ability to hold the SABC executives accountable. Coupled with this, instability at senior management level has had a significant impact on the SABC's ability to fully execute its mandate.

5.3.11 Evidence heard from all former Board members of the most recent Board, including former group chief executive officers, revealed that the Board was often divided along two lines.

5.3.12 Evidence by most former Board members who gave evidence suggested that the Minister was at the centre of the appointment and removal of Board members, and curtailed the functions and responsibilities of the Board through amendments of the MOI which in turn impacted on the roles and responsibilities as outlined in the DAF, and in so doing contravened the Broadcasting Act.

6. Report of the Auditor-General of South Africa

6.1 Audit Findings

The following audit outcomes spanning the last three financial years—2013/14, 2014/15 and 2015/16—were highlighted by the Auditor-General.

6.1.1 The SABC received qualified outcomes with findings for the 2013/14, 2014/15 and 2015/16 financial years. A qualified opinion refers to an outcome where the entity failed to produce credible and reliable financial statements, and had material misstatements on specific areas in their financial statements which could not be corrected before the financial statements were published.

6.1.2 In 2015/16 the areas of qualification had been reduced but irregular, fruitless and wasteful expenditure—which had escalated considerably—remains an area requiring urgent intervention.

6.2 Irregular Expenditure

6.2.1 Irregular expenditure refers to expenditure incurred owing to non-compliance with applicable legislation and is incurred when proper processes are not followed[2]. Such expenditure does not necessarily imply that money was wasted or that fraud had been committed, but is rather an indication that legislation and prescribed processes were not followed. This legislative requirement is aimed at ensuring that procurement processes are competitive and fair.

6.2.2 Irregular expenditure was misstated as follows: -

- The SABC Group incurred expenditure in contravention with supply chain management (SCM) requirements for both the current and prior years that were not included in irregular expenditure note. The understatement amounted to R35,1 million. This contravened section 55 (2)(b)(i) of the PFMA which states that the annual report and financial statements must include the particulars of any material losses through criminal conduct and any irregular, fruitless and wasteful expenditure that occurred during the financial year;

- The SABC did not have supporting documents in place to identify irregular expenditure. Supporting documents to verify the disclosed irregular expenditure of R141,4 million to test these for compliance with SCM regulations were not provided for audit purposes. Irregular expenditure incurred in previous periods which was not disclosed was also reconsidered. In 2015, supporting documents to the value of R23,9 million to test compliance against SCM regulations were not

[2] PFMA, Act No 1 of 1999.

provided for audit purposes. This was in contravention with section 55(1)(a) of the PFMA which states that the accounting authority must keep full and proper records of the financial affairs of the public entity. Section 28(1)(a) of the Companies Act states that a company must keep accurate and complete accounting records in one of the official languages of the Republic;

- The table below shows irregular expenditure incurred in 2014, 2015 and 2016. In 2014, the SABC incurred irregular expenditure to the amount of R990,7 million; R2,4 billion was incurred in previousyears but discovered in 2014, resulting to a cumulative figure of R3,4 billion. An amount of R441,2 million was incurred in 2016. In addition to this, R322,3 million was incurred in previousperiods but only identified in 2016, resulting in the escalation of irregular expenditure to R5,1 billion.

	2014 (R'000)	**2015 (R'000)**	**2016 (R'000)**
Opening balance	1 231	3 376 809	4 385 138
Add: Irregular expenditure identified in the current year relating to prior years	2 399 775	1 732 127	322 282
Expenditure previously disclosed as irregular re-verified in the current year		(1 113 081)	
As restated		3 995 855	4 707 420

Add: Irregular expenditure- current year	990 694	389 283	441 223
Irregular expenditure not condoned		4 385 138	5 148 643
Less: Amounts recoverable	(14 891)		(117)
Irregular expenditure awaiting condonation	**3 376 809**	**4 385 138**	**4 148 526**

Irregular expenditure for the SABC Group

6.2.3 The SABC incurred the following types of irregular expenditure:

- no original tax clearance on the date of the award;
- payments without contracts;
- splitorders (which relate to instances where procurement of goods and services was deliberately splitinto parts or items of lesser value to avoid complying with SCM policy and regulations);
- inadequate contract management;
- over invoiced contracts (which relates to instances where payments made exceeds the approved contract amount);
- procurement process not followed/inadequate deviation from the SCM policy and
- deviation from the DAF.

6.2.4 R25,7 million of the irregular expenditure incurred in the current financial year was incurred as a result of contraventions of SCM legislation. The Auditor-Generalfurther noted that the SABC hasnot fully implemented its SCM policy.

6.2.5 The Auditor-General reported findings on awards to persons in the service of the state and their close family members. Although these are not prohibited, compliance with the legislation and policies was tested to ensure that conflicts of interest did not result in contracts being unfairly awarded or unfavourable price quotations being accepted. The findings were as follows:

- twoawards to the value of R716,690 were made to officials who did not submit declarations of interest;
- 71 awards to the value of R150,7 million were made to close family members, partners and associates of the SABC; and
- twoawards to the value of R3,5 million were made to persons in the service of other state institutions.

6.2.6 The Auditor-General found that 15awards to the value of R6,9 million were procured without inviting at least the minimum prescribed number of written price quotations from prospective suppliers, and the deviation was not approved by a properly delegated official. Contracts to the value of R2,1 million were procured without inviting competitive bids - the deviations were approved even though it would have been practical to invite competitive bids.

6.3 Fruitless and wasteful expenditure

6.3.1 Fruitless and wasteful expenditure is expenditure that was made in vain and that would have been avoided had reasonable care been taken[3]. The table below shows fruitless and wasteful expenditure for the SABC for 2014, 2015 and 2016. An amount of R34,7 million in fruitless and wasteful expenditure was incurred in 2016 and a total of R92,5 million in fruitless and wasteful expenditure awaits condonation.

	2014 (R'000)	**2015 (R'000)**	**2016 (R'000)**
Opening balance		42 000	58 299
Add: Fruitless and wasteful expenditure- current year	54 600	16 154	34 678
Add: Fruitless and wasteful expenditure- prior years		1 014	

[3] Ibid

Fruitless and wasteful expenditure not condoned		58 168	92 977
Less: Amounts recoverable	(12 600)	(869)	(516)
Fruitless and wasteful expenditure awaiting condonation	**42 000**	**58 299**	**92 461**

Fruitless and wasteful expenditure for the SABC Group

6.3.2 Thefruitless and wasteful expenditure incurred relates to settlement amounts paid as a result of the cancellation of employment contracts; salaries paid to employees while they were on suspension with no evidence to confirm that investigations were conducted; and salaries paid to employees whilst they were on suspension but the investigationswere not conducted as soon as the suspension came into effect.

6.4 Compliance with laws and regulations

6.4.1 The SABC failed to comply with the applicable laws and regulations in its financial management. The Auditor-General noted instances of non-compliance with laws and regulations. The following instances were identified:

- Financial statements submitted for auditing were not prepared in accordance with International Financial Reporting Standards (IFRS) as required by section 55(1)(b) of the PFMA and section 29(1)(a) of the Companies Act.Material misstatements identified by auditors were subsequently corrected, but the uncorrected material misstatements and supporting documents that could not be provided resulted in the financial statements receiving the qualified opinion.

- Goods, works or services were not procured through a procurement process which is fair, equitable, transparent and competitive as required by section 51(1)(a)(iii) ofthe PFMA Sufficient appropriate audit evidence could not be obtained that the procurement systems or processes complied with the requirements of a fair SCM system as envisaged in section 51 (1)(a)(iii) of the PFMA.

- Section 51(1)(b)(ii) of the PFMA requires that effective steps are taken to prevent irregular, fruitless and wasteful expenditure;

- Proper control systems to safeguard assets were not implemented as required by section 50(1)(a) of the PFMA which states that the accounting authority must exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity.

- Disciplinary steps were not taken against officials who made and permitted irregular, fruitless and wasteful expenditure as required by section 51(1)(e) (iii) of the PFMA.

6.4.2 Adequate performance management systems were not in place to ensure that the performance of all staff was measured regularly. The following shortfalls were identified in the recruitment policy:

- competency assessments were not conducted;
- criminal record checks were not conducted for every employee; and
- verification of citizenship was not conducted for every employee.

6.4.3 An assessment of Human Resource management revealed the following deficiencies:

- increase in vacancy rate from 3.1 per cent to 7.4 per cent in 2015/16;
- senior management vacancy rate increased from 8per cent in 2014/15 to 14,7 per cent in 2015/16; and
- vacancy rate in 2015/16 at finance division was 5.07 per cent, and internal audit 4 per cent.

6.4.4 An assessment of human resource management identified that:

- appointments were made in posts that had not been advertised; and
- new appointees did not have the required qualification and experience for posts.

6.5 Consequence management

6.5.1 The Auditor-General noted the lack of consequence management at the SABC. Forty-four alleged cases of fraud and corruption were reported through internal mechanisms in previousyears, and thirteenin the current year. Nineteen cases resulted in disciplinary action in previousyear, and ninein the current financial year. Only three cases from the previous year, and one in the current financial year were referred to law enforcement agencies.

6.6 Going concern

6.6.1 During the audit of financial statements for the year ended 31 March 2016, the following matters were noted regarding the entity's going concern assumption:

- The cash reserves of the SABC have been deteriorating in the last two years. In 2014, cash and cash equivalents amounted to R1,4 billion. This decreased to R1 billion in 2015 and R874,7 million in the current financial year. Revenues need to increase significantly in order for the SABC to return to profitability. The cash balances after year-end have deteriorated. The bank balance moved from R874,7 million at the end of March 2016 to R837,8 million at the end of April 2016. This represents a 4.2 per cent decrease in one month. The balance decreased further in May to R703, 8 million which is a 16 per cent decrease. The balance after May also showed a significant decrease in cash reserves to R548,7 million (per SAP general ledger) which is a 22 per cent decrease. This is a decrease of 37 per cent in cash in just four months. Incorporated in the cash reserves at year-end is the Government Grant restricted cash of R167,4 million which is for conditional migration, and not for the operational use of the entity.

- Revenue increased slightly with operational expenditure increasing faster than revenue which casts doubt on the budgeted net profit of R3,4 million for the 2016/17 financial year.

- The SABC reported recurring losses for the past financial years. Losses weredriven by employee costs, broadcasting costs and signal and distribution costs. Professional and consulting fees increased significantly, by 45 per cent.

6.7 The role of the Board in relation to financial management

6.7.1 The Board failed in discharging the following of its duties with regard to the SABC's financial management, and sustainability:

- Investigating all irregular, fruitless and wasteful expenditure to establish misconduct, fraud or losses that should be recovered and, where deemed necessary, to recover these expenditures as required by section 50(1) of the PFMA which highlights the fiduciary duties of accounting authorities and section 51(1)(b)(ii) which lists the

responsibilities of accounting authorities of public entities andwhich includes taking effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure as well as losses resulting from criminal conduct. Section 51(1)(e) states that accounting authorities must take effective and appropriate disciplinary steps against any employee who:

- contravenes the PFMA;
- commits an act which undermines the financial management and internal control system; and
- makes or permits irregular, fruitless and wasteful expenditure.

- The Board failed to discharge its duties as contemplated in the PFMA and failed to take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure as well as failed to act against employees who incurred these expenditures.

- The Board failed to ensure that an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective was in place as required by section 51(1)(a)(iii) of the PFMA.

- According to section 51(1)(c) of the PFMA the Board had a responsibility to ensure that all assets are safeguarded. The Auditor-General highlighted that proper control systems to safeguard assets were not implemented as required by section 50(1)(a) of the PFMA.

- The Board failed to ensure that the SABC had, and maintained,an effective and transparent system of financial and risk management, and internal control as required by section 51(1)(a)(i) of the PFMA. The internal control environment wasweak which allowed employees to commit irregular expenditure.

- The Board failed to submit the necessary documents to the Auditor-General which limited the scope of the audit into irregular expenditure. Section 54(1) of the PFMA obligates the accounting

authority to submit to the Treasury or the Auditor-General documents, explanations and motivations as may be prescribed or as the Auditor-General may require.

6.7.2 According to section 86(2) of the PFMA "an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55".

7. Supply Chain Management

7.1 Background

The SABC's supply chain management was marred by contraventions of supply chain policies and regulations, as well as the purging of officials such as Ms Nompilo Dlamini, the former Supply Chain Manager (August 2008 to January 2015) and other staff members. Other officials, including Mr Shushu, resigned as their ability to discharge their duties efficiently was severely constrained.

7.2 Mr M Shushu -oral evidence

7.2.1 Mr Shushu's evidence pointed to the following contraventions:

- The circumvention of supply chain processes and regulations in relation to, for example, the *SekelaXabiso* company which was appointed to supply audit services and assist with resolving irregular expenditure; and the *Vision View* contract for the acquisition of a studio valued at of R43 million.

- Payments were made without contractual obligations having been fulfilled, and in some instances where no valid contracts were in place.

- Irregular payments were made to certain service providers such as Talent Africa which was irregularly appointed to recruit a Group CEO and chief financial officer (CFO); a legitimate process was initially undertaken by the Group Executive: Human Resource and the Head: Supply Chain Management but this process was halted by the Board

sub-committee on Governance and Ethics i.e. the Board interfered in operational SCM matters and excluded the SCM unit.

- Supply chain management-deviations were approved for transactions which did not warrant the use of an emergency clause e.g. the *Lorna Vision* contract which was sourced to collect TV licence fees. This contract did not meet the requirements of a deviation: for a deviation to apply, it must be proven beyond reasonable doubt that it is a sole source situation or that it would have beenimpractical to source the goods through other means. Tests are done to verify impracticality or sole source situations. This did not applyto this contract.

- There were transactions where payments were escalated, and the payments made to suppliers were more than the contract amount. Mr Aguma had done an unauthorised transactionwhen he was the CFO. Initially, the contract was for R8,2 million but it escalated by 17 per cent to R10 million when invoicing was done.

- There was an amendment of the DAF, which gave executive directors the authority to approve up to R10 million, while the Head: SCM could only approve up to R5 million. This may have been done to allow executive directors to appoint preferred bidders. A substantial number of transactions with irregularities were reported after the approval of the DAF.

- There was abuse of power by executives by changing reporting lines to render the SABC's governance structures weak. Mr Shushu highlighted instances where executives such as Mr Aguma, who was the CFO at the time and the COO at the time, Mr Motsoeneng, abused their power and committedthe organisation to millions of rands.

- Assurance providers had collapsed: the Internal Audit unit, the Audit Committee and the Board were ineffective and did not ensure that supply chain processes were adhered to.

7.3 Ms N Dlamini - affidavit

7.3.1 In her written evidence, Ms Dlamini highlighted certain supply chain irregularities including the involvement of Board members in operational issues.

7.3.2 The SCM reporting lines were changedfrom the CFO to COO which meant that procurement decisions could be taken by the COO or his office through MsSully Motsweni. These decisions were not supported by Ms Dlamini as they contravened supply chain processes.

7.3.3 Functions were duplicated as external service providers were appointed even though the same services were already available internally. Mr Motsoeneng requested her to appoint a company to recover VAT from SARS over a period of 10 years at a management fee of 35 per cent, yet the SABC had its own internal unit responsible for this function. Dick Foxton, a public relations firm, was appointed to be the spokesperson and publicist of the Group CEO despite the fact that the SABC had its own internal spokesperson. The company was paid a R350 000.00 per month retainerplus additional fees.

7.3.4 The VAT contract was estimated to be between R250 million and R500 million but theDAFdid not provide any individual at the SABC, or even the Board the authority to approve such an amount.

7.3.5 Supply chain specialists were compromised and severely constrained because suppliers concluded contracts directly with the then COO, Mr Motsoeneng. Mr Nazeem Howa, a New Age Media Group representative had instructed Ms Dlaminito issue an appointment letter for the New Age Newspaper–subscription, but she would not cooperate.

7.3.6 The issue of interference by the Board and unclear demarcation of roles between the Board and executives was mentioned by Ms Dlamini again as DrNgubane had unexpectedly attended a Bid Committee meeting where he informed her she could not tell the Board to whom it should award tenders to.

7.4 Mr I Tseisi - oral evidence

7.4.1 Mr Tseisi alluded to contracts which were awarded irregularly and with little regard for SCM regulations. These concerns were raised with the Board as identified risks, and included the *SekelaXabiso* and *PriceWaterhouseCoopers* contracts.

7.5 Organisation Undoing Tax Abuse –written submission

7.5.1 According to documents submitted to motivate for the deviation from normal procedures in the acquisition of the multi-purpose set, the SABC claimed that the insurance claim process had not yielded any positive results, thereby creating a false impression in order to have the deviation approved.

7.5.2 There was no evidence that the construction and architectural design wereapproved by the Construction Industry Development Board (CIDB) as isrequired by section 13 of the SABC's Supply Chain Management Policy First Review.

7.5.3 An emergency clause applies to urgent cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. Lack of proper planning does not constitute an urgent case. The SABC had sufficient time and knowledge of the 2015 Rugby World Cup and the state of studios 1 and 2 prior to the deviation request, therefore the urgency claim was not valid.

7.5.4 The Head of Sport misrepresented the facts when he stated that studios 1 and 2 were destroyed in the Henley fire. Only studios 5 and 6 were affected.

7.5.5 Mr Motsoeneng, as chair of the Operations Committee approved the *Vision View* contract and unlawfully cancelled the tender the Bid Adjudications Committee had approved and recommended to the Group EXCO. This resulted in an irregular and unauthorised deviation process.

8. Questionabletransactions

8.1 *MultiChoice* agreement

8.1.1 The agreement between pay-TVchannel *MultiChoice* and the SABC has been surrounded by controversy since its inception. Three main issues sparked the controversy: the lack of transparency in the processing of the agreement; the "sale" of SABC archives which would result in the establishment of an entertainment channel SABC ENCORE; and the fact that the "sale" renders the

two channels that broadcast SABC content inaccessible to the majority of South African citizens who do not have access to pay-tv.

8.1.2 From the information that was available to the Committee it is evidentthat the *MultiChoice* agreement was well underway by the time the 2013 Board was appointed. Evidence by a former Board member indicates that upon their appointment to the interim Board, they were presented with numerous documents for Board members' information. These includedthe commercial and master channel distribution agreement between the SABC and *MultiChoice*.Minutes provided to the Committee by Ms Kalidass indicate that the interim Board had granted provisional approval of the proposal/agreement on 12 June 2013.

8.1.3 Some Board members raised concerns around the legal aspects of the contract between the SABC and *MultiChoice*, drawing attention to section 8 read with section 2 of the Broadcasting Act which related to the powers, objectives and parameters within which the SABC could operate, in particular. Based on these provisions it was suggested that the deal was unlawful.

8.1.4 Mr Naidoo, a practising attorney testified that he had assessed the legality of the agreement and had, towards the end of 2013, advised the Board that the contract was unlawful. His evidence was corroborated by other former Board members. In light of the above, the then Chairperson of the Board proposed that a second opinion, which ultimately contradicted Mr Naidoo's, be sought.

8.1.5 According to evidence, the terms of the agreement include that *MultiChoice* would use the SABC's archived material on condition that a particular position on set-up control be adopted. Furthermore, the person who had signed the agreement on behalf of the SABCwas not authorised to do so.

8.1.6 ICASA first dealt with the *MultiChoice* matter in July 2013, when it became concerned that it would stifle competition in the industry. They referred the matter to the Competition Commission. In about October 2013, after various engagements between ICASA and the affected parties, ICASA's legal department furnished the Council with a legal opinion which concluded that the Authority's integrity and credibility would be compromised if it lodged a complaint against one party involved in the debate around whether set-top boxes should be encrypted. ICASA accordingly withdrew its referral. Caxton and CTP Publishers

and Printers and others, as interested parties, then referred the complaint to the Competition Commission. The application was dismissed by the Competition Tribunal on 11 February 2016. Having noted the Committee's concerns about whether the sale of the SABC archives was in violation of section 8(j) of the Broadcasting Act, ICASA sought a legal opinion responding specifically to this concern. The opinion, which ICASA is still to consider, found that the SABC had indeed violated section 8(j) although not on grounds queried by the Committee.

8.1.7 A recurring theme in the inquiry was the apparent connection between *MultiChoice* and the SABC's agreement, and the SABC's policy on Digital Terrestrial Television (DTT), in particular set-top box (STB) encryption. Evidence suggests that the SABC, along with the Government, had supported encryption. In 2007 the SABC developed a strategy for encryption, which Cabinet later adopted as the official government policy. Evidence from a variety of witnesses revealed that the *MultiChoice* agreement required that the SABC rejects its original position in support of set-top box encryption. By 2014, the SABC had begun to advocate for non-encryption in spite of the significant benefits set-top box encryption would have for free-to-air broadcasters, including itself. Encryption would have given the SABC a competitive edge over its biggest rival, *MultiChoice's* DSTV.

8.2. Relationship with the New Age Media Group

8.2.1 Mr Masinga gave evidence about an unscheduled meeting with Mr Howa, representing the New Age Media Group, the parent company of ANN7, which had been convened by Mr Motsoeneng. At the meeting he was presented with a three-page bid to rebrand SABC News using SABC resources including its reporters, while The New Age (TNA) would retain the advertising revenue. Despite attempts to do so, the agreement was never signed.

8.2.2 The Committee heard conflicting evidence regarding the SABC's involvement in the TNA BusinessBreakfasts. Mr Molefe testified that Mr Motsoeneng had initiated meetings with Mr Tony Gupta in July 2011 to discuss a possible business agreement between the SABC and the TNA Media Group. In the main, discussions centred around entering into a memorandum of understanding (MOU) in terms of which the SABC would allow TNA to air live broadcasts of its Business Breakfastson Morning Live; a "huge" subscription to the New Age, for

newspapers to be distributed in the SABC's national and provincial offices; for a stake in the SABC's news channel which was still in the pipelines at that time. Mr Molefe testified that he had not agreed to any of the proposals.

8.2.3 Dr Ngubane contradicted Mr Molefe's claims, and indicated that Mr Molefe himself had approved *The New Age*-subscription, and that he had initiated the talks with the TNA Media Group which had resulted in the TNA BusinessBreakfastsbeing aired during Morning Live.

8.2.4 Mr Mvoko gave evidence that SABC resources were diverted to fund ANN7, a rival news channel. He indicated that *Morning Live* resources were diverted to pay for the production costs associated with the TNA Business Breakfasts. The SABC did not generate any revenue from the briefings. This contradicted evidence from Dr Ngubane who insisted that the TNA arrangement made good business sense and that there was no cost to the SABC.

8.3 Vision View

8.3.1 Mr Shushu in his evidence stated that a flood of irregular transactions were introduced after the amendment of the DAF. These included the above-mentioned *Vision View* contract which was approved by the Board via round robin on 31 July 2015. He confirmed that the Board's approval came after the agreement had already been signed. The office responsible for SCM was not consulted or involved in the process.

9. Human Resource-related matters

9.1 Executive Appointments

9.1.1 The SOS Support Public Broadcasting Coalition submitted that different interpretations of who should appoint the SABC's CEO, CFO and COO have arisen because the Act was not explicit as far as who the appointing authority should be. The organisation is of the firm view, however, that in light of the SABC's mandate as an independent public broadcaster its executive directors should not be appointed by a political authority.The organisation gave evidence that the MOI was amended irregularly to compensate for a lacuna in the Broadcasting Act around who should appoint these top senior managers.

9.1.2 During her evidence the Minister insisted that amendments to the MOI were effected in accordance with both the Broadcasting Act and the Companies Act. She stated that

although legislation did not require her to do so, the Ministry had consulted the Board on the amendments as a courtesy before they were submitted to Companies and Intellectual Property Commission(CIPC). She had also briefed the Portfolio Committee on the MOI in June 2015. According to the Minister, neither the Board nor the Portfolio Committee had raised any reservations about the impact of the amendments or the manner in which they were processed.

9.2 Appointment of Mr H Motsoeneng as COO

9.2.1 Some former Board members testified that the process to appoint Mr Motsoeneng permanently in the position of COO was done hastily, in a manner which had highlighted the above-mentioned division among Board members. Many witnesses expressed disbelief that despite the Public Protector's damning findings against the then acting COO, the majority of the members voted in favour of his permanent appointment. Mr Mabaso's evidence confirmed that he, as the Chief Executive: Human Resources, had not been included in discussions around this appointment.

9.2.2 Evidence presented suggested that this appointment was done in contravention of the SABC's recruitment policies and procedures. Many witnesses further alluded to the Minister having exercised undue pressure to ensure Mr Motsoeneng's permanent appointment.

9.2.3 The Minister, in her own evidence, explained that she had emphasised the urgency with which the long-vacant senior management posts had to be filled. She could however not allay suspicions that the Board was pressurised to make the appointment, and that in so doing the Board had failed to uphold its fiduciary duties. Evidence was presented that despite recruitment policies and procedures, and despite the Public Protector's findings that Mr Motsoeneng was not qualified for that position, the Minister had nonetheless endorsed the Board's decision to appoint him, within hours of having received the recommendation.

9.2.4 Ms Tshabalala, who was the Board chairperson at the time, explained that in addition to the Board's uncertainty with regard to the implementation of the Public Protector's recommendations, the Board had been swayed by a legal opinion from Mr Motsoeneng's attorneys which suggested that because he had been acting for a long period of time, the SABC would face some legal risk if it did not appoint him permanently. According to Ms Tshabalala, the Board nevertheless considered more than one candidate and came to the conclusion that Mr Motsoeneng would be most suitable.

9.2.5 Ms Tshabalala pointed out that the Board had also been under pressure from the Portfolio Committee to fill all executive positions. Although the Portfolio Committee had by no means advised that policies and procedures be flouted, the Board had understood that immediate action was expected.

9.2.6 The evidence suggests that the Board was deeply divided on this matter, not least because some were of the view that Public Protector's findings and remedial action had to be accepted and implemented.

9.3 Purging, suspensions and dismissals

9.3.1 Evidence heard corroborated the Public Protector's findings that the SABC had for several years been losing highlyskilled, highlyexperienced and highlyqualified staff as a result of the abuse of power and systematic governance failures involving irregular termination of employment of several senior employees at the SABC. The Public Protector's report detailed how the systematic purging of senior staff members had resulted in huge financial losses which were paid out in settlement agreements where contracts had been terminated irregularly.

9.3.2 Ms Nkosi's evidence indicated that labour relations specialists' advice would be ignored, and that those senior employees who refused to cooperate would be dismissed with no regard for the applicable employment policies, procedures or labour laws. These matters were seldom tabled before the Board for consideration and approval.

9.3.3 While the Committee does not have an exhaustive list of those who had been purged, most former senior managers who have appeared before the Committee had parted with the SABC for reasons one way or the other related to their refusal to cooperate when policies and procedures were being flouted. If the Board was aware of the 'purges' it did not speak out against the self-inflicted brain drain. Some of the dismissals would be challenged at the Commission for Conciliation, Mediation and Arbitration (CCMA), and others would be settled out of court with the SABC still paying enormous amounts in settlements.

9.3.4 Many witnesses linked the unlawful dismissals to the new MOI which conferred the Board's powers to the executives, thereby reducing the Board to an instrument that merely ratifies the decisions taken by the executive.

9.3.5 These unprocedural dismissals were not restricted to the administration, but also extended to the newsroom. The most recent dismissals took place in July 2016 when eight experienced and skilled journalists—the "SABC 8"—were suspended and then summarily dismissed because they had disagreed with an editorial decision to not broadcast images of violent protests which involved the destruction of public property, and which in their opinion amounted to self-censorship. Although the SABC reinstated seven of the eight with no explanation, Mr Mvoko has not had his contract with the SABC renewed.

9.4 Performance Management

9.4.1 Mr Mabaso testified that the SABC did not have a proper performance management system in place, and that performance agreements had not been entered into with its senior management and other employees. This is corroborated in the Auditor-General's findings. Notwithstanding that, millions of rands in "performance" bonuses have been paid to senior and junior employees. In the case of senior managers, bonuses were often paid without seeking the Board's approval.

9.4.2 In addition, witnesses also reported that the management had announced that cash bonuses would be awarded to some employees and freelancers. This was done haphazardly, without due process being followed or budgetary provision for such awards having been made.

10. Editorial Independence

10.1 Editorial Policies

10.1.1 Editorial independence is central to quality journalism. Editorial interference undermines the prescripts of the Broadcasting Act, inhibiting citizens from making informed judgments on topical issues. Editorial independence and institutional autonomy are absolutely essential components of public broadcasting, and therefore the safeguards in place to ensure ethical and quality journalism should not be compromised.

10.1.2 Subsections 6(8)(d), (e) and (f) of the Broadcasting Act state that the corporation must develop a code of practice that ensures that the services and personnel comply with the rights of all South Africans to receive and impart information and ideas; the mandate to provide for a wide range of audience interest, beliefs and perspectives; and a high

standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.

10.1.3 The Committee heard evidence of the disregard of journalistic values and ethics. Evidence from the "SABC 8" gave an account of how the announcement in 2013 that the SABC would henceforth report "70 per cent positive news and 30 per cent negative news" had affected unbiased reporting and contravened the most basic of journalistic ethics. This policy undermined core principles of truth and was one of the many attempts by senior management to undermine quality journalism in favour of content that would yield positive spin-offs.

10.1.4 According to the "SABC 8", the crisis as far as providing independent and credible news and current affairs programmes to the vast majority of citizens and residents has been a concern for a long period. It was particularly pronounced through the month of July 2016 which preceded South Africa's local government elections.During this time an editorial decision by the SABC was announced banning the airing of violent footage. Journalists were suspended and summarily dismissed for challenging editorial directives which in effect required journalists to self-censor. Although seven of the eight journalists were reinstated shortly after their dismissal, they informed ICASA that the editorial interference was continuing unabatedly.

10.1.5 Evidence was also heard from the "SABC 8" that journalists and editors were discouraged from covering the election campaigns of opposition parties. In some cases journalists were informally requested to give certain individuals within the governing party more positive coverage.

10.1.6 The Minister denied that she had interfered in the editorial policy or the newsroom, as the "SABC 8" had indicated. She also dismissed their recommendation that an internal ombud be established.

10.2 Editorial Review process

10.2.1 When the SABC last reviewed its editorial policy in 2004, a draft editorial policy was released for public consultation. When the policy was reviewed in 2015, the same level of intensive public consultation did not occur, despite what the Broadcasting Act requires. This matter is currently under investigation by ICASA.

10.2.2 The revised editorial policy is problematic for several reasons–it gives the COO control of the SABC's content and programming, making him or her the Editor-in-Chief. Another problematic inclusion in the revised policy is that it makes the principle of "upward referral" mandatory and the COO's decision on all editorial issues final. Editors and journalists are threatened with severe consequences should they not refer "contentious" matters to their superiors and Mr Motsoeneng. This is a complete about-turn from the old policy, where it was made clear that it is not management's role to make day-to-day programming and newsroom decisions and although not ideal, upward referral was largely voluntary. It is a basic principle in many news organisations worldwide that editorial decisions should to be made by news editors, and not management, in order to insulate news decisions from any commercial or political considerations.

10.2.3 The Minister denied that the review of the editorial policy had been irregular. In her evidence she emphasised that section 5A of the Broadcasting Act had been complied with. The proposed amendments were translated into all eleven official languages and placed on the SABC's website. The SABC had consulted in 2013 and early 2014 when the initial review was conducted. In her view the Board had ensured that sufficient public comment was sought in the development of the policy. More than 30 organisations participated in stakeholder engagements held across the country, and in the 17 public hearings which were held across all nine provinces. In addition, the SABC had considered 216 written submissions from individuals and organisations. The Board had approved the policy for implementation, and ICASA was duly informed.

10.3 Regulatory compliance

10.3.1 Section 4(3)(d) of the ICASA Act states that the Authority must develop and enforce licence conditions consistent with the objects of this Act and the underlying statutes for different categories of licenses. The Act in section 17E(2) of the Act empowers the Complaints Compliance Committee (CCC) to direct the licensee to desist from any contraventions; to direct the licensee to take such remedial or other steps in conflict with the Act or underlying statutes as may be recommended by the CCC as per section 17E(2)(b)(c).

11. Public Protector Report No 23 of 2013/14: *When Governance and Ethics Fail*

11.1 Board's response to the report

11.1.1 Mr Naidoo gave evidence, which was corroborated by other former Board members, that the Public Protector's interim report which Ms Tshabalala, had received in December 2013, was never tabled in the Board or any of its sub-committees. When the matter was raised in a meeting of the Board in February 2014 shortly after members became aware—through the media—of the release of the final report, Ms Tshabalala confirmed that she had received the interim report but had thought that, as it was addressed to her, it was not for the entire Board's consideration.

11.1.2 Further evidence indicated that after the Board became aware of the final report, Ms Tshabalala had ruled that each of the Board sub-committees would consider the findings and recommendations relevant to them, and make recommendations to the Board as to how to respond. Consensus could not be reached on how to respond to the remedial action contained in the report: some Board members thought that the remedial actionshould be implemented, while others disagreed. This uncertainty was further fuelled by the public debate at that time about the binding nature of the Public Protector's remedial action.

11.1.3 The Human Resource sub-committee had recommended that disciplinary proceedings be instituted against the then acting COO as most of the Human Resource-related findings related to him. With regard to the finance-related remedial action, the former Chairperson of the Audit sub-committee, confirmed that that sub-committee had agreed that further investigations be undertaken before disciplinary action could be instituted.

11.1.4 According to some Board members, Ms Tshabalala had unbeknown to them, appointed Mchunu Attorneys to draft an opinion on the report. Although former Board members confirmed that the Board had at the time agreed to request a legal opinion as to whether the recommendations were binding, the Board had not agreed that the legal opinion—which in reality was not a response, but countered all the Public Protector's findings—be submitted as the SABC's formal response.

11.2 Disciplinary action against the then acting COO

11.2.1 Many of the findings related directly to the actions of the then acting COO, and the Board agreed that disciplinary charges would be instituted against him. The appointment of a chairperson and an evidence leader to preside over the disciplinary hearing was done via round robin. The members of the disciplinary committee were also changed about three times before the hearing commenced. The evidence file that the Public Protector had compiled to support the disciplinary proceedings, and which the SABC had requested, was never collected from that office or referred to during the proceedings.

12 Contradictory Evidence

In many instances the evidence provided by witnesses was contradictory. The Evidence Leader has been requested to analyse the contradictory testimonies, and on conclusion of this exercise, Parliament's Legal Services Office will make appropriate recommendations.

Part D: Summary of responses to the Interim Report

13. Former Board Chairpersons

13.1 Dr B Ngubane

13.1.1 In his submission, Dr Ngubane comments on the process of the inquiry, the treatment he had received as a witness as well as on specific sections of the report.

13.1.2 On the process, Dr Ngubane notes that the Committee had relied heavily on oral evidence, and that one could not ascertain whether any of the documents requested from the SABC had ever been provided. One could also not ascertain whether the Committee had taken into account any of the written evidence, including those he had submitted, in arriving at its findings.

13.1.3 Dr Ngubane also points out that none of the documents, in particular those which implicated him, were made available to him for purposes of preparing for his hearing. Although he had to answer questions related to Ms Dlamini's affidavit, the affidavit was not made available to him. It is also not clear whether the affidavit included annexures corroboratingthe claims Ms Dlamini made. In Dr Ngubane's view, the fact that documents pertaining to the inquiry had not been made available to him, pointed to a lack of transparency on the part of the Committee.

13.1.4 He questions Ms Dlamini's credibility as a witness amidst various allegations that she had contravened procurement processes between 2010 and 2012 while she was employed at the SABC, and included supporting documentation in this regard.

13.1.5 An arbitration award from the CCMA awarded on 15 January 2015 states that Ms Dlamini was found guilty of gross misconduct on one charge relating to Impala, although there was no evidence to prove that she had enriched herself. It was recommended that the employer terminate her contract of employment.

13.1.6 Dr Ngubane raises concern that the manner in which the inquiry was conducted and the information sought extended beyond the Committee's mandate, which was aimed at inquiring into the fitness of the SABC Board that was chaired by Prof. Maguvhe. He points out that, bearing in mind the provisions of section 15A(1)(b) of the Broadcasting Act, the mandate of the Committee appears to have been "overtaken by events".

13.1.7 Dr Ngubane questions the appropriateness of prioritising the inquiry when in fact an Interim Board should have been appointed as a matter of urgency. He emphasises that it was not in the best interest of the SABC and/or any of its stakeholders for it to have been left to operate without a Board. This drew into question the Committee's commitment to the SABC's sustainability.

13.1.8 With regard to section 7ofthe Interim Report, Dr Ngubane questioned the extent to which the Committee could have considered the *MultiChoice* and *the* TNA Media Group contracts without having had sight of the actual agreements. In relation **to** the SABC's relationship with the TNA Media Group, Dr Ngubane reiterates that Mr Molefe's "allegations" in that regard had been unfounded.

13.1.9 In his concluding comments Dr Ngubane emphasised that the Committee could only reach a "meaningful conclusion" if it inquired further in order to obtain relevant information in instances where witnesses provided conflicting information. To this end, a more thorough investigation may still be required. In his view, the only reasonable recommendation the Committee could arrive at would be that an Interim Board be appointed, and that that body assists with a more in-depth investigation.

13.2 Ms E Tshabalala

13.2.1 Ms Tshabalala points out that the evidence she had given was not reflected adequately in the Interim Report, but does not elaborate on the aspects that she would have wanted to see reflected in greater detail.

13.2.2 During her hearings Ms Tshabalala indicated that there had been "gross" political interference in the Board she had chaired, particularly in relation to the SABC's policy on Digital Terrestrial Television (DTT) and specifically set-top box encryption. The Committee had requested that detailed information be provided in an affidavit. Ms Tshabalala refused to provide an affidavit because, in her view, both her oral *and* subsequent written submission were provided under oath.

14. Former Board Members

14.1 Ms R Kalidass

14.1.1 Ms Kalidass was in agreement with the contents of the interim report, and did not propose any substantive amendments.

15 Shareholder Representative

The Minister's submission responds to the findings contained in the Interim Report and identifies five areas in which the Minister is implicated. The specific findings are:

- that the MOI was irregularly amended to empower the Minister to remove Board Directors in line with the Companies Act;
- that the proposed amendments to the Broadcasting Act were aimed at concentrating power in the Ministry;
- that the Minister had been involved in the removal of non-executive Board members;
- that the Minister unduly pressurised certain Board members to resign; and
- that the Minister had possibly pressurised the Board to appoint Mr Motsoeneng permanently as COO.

15.1 Amendments to the MOI

15.1.1 The Minister in her submission states that a copy of the MOI was registered with CIPC on 14 May 2014. TheMinister contends that it is factually incorrect that she

had irregularly amended the MOI to concentrate power within the Ministry. She also states that when she was appointed on 25 May 2014, the MOI had already provided (in clause 14.4) for non-executive directors to be removed using section 71(3) of the Companies Act. The Interim Report incorrectly in stated that the MOI transferred the Board's powers to the Minister.

15.1.2 The Minister also reaffirms points made in her initial evidence, particularly in relation to the validity of removing Board members using section 71(3) of the Companies Act. She further states that she had sought independent legal advice on the matter, and that the matter had been put to the Portfolio Committee too.

15.1.3 The Minister further questions Mr Masinga's credibility as a witness, particularly with regard to his decision to contest the amendment of the MOI (see SM Masinga v The Minister of Communications and three other respondents, Case Number 10721/2015).

15.1.4 The Minister further submits that the "agreement in question" has been amended three times since 2013 but despite those amendments the Committee "heavily relied" on the initial agreement signed in 2013 as the basis upon which it has made its findings.

15.2 Amendments to the Broadcasting Act

15.2.1 The Minister argues that the matters addressed in paragraph 4.2 of the Interim Report which deals with the amendment bill, as well as paragraphs 12.1.3 and 13.1.2, are irrelevant to the inquiry. The Minister nevertheless voiced concern that the Committee failed to acknowledge that the bill had been certified constitutionally compliant by the Office of the Chief State Law Advisor and independent counsel. The bill was approved by Cabinet and presented to the Portfolio Committee. She further states that the claim that the bill represented an attempt to centralise power was without merit.

15.2.2 Finally, the Minister also cautions against the Legislature interpreting law and urges that the principleof separation of powers be maintained. The submission emphasises that section 5 of the Companies Act makes reference to legislation

that took precedence over that Act, and that the Broadcasting Act was not included among those listed.

15.3 Removal of non-executive Board members

15.3.1 The Minister denies that she had exercised undue influence on the Board to remove former non-executive members Mr Lubisi, Ms Zinde and Ms Kalidass from their positions. The Board had acted in line with section 71(3) of the Companies Act which empowered it to remove the Board members.

15.3.2 The Minister also denies that she had at any point pressurised Board members to resign.

15.4 Pressurising the Board to appoint Mr Motsoeneng

15.4.1 The Broadcasting Act empowered the Board to appoint or recommend persons to be appointed as executive members. The Minister states that she had been invited to attend a Board meeting scheduled for 7 July 2014 at which Mr Motsoeneng's permanent appointment as COO would be discussed. She had declined to attend the Board meeting, but waited at the SABC's premises. The Minister eventually joined the meeting when deliberations had been concluded, and she was informed of the decision. She requested the Board to provide her with a written recommendation for Mr Motsoeneng's appointment. She emphasised that the decision was made after full consideration had been given to the facts, and after consultation with Mchunu Attorneys who had been mandated to provide a report on the Public Protector's report, which had included findings against Mr Motsoeneng.

15.4.2 With regard to concerns about the COO post not having been advertised externally, the Minister indicates that she had considered this as well as the Board's motivation for why he should be appointed. She confirms that she was satisfied with the explanation that Mr Motsoeneng had done "a sterling job" as acting COO and that it therefore "made sense" to appoint him permanently "without advertising the position".

15.5 Alleged breaches of law

15.5.1 The Minster raises the issue of process and natural justice with reference to the Committee's findings that she acted in conflict with various statutes. The Minister found the Interim Report's findings in relation to breaches vague. She pointed out that she was not afforded sufficient notice of the allegations against her in order for her to assess what aspects of her conduct were in contravention or breach of her legal obligations. She does not waiver her right to be properly informed of the allegations against her, and to be afforded sufficient time to consider them.

15.6 Breach of the Constitution Act 108 of 1996

15.6.1 Paragraph 13.2.3 of the Interim Report states that the Minister may have contravened section 96(b) and (c) of the Constitution, section 15(1) of the Broadcasting Act, section 2.1(b) and (d) of the Executive Code of Ethics, and section 17(e) of the Privileges Act in the removal of Board members and in Mr Motsoeneng's permanent appointment as COO, for instance. The Minister points out that the applicable provisions of the Constitution are in fact section 96(2)(b) and (c) and not section 96(b)and (c) as reflected in the report. The Minister noted the Committee's use of "such as" and contends that this indicated uncertainty in relation to this finding. The Minister argues that there was no evidence that she exposed herself to any situation involving the risk of conflict between her official responsibilities and her private interests. The Committee's finding is therefore, factually incorrect.

15.7 *MultiChoice* transaction

15.7.1 The Minister pointed out that *Caxton and CTP Publishers and Printers* who was one of the complainants in the Competition Commission matter between the SABC and *MultiChoice* has lodged an appeal in the Competition Appeal Court on the grounds that not all documents pertaining to the transaction had been made available as per the order to the SABC and *MultiChoice*. The appeal was heard in December 2016 and a decision was being awaited. In light of the above, the Minister argued that the matter should be regarded as *subjudice*.

15.7.2 The Minister also disagreed with the assertion that the SABC had sold its archives to *MultiChoice* and that in so doing section 8(j) of the Broadcasting Act had possibly been contravened. She points out that the SABC only packaged content

for the SABC ENCORE channel which is then licensed to *MultiChoice* for broadcast.

15.7.3 The Minister confirmed that the SABC maintained libraries and archives at their premises and that these were available for inspection by the public as required by the Broadcasting Act. She further stated that once the migration to digital has been completed all television-owning households would have access to the SABC ENCOREchannel which would then be available on the SABC's DTT platform.

16. SABC

16.1 General

16.1.1 The SABC states that despite the fact that it was "battling to accept the Inquiry as objective and fair" it would provide responses to the issues raised in the course of the Inquiry. In its response to the Interim Report, the SABC asserts that:

- the Committee had "*displayed specific bias and did not take any reasonable steps to ensure that it received balanced information during the inquiry as the majority of the witnesses who testified were mainly ex-SABC employees and Board members, and civil society groups who have always viewed the SABC in the negative light,' and that this had led to a pre-determined outcome;*
- the decision not to afford Mr Motsoeneng an opportunity to appear before the Committee was in contradiction of the *audi alteram partem* rule;
- the use of information that the Evidence Leader had collected on behalf of the Portfolio Committee had not been appropriate in light of the fact that the SABC had contested that committee's objectivity;
- the inquiry was accusatorial rather than inquisitorial; and
- additional submissions made had not been shared with the SABC to allow the opportunity to comment and respond.

16.2 Introduction of the Interim Report

16.2.1 The SABC submitted comment that refuted statements made in the "Introduction". In the main the SABC states that:

- Board members had started resigning as early as December 2015 but that the Portfolio Committee had failed in its duties to appoint new members;
- the removal of Ms Zinde, Ms Kalidass and Mr Lubisi was as a result of their transgressions, and in line with the SABC's *'efforts to correct its governance processes in accordance with the undertaking given to the Shareholder, the PCC, SCOPA and to correct findings of the AGSA and the SIU reports';*
- a quorate Board meeting comprises nine members, which the Board had had up until October 2016;
- except for October 2014, all the SABC's services had been receivable on air; and
- no former employees were purged or forcefully removed, providing a detailed account of the circumstances surrounding certain witnesses' departure from the SABC.

16.3 Witnesses

16.3.1 In its response the SABC provides information attempting to prove that several of the witnesses who had appeared before the Committee were, for various reasons, not credible or trustworthy.

16.4 Regulatory Framework

16.4.1 The SABC provides a lengthy argument on the applicability of the Broadcasting Act and the Companies Act. In the SABC's view any reference to the Companies Act in the Broadcasting Act of 1999 refers to the Companies Act of 1973 and not that of 2008. The SABC claims that the fact that the Broadcasting Act of 1999 has not been amended to align it with the Companies Act of 2008 was the real challenge.

16.5 Governance

16.5.1 The SABC makes several statements in response to paragraphs 4.1.1 to 4.1.5 of the Interim Report. Amongst others the SABC maintains that:

- the Companies Act was supreme as far as the SABC's governance, and therefore the Board should be liable under that Act;

- the statement that the MOI was used to trump the Broadcasting Act was incorrect;
- the implementation of sections 85 and 86 of the PFMA was the responsibility of the Minister of Finance, and not that of the Board;
- the revision of the MOI was done in accordance with the Companies Act of 2008 and has not been disputed in a court of law; none of the annexures provided supported this claim; and
- the process to be followed to appoint Executive Directors was not altered when the Articles of Association was converted to the MOI.

16.6 Broadcasting Bill

16.6.1 In relation to paragraphs 4.2.1 to 4.2.8 the SABC registered its confusion as to the inclusion of the Bill in the inquiry. They also point out that the main objectives were more detailed than those reflected in the Interim Report.

16.7 Fiduciary Duties

16.7.1 In response to paragraphs 4.3.1 to 4.3.12 the SABC argues that the Companies Act did not distinguish between non-executive and executive directors and *all* directors had fiduciary duties. For this reason the Committee should have invited executive directors to give evidence too. The SABC further states that there was no MOI dated 20 September 2013. The response includes a lengthy legal argument pertaining to the provisions of the MOI, PFMA, and Companies Act in relation to the fiduciary duties of directors as well as the appointment, removal and disciplining of directors.

16.8 SABC finances

16.8.1 In its response, the SABC listed "salient features" of its finances over the last eight years. Amongst others, they maintain that:

- "Revenue and other income 2016 grew by 98% to R8.09bn from R4,71m in 2009. Revenues grew by 12% (R920m)from R7,17bn to R8,09bn when the current Board was appointed in 2013/14 to 2015/16;
- net assets have increased by 73% from R1,55bn in 2008 to R2,69bn. Net assets grew by 15% (R350m) from R2,34bn to

R2,69bn when the current Board was appointed in 2013/14 to 2015/16".

16.9 Report of the Auditor-General of South Africa (paragraphs 5.1.1 to 5.7.2)

16.9.1 On its financial management, the SABC highlighted that it has succeeded in reducing the number of material matters which had in the past led to audit qualification from nine in 2012/13 to one in 2016. The 2016 audit outcome is ascribed to lack of skills in its supply chain management division, and inadequate record keeping.

16.9.2 The SABC points out that the reduction on the "material, reportable concerns" in the audit report signified a "drastic improvement" in the corporation's financial and operational management "under the guidance of the Board and the Shareholder". The SABC insists that the majority of challenges which had resulted in the irregular, fruitless and wasteful expenditure referred to in paragraphs 5.2.1 to 5.3.2, was due to poor implementation of internal controls in preceding years.

16.9.3 The SABC refutes the Auditor-General's findings that it had failed to produce credible and reliable financial statements and had material misstatements on specific areas (as reflected in paragraph 5.1.1). It insists that its financial statements present fairly the financial position and financial performance of the entity.

16.9.4 In response to paragraphs 5.3.1 to 5.3.2, the SABC states that the bulk of its fruitless and wasteful expenditure was due to the impairment of foreign and sports content which was acquired in a batch.

16.10 Supply Chain Management

16.10.1 With regards to the flouting of supply chain management processes, the SABC alleges that Mr Matlala and Mr Shushu had delayed the timeous appointment of service providers, and that their reasons for delaying the processes were not valid.

16.10.2 In its response, the SABC provides reasons for the use of consultant services from *PriceWaterhouseCoopers*, *Asante Sana*, *SekelaXabiso* and *Lorna Vision*. These include the fact that the SABC's finance department was inadequately resourced and the urgency presented by the SABC's history of irregular expenditure.

16.10.3 The SABC disputes that individuals were purged as indicated in paragraph 6.1 and insists that their dismissal was in terms of section 85 and 86(2) of the PFMA. The SABC argues that Mr Shushu did not resign but was suspended for failure to action audit reports and payments to suppliers.

16.10.4 In response to paragraph 6.2.1, the SABC states that both Mr Shushu and Mr Tseisi had approved the deviations from SCM policies in relation to the *SekelaXabiso* contract in a Bid Adjudication Committee meeting on 18 November 2014.

16.10.5 The SABC refutes Ms Dlamini's evidence in paragraph 6.3.3 that Foxton Communicating was paid R350 000 per month. They confirm that the firm was paid R85000 per month as indicated in the documentation provided to the Committee.

16.10.6 In its response, the SABC states that it does not have any VATrecovery contracts.

16.10.7 In response to paragraph 6.3.5, the SABC pointed out that the TNA Media Group provided the SABC with 200 copies of it The New Age newspaper at no charge from December 2010 (after the newspaper was launched) and for a limited period. The SABC has since April 2011 subscribed to 180 copies of the newspaper per day for its head office and provincial offices. The TNA-subscription accounted for only 8 per cent of SABC's newspaper costs.

16.11 *MultiChoice* Agreement

16.11.1 In relation to paragraphs 7.1.1 to 7.1.7, the SABC claims that the *MultiChoice* agreement was '*initiated by the former Minister Ms Dinah Pule under pressure from the then PCC (Chaired by the Hon Kholwane) to implement the 24 Hours News Channel.'* Despite this pressure, the SABC did not have the funds to launch the channel. Mr Motsoeneng was therefore requested to raise the necessary funds.

16.11.2 The SABC observes that despite the fact that DSTV Channel 404 which flights parliamentary proceedings was carried on the same platform as the 24 Hours News Channel and SABC ENCORE, the Committee had only "painted" the 24-hour news channel and SABC ENCORE as "elitist".

16.11.3 In relation to the *MultiChoice* transaction, the SABC points out that the five-year agreement was already in its fourth year. The SABCemphasised that should the agreement be terminated over 100 jobs would be lost, and broadcasting operations of the 24 Hour News Channel and ENCORE would "suffer closure".

16.11.4 The SABC refutes claims that the *MultiChoice* agreement involved the sale of the SABC archives or the SABC's intellectual property, and that it was at all "relevant" times compliant with section 8(j) of the Broadcasting Act. In relation to the ENCORE channel, the agreement comprises "a license agreement between the SABC and *MultiChoice* of only 1% of the SABC archive material".

16.11.5 The SABC also clarified that the 2014 amendment of the original agreement provides that content broadcast on the *MultiChoice* ENCORE platform could be broadcast by the SABC 60 days after it had been broadcast by *MutliChoice*. Furthermore, the channels wouldrevert to the SABC platform once the DTT process has been completed. The SABC also points out that the broadcast of its two channels on the *MultiChoice* platform was a direct result of the shortage of bandwidth.

16.11.6 The SABC rejected claims that its stance on STB encryption was influenced by the *MultiChoice* transaction. The decision was purely based on sound and valid cost concerns. TheSABC points out that Section 2(k) of the Broadcasting Act provides that the SABC couldengage in commercial transactions (such as licensing agreements) to generate income in order for it to be competitive commercially.

16.12 New Age Media arrangement

16.12.1 In relation to paragraphs 7.2.1 to 7.2.4 the SABC denies that Mr Masinga had been tasked with rebranding SABC News, or that the SABC paid the TNA Media Group for the TNA Business Breakfasts

16.13 Vision View

16.13.1 The SABC denies (and provides documents supporting itsclaim) that the *Vision View* contract was approved on 31 July 2015 as stated in paragraph 7.3.1 of the Interim Report, or that it was approved via Round Robin. The SABC states that although the Round Robin decision was taken on 31 July 2015, that decision was "further" ratified in an EXCO meeting on 18 September 2015.

16.14 Human resource-related matters

16.14.1 The SABC provides several response to paragraphs 8.1.1 to 8.4.2 of the Interim Report. With regard to executive appointments the SABC indicates that the MOI approved in May 2014 reflected the process to be followed to appoint executive directors, while the Broadcasting Act only referred to the appointment of non-executive directors. The MOI was therefore not amended to provide for the appointment of executive directors but to appoint managers—an operational matter falling outside of the fiduciary duties of the Board—and therefore the Board was party to the amendments of the MOI as stated by the Minister in her evidence, and as confirmed in the AGM minutes of 4 September 2015, and the Board minutes of 29 June 2016 and 18 August 2016 which the SABC included in its submission.

16.14.2 The SABC further stated that Mr Motsoeneng was notappointed as Group Executive: Corporate Affairs after the Court had reviewed and set aside his appointment as COO: he was not appointed, but merely "restored" to the position he had occupied prior to his promotion.

16.14.3 The SABC also stated that most witnesses cited in the Public Protector's report either denied participating in the investigation, or being interviewed by the Public Protector.

16.14.4 In response to the claims that staff had been purged, the SABC highlights that the Board was not required to ratify decisions to appoint or dismiss employees since this was an operational matter. There were valid reasons and merits for each removal and dismissal.

16.14.5 The SABC refuted Mr Mabaso's claims that he had introduced the performance management system. According to the SABC, he merely revised a policy which was approved prior to his appointment in June 2013.

16.15 Editorial policies

16.15.1 In response to paragraphs 9.1.1 to 9.3.1 of the Interim Report, the SABC points out that its editorial independence rested with the Corporation and not individual journalists or staff members. The SABC made editorial decisions based on news value, editorial policy, balance, credible source confirmation and the deliberations of the editorial team as a collective. It further elaborates on its editorial policies, the election processes and complaints about biased coverage of political parties.

16.16 Public Protector Report

16.16.1 The SABC confirms that up until the time the Constitutional Court pronounced on the status of the Public Protector's remedial actions in the matter between *Economic Freedom Fights and Others v. The President of the Republic of South Africa*, there was "uncertainty on the binding nature of the Public Protector's remedial action".

16.16.2 In response to paragraphs 10.1.1 to 10.2.1, the SABC submits that Mr Lubisi had failed to submit the required report to the Committee of Chairs, which had resulted in an independent external review of the report not being 'appointed'.

16.16.3 With regard to the non-collection of the evidence file the Public Protector had compiled to assist in Mr Motsoeneng's disciplinary hearing, the SABC indicates that Mr Ledwaba had not responded to communication, and that a further prosecutor was appointed.

17. Former SABC employees

17.1 Mr P Molefe

17.1.1 Mr Molefe states that Dr Ngubane had "lied and deliberately misled" the Committee during his hearing. He denies Dr Ngubane's claim that he had signed the TNA subscription contract.

17.1.2 Mr Molefe further emphasises that he had been against the "carte blanche" proposal for the TNA Business Breakfastswhich would have amounted to a

takeover of SABC Morning Live programme by TNA. The contract was signed after he had resigned from the SABC.

17.1.3 Mr Molefe corroborated evidence that the SABC bore costs associated with the Business Breakfasts. In his submission he indicates that the shows came at a huge cost to the SABC. Technical equipment for one production could cost R1 million or more. In addition, the SABC had to cover the flights, accommodation and subsistence of its production staff when the briefings tookplace outside of Johannesburg. Mr Molefe confirms that while the SABC carried the production costs, the TNA Media Group earned the revenue exclusively.

17.1.4 Mr Molefe indicates that he was aware that a business case for the contract which set out the responsibilities of each of the parties as well as costs, and "specifically a 50:50 revenue sharing arrangement" was presented to the Group Executive. He later learned that the contract which was eventually signed excluded any reference to the revenue sharing arrangement.

17.1.5 In his evidence Dr Ngubane had alluded to the fact that Mr Molefe's visit to India while he was the acting GCEO had been linked to the controversial Guptafamily. Mr Molefe indicates however that the visits he had undertaken were motivated for and approved, and were aimed at exploring possible content and skills partnerships with other national broadcasters, and part of benchmarkingexercises in anticipation of the launch of a free-to-air 24-hour news service. The trip to India had been part of Board-approved international strategy to pursue partnerships with, amongst others the BBC in the United Kingdom, CCTV in China and Prasar Bharati in India.

17.1.6 In his evidence Dr Ngubane had denied the claim that he had attempted to force Mr Molefe to approve a R 500 000 salary increase for Mr Motsoeneng. In his response Mr Molefe insisted that the SABC's record would reflect that Mr Motsoeneng's salary had been increased by that amount, and later more.

17.2 Mr S Masinga

17.2.1 In relation to the amendment of the MOI, Mr Masinga provided proof that contradicted the Minister's evidence as reflected in paragraph 8.1.2 in the Interim

Report. Board minutes of a meeting that took place on 29 January 2015 indicated that Board members had raised concerns that the Minister had changed and registered the MOI without having consulted the Board. Members had raised concerns that the amendments may have resulted in the Board being stripped of its powers, but the proposal that an opinion on the legality of the amendment be sought was not pursued as it may have had implications for the relationship between the Shareholder Representative and the Board. Instead, it was agreed that the Minister would be invited to clarify the issue in a Board meeting.

17.2.2 Mr Masinga provided correspondence and a proposed agreement between the SABC and an entity called Applewood Trading 2006 (Pty) Ltd which supported the evidence referred to in paragraph 7.2.1 of the Interim Report. The agreement was for the distribution of a 24-hour, seven-day commercial news channel for delivery to SABC audiences (in South Africa and other countries in sub-Saharan Africa which fall in the footprint of the SABC's Analogue Terrestrial and Digital platforms) via the SABC platform. In addition the SABC would "allow the use of its archives for News, Current Affairs and other content as and when sought by the Channel Provider". In line withthe agreement the SABC would carry the costs of the proposed news channel, but whether the SABC would have benefitted financially from the agreement is unclear.

17.3 Mr I Tseisi

17.3.1 Mr Tseisi was in agreement with the contents of the Interim Report, and did not propose any amendments.

17.4 Mr M Shushu

17.4.1 In his response Mr Shushu proposed a number of detailed additions relating to services the SABC had procured from *SekelaXabiso*, *VisionView*, *Lezaf*, *Lorna Vision*, *PriceWaterhouseCoopers*, Ms Ayanda Mkhize (a procurement consultant), Mott MacDonald, and *Asante Sana*. He also provides additional information related to the RFP Book for content acquisition process, and the SABC's human capital recruitment services.

18. "SABC 8"

18.1 TNA Business Breakfasts

18.1.1 Ms Gqubule-Mbeki provided email correspondence which supported Mr Mvoko's evidence that the SABC bore significant costs associated with the TNA Business Breakfasts. The emails further confirmed that the briefings were continuing despite the concerns that had been raised in the course of the inquiry.

18.2 "Black Paper on the SABC: For Public Broadcasting in South Africa"

18.2.1 Six of the journalists who have become known as the "SABC 8" submitted recommendations to the public aimed at saving the public broadcaster. The *"Black Paper on the SABC: For Public Broadcasting in South Africa"* calls for:

- the scrapping of the 2016 editorial policy, the 70 per cent good news policy, and the protest ban;
- a return to quality broadcasting through "massive and targeted" training;
- the reversal of the recent "unlawful" dismissal, and termination of the contracts of, in particular, Mr Mvoko and Mr Kgaogelo Mogelego; as well as the decision to 'can' programmes including "The Editors" and the "Newspaper".
- a review of unprocedural appointments to the executive and the news room;
- a stop to gross violations of labour rights;
- the termination of the SABC's relationship with the New Age Media Group;
- the establishment of an editorial ombudsman;
- migration from analogue to digital;
- a forensic investigation of the *MultiChoice* deal as well as the *SekelaXabiso*, *Foxton Communicating* and *Vision View* transactions;
- increased public funding for the SABC; and
- a multi-stakeholder Board.

18.3 Suna Venter

18.3.1 Ms Venter submitted a response in her individual capacity, supported by Mr Foeta Krige, her senior and executive producer within the RSG Current Affairs.

18.3.2 In her response she calls for, amongst others:

- a separate inquiry into the SABC's news division to uncover information related to the culture of fear and uncertainty that continues, as well as continued political interference in newsroom activities;
- an investigation into the continued involvement of Mr Motsoeneng through the 'enforcers' he had appointed;
- the setting aside of the 2016 editorial policy;
- a direct finding relating to the failure of the Speaker of the National Assembly and the Chairperson of the Portfolio Committee to fulfil their constitutional obligations;
- an apology from the Minister and the SABC executive who had before the Portfolio Committee implied that the "SABC 8" were dishonest, unethical and racist; and
- strict instructions to the interim and new Boards, which includes the establishment of an internal forum for news staff.

18.3.3 Ms Venter does not support the establishment of an internal ombud which she believes would be unnecessary once a stable management has been appointed, and provided sound broadcasting guidelines are adhered to.

19. Chapter 9 institutions

19.1 AGSA

19.1.1 The AGSA proposed certain technical amendments, but did not propose any substantive changes.

20. Civil Society Organisations

20.1 SOS Coalition

20.1.1 The SOS Coalition did not comment on the contents of the Interim Report but proposed a number of recommendations for the Committee's consideration. These

include the dissolution of the Board, and urgent actions to be taken by the Interim Board in relation to corporate governance failures; human resource management; and supply chain management (in particular the *MultiChoice, Vision View and New Age Media* agreements/transactions); and the editorial policy and censorship.

20.1.2 The submission also argues for amendments to the Broadcasting Act, the Companies Act, the MOI and the Constitution in order to establish the SABC as a Chapter 9 institution.

20.1.3 The submission is supported by MMA.

20.2 Right2Know

20.2.1 Right2Know's submission calls for:

- the inclusion of the TNA Business Breakfastsamong those reported on under "Suspicious Transactions";
- public involvement in the appointment of the Interim Board;
- action to be taken against shareholder representatives who have breached the Broadcasting Act and the Companies Act;
- Dr Ngubane's removal as Chairperson of the Eskom Board;
- the review of the SABC's policies on the protection of electronic communication and the development of whistle-blower policy in order to protect journalists;
- a thorough investigation of the SSA's activities at the SABC;
- the recovery of the SABC's archive, and the prosecution of the individuals who had authorised the *MultiChoice* and *The New Age* transactions.
- public consultation on the local content quotas and the editorial policy;
- the filling of senior management posts through a public process;
- the summoning of those witnesses who had refused to participate in the inquiry;
- findings against attempts to give the Minister more executive and unchecked powers to interfere with the SABC; and

- a thorough investigation of all irregular and wasteful expenditure extending to before 2013/14, and that monies be recouped where necessary.

20.3 Media Monitoring Africa

20.3.1 MMA draws attention to two matters they believed ought to have been included in the Interim Report i.e. comment on the SABC's bias in the coverage of elections; and the SABC's failure to adhere to ICASA's ruling in relation to the decision not to cover violent protests.

20.3.2 MMA proposes a series of recommendations in relation to, amongst others:

- an investigation of the threats made against journalists, including the "SABC 8", and that the Interim Board expresses itself on the matter of intimidation and threats and ensures that measures are put in place to protect journalists;
- broad public consultation on the amendment of the editorial policy;
- an investigation of the newsroom, in particular irregular appointments and editorial interference; and
- a legal and forensic audit of the *MultiChoice* agreement which led to material from the SABC's archives only being available on a pay-to-view channel.

21. Unsolicited responses

21.1 Mr D Foxton

21.1.1 Mr Foxton's affidavit was submitted in response to paragraph 6.3.3 of the Interim Report. The affidavit clarifies that *Foxton Communicating (Pty) Ltd* is a political and current affairs consultancy and not a public relations firm. He further denies that the company was paid R350 000 per month for the services provided to the SABC. According tothe affidavit the company was paid R75 000 per month excluding VAT.At present they arepaid R85 000 excluding VAT.

21.1.2 *Foxton Communicating* offers a unique national and international service, providing effective communication between individuals at the highest levels in business, politics and media. The SABC entered into the agreement with *Foxton Communicating* in November 2013. The contracts werefor 12-month periods at a time, with three month-notice of termination available to either side at the end of each 12-month period. The documentation provided by the SABC confirms that *Foxton Communicating* was paid a monthly fee of R75 000 plus VAT calculated at R10 500.00. Annexure A of the SABC's submission in this regard states that the fee was fixed and that other than expenses specifically agreed to, no additional charges would be levied.

21.1.3 *Foxton Communicating* would, amongst others assist the then GCEO, Ms Mokhobo, and the SABC to develop and improve their public image and reputation through:

- identifying the CEO's immediate communication challenges and imperatives;
- structuring a programme of meetings with media and important business leaders according to which *Foxton Communicating* would, for example, arrange for the GCEO to annually host or participate in a minimum four meetings with prominent newspaper editors and three groups of business leaders during the year with aim of disseminating key messages to important audiences;
- facilitating opportunities for the GCEO to produce thought pieces or conduct interviews for selected media; and
- providing a crisis communications advisory service.

21.2 Mr H Motsoeneng, former SABC COO

21.2.1 Mr Motsoeneng's legal representatives, *Majavu Inc*, submitted a response on his behalf. The response did not address the evidence or findings, but highlighted Mr Motsoeneng's concerns with regard to the Committee's process, and the decision not invite him to give evidence.

21.2.2 Mr Motsoeneng wished to place on record the prejudice he believes he has suffered because he was not afforded an opportunity to appear before the Committee to defend himself or to contextualise matters in which he was

implicated. He believes that by not calling him to appear before it, the Committee had accepted as truth allegations made against him, including that he been responsible for staff purges, had flouted SCM policies, and that he did not have the requisite qualifications.

21.2.3 Although he was not specifically mentioned in it, the submission makes specific mention of paragraph 17.1.1 and states that Mr Motsoeneng had not been invited or summoned to Parliament, and had therefore not boycotted the inquiry.

21.3 TNA Media Group

21.3.1 The Committee received a submission from The New Age Media (TNA) Pty Ltd, responding to references in the Interim Report to the TNA Media Group.

21.3.2 In response to paragraph 6.3.3 of the Interim Report, TNA contends that the agreement between the SABC and TNA was the result of negotiations which were headed by Ms Lucille Jacobs and Mr Paul Nothnagel— both of whom were TNA representatives—which took place in 2011. TNA denies that any TNA representatives had given an instruction to the SABC to agree to subscribe to the TNA newspaper. The proposal was made after the SABC had requested that The New Age newspaper should form part of its newspaper bouquet. Mr Howa includes email correspondence dated 7 November 2011 from Ms Lucille Jacobs of The New Age to Ms Mmadiboka who was the SABC's Acting Head of Procurement at the time in which Ms Jacobs states that "The New Age is ideally placed to assist in the task of showing that 'the glass is half full'".

21.3.3 TNA corroborates evidence referred to in paragraph 7.2.1. The submission confirms that several proposals by the TNA Media team for cooperation between it and the SABC were declined by various line managers. TNA Media indicates that these proposals included an exploratory discussion document forcertainnews productions to be outsourced to TNA Media in order to narrow the urban-rural divide.

21.3.4 In response to paragraph 7.2.2 of the Interim Report TNA states that its executives started engaging the SABC on subscriptions and the Business Breakfastsin July 2011. The Business Breakfast-project was launched without the SABC, and TNA

managed the entire project using its own resources. The entire cost of hosting a Business Breakfast was borne by TNA Media but the SABC was responsible for the broadcast costs. This contradicted claims that the SABC bore none of the costs associated with the briefings. During the negotiations revenue-sharing with regards to the Business Breakfasts was discussed. Mr Howa provided email correspondence between the SABC and the TNA Media Group which confirmed that "an in principle commercial business partnership between The New Age and the SABC" had been reached according to which revenue would be split according to a 40:60 ratio, in the SABC's favour. The revenue-sharing aspect was eventually abandoned when the parties could not agree on the details.

21.3.5 The SABC nevertheless agreed to broadcast the event, in part because "the content generated by the breakfasts, content that would be required in any event on the basis of the SABC's mandate" was "of great interest" to the SABC.

Part E: Observations

22. Governance

22.1 Legislative Framework

22.1.1 The Committee is of the view that the SABC conveniently used the Companies Act to subvert the Broadcasting Act in order to justify decisions which appeared to be in pursuit of undermining both Parliament's and the President's roles in the appointment of non-executive directors.

22.2 Fiduciary Duties

22.2.1 At the commencement of the inquiry, the Board was dysfunctional as only three of its non-executive Board members still remained. In addition, all three of its executive directors were acting in their posts. The Board could notconvenequorate meetings. The Committee also noted that some non-executive Board members who were removed from the Board were challenging their irregular removal through a legal process.

22.2.2 The Committee was presented with overwhelming evidence that the Board had failed to carry out its duties. Board leadership, most notably chairpersons, appear to have failed to provide leadership which had prevented the CFO, COO and CEO from carrying out their operational duties. This had rendered the work environment

unbearable which in turn led to a costly skills exodus, ill-informed policy decisions, loss of competitiveness, the SABC's compromised fiscal position, reputational risk and a complete breakdown in governance. In short, the Board had failed to monitor and enforce compliance with the Charter of the Corporation or to act in the SABC's best interest, and in so doing had contributed to the SABC's administrative and financial instability.

22.2.3 Prior to the resignation of the last three non-executive members, the remaining members had continued to refer to themselves as Board, and despite the fact that they did not form a quorum, they had continued to take and implement decisions.

22.2.4 SomeBoard members had objected to the irregular amendment of the MOI, which effectively transferred their responsibilities to the executive directors of the Board, and was an attempt to centralise power in the Ministry. The lack of resistanceby themajority of the Board members to the amendment demonstrated their flawed understanding of the Board's duties and responsibilities, and of the relationship between the Board, the Shareholder Representative, and the Administration.

22.2.5 In some instances no consultationwas heldwith key stakeholders—including Parliament—and the broader public when SABC policies, such asthe 90/10 local content, 70/30 good news, and editorial policies were amended. In addition, these policy decisions appear to have been implemented without having considered the impact on the SABC's finances.

22.2.6 The Committeeis of the view that had the Board members beenproperly inducted into their new roles upon taking office, and received training with regard to their respective roles and responsibilities, many of the challenges may have been averted.

22.2.7 The Committee has noted that much of the decline at the SABCwas the result of both executive and non-executive directors having tolerated the gradual erosion of good governance and sound financial management, until such time that it directly affected them. This failure to object to/resist had contributed to the widespread non-compliance with, for example, SCM and labour policies and procedures, and the disregard for the regulatory framework within which the SABC operated. The situation was further exacerbated by the rapid turn-over of executive and non-executive directors.

22.2.8 The Board failed to ratify operational decisions or to engage the shareholder representative on the implications of the amendments to the MOI and the delegation of authority framework, which impacted directly on the public broadcaster's mandate, its financial management and competitiveness.

22.2.9 Despite theCompany Secretary having served in the position for a long period of time, and despite her having been highly-experienced and highly-qualified, the evidence suggested that she failed to provide adequate guidance to the Board. Former Board members gave evidence of an unusually large number of special meetings convened at short notice and without proper notification or adequate documentation, and frequent round-robin decision-making, albeit—according to the SABC—ratified at the next quorate meeting. This modus operandi appears to point to deliberate attempts tostifle Board discussion and to manipulate the Board's decision-making, particularly in matters on which Board members may have had divergent views.

22.2.10 The Board had failed to ensure that the remedial actions of the Public Protector and ICASA rulings were fully implemented.

22.2.11 The Committee notes that at the adoption of this report the SABC was without a quorate Board. All the non-executive members had been dismissed or had resigned of their own accord. The Board only had three executive members, all in acting capacities.

22.3 Financial Management and Sustainability

22.3.1 The Committee noted with concern statements bysome ofthe SABC's executive managersand Prof. Maguvhe, that the SABC was not accountable to Parliament as it only received a small percentage of its budget from the fiscus. This reflects their lack of understanding of their duties and responsibilities. Regardless of its commercial activities, the SABC remains a public entity, funded from the public purse, and is, in terms of the PFMA,accountable to Parliament.

22.3.2 In 2015/16 the Auditor-General reported fruitless and wasteful expenditure with a cumulative value of R92.8 million. The evidencebeforethe Committee supports the Auditor-General's finding that the SABC Board had failed to discharge its duties as required by the PFMA in that it had failed to put in place effective measures to prevent irregular, unauthorised, and fruitless and wasteful expenditure. The Committee concurs with this finding.

22.3.3 The Committee notes with concern the evidence about the SABC's deterioratingfinancial management which has impacted negatively on itssustainability. There appears to beserious cash-flow challenges, given the significant deterioration in cash reserves.In addition, there is reference in the Auditor-General's management letter that points to material uncertainty on the going concern assumption. In this regard, the funding model is of concern, particularly in light of the SABC's mandate as a public broadcaster. The corporation may be at risk of becoming technically insolvent.

23. Role of the shareholder representative

23.1 Memorandum of Incorporation

23.1.1 The Committee is extremely concerned about March 2014 changes to the MOI which effectively erodes the powers and duties of the Board as per the Broadcasting Act.

23.1.2 The Committee received four "MOIs" in the course of the inquiry. An enquiry to the CIPC revealed that the last amendments to the MOI were registered in March 2014, when Mr Yunus Carrim was the Minister of Communications.The CIPC had no record of any further amendments, other than changes in directorship which were filed in 2015.TheCIPC-enquiry revealed the questionable appointment of Mr Motsoeneng and Ms Geldenhuys as directors in 2011 and 2012 respectively.

23.1.3 The "MOI" signed by MinisterMuthambi in October 2014 empowers the Shareholder Representative to remove directors in line with the Companies Act. It also gives the Minister undue access to the SABC's administrationthereby compromising the SABC's independence.It further concentrates certain Board powers in the hands of the executive management.

23.1.4 During her evidence the Minister statedthat theamendments she had made were submitted to the CIPC. On further enquiry the SABC's acting GCEO provided the Committee with a document which suggests that the amendments were submitted tothe CIPC in March 2015. The Committee has serious reservations about the authenticity of this document. The fact that the amendments which the Minister had signed inOctober 2014 have not been registered means that it has not taken effect in law.

23.1.5 Furthermore, the Minister stated that on presentation of the amendments to the Board,the Board members did not registerany concerns. Board minutes provided to the Committee indicateotherwise.

23.1.6 The unregistered "MOI" appears to be at the core of theSABC's governance complications, most notably the amendments to the Delegation of Authority Framework which appear to be irregular.

23.1.7 The MOI signed in October 2014as well as the proposed amendments to the Broadcasting Act, demonstrate efforts to concentrate power in the Ministry by curtailing and removing the powers of both the Board as the accounting authority, and Parliament's role in the appointment and removal of non-executive Board members. It also strips the Board of its role in the appointment of the executives.

23.2 Removal and appointment of Board members

23.2.1 The Minister's role in the removal of non-executive members, either through dismissal or resignation, is noted with concern.

23.2.2 The Committee also notes from Board minutes of a meeting that took place on 7 July 2014, that the Minister may have, directly or indirectly, pressurised the Board to appoint Mr Motsoeneng in the COO position.

23.2.3 In both instances the Minister may have contravened section 96(2)(b) and (c) of the Constitution, section 15(1) of the Broadcasting Act, and the relevant sections of the Executive Members Ethics Act Code of Ethics, and section 17(e) of the Privileges Act, and possibly other applicable legislation.

24. Questionable transactions

24.1 *MultiChoice*

24.1.1 Section 8(j) of the Broadcasting Act requires the SABC to establish and maintain libraries and archives containing materials relevant to the objects of the Corporation and to make these available to the public with or without charge. The *MultiChoice* agreement therefore potentially contravenes the provisions of the Act too.

24.1.2 A significant section of the country's population does not have access to DSTV, and can therefore not view the archival material aired on *SABC ENCORE* and

SABC News. This is particularly problematic in light of the SABC's public mandate to educate, entertain and inform.

24.1.3 Having taken into consideration all the evidence, including the SABC's responses to the Interim Report, the Committee could not establish with certainty whether the content of the archives of the public broadcaster remained in the SABC's possession, or the extent to which *MultiChoice* has access or pays for access to the archives. According to Ms Geldenhuys's evidence*MultiChoice*hadpurchased the right to air the material, but didnot own the archives. This contradicts evidence by former executives and Board members.

24.1.4 The SABC's sudden about turn with regards to set-top box encryption appears to have been the result of conditions imposed by the *MultiChoice* agreement. It appears that the "purging" of the Group Executive: Technology was partly due to his implementation of the Board-approved strategy supporting encryption, which he had opposed.

24.1.5 The SABC archives are a public asset. There appears to be insufficient disclosure and transparency in the manner in which the *MultiChoice*-agreement was negotiated. The manner in which the contract was crafted appears to have serious legal implications in respect of access to public information.

24.1.6 At the time of reporting, the *MultiChoice* transaction was the subject of litigation.

24.2 *SekelaXabiso*

24.2.1 The SABC was well equipped to provide the services procured from *SekelaXabiso.* The Committee noted that the evidencesuggests some irregularity in the company's appointment, and that procurement procedures may have been circumvented in awarding the contract.

24.3 *Vision View*

24.3.1 The Committee notes with concern possible irregularities around the manner in which the *Vision View* agreement, which cost the SABC R42 million, was awarded.The evidence suggests that plans to use internal capacity to "beef up" equipment had been abandonedin favour of the Vision View transaction.

24.4 Foxton Communicating

24.4.1 Ms Dlamini in her affidavitto the Committee made several claims in relation to the company owned by Mr Dick Foxton, and its relationship with the SABC. Following the release of the Interim Report for comment, Mr Foxton wrote to the Committee clarifying certain matters related to the company's relationship with the SABC. These comments were corroborated by the SABC and are contained in paragraphs 21.1.1to 21.1.3 above.

24.5 Additional transactions

The Committee has noted information provided by Mr Shushu in his oral evidence and in his response to the Interim Report regarding other transactions that may also be of a questionable nature i.e. the SABC's contracts with *SekelaXabiso*, *Vison View*, *Lezaf*, *Lorna Vision*, *PriceWaterhouseCooper*, Ms Ayanda Mkhize (Procurement Consultant), Mott MacDdonald, *Asante Sana*, the RFP Book content acquisitions, *Talent Africa*, and *Human Capital Recruitment.*

25. Human Resource Management

25.1 Irregular appointments and dismissals

25.1.1 The Committee notes with concern evidencethat pointed to a number of irregular appointments and dismissals within the SABC.It notes further that the SABC has a high staff turnover especially at the level of its Executive.

25.1.2 TheCommittee notes with concern that Mr Motsoeneng was appointed as COO—outside of the relevant employment processes—despite him having hadadverse findings made against him by the court as well as the Public Protector. In addition he did notmeet the most basic criteria, and was appointed without following the relevant employment processes. This points to the Board and/or its sub-committees' failure to exercise effective oversight of the administration specifically in relation to human resource management and finance-related matters. The evidence further suggests that the Board had allowed itself to be unduly influenced to approve this irregular appointment which has had far-reaching consequences.The Minister in her evidence indicated that in light of the advice she had received on the matter, she did not think it necessary for the relevant recruitment policies to be followed in this case.

25.1.4 The Committee notes with concern that some internal changes were effectedto senior management positions and that the appointment of the current Company Secretary may have been irregular.

25.1.5 The Committee notes that despite the SABC's claims that many of the witnesses who had appeared before the Committee had been guilty of gross misconduct/wrong-doing, they were in most casespaidlarge settlement amounts after their contracts were terminated.

25.2 Vetting

25.2.1 Despite the fact that the SABC has been classified as a national key point, most of its executive directors and Board members were notgivensecurity clearanceas is the requirement.

25.3 Victimisation and Intimidation

25.3.1 The SABC Board made no meaningful intervention to put a halt to the intimidation and threats the "SABC 8" were subjected to. Neither Prof. Maguvhe nor the Minister appeared to view the threats, which had been widely reported, and which were subject to police investigation, in a serious light. Prof. Maguvhe went to the extent of expressing ignorance of their labour dispute as well as of the threats.The physical attacks and acts of victimisation continued throughout most of the inquiry. The SABC's response that the corporation has offered wellness programmes to affected employees illustrated their lack ofunderstanding of the seriousness of the situation.

25.3.2 Evidence that the SSA had been monitoring/intercepting communication between employees is noted with serious concern. This irregular use of state resources is a matter of concern.

26. Response to the Public Protector Report No 23 or 2013/14 And ICASA rulings

26.1 Compliance

26.1.1 As is apparentfrom the evidence by the Public Protector, the Board had gone to great lengths to avoid fully implementing the Public Protector's remedial action. They instead relied on a legal opinion by a firm of attorneys which sought to trump the remedial findings of the Public Protector. The Committee further notes that the SABC Board had on 19 April 2016, almost two years after the Public Protector's report was released the SABC decided to take the report on review.

26.1.2 In a similar vein the Board had failed to ensure that the SABCfullycomplied with ICASA's ruling with regard to the decision not to broadcast violent protests. This had resulted in ICASA laying criminal charges against the SABC.

27. Accountability

27.1 SABC's response to the inquiry

27.1.1 The SABC's had in several ways attempted todelaythe inquiry. These efforts included:

- failure to submit documentation required in preparation for the inquiry timeously and in appropriate formats;
- the attempt to interdict the inquiry which delayed proceedings by over a week;
- frivolous claims that the Committee had violated its former Chairperson's rights as a person living with disabilities;
- walking out of Committee proceedings on the first day of hearings, and hosting a press conference at which the inquiry was referred to as a "kangaroo court";
- failure to cooperate with the inquiry, and having had to be summoned to appear before it; and finally
- the tone of the response provided to the Committee's Interim Report.

27.1.2 The refusal to provide Parliament with certain information, under the pretextthat such disclosure to a parliamentary committee would compromise its commercial interests, further illustrates their resistance to parliamentary scrutiny and their refusal to account.

27.1.3 The Committee notes that the Executive of the SABC, Mr Aguma, submitted a lengthy written response to the Interim Report wherein serious aspersions were cast against the Committee's approach to the Inquiry. The SABC accused the Committee of,*inter alia*,"bias", "an adversarial tone", "Mr Hlaudi Motsoeneng-bashing" and disputing the Committee's statement about it deviating from its mandate as the public broadcaster "with the contempt it deserves". The Committee is of the view that the allegations are unfounded, and that they display further contempt for Parliament and the Inquiry.

27.1.4 While the SABC went to great lengths to discredit many of the witnesses who had appeared before the Committee, its response provided very little information that contradicted these witnesses evidence.

27.1.5 The response to the inquiry confirmed the former Chairperson and the SABC's disregard and rejection of Parliament's oversight authority which is enshrined in the Constitution, and showed little regard for the financial andreputational damage the SABC would suffer.

27.1.6 The Committee further notes with extreme concern the Minister's failure to take action in response to the former Board Chairperson and the SABCExecutive'scontempt for Parliament and theparliamentary process.

28. Editorial Independence and Journalistic Ethics

28.1 Compliance with the Broadcasting Charter

28.1.1 The Committee heard evidence which illustrated the extent to which journalistic ethics compliance at the SABC had been compromised. The gradual erosion of editorial independence and expectation of self-censorship stands in direct contradiction to the SABC's obligation to report in a manner that is accurate, fair and responsible. The Board had therefore failed in its responsibility to ensure the SABC's compliance with the provisions of the Broadcasting Charter. In addition, the 90/10 editorial policy has undoubtedly contributed to the SABC's loss of revenue, and may have contributed to the decline in viewershipand listenership.

29. Parliamentary oversight

29.1 Parliament's role in the SABC's decline

29.1.1 The Committee acknowledges that Parliament may have relinquished its constitutional duty to hold the Executive and consecutive SABC boards to account. This may have renderedParliament complicit in the gradual decline of good governance, accountability and commitment to public broadcasting at the SABC.

Part F: Recommendations

Notwithstanding the fact that at the time of the commencement of the parliamentary Inquiry there was no functional Board as envisaged by the Broadcasting Act, the Committee is of the view that the Board has for some time prior to its collapse failed **to**:

- discharge its fiduciary duties;

- adhere to the Charter; and
- carry out its duties as contemplated in section 13(1) of the Act.

Paragraphs 30.1.1 to 42.1.5 contain the Committee's recommendations for implementation by the relevant authorities.

30. Governance

30.1 Formal dissolution of the Board and appointment of Interim Board

30.1.1 Noting the resignation of the majority of the non-executive directors, the Committee recommends the formal dissolution of the Board and the immediate appointment of an Interim Board in terms of section 15 A of the Broadcasting Act.

30.1.2 The Committee recommends that the appointment of the Interim Board should be through an expeditious process with due regard being given to appointing individuals who, in addition to meeting criteria set out in section 13 of the Broadcasting Act, also possess the skillset and experience to stabilise and regularise the SABC's governance and operations, with a view to limiting the corporation's exposure to risks.

30.2 Memorandum of Incorporation, Legislative Framework, and the Shareholder Compact

30.2.1 The Committee recommends that the Interim Board and the National Assemblyinvestigate the validity of the MOI that was signed in October 2014.

30.2.2 The Committee recommends urgent amendments to the MOI in order to align it with the Broadcasting Act.

30.2.3 The Committee holds the view that the Broadcasting Act is the principal legislation that governs the affairs of the SABC.Only in instances where the Broadcasting Act is silent, should the provisions of the Companies Act be given preference. The Committee further recommendsthat Parliament should consider amending the Broadcasting Act and, if necessary, the Companies Act to create legal certainty in this regard.

30.2.4 If necessary, the Shareholder Compact should be amended to clarify the role of the Shareholder Representative in relation to the Administration of the Broadcaster, and the Board.

31. Appointment and Induction of new Board of Directors

31.1 Appointment of an Interim Board/New Board

31.1.1 The Committee recommends that the National Assemblyshould soon after the appointment of an Interim Board commence with the process to appoint a new SABC Board in terms of section 13 of the Broadcasting Act. The Committee further recommends that the appointment of the new Board should be a transparent and public process, and that all shortlisted candidates should be subjected to vetting by the SSA.

31.1.2 The Committee recommends that the Company Secretary should ensure that members of the Interim Board and all subsequent Boards are inducted within reasonable time, so as to ensure their full understanding of the Board's duties and responsibilities.

32. Risk-mitigation measures

32.1 Regularising previous decisions

32.1.1 In light of the overwhelming evidence of external interference and non-compliance with the Broadcasting Act, the Companies Act and other relevant legislation, the Committee recommends that the new Board takes reasonable steps to regularise previous decisions that may pose a financial or legal risk.

32.2 Sub-committees

32.2.1 The establishment of Board sub-committees should be in accordance with the Broadcasting Act, Companies Act, and any other applicable legislation.

33. Restoring good governance practices at the SABC

33.1 Financial management

33.1.1 The Committee recommends that the Interim Board, or, if necessary, the new Board should urgently engage the Auditor-General to address all its findings relating to irregular, fruitless and wasteful expenditure, as well as to initiate disciplinary steps against any officials as required by section 51(1)(e)(iii) of the PFMA, who made and permitted irregular, fruitless and wasteful expenditure.

33.1.2 The Interim Board should institute an independent forensic investigation into questionable and irregularly-awarded contracts referred to in this report or any other matter which it deems necessary.

33.1.3 The Committee recommends that the Interim Board shouldevaluate the feasibility of the business case for entering into agreements with rival broadcasters (ANN 7 & DSTV) so as to ensure that the public broadcaster does not cross-subsidise its competitors. In instances where such contractual arrangements are in essence diverting resources from the SABC, such contracts must be renegotiated or terminated.

33.1.4 The Committee recommends that on conclusion of the forensic investigations into all financial irregularities (e.g.irregularly awarded contracts and performance bonuses, as well as suspicious transactions entered into) appropriate steps must be taken against any current and/or former employees and Board members who are found to have been complicit in the SABCincurring wasteful expenditure as a result of these irregular activities.

33.1.5 The Committee recommends that the Interim Board should ensure that a comprehensive progress report relating to all pending investigations, including those related to the SABC's financial sustainability, is compiled and submitted to Parliament. The findings, recommendations and remedial actionof already-concluded investigations such as those of thePublic Protector, ICASA, the Special Investigating Unit (SIU), National Treasury and the Auditor-General should be considered and implemented within the shortest possible timeframes.

33.1.6 The Committee recommends thatParliament, along with National Treasury should review the funding model of the SABC, which operates both as a public broadcaster and a commercial entity so as to ensure that it fulfils its mandate, while retaining its competitiveness as a commercial entity. This would ensure its long term financial sustainability.

33.2 Human Resource Management

Filling of senior management posts

33.2.1 The Committee recommends that the Interim/new Board must start the process of filling the top three executive positions (GCEO, COO and CFO) with suitablyqualified and experienced professionals who are able to develop and put in place systems that will support the Board in its efforts to stabilise and regularise the administration and governance of the SABC. The appointments should be made in line with the relevant human resource policies. The candidates should be vetted as is required for positions

at that level, and once they have been appointed their performance reviewed in line with the approved performance management system.

33.2.2 The Committee also recommends that all other vacant executive positions be properly advertised and filled with suitably qualified people, and that human resource management-related policies, procedures and practices are adhered to during the appointment process.

33.2.3 The Committee recommends that all SABC employees who failed to enter into performance management contracts, should do so within 60 days from date of adoption of this report by the National Assembly and that new appointees should do so before they receive their first salary payment.

33.2.4 In light of past experience, the Committee recommends that the Interim Board should start the process of appointing a new Company Secretary. He or she should be a person who understands the public broadcaster's responsibility to account to Parliament and who meets all criteria set out in the Broadcasting Act, the Companies Act and the King Code of Good Governance.

33.2.5 The Committee recommends that in view of the SABC's status as a national key point, the Board should ensure that the State Security Agency conducts the vetting of all new senior management appointees and that the vetting of all other senior employees should be fast-tracked as an additional measure to regularise and stabilise the SABC.

33.2.6 The Committee recommends that the Board reviews the SABC's human resource policies to ensure that they comply with labour legislation and regulations.

34. Parliamentary oversight

34.1 Capacity

34.1.1 The inquiry has revealed how inadequate parliamentary oversight had contributed to the disintegration of governance and accountability at the SABC. The Committee therefore recommends that Members of Parliament should receive adequate training and support to enable them to exercise their oversight responsibility competently. Such capacity-building should include general training on legislative oversight and on ethics and corporate governance, and specific training to assist them in their respective portfolios.

34.2 Compliance monitoring

34.2.1 The Committee recommends that the National Assemblyshould conduct more regular and thorough oversight over the SABC and its compliance with the Broadcasting Act, the PFMA, and other applicable legislation. The broadcaster's compliance with regulations regarding contract management, financial management and supply chain management should be thoroughly monitored. Similarly, the National Assemblyshould ensure that the Broadcaster adheres to effective human resource management.

34.2.2 The National Assembly should ensure that the Interim Board and all subsequent boards report to Parliament on a quarterly basis, and that such reports include detailed progress reports on the implementation of corrective measures in relation to financial management and compliance with human resource policy compliance.

34.3 Legislative amendments

34.3.1 Parliamentshould ensure that amendments to the Broadcasting Act and possibly the Companies Act, serve the purpose of strengthening the legislation governing the SABC, and the SABC, without weakening oversight and accountability, and in particular the National Assembly'srole in the appointment and dismissal of non-executive Board members.

35. State Security Agency

35.1 Allegations of spying and intercepting of communication

35.1.1 The Committee recommends that the Interim Board should investigate the nature of the SSA's activities within the SABC.

35.1.2 The Committee further recommends that Parliament should refer allegations of the SSA spying on employees, and intercepting their communication to the Inspector-General of Intelligence for investigation so as to establish whether the SSA had in fact been involved in unlawful monitoring of SABC employees, and to report its findings to the Minister of Intelligence and Parliament. Disciplinary action should be taken where applicable.

36. Compliance with legislation and remedial action/recommendations by competent authorities

36.1 Compliance audit

36.1.1 The Committee has noted with concern the number of instances in which the SABC hasfailed to comply with the orders of courts and other competent authorities such as the Public Protector, ICASA and the Auditor General.The Committee therefore recommends that the Interim Board performs an audit of all remedial action, recommendations and orders that have been issued over the last three years to determine the SABC's compliance in this regard. Where matters are not subject to review, implementation plans should be developed and executed without delay.

36.2 Unilateral policy changes

36.2.1 The Committee recommends that the Interim Board shouldinstitute an investigation to evaluate the financial and legal implications of unilateral changes to the policies as well as the alleged bonuses paid to certain categories of workers which were done without following due process. The Committee recommends that those responsible for the irregular changes to policies, which resulted in financial losses for the broadcaster should be held financially accountable for the financial losses and all consequential legal challenges as per the provisions of the PFMA and any other applicable legislation.

36.2.2 Upon conclusion of all the above investigations, those responsible for non-compliance with the PFMA and any other applicable legislation, should face appropriate disciplinary action and where appropriate, should be held liable for financial losses incurred by the SABC and/or face criminal charges.

37. Public Protector Report No 23: *"When Governance and Ethics Fail"*

37.1 Implementation

37.1.1 The Committee recommends that the Interim Board implements the Public Protector's remedial action outlined in the report titled *"When Governance and Ethics Fail"*.

38. South African Broadcast Production Advisory Body

38.1 Role

38.1.1 The Committee believes that the recently-established South African Broadcast Production Advisory Body must contribute positively towards ensuring greater compliance with the SABC's licencing requirements especially as it relates to local content, public participation and artists' royalties. This body must, in line with its

mandate as outlined in the Broadcasting Act, play a more effective role in advising the Minister.

39. Role of the Shareholder Representative

39.1 Political Interference

39.1.1 The Committee found that the Minister displayed incompetence in carrying out her responsibilities as Shareholder Representative. Evidence suggested major shortcomings in the current Shareholder Representative's conduct particularly in relation to her apparent failure to lodge the October 2014 amendments to the MOI, and her role in Mr Motsoeneng's permanent appointment as COO. The Committeeis of the view that the Minister interfered in some of the Board's decision-making and processes and had irregularly amended the MOI to further centralise power in the ministry. In light of this, all political interference in the SABC Board's operations must be condemned and must be reported to the Ethics Committee for processing in line with its mandate. In addition, Parliament must refer any violations of the Constitution, Privileges Act, the Executive Code of Ethics and/or the Broadcasting Act to the Ethics Committee and/or the Presidencyfor processing and—if there is sufficient proof—ordering appropriate corrective action which could include but is not limited to the institution of charges.

39.1.2 The President should seriously reconsider the desirability of this particular Minister retaining the Communications portfolio.

39.2 Remedies

39.2.1 The Shareholder Representative should assume a more pro-active role in ensuring good corporate governance and compliance with all relevant policies and legislation specific to the SABC.

39.2.2 The Shareholder Representative's involvement must be regulated so as to ensure that there is no undue encroachment in matters normally reserved for the SABC Board. The roles of the Board, the Shareholder Representative, the Executive, and Parliament should be clearly understood at all times. This relationship should at all times be regulated in accordance with King Code of Good Governance, the Broadcasting Act and, where applicable, the Companies Act.

40. Journalistic ethics and related matters

40.1. Editorial independence

40.1.1 As the public broadcaster established in terms of the Broadcasting Act, the SABC must in terms of the Broadcasting Charter at all times adhere to the highest standards of journalism with editorial independence being of uppermost importance.

40.2 Editorial policies

40.2.1 The SABC must restore public confidence in its reporting on current affairs, entertainment programmes and educational programmes, and seek to recover revenue lost as a result of inadequate editorial policies. The revised editorial policy should be withdrawn and thorough public consultation should be conducted. The Interim Board should ensure that this process is expedited. Although the policy does not require approval by Parliament, the Portfolio Committee should monitor the Interim Board's progress in this regard.

40.3 Victimisation and intimidation

40.3.1 The SABC Board should ensure that an environment free of fear and intimidation or abuse of power prevails at the SABC at all times. In light of the plethora of human resource-related challenges the SABC faces, every effort should be made to restore staff morale and a productive work environment. All incidents of intimidation and victimisation should be investigated, and those who have been implicated sanctioned appropriately.

40.3.2 Should there be any further death threats, intimidation or acts of violence committed against any staff member, relating to the situation at the SABC, the Accounting Authoritymust take immediate disciplinary action. In addition, all victims should be encouraged to report such incidents to the South African Police Service (SAPS) for criminal investigation.

40.4 Electoral coverage

40.4.1 The Electoral Commission and the SABC Board should ensure equitable coverage during election periods, as well as compliance with the Electoral Act and ICASA regulations.

41. Misleading Evidence/Perjury

41.1 Misleading/Contradictory evidence

41.1.1 Any witness who gave contradictory or misleading evidence must be investigated by Parliament for possible breaches of the Privileges Act.

41.1.2 Parliament's Legal Services Unit, with the assistance of the Evidence Leader, should within 60 days from the adoption of this report by the National Assembly, identify the persons who misled the inquiry or provided false information or false testimony with the aim of criminal charges being laid.

42. Additional legal steps

42.1 Court order in relation to the attempt to interdict the inquiry

42.1.1 Parliament should ensure that all legal costs incurred as a result of the court challenge by the previous SABC Board Chairperson in his personal capacity is recovered as per the court order.

42.1.2 The new Board in conjunctionwith theMinister should implement necessary disciplinary action against the acting GCEO for having defied Parliament.

42.1.3 In light of the former Company Secretary's role in obstructing the inquiry, the Interim Board should investigate her conduct, and if necessary she should be charged criminally in terms of section 17(2)(e) of the Privileges Act.

42.1.5 The attorneys who had advised and acted on behalf of the SABC Board chairperson and the Company Secretary in denying Parliament access to the documents requested in preparation for the inquiry should face all appropriate consequences, including being reported to the appropriate law society.

Report to be considered

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

Reportable

CASE NO: 12497/2014

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	First Respondent
THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Second Respondent
THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATIONS SOC LTD	Third Respondent
THE MINISTER OF COMMUNICATIONS	Fourth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Sixth Respondent
THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS OF THE NATIONAL ASSEMBLY	Seventh Respondent
HLAUDI MOTSOENENG: THE CHIEF OPERATING OFFICER OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Eighth Respondent
THE PUBLIC PROTECTOR	Ninth Respondent

JUDGMENT: 27 November 2015

DAVIS J

Introduction

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

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

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

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

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

A brief background

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

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

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

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

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

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

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

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

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

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

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

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

The Supreme Court of Appeal judgment with regard to Part A

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

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

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

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

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

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

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

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

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

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

A final passage of the judgment is also worth noting:

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

Applicant's case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

an application for leave to appeal is suspended, pending the decision of the application or the appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adv Madonsela: To make up the symbols.

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

Mr Motsoeneng: Marie Swanepoel.'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

The order

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

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

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DAVIS J

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 393/2015

In the matter between:

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

And

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

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

THE PUBLIC PROTECTOR **SEVENTH RESPONDENT**

and

CORRUPTION WATCH **AMICUS CURIAE**

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

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

Heard: 18 September 2015

Delivered: 8 October 2015

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

ORDER

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

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

JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

[3] In modern democratic constitutional States, in order to ensure governmental accountability, it has become necessary for the guards to require a guard. And in terms of our constitutional scheme, it is the Public Protector who guards the guards. That fundamental tenet lies at the heart of this appeal, in which we consider the Public Protector's powers and examine the constitutional and legislative architecture to determine how State institutions and officials are required to deal with remedial action taken by the Public Protector.

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

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

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

. . .'

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

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

Protector released a report relating to her investigation entitled 'When Governance and Ethics Fail'.[7]

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

(i) his appointment as Acting COO was irregular;

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

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

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

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

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

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

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

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

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[7] Public Protector's Report No 23 of 2013/2014. The full title of the Report, filed by the Public Protector in terms of s 182(1)*(b)* of the Constitution and s 8(1) of the Public Protector Act, reads: 'A report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC).'
The Public Protector borrowed from a former member of the SABC Board, who had stated: 'When governance and ethics fail, you get a dysfunctional organization. Sadly those in charge cannot see that their situation is abnormal. That has been the case at the SABC for a long time . . . ' A copy of the report is available at: *http://www.pprotect.org/library/investigation_report/2013-14/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf*, accessed 1 October 2015.

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

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

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

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

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

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

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

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

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

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

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

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

[9] On 7 July 2014, instead of implementing the Public Protector's remedial action and without notice to her, the SABC Board resolved that Mr Motsoeneng be appointed the permanent COO of the SABC. This was accepted by the new Minister (who had by that stage replaced Mr Yunus Carrim), Ms Faith Muthambi, who approved and formally announced his appointment the next day. Both the Board and the Minister acted as they did without reference to the Public Protector. Aggrieved, the Democratic Alliance (DA), the official opposition political party in the National Assembly, applied to the Western Cape Division of the High Court, Cape Town (the High Court), to first suspend and then set aside Mr Motsoeneng's appointment. It contended that in the light of the damning findings of the Public Protector in relation to Mr Motsoeneng and the clear requirements for the appointment of the COO, his appointment to that position was irrational and unlawful.

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

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

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

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

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

. . . . '

[11] Part B sought relief as follows:

'7. Reviewing and setting aside the decision taken by the Board, on or about 7 July 2014, to recommend the appointment of Motsoeneng as COO;
8. Reviewing and setting aside the decision taken by the Minister, on or about 7 July 2014, to approve the recommendation made by the Board to appoint Motsoeneng as COO;
9. Directing the Board to recommend the appointment of, and the Minister to appoint, a suitably qualified COO within 60 days of the date of the court's order;
10. Directing that, if the Board and/or the Minister fail to comply with the terms of paragraph 9, the Third Respondent ("the Chairperson"), and the Minister, shall file affidavits within 70 days of the date of this court's order giving reasons why all the members of the Board and the Minister should not be held in contempt of court;
11. Declaring that, the decisions to recommend and appoint Motsoeneng as COO before responding to the report of the Ninth Respondent [the Public Protector] dated 17 February 2014 and titled *'When Governance and Ethics Fail',* the Board and the Minister respectively were inconsistent with the Constitution, particularly section 181(3) of the Constitution, and invalid;
12. Ordering that the members of the Board who voted in favour of the appointment of Motsoeneng as COO, and the Minister in their personal capacities pay the Applicant's costs on an attorney and client scale;
. . . .'

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

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

'34. *First*, the Public Protector concluded that Motsoeneng had *lied about his qualifications* when applying for the COO position, and when applying for his earlier positions at the SABC. Motsoeneng lied about having obtained a matric certificate and made up imaginary grades on his application form. It appears that the SABC Board may have been aware of this misrepresentation and appointed Motsoeneng nonetheless. As the Public Protector notes, Motsoeneng's attempt to rely on this connivance only exacerbates his crime as he showed no remorse for his unethical conduct. The lie was necessary as a matric was a minimum requirement for the position (as it had been for his earlier positions). The Public Protector described this as fraudulent.

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

. . .

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

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

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

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

the appointing a new COO. However, Mbebe had denied that there has been a final settlement.

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

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

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

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

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

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

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

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

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

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

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

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

125.4. The Minister was empowered to accept the recommendation of the Board and to appoint Mr Motsoeneng as the COO of the SABC. Any alleged failure by the Board to follow procedures set out in the Articles of Association did not preclude the 100% shareholder, empowered under the Broadcasting Act read with the Articles of Association to appoint a COO, to approve the appointment of Mr Motsoeneng. The legal basis for this contention, as well as the relevant facts, will be fully set out in the answering affidavit to Part B of the notice of motion. The outcome of Part A does not depend on this. I am advised and respectfully submit that this is not a case of an applicant seeking interim relief that is linked directly to the final relief sought – as in Part A (allegedly interim) and Part B of the notice of motion (final).' (Our emphasis.)

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

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

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

. . .

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

. . .

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

42. I have already indicated that I intend to engage the Public Protector in the light of facts which were established by Mchunu Attorneys, in their investigation. I have prepared the response of my office to the Public Protector of which such report will reach the Public

Protector's office in time, I will also meet the portfolio committee on communications on the 26 August 2014 to take them through my reply to the Public Protector.

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

. . .

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

. . .

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

. . .

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

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

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

. . .

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

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

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

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

. . .

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

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

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

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

being given due consideration and that an implementation plan would be furnished, her remedial action was ignored.

[19] The court below (Schippers J), formulated the primary question for adjudication as follows: Are the findings of the Public Protector binding and enforceable? He examined the relevant provisions of the Constitution and the Public Protector Act 23 of 1994 (the Act) and reasoned:

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

51. Further, unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of State.[8] If it were intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action in s 182(1)*(c)* of the Constitution is inextricably linked to the Public Protector's investigatory powers in s 182(1)*(a)*. Having regard to the plain wording and context of s 182(1), the power to take appropriate remedial action, in my view, means no more than that the Public Protector may take steps to redress improper or prejudicial conduct. But that is not to say that the findings of the Public Protector are binding and enforceable, or that the institution is ineffective without such powers.'

Then, somewhat contradictorily, he stated:

'59. However, the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of State may accept or reject.'[9]

[20] Schippers J concluded:

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

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

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

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

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

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

'1. The Board of the South African Broadcasting Corporation Ltd (SABC) shall, within 14 calendar days of the date of this order, commence, by way of serving on him a notice of charges, disciplinary proceedings against the eighth respondent, the chief operations officer (COO), Mr George Hlaudi Motsoeneng, for his alleged dishonesty relating to the alleged misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increases of Ms Sully Motsweni; and for his role in the alleged suspension and dismissal of senior members of staff, resulting in numerous labour disputes and settlement awards against the SABC, referred to in para 11.3.2.1 of the report of the Public Protector dated 17 February 2014.

2. An independent person shall preside over the disciplinary proceedings.

3. The disciplinary proceedings referred to in para 1 above shall be completed within a period of 60 calendar days after they have been commenced. If the proceedings are not completed within that time, the chairperson of the board of the SABC shall deliver an affidavit to this court:

(a) explaining why the proceedings have not been completed; and

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

'Through the application of reason the results are infinitely more powerful than through the application of coercion. While a coercive approach may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to accommodate the recommendations in future actions. By contrast when change results from a reasoning process it changes a way of thinking and the result endures for the benefit of potential complainants in the future.'

(b) stating when they are likely to be completed. The applicant shall be entitled, within five calendar days of delivery of the affidavit by the Chairperson, to deliver an answering affidavit.

4. Pending the finalisation of the disciplinary proceedings referred to in para 1, and for the period referred to in para 3 above, the eighth respondent shall be suspended on full pay'.

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

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

'. . .

(a) The Public Protector.

(b) The South African Human Rights Commission.

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

(d) The Commissioner for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.'

[24] Section 181(2) of the Constitution states that '[t]hese institutions are independent, and subject only to the Constitution and the law'. For their part, 'they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Section 181(3) imposes a positive obligation on other organs of State, who 'through legislative and other measures, must assist and protect these institutions' to ensure their 'independence, impartiality, dignity and effectiveness'. Section 181(4) specifically prohibits any 'person or organ of the State' from interfering with the functioning of these institutions. However, our Constitution does attempt to strike a balance between their independence, on the one hand, and accountability, on the other. To that end, s 181(5) provides that: '[t]hese institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.' But as the Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC) para 27: the Constitution, in effect, describes Chapter Nine institutions as State institutions that strengthen constitutional democracy; Chapter Nine institutions are independent and subject only to the Constitution and the law; it is 'a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government'; and independence cannot exist in the air and it is thus clear that independence is intended to refer to independence from the government.

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

'In dealing with the independence of the [Independent Electoral] Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it

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

is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

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

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

[26] The Public Protector, which is the first on the list of Chapter Nine institutions, has its historical roots in the institution of the Swedish Parliamentary Ombud.[12] That office was established with the adoption of the Swedish Constitution Act of 1809 and is said to have been a response to the King's authoritarian rule. The task assigned to the Swedish Ombud, which had been conceived as far back as 1713, was to ensure that public officials acted in accordance with the law and discharged their duties satisfactorily in other respects.[13] If the Ombud found this not to be the case he was empowered to institute legal proceedings for dereliction of duty.[14] Like similar institutions around the globe,[15] the purpose of the office of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics and that government officials carry out their tasks effectively,

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

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

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

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

fairly and without corruption or prejudice.[16] The term *'Defenser del Pueblo'* employed in Spain and some South American countries translates into 'Public Defender'. This emphasises 'the protection of the people' and 'the public good'.[17]

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

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

This predated the adoption of our Interim Constitution.

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

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

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

(b) to report on that conduct; and

(c) to take appropriate remedial action.

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

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

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

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

[29] The independence, impartiality and effectiveness of the Public Protector are vital to ensuring accountable and responsible government. The office inherently

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[16] *First Certification Judgment* para 161.

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

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

entails investigation of sensitive and potentially embarrassing affairs of government.[19] In terms of s 182(2) of the Constitution the Public Protector also 'has the additional powers and functions' prescribed by national legislation. The national legislation that is referred to in s 182 is the Act, which makes it clear that, while the functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that.[20] The office of the Public Protector provides '. . . what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation.'[21] It follows that in fulfilling its constitutional mandate that office will have to act with courage and vigilance.[22]

[30] Sections 193 and 194 of the Constitution provide for the appointment and removal of the Public Protector. The Public Protector is appointed by the President on the recommendation of the National Assembly. The National Assembly must recommend persons: (i) nominated by a committee of the Assembly proportionally composed of members of all political parties represented in the Assembly; and (ii) approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. In addition to being a South African citizen and a fit and proper person,[23] the Public Protector must have at least ten years' relevant experience or be a judge of the High Court.[24] This obviously suggests that the incumbent must be someone who is beyond reproach, a person of stature and suitably qualified. Section 183 of the Constitution provides for a non-renewable tenure of seven years. The Public Protector may be removed from office only on: (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for her removal from office. A resolution of the National Assembly concerning the removal of the Public Protector from office must be adopted with a supporting vote of at least two thirds of the members of the Assembly. Upon the adoption of such a resolution the President must remove the

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

Public Protector from office. The Public Protector is thus well protected and a high threshold is set for her removal. Significantly, in the *First Certification Judgment*, the Constitutional Court found that the provisions in the Interim Constitution governing the removal of the Public Protector from office did not pass constitutional muster.[25]

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

'. . . to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by –

(i) mediation, conciliation or negotiation;

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

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

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

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[25] See the *First Certification Judgment* para 163.

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

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

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

'Whereas sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996),[27] provide for the establishment of the office of Public Protector and that the Public Protector has the power, as regulated by national legislation, to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic; . . . .'

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

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

'The Public Protector shall, be competent-

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

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

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

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

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

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

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

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

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

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

(i) mediation, or conciliation or negotiation;

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

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

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

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

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

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

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

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

Section 8(3) reads as follows:

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

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

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

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

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

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

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

Once the Public Protector establishes State misconduct, however, she has the vast array of measures available to her as provided in the Constitution and the Act.

[43] Before us, all counsel accepted that the powers conferred on the Public Protector in terms of s 182(1)*(c)* of the Constitution far exceeded those of similar institutions in comparable jurisdictions. There was, however, a faint suggestion by counsel on behalf of the Minister, that the powers of the Public Protector ought rightly to be sourced from the Act, being the legislation envisaged by the Constitution rather than from the Constitution itself. The problem with that suggestion is that the Constitution is the primary source and it stipulates and refers to 'additional' powers to be prescribed by national legislation.[32] The proposition on behalf of the Minister is contrary to the constitutional and legislative scheme outlined above and would have the effect of the tail wagging the dog.

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

'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance

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

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

development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services. . .

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

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

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

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

finally arrived at by that institution. After all, the rationale for the principle in the administrative law context (namely, that the proper functioning of a modern State would be considerably compromised if an administrative act could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question (*Oudekraal* para 26)), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports.

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

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

With reference to *Bradley*, Schippers J held:

'66. It seems to me that before rejecting the findings or remedial action of the Public Protector, the relevant organ of State must have cogent reasons for doing so, that is for reasons other than merely a preference for its own view. In this regard, *Bradley* is instructive.' (Footnote omitted.)

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

have any equivalent of our Public Protector's power to 'take appropriate remedial action'. *Bradley* is consequently not of any assistance in the interpretation and understanding of our Public Protector's remedial powers. Schippers J's reliance on *Bradley* was therefore misplaced.

[47] Here, there is no suggestion that the Public Protector exceeded her powers or that she acted corruptly. Nor have any of the other traditional grounds for a review been raised. The principal reason advanced by both the SABC and the Minister for ignoring the Public Protector's remedial action is that the former had appointed Mchunu Attorneys to 'investigate the veracity of the findings and recommendations of the Public Protector'. That, in our view, was impermissible. Whilst it may have been permissible for the SABC to have appointed a firm of attorneys to assist it with the implementation of the Public Protector's findings and remedial measures, it was quite impermissible for it to have established a parallel process to that already undertaken by the Public Protector and to thereafter assert privilege in respect thereof. The assertion of privilege in the context of this case is in any event incomprehensible.[34] If indeed it was aggrieved by any aspect of the Public Protector's report, its remedy was to challenge that by way of a review. It was not for it to set up a parallel process and then to adopt the stance that it preferred the outcome of that process and was thus free to ignore that of the Public Protector. Nor was it for the Minister to prefer the Mchunu report to that of the Public Protector. It bears noting that the Public Protector is plainly better suited to determine issues of maladministration within the SABC than the SABC itself. That, after all, is why the office of the Public Protector exists. The Public Protector is independent and impartial. Mchunu Attorneys, who had already represented the SABC during the course of the Public Protector's investigation, was not. The Public Protector conducted a detailed investigation in which she interviewed all the relevant role

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

players, considered all relevant documents, and gave all affected parties an opportunity to comment on her provisional report. Only after following that process, did she make her findings and take remedial action. That cannot simply be displaced by the SABC's own internal investigation. Thus, absent a review, once the Public Protector had finally spoken, the SABC was obliged to implement her findings and remedial measures.

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

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

Minister were dead set on Mr Motsoeneng's appointment and had no genuine intention of engaging with the Public Protector.

[49] It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate.[36] The public interest should thus be its overarching theme and objective. Sadly, that has not always been the case. Its Board has had to be dissolved more than once and its financial position was once so parlous that a loan of R1 billion, which was guaranteed by the National Treasury, had to be raised to rescue it. Here as well, the public interest appears not to have weighed with the Board of the SABC. The Public Protector observes in her report:

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

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

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

She added that:

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

In his written response to the Public Protector's provisional report, Mr Motsoeneng accepted that the information furnished on the form when he first sought employment at the SABC 'was clearly inaccurate' and that his assertion that he had passed standard ten was 'inaccurate and false'. That notwithstanding, Ms Tshabalala, who had been appointed Chairperson of the SABC Board shortly before the application was launched in the court below stated: 'The objective facts contradict the finding by the Public Protector that Mr Motsoeneng misrepresented his qualifications . . .' and

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[36] In terms of s 6(4) of the BA, the SABC must:
'encourage the development of South African expression by providing, in South African official languages, a wide range of programming that –
(a) reflects South African attitudes, opinions, ideas, values and artistic creativity;
(b) displays South African talent in education and entertainment programmes;
(c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;
(d) advances the national and public interest.

'the findings of the Public Protector . . . have been demonstrated to be false in this regard'. Likewise, the Minister's assertion that after reading the transcript of the interview between the Public Protector and Mr Motsoeneng she was satisfied that he did not 'lie to the [SABC] about the matric qualification' can hardly withstand scrutiny.

[50] The following parts of a transcript of the interview conducted on 19 July 2013 by the Public Protector with Mr Motsoeneng, concerning his matric qualification, appear to support that part of the Public Protector's report referred to in the preceding paragraph:

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

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

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

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

Adv Madonsela: To make up the symbols.

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

Mr Motsoeneng: Marie Swanepoel.'

This explanation by Mr Motsoeneng is muddled and unclear. Even after the passage of a considerable period of time and sufficient opportunity for reflection on his part, it does reveal an alarming lack of insight. He appears not to fully appreciate that this

was an admitted deliberate falsehood and that in that sense his explanation lacks contrition and honesty. But his explanation evidently satisfied both the Board and the Minister that he did not lie about his matric qualification. It is not clear how they could have come to that conclusion because it is not in dispute that: (a) he did not have a matric qualification; and (b) when he first sought employment with the SABC he misrepresented that he did. It matters not, as he suggests in seeking to justify his behaviour, that certain persons at the SABC might have known that he did not in fact have a matric. That others may have known the truth simply makes them complicit in the lie. It does not excuse his lie. Mr Motsoeneng's more recent lack of candour and contrition is also cause for concern. He does not furnish a confirmatory affidavit from Ms Swanepoel. In his answering affidavit Mr Motsoeneng states 'I have been unable to trace Swanepoel again'. But it would seem that she did depose to an affidavit in which she disputes his version. That affidavit, for some inexplicable reason, does not form part of the appeal record. In his judgment on the application for leave to appeal, Schippers J records:

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

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

27. Ms Swanepoel left the SABC in 2006. In late 2012 Mr Motsoeneng telephoned her. He told her that the SABC was trying to fire him and he wanted to keep his job. He said that his attorneys wanted her to make an affidavit about his matric certificate and the form he had completed. He indicated to Ms Swanepoel that she should say that he had told her that he did not have matric when he filled in the form. She refused. She also told Mr Motsoeneng

that she did not wish to speak to him as she had a sexual harassment suit pending against the SABC at the time. He knew about the case and asked what she wanted from the SABC. She said she wanted R2 million in compensation. Mr Motsoeneng, then the Acting COO, replied, in Ms Swanepoel's words that, "he could organise for the SABC to pay me the R2 million, if I was willing to depose to the affidavit about the certificate." She again refused. Ms Swanepoel says that for some four weeks thereafter Mr Motsoeneng phoned her repeatedly, but she generally ignored his calls. On the occasions that she did answer, Mr Motsoeneng asked her if they could meet just to talk or if his attorney could speak to her about the matter. She replied that she would talk to him but that she would not lie in an affidavit for him.' (Footnotes omitted.)

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

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

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

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

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

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

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

[56] On the undisputed evidence it would appear that the Minister was able to apply her mind to the Mchunu Report, the recommendation of the Board and the transcript of Mr Motsoeneng's interview before acting on the recommendation of the

SABC Board. She had to then weigh that against the 150 page Public Protector Report, which she already had in her possession. She did all of that within a single day. As this court has previously pointed out: 'Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task.'[37] Moreover, the Minister seems to have restricted herself to a consideration of only one of the several negative findings against Mr Motsoeneng, namely, the allegation of dishonesty concerning his matric qualification. She does not state that she considered the findings of abuse of power, waste of public money, purging of senior staff and the disregard for principles of good corporate governance, all of which were plainly relevant to her decision. She also says nothing about the failure of the Board to advertise the post, consider other candidates or hold interviews before recommending Mr Motsoeneng for appointment in circumstances where, had she properly considered the Public Protector's Report, she would have known that the Public Protector had found that he had 'been allowed by successive Boards to operate above the law'. Armed with that knowledge, she ought to have considered that greater vigilance was required of her in acting on the recommendation of the Board. Thus, despite the appellants' protestations to the contrary, the permanent appointment of Mr Motsoeneng is inconsistent with the Public Protector's findings and remedial action and is inconsistent with the principles of co-operative governance.

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

'71. The high court does not mention a word about the submission of the government applicants on separations of powers. As a result we do not have the benefit of its attitude to the submissions. It is equally unclear whether the high court had considered the submissions at all. Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present case, a

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

state functionary is restrained from exercising statutory or constitutionally authorised powers. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrant otherwise.'

[58] It was submitted that the power to remove the COO was one vested in the President and that it was not competent for a court to usurp that function. We were referred to s 15 of the BA which deals with the removal from office of a 'member'. In s 1 of the BA, a 'member' is defined to include executive members of the SABC Board, which in turn includes the COO, in terms of s 12*(b)*.

Section 15(1) of the BA provides:

'(1) The appointing body –

(a) may remove a member from office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board; or

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

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

[59] In the present case the Minister and the SABC both erred in their approach to the task that confronted them. In this regard it is important to emphasise that the Constitution requires that public power vested in the Executive and other functionaries be exercised in an objectively rational manner.[38] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the principle of legality, which is part of that law. The principle of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the

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

Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.[39] Thus, although the common law remains relevant to this process,[40] the nature and characterisation of the public power exercised, namely, whether executive or administrative, matters less now than it did under the common law, pre-Constitution.[41] As Nugent JA pointed out in *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA), para 61:

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

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

As this court has previously explained:

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

[60] The question, whether the Minister and the SABC have to give effect to remedial action by the Public Protector is one eminently for a court to decide. In any event, according to the Public Protector, the Executive through Minister Carrim had undertaken in Parliament to give effect to the remedial action taken by her. In that regard the Portfolio Committee on Communications held a meeting on 18 February 2014, with the purpose of allowing the Minister and Deputy Minister of Communications to present a progress report on the commitments made to the

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

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

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

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

Portfolio Committee covering the period November 2013 to January 2014. The Parliamentary Monitoring Group's report of this meeting records the then Minister Carrim as suggesting that:

'. . . if it was legally tenable:

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

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

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

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

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

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

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

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

The approach of the High Court cannot be faulted.

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

[63] Further, it bears noting that a judicial decision is only appealable if it has the following three attributes: first, it must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed (see *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I - 533B, cited with approval by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 49). The suspension of Mr Motsoeneng pending finalisation of his disciplinary proceedings, appears to have neither the second nor third of the required attributes. That would be enough to

disqualify it as an appealable decision, because the first attribute – assuming it to be present – cannot on its own confer appealability. Mr Motsoeneng has been suspended pending finalisation of his disciplinary proceedings. That does not, one would imagine, in and of itself dispose of even a portion of the relief claimed. It is thus also distinctly questionable at this stage whether the order suspending Mr Motsoeneng will have any final effect.[43] The facts of this case thus distinguish it from those dealt with by the Constitutional Court in *OUTA.*

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

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

[66] At the outset of the hearing of the appeal, we were occupied with some debate as to whether it was desirable that this court consider the appeal in respect of

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[43] See, inter alia, *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) 47C–D; *Cronshaw & another v Fidelity Guards Holdings Pty Ltd* [1996] ZASCA 38; 1996 (3) SA 686 (A); and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* para 49, where the above two cases are cited with approval.

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

'As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time.'

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

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

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

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

[69] We appreciate that we were called upon to adjudicate only that part of the relief sought in part A of the notice of motion. However, part A is not a hermetically sealed enquiry and because of the manner in which the litigation was conducted we were obliged to range beyond it to a consideration of some matters upon which the High Court is yet to finally pronounce. In determining whether a suspension order was apt, it was necessary for us to consider, at least on a prima facie basis, as was done by the court below, matters pertaining to part B of the notice of motion. For, it must be accepted that the suspension order could only issue if there were prospects of success in relation to part B. That is not to suggest that we have made any final decisions in relation to the review application nor have we pre-empted any decision that the High Court might in due course be called upon to make, including those that relate to relevant Ministerial decisions and their proper classification.[44]

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

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

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M S Navsa

Judge of Appeal

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V M Ponnan

Judge of Appeal

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

Appearances:

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

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 140/16, 141/16 and 145/16

In the matter between:

ELECTRONIC MEDIA NETWORK LIMITED	First Applicant
MINISTER OF COMMUNICATIONS	Second Applicant
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Third Applicant
and	
E.TV (PTY) LIMITED	First Respondent
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (FIRST GROUPING)	Second Respondent
SOS SUPPORT PUBLIC BROADCASTING COALITION	Third Respondent
MEDIA MONITORING AFRICA	Fourth Respondent
MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES	Fifth Respondent
INDEPENDENT COMMUNICTIONS AUTHORITY OF SOUTH AFRICA	Sixth Respondent
UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA	Seventh Respondent
ASSOCIATION OF COMMUNITY TELEVISION – SA	Eighth Respondent

SOUTH AFRICAN COMMUNICATIONS FORUM	Ninth Respondent
SENTECH SOC LIMITED	Tenth Respondent
CELL C (PTY) LIMITED	Eleventh Respondent
TELKOM SOC LIMITED	Twelfth Respondent
TELLUMAT (PTY) LIMITED	Thirteenth Respondent
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (SECOND GROUPING)	Fourteenth Respondent

Neutral citation:	*Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Mogoeng CJ (first judgment): [1] to [88] Cameron J and Froneman J (second judgment): [89] to [163] Jafta J (third judgment): [164] to [210]
Heard on:	21 February 2017
Decided on:	8 June 2017
Summary:	section 192 of the Constitution — Independent Communications Authority of South Africa Act — Electronic Communications Act — Broadcasting Digital Migration Policy — policy amendment — Minister of Communications separation of powers — legality review — legality — consultation — negotiation — rationality

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with:
   "1. The appeal is dismissed; and
   2. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay the Electronic Media Network Limited's costs, including costs of two counsel."
4. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay costs of the Electronic Media Network Limited in this Court, including costs of two counsel.

JUDGMENT

MOGOENG CJ (Nkabinde ADCJ, Mojapelo AJ and Zondo J concurring):

[1] Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament[1] whereas the judicial and the executive authority of the Republic repose in the Judiciary[2] and the Executive[3] respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned

[1] Sections 43 and 44 of the Constitution.

[2] Section 165 of the Constitution.

[3] Section 85 of the Constitution.

operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.

[2] Turning to the Executive, one of the core features of its authority is national policy development.[4] For this reason, any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive. Meaning, the Judiciary may, as the ultimate guardian of our Constitution and in the exercise of its constitutional mandate of ensuring that other branches of government act within the bounds of the law, fulfil their constitutional obligations and account for their failure to do so, encroach on the policy-determination domain only when it is necessary and unavoidable to do so.[5]

[3] A genuine commitment to the preservation of comity among the three arms of the State insists on their vigilance against an inadvertent but effective usurpation of the powers and authority of the others. Absent that vigilance in this case, a travesty of justice and an impermissible intrusion into the policy-determination terrain would take place to the grave prejudice of the Executive or even the nation. For, that is bound to happen whenever the eyes of justice are unwittingly focused on peripherals rather than on the fundamentals.

[4] Driven by this reality, we were constrained to sound the following sobering reminder:

> "The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.
>
> . . .

[4] Section 85(2)(b) of the Constitution.

[5] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at paras 37-8.

> Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government."[6]

[5] The determination of the issues must thus be grounded on and steered by the ever-abiding consciousness of the import of the principle of separation of powers. Permissible judicial intervention is quite distinct from the Judiciary's imposition of its preferred approach to the issues or what it considers to be the best or superior choice in relation to matters that the political arms are constitutionally mandated and therefore best-placed to handle. Properly contextualised, this is what this Court sought to convey in *Albutt* when it said:

> "Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected . . . . What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."[7]

[6] It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely designed master key that opens any and every door, any time, anyhow. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously.

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[6] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 92-3.

[7] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[7] That said, an issue that is incidental to policy-formulation is at the heart of this litigation. And it is whether one out of at least nine key roleplayers in the broadcasting sector should have been consulted again when the Broadcasting Digital Migration Policy was being developed further. It is in essence contended that the alleged failure to consult in relation to policy-determination or considerations of rationality justify judicial intervention and the setting aside of the policy.

Parties

[8] Applicants are the Electronic Media Network Limited (M-Net), Minister of Communications (Minister Muthambi or Minister) and South African Broadcasting Corporation SOC Limited (SABC). Some of the respondents are e.tv (Pty) Limited (e.tv), National Association of Manufacturers of Electronic Components (First Grouping), SOS Support Public Broadcasting Coalition (SOS), Media Monitoring Africa (MMA), Independent Communications Authority of South Africa (ICASA) and Universal Service and Access Agency of South Africa (USAASA).

Background

[9] The need to catch up with the latest technological developments in broadcasting was identified by South Africa several years ago. Consequently, in 2005 the Minister of Communications, Dr Ivy Matsepe-Casaburri, embarked on a consultative process that culminated in a 2008 policy decision in terms of which television signals would migrate from analogue to digital. That shift would enable the overwhelming majority of viewers, who presently receive analogue television signals, to watch television in the digital terrestrial television environment through a functionality known as set top boxes. Set top boxes will be required for the foreseeable future until television sets with the technology to unscramble digital signals are accessible to all. These boxes will thus be needed by the financially under-resourced, for as long as television sets with signal-unscrambling capabilities are beyond reach.

[10] e.tv was very much involved in the consultative process triggered by Dr Matsepe-Casaburri and described the role it played in policy-formulation, as crucial. Its strongly-held position at the time was that the incorporation of a decryption facility in set top boxes was "wholly unsuited for free-to-air television". It lamented its intended introduction into a free-to-air terrestrial environment on the basis that it "fundamentally changes the nature of free-to-air television broadcasting" and "removes the control over access to free-to-air television from the viewer/citizen to the broadcaster, transmission provider or a third party". e.tv also said decryption capabilities raised "critical constitutional, economic, financial and competition issues". It decried the exorbitant costs that would be occasioned by the incorporation of decryption capabilities into set top boxes. It labelled that policy "direction" as uncompetitive. That in its view would effectively mean that "*government would be subsidising the profits of a single* [conditional access] *provider*" in circumstances where conditional access is unnecessary for the purposes of digital migration. Finally, e.tv maintained that the basic set top box ought not to include decryption capabilities so as to curb production and incidental maintenance costs particularly because it was a bridging mechanism intended to allow analogue terrestrial television to receive digital signals. The SABC and M-Net agreed. But, it is precisely because this position of e.tv has in effect been adopted as policy by Minister Muthambi, that e.tv is aggrieved and litigating.

[11] Minister Matsepe-Casaburri formulated a policy that provided for a system capable of disabling the usage of stolen set top boxes outside South Africa. The policy also provided that those boxes were to have "capabilities to unscramble the encrypted broadcast signals so that only fully compliant [set top boxes] made or authorised for use in South Africa can work on the network". In sum, the policy provided for both a control system and decryption capabilities. What this entails is that set top boxes will be manufactured to incorporate technology that has the capabilities to decrypt encrypted television signals.

[12] In came Minister Dina Pule who also paid attention to this policy in 2011. She consulted stakeholders with a view to amending the policy. And this she did in 2012. The key issues provided for in her policy amendment were that the control system had to be robust. It had to ensure that "only conformant" set top boxes can work in the electronic communications network in South Africa and that multiple set top boxes were to be avoided for current and future free-to-air broadcasting services. Parties disagree on the meaning of this. Some argue that set top boxes were to have decryption capabilities, whereas others hold a different view. But this is a side issue that need not derail us.

[13] Minister Yunus Carrim took over the reins from Minister Pule. He consulted on whether set top boxes "should have a control capability or not". In 2013 he first held the Roundtable Discussion with broadcasters and other roleplayers before he published policy proposals that were somewhat similar to the policy of Minister Matsepe-Casaburri. More importantly, he was minded to distribute five million set top boxes that would have decryption capabilities. All parties, including e.tv, understood the consultative process to entail a solicitation of views on whether government set top boxes were to have decryption capabilities and whether it was a cost-effective proposition from a taxpayer's perspective. Also, that the free-to-air broadcasters who would choose to encrypt their signals and would need to use the decryption capabilities built into those set top boxes, would have to pay for usage.

[14] e.tv made a 180° about turn from its previous strongly-held and fully-motivated position. It supported the incorporation of decryption capabilities into set top boxes and was pleased that "free-to-air broadcasters could now decide how they wish to manage their signal and whether that signal would be encrypted." e.tv viewed as inconceivable any opposition to the proposed policy since broadcasters would now have "the right to choose whether or not to encrypt their signals". SABC, the Association of Community Television South Africa (Act-SA) and M-Net remained opposed to this policy "direction".

[15] When Minister Carrim's term of office expired, Minister Faith Muthambi was appointed. At that stage, Minister Carrim had not yet formulated a policy but had only solicited views on his draft from interested parties.

[16] Minister Muthambi pursued a policy "direction" that is significantly dissimilar to that of Minister Carrim in relation to the production specifications of set top boxes. She formulated a policy that is inclined to exclude decryption capabilities from set top boxes whilst leaving it open to free-to-air broadcasters to decide whether to encrypt their signals and if that be their preferred option, to do so with their own financial resources. The following statement issued on 13 March 2015 by Minister Muthambi's department explains her position:

> "Government has assured parliament that cabinet's endorsement of an inclusion of a 'control system' aims to protect multi-billion rand investment in the [set top boxes] from use outside of South Africa and that broadcasters who seek conditional access related to encryption of their broadcast content may do so at their own cost. Our responsibility is to protect the [set top boxes] that government is making an investment in. The issues beyond the box or the encryption of the signals is not our domain. Those who want to encrypt the signal or content so that they give rights to watch certain programs can do that and they can make the investment in that area."

[17] The Minister eventually published an amendment to the pre-existing policy on 18 March 2015. In line with this statement, the amendment rules out decryption capabilities as an integral part of government-supplied set top boxes and provides for a control system. To this, e.tv objects.

[18] And the real nub of its opposition is that Minister Muthambi did not consult them. Had she done so, they would have had the opportunity to in effect negotiate the possibility of a policy that accommodates decryption capabilities in government set top boxes. Their proposal amounts to virtually reverting to Minister Matsepe-Casaburri's policy and Minister Carrim's proposals that provided for the inclusion of decryption capabilities. e.tv says this approach would facilitate public

access to unpaid-for broadcasting and incentivise competition in the industry. Its attempt to open negotiations with the Ministry was unsuccessful and it was displeased.

[19] In pursuit of its preferred policy "direction", e.tv then applied to the High Court of South Africa, Gauteng Division, Pretoria, not only to interdict the Minister from implementing the policy but to also have it reviewed and set aside. That application was unsuccessful.[8] The Supreme Court of Appeal was then approached on appeal. And e.tv succeeded.[9] The SABC, the Minister, and M-Net have now each brought an application to this Court to challenge the decision of the Supreme Court of Appeal.

Issues

[20] The issues to be resolved are whether:

20.1 Minister Muthambi had the legal authority to make the policy-determination now being challenged or exceeded her powers.

20.2 The Minister was required to and did consult in terms of section 3(5) of the Electronic Communications Act[10] (ECA). If not,

20.3 Section 3(6) of the ECA also exempts the amendment of policies from consultation.

20.4 The policy-formulation process and its content are irrational.

Leave to appeal

[21] The SABC, Minister and M-Net each seeks leave to appeal against the decision of the Supreme Court of Appeal that invalidated and set aside the Minister's Broadcasting Digital Migration Policy amendment. e.tv, SOS and MMA are opposing.

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[8] *e.tv (Pty) Ltd v Minister of Communications*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 26166/2015 (24 June 2015).

[9] *e.tv (Pty) Ltd v Minister of Communications* [2016] ZASCA 85; 2016 (6) SA 356 (SCA).

[10] 36 of 2005.

[22] Since this matter has its genesis in e.tv's challenge to the Minister's exercise of public power vested in her in terms of the ECA, these applications trigger the constitutional principle of legality into operation. And it is safe to hold that the Supreme Court of Appeal was correct to conclude that the Minister's policy amendment could properly be reviewed under the principle of legality and that it was unnecessary to deal with the Promotion of Administrative Justice Act[11] as the basis for review.

[23] Additionally, government and all key stakeholders in the broadcasting industry agreed in principle that the time had come for broadcasting to migrate from an analogue terrestrial television environment to the digital terrestrial television setting about a decade ago. The nation has since been anxiously waiting for policy facilitation. A challenge to the validity of that policy-determination raises an arguable point of law of such general public importance that it deserves the attention of this Court.

[24] Besides, applicants have reasonable prospects of success and it is in the interests of justice that leave to appeal be granted.

Legality

[25] One of the challenges mounted against Minister Muthambi's policy is that she lacked the legal authority to make it or exceeded her policy-making powers. e.tv contends that the impugned provisions of the policy essentially fall within the exclusive powers of ICASA. Also, that the Minister sought to make a policy that binds USAASA although a policy cannot in law have a binding effect. To the latter end, e.tv relies on *Harris*.[12]

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[11] 3 of 2000.

[12] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (*Harris*). In January 2000 the Minister of Education published a notice which stated that a learner may only be admitted to grade one at an independent school if he or she turns seven in the course of that calendar year. The validity of the notice was challenged; one of the bases being that it unfairly discriminated against children of a certain age. The Court held that the Minister, under the National Education Policy Act, had the power to issue the notice he did, however that Act only gave the Minister power to determine policy and not to impose binding law. Thus in issuing the notice *that the Minister intended to have binding effect*, the Minister exceeded his powers and accordingly infringed the constitutional principle of legality.

[26] It bears repetition that policy-formulation is the exclusive domain of the executive arm of the State. The judicial arm would do well to resist the enticement or urge to inadvertently, yet impermissibly, encroach on the Executive's national policy-determination space on some elasticised rationality or other constitutional basis that purportedly justifies judicial intervention. Judicial intrusion in matters of policy-formulation is permissible when policy-determination constitutes a disregard for the law or Constitution. This would be the case for instance where the rule of law or principle of legality is not observed, such as where the Executive purports to exercise the power it does not have in the name or under the guise of policy-determination. Courts are thus empowered to intervene and even set aside policy but only under exceptional and separation of powers-sensitive circumstances.[13] Courts must always remember that ministerial policy-formulation fundamentally derives from section 85(2) of the Constitution which provides in relevant part:

> "The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> . . .
>
> (b) developing and implementing national policy."

[27] So, foundational to any other policy-formulation exercise the Minister, as a member of Cabinet, might have to embark upon, is section 85(2)(b) of the Constitution. She enjoys the constitutional entitlement to exercise executive authority by "developing and implementing national policy". This is an all-encompassing constitutional policy-determination authority. And section 3(1) of the ECA empowers the Minister to "make policies on matters of national policy applicable to the [Information Communications and Technology] sector" in relation to "the application of new technologies pertaining to . . . broadcasting services". The reference to "national policy" in section 3(1) of the ECA finds resonance with "national policy" in section 85(2)(b) of the Constitution. There thus ought to be no disputation about where the Minister's original policymaking authority derives from even with regard to the

[13] *Doctors for Life* above n 5 at paras 37-8.

broadcasting digital migration policy. It is a constitutional power not to be lightly dislodged by a clamour for consultation, actuated by commercial interests masked with the appearance of the advancement of public interest, ensuring fairness, competition and a diversity of views broadly representing South African society.

[28] The Minister made the impugned policy-determination in terms of the powers vested in her by section 3(1)(d) of the ECA which provides:

> "**3 Ministerial policies and policy directions**
>
> (1) The Minister may make policies on matters of national policy applicable to the [Information Communications and Technology] sector, consistent with the objects of this Act and of the related legislation in relation to—
>
> . . .
>
> (d) the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communications network services."

[29] The power to make policies on matters that apply to the Information Communications and Technology sector in relation to the application of new technologies relevant to broadcasting services, does in my view extend to set top boxes. The latter are those new technologies. And their proposed specifications in relation to how they would apply to free-to-air broadcasting services fall well within the legal authority of the Minister to provide guidance on. She is thus not usurping any aspect of ICASA's constitutional powers "to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society"[14]. The Minister formulated a policy that allows free-to-air broadcasters to encrypt their signals if they so wish, provided they bear the costs of doing so. That also falls within her wide discretionary policy-making powers.

[14] Section 192 of the Constitution.

[30] National policy is not inconsequential. If it were, the Constitution would not have made express provision for it. It is intended to be an essential governance and service delivery-enabling tool in the hands of the Executive. And broadly speaking, policy is supposed to be a compendium of guidelines or principles on which decisions for the execution of an institution's mandate or vision are to be based. It essentially ought to give direction or point to the cause of action to be followed. As is the case with all other national policies, Minister Muthambi must have intended hers to be taken seriously by agencies and all other functionaries who needed guidance or direction on broadcasting digital migration. This is an important factor to bear in mind in determining whether she sought to bind USAASA or usurp the constitutional powers of ICASA. And it is within this context that the words used in the impugned clauses are to be understood.

[31] The primary basis for e.tv's contention that the policy seems to have a binding effect and was so intended is the use of the word "shall" in paragraph 5.1.2(B). This construction explains why *Harris* is said to be applicable to this policy. But *Harris* is distinguishable from this case.

[32] The impugned portion of the policy in *Harris* was accompanied by clauses that left an objective reader with no option but to conclude that the Minister's policy was meant to bind Members of the Executive Council (MECs) responsible for education in our provinces. It could not reasonably be interpreted in any other way. Here, paragraph 5.1.2(A) reads: "[set top box] control system in the free-to-air [digital terrestrial television] *will* be non-mandatory". And paragraph 5.1.2(B) reads that "the [set top boxes] control system for the free-to-air [digital terrestrial television] [set top boxes] *shall* not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]". But paragraph 5.1.2(C) provides that individual broadcasters "*may* at their own cost make decisions regarding encryption of content". Additionally, throughout the document, the words "shall", "will" and "may" are used interchangeably.[15] And the

[15] The word "will" appears in the following paragraphs of the Amendment of Broadcasting Digital Migration Policy, GN 232 *GG* 38583, 18 March 2015 (2015 Amendment): 1.1.8, 3.3.1, 5.1.2.7, 5.1.2(A), 5.1.4, 7.2, and the

policy is said to be intended to provide a "framework"[16] that would "inform and guide"[17] the process and aims to "establish a policy environment within which the broadcasting digital migration is implemented".[18]

[33] All of the above have the cumulative effect of demonstrating that the policy was neither meant to bind nor does it have a binding effect on ICASA or USAASA. Its language cannot therefore be construed as peremptory merely because of the use of the word "shall" in clause 5.1.2(B).

[34] More telling though are the provisions of section 3(4) of the ECA. Unlike in *Harris* where the insulation of provinces or MECs from "the binding effect" of a ministerial policy-determination, was inferential and arguably uncertain especially to non-lawyers, here the position is different. Remember, the Minister of Education's age limitation policy in *Harris* was implemented by the MEC in the affected province. In all likelihood the MEC did not want to flout what appeared to be a clearly binding policy of the Minister. In this case, section 3(4) has an expressly insulating effect on whatever policy-formulation the Minister might come up with. It is the statute versus policy. The same law that binds both the Minister and the relevant agencies provides essentially that USAASA may "consider" the impugned policy. It is known not to be binding in terms of the law that gives ICASA or USAASA the power to be exercised with reference or due regard to that policy. In other words, before they can have regard to or apply the impugned policy in terms of their statutory powers, the agencies must first determine what that self-same statute says about the binding effect of that policy. And the statute makes it abundantly clear that they need only consider the policy.

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executive summary. The word "shall" appears in the following paragraphs of the 2015 Amendment: 5.1.2(B), 7.2 and the executive summary. The word "may" appears in the following paragraphs of the 2015 Amendment: 5.1.2(C) and the executive summary.

[16] Broadcasting Digital Migration Policy, GN 958 *GG* 31408, 8 September 2008 (2008 Policy), paragraph 1.2.3(e).

[17] Amendment of Broadcasting Digital Migration Policy, GN 124 *GG* 35051, 17 February 2012, substitution of paragraph 2 of the Foreword by the Minister.

[18] 2008 Policy above n 16, paragraph 1.2.3(a).

[35] It bears repetition that in *Harris*, the language of the policy was consistently peremptory. The objective was to extend a rule made in terms of the Schools Act to independent schools. And the Minister of Education expressly admitted that he intended to make a binding policy and fought hard to defend its binding effect. That is not the case here. Minister Muthambi has made it abundantly clear that her policy is not binding and that it is nothing more than a policy choice or preference or statement. And section 3(4) of the ECA constitutes an express and crucial neutralising factor in relation to the possible binding effect of the policy, contended for by e.tv. This policy is thus not a binding rule or edict but a set of guiding principles. In line with *Arun* the policy amendment is "consistent with the operative legislative framework"[19] and falls within the Minister's powers. It is therefore not *ultra vires* but valid.[20]

Consultation

[36] The procedural challenge to the policy is two-pronged. First, that the Minister failed to comply with the consultation requirements set out in section 3(5) of the ECA. Second, that she made her policy after following an irrational procedure. The basis for the challenge is essentially that on both fronts, the requirements for consultation were not met and that all the Minister did was issue a policy. A proper resolution of this issue requires that we first reflect on how the consultative process has unfolded over the years in relation to the various iterations of policy drafts. But first, some observations.

[37] Given the prominent role of consultation in the determination of this matter, it behoves this Court to remind itself and the public of the rationale behind any consultative process. Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy

[19] *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37; 2015 (2) SA 584 (CC); 2015 (3) BCLR 243 (CC) (*Arun*) at para 46.

[20] I have assumed without deciding that this policy deals with matters in relation to which it is not supposed to be binding. All of the above is based on the parties' submissions including the Minister's concession that her policy amendment was not meant to be binding, and the reading of the impugned provisions. But, it is worth noting that to the extent that the policy relates to the Universal Service Access Fund that is administered by USAASA, that Fund is in terms of section 87(4) of the ECA to be administered "subject to the control and in accordance with the instructions of the Minister".

development it must mean that a genuine effort is being made to obtain views of industry or sector roleplayers and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must thus be allowed to reach a policymaker. But, consultation fulfils a role that is fundamentally different from negotiation.

[38] Generally speaking, where there are two opposing positions and a party aggrieved by the ultimate policy-determination has had the opportunity to express itself properly in favour of each of the diametrically opposed possibilities, another round of consultation on the ultimate policy standpoint can hardly ever serve any legitimate purpose. If it is the first policy "direction" it prefers, then it is covered. If it is the second, it would also have been appropriately accommodated in terms of process. Consultation is not an inconsequential process or a sheer formality, particularly in relation to national policy development. It exists to facilitate a festival of ideas that would hopefully provide some enlightenment on the stakeholders' major perspectives so that policy-formulation is as informed as possible for the good of all, not some.

Alleged non-compliance with section 3(5)

[39] Two points must be made upfront. One, the requirements of the consultative process envisaged by section 3(5) of the ECA and procedural rationality had already been met when Minister Muthambi amended the policy in 2015. Two, this approach or conclusion renders it unnecessary to resolve issues around the applicability or otherwise of section 3(6) of the ECA to the amendment of policies.

[40] e.tv contends that ICASA, USAASA and interested persons should have been but were not consulted. All this is based on the provisions of section 3(5):

"When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister—

(a) must consult the Authority or the Agency, as the case may be; and

(b) must, in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the *Gazette*—

(i) declaring his or her intention to issue the policy or policy direction;

(ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than 30 days from the date of the notice;

(c) must publish a final version of the policy or policy direction in the *Gazette*."

This reinforces the reality that the main and arguably sole repository of the constitutional and statutory authority to formulate broadcasting policy is the Minister. She initiates consultation "in order to obtain the views of interested persons" like e.tv.

[41] This subsection stipulates that the Authority, ICASA, and the Agency, USAASA, be consulted when a policy is being formulated. Though cited as parties to this litigation, they have decided not to oppose the Minister's application to protect the policy from being set aside by reason of the alleged non-consultation or invalidity. It must thus be reasonably assumed on their behalf that they find nothing wrong with the policy-formulation process as it affects them, and even as regards compliance with the provisions of section 3(5) of the ECA.

[42] Section 3(5) requires no more than that the views of interested persons be obtained. This is to be done by publishing the text of the draft policy by notice in the Gazette. Interested persons are to submit written submissions "in the manner specified in such notice in not less than 30 days from the date of the notice". This is a procedure a Minister must follow when she initiates a policy development process in terms of the ECA. It would be a misinterpretation of section 3(5) and a misunderstanding of the

concept of consultation if one were to approach it as if it is intended to allow parties to exhaustively discuss or iron out divergent views until some mutually acceptable basis to proceed from, is found. e.tv and other interested persons only have the right to ensure that their voices are heard during the consultation period before a final policy-determination is made.

[43] The stipulation that the views of interested persons are to be submitted in writing rules out the possibility of a legal entitlement to insist on some kind of a negotiated settlement on any major or incidental aspect of the policy. Interested persons ought to speak exhaustively on any aspect of the policy when presented with the section 3(5) opportunity. In this case, their written submissions would have had to include all key scenarios or possibilities relating to "what if" decryption capabilities are ultimately excluded to save costs, as was initially contended for by e.tv. More importantly, e.tv went all out to demonstrate why inbuilt decryption capabilities would be uncompetitive, too costly and most inappropriate, in response to the possibility raised by Minister Matsepe-Casaburri to include those capabilities. Similarly, it should like SABC, M-Net and Act-SA have spoken just as strongly and exhaustively to rule out the possibility of a policy that is different from Minister Carrim's proposals. This is so because the reasonable possibility of the Minister being persuaded by other broadcasters to go in the direction opposite to the draft has always loomed large. And no provision is made in the ECA for another round of "written submissions" within another period "not less than 30 days from the date of the notice" of a new text or changed position.

[44] What cannot be taken out of account is that the process of formulating the broadcasting digital migration policy, that would apply to or facilitate a transition from an analogue terrestrial television system to a digital terrestrial television environment, was never really finalised. Meaning, a point was never arrived at when a policy was made and applied to regulate migration from analogue to digital. All inputs made to the various iterations of policy proposals to help shape a policy that could be implemented, are therefore important and must be taken into account for any concern raised to be properly understood. This would help us determine whether it was necessary to consult

again regard being had to previous consultative processes and the particular issue over which consultation is currently being sought. In other words, for the purpose of determining whether Minister Muthambi's policy amendment attracted the need to consult, we must consider the opportunities parties were afforded to be heard, especially by Minister Carrim.

[45] Interested parties, including e.tv, have over the years had the opportunity to express their views and preferences on various versions of the broadcasting digital migration policy-formulation. e.tv has had all the opportunities it could ever have legitimately wished for, to influence the development of the policy on its two sharply opposing ends. We are now virtually grappling with e.tv's own battle of ideas. Its position is particularly striking in that it has been able to articulate quite forcefully at times persuasively, two diametrically opposed viewpoints. Initially, against the inclusion of decryption capabilities in set top boxes in order to save the taxpayers' money, avoid enriching individual entities at government expense and promote competition, but later in favour of the inclusion of decryption capabilities in government-supplied set top boxes. The latter is now said to be done for the promotion of competition and the advancement of the best interests of the public by ensuring that there is fairness and diversity of views broadly representing South African society.[21]

[46] The reality is that the issue of costs for inbuilt decryption capabilities was open to be addressed by those interested persons or stakeholders who deemed it necessary to deal with them in whatever way they saw fit when Minister Carrim published his policy proposals. e.tv could, knowing the strong views held by all other broadcasters and in response to the Carrim policy draft, have proposed that costs, to be paid by free-to-air broadcasters who would prefer to encrypt and therefore use the inbuilt decryption capabilities, be paid in advance. The costs issue is a specific, noteworthy but peripheral

[21] Section 192 of the Constitution provides:

> "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

aspect of the Broadcasting Digital Migration Policy. Importantly, encryption is an option open to e.tv to pursue if it is so minded. It would be extremely difficult to explain why e.tv believes that the opportunity to make written submissions to the effect it now proposes was not open to it to make in response to Minister Carrim's proposals. This is so because all other broadcasters fought strenuously, at the Roundtable Discussion and through their written submissions, to have decryption capabilities excluded in order to save the taxpayers' money.

[47] It was then open to e.tv to make the same submissions it seeks to make in defence of Minister Carrim's proposals particularly because there was no guarantee that the final version would be the same as the proposals. That this is an avenue known by e.tv, just like other broadcasters, to have always been available to it, is manifestly evident from its approach to Minister Matsepe-Casaburri's draft policy that was significantly different from Minister Muthambi's amendment. There, e.tv dealt extensively with costs implications attendant to the proposed policy position.

[48] The only real difference is thus that e.tv failed to take advantage of the opportunity it had to address that reasonably foreseeable possibility. Had it done so, it would have sought to convince Minister Carrim and by extension Minister Muthambi to retain a feature of the policy that she has decided to drop. The issue of users having to bear the additional costs occasioned by decryption capabilities was by implication always on the table in the event of a decision being taken that is similar to the one initially advocated for by e.tv. This is evident from the representations made by all other broadcasters to Minister Carrim's policy proposals.

[49] To e.tv's knowledge, SABC and M-Net have always been opposed to the incorporation of decryption capabilities into government-supplied set top boxes. They expressed their opposition in very clear and strong terms to Minister Carrim's predisposition to government-supplied set top boxes that have inbuilt signal-unscrambling capabilities. One of the major bases on which SABC and M-Net opposed the inclusion of those capabilities was that it would drive up the costs of the

service and would amount to subsidising commercial broadcasters. In particular M-Net said:

> "The proposed [Broadcasting Digital Migration] policy amendments even agree with this assessment that it is a Pay TV technology, when they state that 'to avoid subscription broadcasters unfairly benefitting from the [set top box] control system, Government's investment in the [set top box] Control System will be recovered from those subscription broadcasters that choose to make use of the [set top box] Control System . . . .' *This raises the policy question of why government is funding the inclusion of an expensive Pay TV technology in the subsidised [free-to-air] [set top box], and requiring its inclusion in the retail [free-to-air] [set top box], thereby increasing the cost for manufacturers and consumers when there is no discernible public interest benefit for doing so.*"

[50] Not just SABC and M-Net but also Act-SA made it abundantly clear that they opposed Minister Carrim's proposals particularly as they related to decryption capabilities and costs. By the way, Act-SA represents all community television licensees in South Africa that were in existence as at 3 January 2014. They were Soweto TV, Cape Town TV, Bay TV, One KZN TV, Tshwane TV, North West TV and Bara TV. It is best to reproduce part of their representations dated 3 January 2014 fairly extensively:

> "4.1 Act-SA participated in the Roundtable Discussion convened by the Minister in September 2013 on the issue of [set top box] control.
>
> 4.2 During this process, Act-SA joined the SABC, the emerging manufacturers and Multichoice in opposing the inclusion of [set top box] control in the free-to-air set top box. *The only party which supported the inclusion of [set top box] control was e.tv.*
>
> 4.3 Act-SA's reasons for opposing the inclusion of a [set top box] control system were briefly as follows:
>
> 4.3.1 The encryption of all free-to-air services and the deployment of a [set top box] control or conditional access system to decrypt or unscramble these services is simply another kind of E-Toll! It takes

away an individual's right to free and unrestricted access to free-to-air broadcasting services;

4.3.2 The implementation of [set top box] control will result in the end of 'free-to-air' television as it is available to viewers in South Africa today;

4.3.3 This system will impose a fundamental change in how the South African public accesses public, commercial and community free-to-air television;

4.3.4 *The system benefits only the chosen few who have vested interests in a short term technology which has no added value to the poor* and will be out-dated before it even starts, because of delays in the [digital terrestrial television] roll out programme;

4.3.5 *The system is only for commercial gain and is not sustainable long term*;

5 *When we consider that every party to the Roundtable Discussion (other than e.tv) was opposed to the inclusion of [set top box] control*, we are surprised at the language which the Minister presented to Cabinet and the language which now appears in the proposed amendments.

. . .

10.1 *The Department should not make decisions to the detriment of the poor and at the expense of the taxpayer*.

10.2 We have never supported [set top box] control, it is not in the best interest of the country and overall objectives of [digital terrestrial television] will be compromised. *The proposed amendments will only further individual greed and personal wealth to the detriment of the poor and South Africans at large*.

. . .

10.4 If anyone must decide on [set top box] control, it should be the free-to-air TV broadcasters, which includes the community TV broadcasters represented by Act-SA.

10.5 Act-SA wants to ensure maximum access to free-to-air broadcasting services, rather than add expenses and restrict individuals from free information."

[51] The plight of the poor, and the costs for the inclusion of decryption capabilities to the taxpayer ranked very high on the list of the grounds for opposing

Minister Carrim's proposals. All other broadcasters argued quite forcefully that it was for the advancement of the commercial interests of only e.tv to include decryption capabilities and not at all in the best interests of the poor and broader public. All this was again raised as early as 3 to 5 January 2014. e.tv had all the notification or warning it could ever have needed that other broadcasters rejected the inclusion of decryption capabilities and that the costs burden they would impose on the taxpayer was high on the list of the grounds for opposition. So strongly did the other parties feel about the Carrim proposals that there was even a veiled threat of litigation in the event of these policy proposals not being changed.

[52] It has thus always been within the reasonable contemplation of the parties that Minister Carrim might be persuaded to keep the policy proposals unchanged or dump inbuilt decryption capabilities in line with the views of the overwhelming majority of broadcasters and with due regard to the enormous cost burden it would place on the taxpayer. The exclusion of decryption capabilities would, in line with e.tv's initial approach and, as consistently argued by all other broadcasters, relieve government of having to fund decryption technology. For, inclusion, does in e.tv's own words, effectively amount to subsidising profits of a single conditional-access provider. These contentions provided the bases for a reasonably foreseeable deviation from those proposals considering the production and administrative burden that would come with that unscrambling technology and the recovery of costs from users. The departure from the Carrim proposals could also be influenced by the fact that decryption is, according to e.tv's initial position, consistently shared by all other broadcasters, not necessary for purposes of digital migration. In any event, this policy facilitates a bridging mechanism that will not last forever.

[53] In substance, there really is nothing new about the debate held out, by e.tv, to be new. The costs issue was thoroughly ventilated in response to Minister Carrim's policy proposals by others like SABC, Act-SA and M-Net and e.tv could have done likewise. Minister Muthambi has virtually gone back to the position that e.tv and all others unanimously and eloquently argued for at first, as a sensible and cost-effective policy

position. It has always been a reasonable possibility that loomed large that decryption capabilities might be left out. To the knowledge of all parties, the live wire that has always run through all iterations of broadcasting digital migration policy initiatives is: to have or not to have the expensive decryption capabilities built into government-supplied set top boxes. For these reasons, by dropping or leaving out decryption capabilities the Minister was doing what was reasonably foreseeable or within the reasonable contemplation of the parties. And that reasonably foreseeable possibility ought to have attracted comment from e.tv. It chose, in the face of fierce opposition by other broadcasters to the Carrim proposals, not to seize the opportunity beyond expressing its satisfaction with the infusion of decryption capabilities into set top boxes and dismissively stating that it was inconceivable that anybody would oppose them. For this it has itself to blame.

[54] But why so much attention to e.tv's desire to reposition itself for greater commercial benefit whereas M-Net, Act-SA and SABC are left unscathed? It must be said that M-Net, unlike e.tv, does not at all depend or seek to rely on government resources or set top boxes in the furtherance of its private commercial interests. It funds its chosen business model. And so must e.tv fund its preferred new business plan. It is concerning that it seeks to ride on the back of a government project to realise its entrepreneurial vision. Just as M-Net, Soweto TV, North West TV, and Cape Town TV, for example, do not seek to derive assistance from the State through the broadcasting digital migration policy in the furtherance of their business interests so should it be with e.tv and all others. It is through those lenses that the competitiveness contended for must be viewed. The effect of the Muthambi policy is to virtually maintain the status quo. None of the broadcasters, including free-to-air broadcasters, would be required to do any more than they have previously been required to do. Nor would any be deprived of any advantage or privilege currently enjoyed in relation to access to their viewership and profit-making opportunities.

[55] e.tv would want to be able to harvest more profit, in the same way it accused others of seeking to do in its representations to the Minister Matsepe-Casaburri policy

proposals. This it seeks to achieve by having decryption capabilities incorporated into the government-supplied set top boxes designed to benefit financially challenged households. This is the same government subsidisation of profits of a single conditional access provider, it complained about in its comments on the Minister Matsepe-Casaburri policy proposals. It has in effect branded the position it previously embraced and fought for as irrational. What it considers to be rational now, is what it previously said was unconstitutional and presumably irrational.

[56] If SABC has been involved in some acts of corruption or in some uncompetitive practices, as suggested, that must be addressed. That conduct however requires a separate legal process altogether. For, regardless of who is involved, wrongdoing must not be condoned. Whatever its merits or demerits, actual or perceived malpractice should not be allowed or used to cloud the issues in this litigation. Long before the alleged collusion with Multichoice Propriety Limited took place, SABC and M-Net have been consistently opposed to the inclusion of decryption capabilities into government set top boxes. Their stance does not therefore appear to have been birthed by the alleged uncompetitive deal with Multichoice.

[57] Unlike other broadcasters who no doubt also have some commercial interests in the direction taken by the broadcasting digital migration policy, e.tv's actions threaten to stall unduly the full-scale rolling-out of set top boxes for which the nation has been waiting for about ten years. It follows that roleplayers and interested persons have had ample opportunities to air their views on various policy proposals by several Ministers of Communications especially those of Minister Carrim in response to which all other broadcasters argued strongly for the dumping of decryption capabilities because of their cost implications to the taxpayer. The requirements of section 3(5) had thus been fully met, when Minister Muthambi amended the policy.

[58] We are dealing with one and the same Ministry of Communications here. The development of the Broadcasting Digital Migration Policy is a project of that Ministry. It thus ought not to matter who the incumbent happens to be at any stage of the policy

development process. In this regard, Minister Carrim began the consultative process and broadcasters submitted their representations between 3 and 5 January 2014. Minister Muthambi was appointed to that portfolio on 25 May 2014, just under five months after the parties had communicated their views to the Ministry. As was to be expected, she took it upon herself to complete the unfinished business of her immediate predecessor. The consultative process facilitated by Minister Carrim catered fully for the gathering of whatever views broadcasters and other interested persons might have had on any aspect of the policy proposals. For this reason, whatever preliminary views the Ministry held at the time the proposals were published for comment, it must have been known by all that they were not unchangeably fossilised. The Ministry was always at large to make a policy decision that is radically different from the proposals, depending on how persuasive it found any of the representations to be. And this was done in a way that meets all the section 3(5) consultation requirements.

The effect of the Minister's selective consultation

[59] The Minister solicited the views of some undisclosed persons. In the policy development process the Minister may if she so wishes consult some interested persons or experts on broadcasting digital migration policy. Broadly speaking, the Minister may seek more enlightenment on any aspect of the policy-formulation exercise beyond the parameters of the prescribed consultative process. The legislation neither forbids nor regulates her zest for clarification or additional information from whomsoever it might be beneficially sourced. This is so because some latitude or a reasonable measure of flexibility ought to be allowed in the exercise of executive authority, without effectively undermining the values of openness and accountability. And this extends to the development of policy although she was under no obligation to consult.

[60] Although the Minister's consultation of some undisclosed stakeholders potentially taints the process in some way, it does not invalidate the policy. It needs to be reiterated that it is so because she is free from any constitutional constraints in the information-gathering exercise for the purpose of policy-formulation. Her disclosure or non-disclosure does not necessarily undermine any broadcaster or interested person's

right. e.tv could have but chose not to pursue readily available openness and accountability-enforcing mechanisms to achieve that objective.[22] More would be required to conclude that the only reasonable inference to draw from the Minister's ill-advised and unfortunate non-disclosure is that her consultation of some interested persons, necessarily redounded to the advantage of those who were consulted at the expense of the unconsulted. Her consultation with some stakeholders did not, without more, give e.tv the right to also be consulted, considering the opportunity it also had to oppose any change to the Carrim proposals.

[61] But this does not mean that a blind eye is to be turned to her concern-evoking evasive and "suspicious" responses or lack thereof to pertinent questions raised by e.tv. For, we live in a constitutional democracy, whose foundational values include openness and accountability. It is thus inappropriate for the Minister to not have volunteered the identities of those she consulted with and what the consultation was about, as if she was not entitled to solicit enlightenment or did so in pursuit of an illegitimate agenda. This conduct must be frowned upon and discouraged. It does not however constitute the necessary and unavoidable constitutional basis for judicial intrusion.

Procedural irrationality

[62] A separate and presumably alternative procedural attack on the policy is based on the following principle from *Democratic Alliance*:

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."[23]

[22] If injustice or prejudice is perceived then steps must be taken even in terms of the provisions of the Promotion of Access to Information Act 2 of 2000.

[23] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 36.

[63] This was aptly elaborated on and reinforced in these terms by *Motau*:

> "The principle of legality requires that every exercise of public power, including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well established that the test for rationality is objective and is distinct from that of reasonableness."[24]

[64] On the strength of this principle e.tv contends that the potential impact of the decryption amendment on it and the public required of the Minister to consult them in order to take a rational policy decision. It essentially argues that its input on how it would cover the additional costs occasioned by the inclusion of decryption capabilities in the government-supplied set top boxes was critical to the rationality of the Minister's decision, that she took without first finding out what e.tv's position was. For this reason, e.tv argues that the Minister's policy decision was procedurally invalid or irrational.

[65] Consultation that meets the requirements of section 3(5) is not inferior to that which flows from principles articulated in *Motau*, *Albutt* and *Democratic Alliance*.[25] Both processes owe their legitimacy and completeness to the Constitution. None of them is exempt or detached from the spirit, objects and purport of our Constitution or Bill of Rights. We do not therefore have classes or categories of consultation – the inferior and unconstitutional and the constitutionally-inspired one. The consultative process must always be rational and constitutional. If it satisfies the demands of section 3(5), then that would be so precisely because it is rational. This section does in reality enable the Minister to obtain views from specified or interested parties in terms of the constitutionally-sourced policy-formulation process.

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[24] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) (*Motau*) at para 69.

[25] Id; *Albutt* above n 7 at para 51; and *Democratic Alliance* above n 23 at para 36. See also *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) (*Scalabrini*) at para 36.

[66] To suggest that a consultative process that meets the full rigor of the statutory requirements, might still not meet the requirements of, or needs some augmentation from, a constitutionally-inspired procedural rationality principle, can only derive from a misunderstanding of our constitutional jurisprudence. No law may be said to have sufficiently provided for a consultative process unless that process meets the procedural rationality test. We have but only one standard for consultation in our jurisprudence. And that is the standard that insists on a genuine and meaningful consultative process that passes constitutional muster, regardless of which legislation or legal framework regulates that process.

[67] For this reason, since the process provided for by section 3(5) has not been declared constitutionally invalid, when its demands have been met, as in this case, then no room exists for exploring the *Motau*, *Albutt* and *Democratic Alliance* procedural rationality avenue, for they are an integral part of the statutory process. That avenue may only be appropriately pursued where no statutory or other provision has been expressly made for consultation.

[68] e.tv made inputs to the policy initiated by Minister Matsepe-Casaburri and Minister Carrim's proposals for its amendment. All those views are presumably archived within the Ministry somewhere. They fall within the institutional memory of the Ministry. It was thus wholly unnecessary for the Minister to seek "e.tv's input on whether it would cover the additional costs associated with including encryption capabilities in the subsidised set top boxes". The policy was never about e.tv's special commercial interests or the niche it seeks to carve out for itself but always about obtaining whatever views interested persons might wish to express on all key aspects of the policy. And that was done in respect of the inclusion or exclusion of decryption capabilities by all broadcasters including e.tv itself. Additionally, the costs issue was thrown wide-open when Minister Carrim published his policy proposals for comment. The proposals specifically raised the issue of costs and it was dealt with fully by the broadcasters. This ought to have triggered the need for e.tv to speak against the possibility of dumping decryption capabilities and to propose how the objective of

saving costs could still be achieved without abandoning unscrambling capabilities. e.tv spurned that opportunity. No acceptable legal basis exists for the special treatment contended for by e.tv. This procedural irrationality point must also fail.

[69] Linked to both the procedural and substantive irrationality points is some reliance on section 192 of the Constitution. The section provides:

> "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

[70] Section 192 of the Constitution has got very little, if anything, to do with the Minister's exercise of her policy-making powers. It explains the existence of ICASA, the constitutional obligations it bears and the guarantee of its independence. Properly understood, this provision informs us that ICASA is an independent authority whose mandate is to regulate broadcasting for the good of the public. When unfair reporting or a biased or inexcusable exclusion of some views happens, it is to ICASA that any aggrieved party may turn to lodge a complaint for possible intervention. ICASA is also constitutionally enjoined to level the broadcasting playing-field so that a diversity of views that broadly reflects the thinking of South African people, as opposed to one-sided propaganda-like narratives, may find expression.

[71] To seek to source the bases for the alleged procedural or substantive irrationality of the Minister's policy-determination from this section would, to say the least, be an unfortunate misapplication of the provision. This position extends to the legislation in terms of which ICASA exercises its powers.[26]

[26] The Independent Communications Authority of South Africa Act 13 of 2000.

Substantive irrationality

[72] To demonstrate that the Minister's policy is substantively irrational, e.tv relies on two grounds:

(a) The Minister is fatally confused as to the effect of the decryption amendment; and

(b) There is no rational connection between the purpose that the Minister seeks to achieve and the means chosen to give effect to that purpose.

[73] The impugned provisions of the Muthambi policy state that:

> "5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised [set top box] market, [set top box] control system in the free-to-air [digital terrestrial television] will be non-mandatory.
>
> 5.1.2(B) The [set top box] control system for the free-to-air [digital terrestrial television] [set top boxes] shall—
>
> (a) not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]; and
>
> (b) be used to protect government investment in subsidised [set top box] market thus supporting the local electronic manufacturing sector.
>
> 5.1.2(C) Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content."

[74] The ordinary meaning of these provisions is that:

(a) Government-supplied set top boxes will all have a control system.

(b) Those set top boxes will not have decryption capabilities.

(c) Free-to-air broadcasters will be at liberty to encrypt their signals but at their own expense.

(d) Commercial set top boxes would not be required to contain a control system.

Did the Minister misunderstand her policy?

[75] e.tv submits that the Minister misunderstood the effect of her encryption amendment. This it says is manifest from her conflicting statements at times suggesting that decryption capabilities are not to be built into government-supplied set top boxes and at times that it would be permissible. And that the latter would be achieved by e.tv investing in technologies and software compatible with government-supplied set top boxes.

[76] The impugned clauses of the policy are self-standing and must be interpreted within the context of the generic policy decision. What e.tv is doing, in relation to the so-called confusion or misunderstanding point, is to interpret not the policy as such, but averments made by the Director General and the Minister in their affidavits with little regard for the language of the impugned provisions themselves. The duty of this Court is to test the alleged irrationality of the policy primarily on the basis of the text itself but not on the clarificatory statements of the Minister or Director General.[27]

[77] The attempt to ground a challenge to the substantive rationality of the impugned provisions of the policy, largely on statements deposed to, is not legally sustainable and must therefore fail. In any event, the statements still do not sustain e.tv's contention that the Minister is confused. Anchored on the policy, they broadly present a coherent and legally sustainable policy position.

[27] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 89.

Absence of rational connection

[78] The contention that the policy is not rationally connected to the purpose for which it was made,[28] is based not only on the contents of the policy itself but primarily on the Minister's affidavit. Whether an affidavit may permissibly be relied on as the major interpretative tool still strikes one as an inappropriate approach. Be that as it may, the argument is that based on the Minister's affidavit, the purpose she seeks to achieve through the policy decision was not to prevent decryption. It was to save costs while at the same time enabling broadcasters to decide freely whether to encrypt and decrypt their digital signals at their own expense. The disconnect between the means and the purpose is said to be that whereas government would indeed save money as intended, the exclusion of decryption capabilities from the government-subsidised set top boxes would not allow e.tv to decide to encrypt. This is said to be so, because it would not be a commercially viable proposition to encrypt signals unless the broadcasting digital migration policy requires set top boxes to have inbuilt decryption capabilities.

[79] The additional reason advanced is that unless its encrypted signals is able to reach those five million deserving households, e.tv's decision to encrypt would not only be financially suicidal but would also place it in breach of its licence conditions. Knowing its licence conditions e.tv previously argued quite strenuously for the exclusion of decryption capabilities. Now, it says that, to do so would constitute a breach of its licence conditions.

[80] Government wanted to save money while embarking on this already expensive but laudable exercise for the good of five million economically disadvantaged households. And this it would achieve through a policy that dumps decryption capabilities. This approach accords with the policy "direction" strongly advocated for by e.tv in its previous written views in response to Minister Matsepe-Casaburri's draft policy that is contrary to the views it subsequently expressed in support of

[28] See *Motau* above n 24, *Albutt* above n 7; and *Democratic Alliance* above n 23.

Minister Carrim's proposals. The policy's purpose is not and would never have been to ruin or promote e.tv's commercial interests. It is not centred around individual players in the broadcasting industry. It is preoccupied with the interests of the financially under-resourced households. The purpose of the policy for this specific aspect of the overall government objective[29] was to relieve government of the exorbitant costs that would be necessitated by the inclusion of decryption capabilities. And it would succeed to do so, if the policy were implemented.

[81] Equally important is the freedom or opportunity it affords free-to-air broadcasters, who consider it to be a commercially viable proposition, to encrypt their signals provided they bear the costs for the decryption technologies. Nobody says that broadcasting digital migration is not feasible without the encryption of signals. On the contrary e.tv previously made a strong case to the effect that signal encryption is not necessary for purposes of migration. Now only e.tv, of all free-to-air broadcasters, wants to encrypt if only, to paraphrase e.tv's words, government can effectively subsidise its preferred business decision or strategy. This subsidy takes the form of government procuring set top boxes into which decrypting gadgets are incorporated. e.tv would then pay only for the signal-unscrambling device. This would spare it the costs of paying for its own set top box equivalent.

[82] Encryption is neither compulsory nor forbidden. It all depends on the depth of one's pocket and the commercial viability and soundness of signal encryption as an option. The cost implications of encrypting and decrypting one's broadcasting signals, ought to inform that decision. Needless to say, if the cost is too high to make business sense, it would then be foolhardy for any free-to-air broadcaster to encrypt signals. Government has taken a policy-decision that accords with the position of all other broadcasters. That policy dumps decryption capabilities and is cost effective. It effectively amounts to a ringing rejection of e.tv's preferred policy "direction". And e.tv effectively says that the policy is irrational.

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[29] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 33.

[83] In conclusion, the Ministry solicited views on the Broadcasting Digital Migration Policy. Finally, it made a policy-decision that would lead to set top boxes being given by government to five million under-privileged households. The need to save the taxpayers' money was identified. To achieve that goal, the Ministry chose not to factor decryption capabilities into set top boxes. e.tv in effect accepts that dumping decryption capabilities is a legitimate and effective cost-saving measure or strategy. It however contends that there is another and possibly more appropriate means of achieving the same purpose. And that it would have presented that other choice to the Ministry had it been consulted by Minister Muthambi before she finalised the policy. e.tv is asking this Court to endorse its apparently more inclusive and better means so that the Ministry may consider it for adoption.

[84] But that is exactly what *Albutt* cautions against. The enquiry is whether there is a rational connection between the means and the purpose. Since the answer is yes, and e.tv together with nine other television licencees were consulted, judicial intrusion is constitutionally impermissible. It is not for interested persons or courts to determine the means but for the Executive. And it is for the Executive to chop and change the means as many times as they wish to achieve the same objective, provided they do so within the bounds of the Constitution and the law. They may even change it in a way that accommodates e.tv's proposals at any time before or after the delivery of this judgment. That is their judgement call, not the courts'.

[85] What courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available, on the other arms of the State. Separation of powers forbids that. Again we say, that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is

permissible only where it is necessary and unavoidable to do so.[30] This is not such a case.

[86] Therefore the substantive rationality challenge fails on both grounds.

Costs

[87] e.tv, SOS and MMA should, but for *Biowatch*,[31] pay costs to all applicants on the basis that costs ordinarily follow the result. They however lose, not because their challenge to the policy is necessarily frivolous or vexatious but, because they seek to vindicate the rule of law and the principle of legality. Theirs was a case with some prospects of success, however thin. And *Biowatch*[32] requires that each party to such constitutional litigation is in these circumstances to pay its own costs. They are however to pay costs to the M-Net in all courts.

Order

[88] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with:
   "1. The appeal is dismissed; and
   2. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay the Electronic Media Network Limited's costs, including costs of two counsel."
4. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay costs of the Electronic Media Network Limited in this Court, including costs of two counsel.

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[30] *Doctors for Life* above n 5 at paras 37-8; *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 19; and *Economic Freedom Fighters* above n 6 at paras 92-3.

[31] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 43.

[32] Id.

CAMERON J AND FRONEMAN J (Khampepe J and Pretorius AJ concurring):

[89] At issue is whether an amendment to the Broadcasting Digital Migration Policy the Minister of Communications (Minister) published on 18 March 2015 (Amendment) was validly issued in terms of section 3 of the Electronic Communications Act[33] (ECA). The vital part of the Amendment was that, in contrast to the original policy, it omitted decryption capability from plans to distribute five million subsidised set top boxes to the country's poorest five million households. The set top boxes will enable those households to receive the impending, new, digital television signal without having to junk their current television sets, which can receive only the old, analogue signal.

[90] We don't need to understand the rights and wrongs of encryption. All we need know, for now, is that e.tv wants it, for self-interested commercial reasons – and that, for comparable reasons, the Electronic Media Network (M-Net) and the South African Broadcasting Corporation SOC Limited (SABC) oppose it. This is because, they contended, it would increase the cost of the service, which would amount to subsidising commercial broadcasters. e.tv is supported by two non-governmental organisations, SOS Support Public Broadcasting Coalition and Media Monitoring Africa, whose disinterested public-interest commitment to supporting encryption has never been questioned. M-Net, the Minister and the SABC opposed e.tv's review of the Minister's omission of decryption from the new policy. The Supreme Court of Appeal upheld e.tv's challenge. That decision is now before us.

[91] We have had the benefit of reading the judgment of Mogoeng CJ, for whose exposition of the facts and issues we are grateful (first judgment). We do not agree that the appeal should succeed and the order of the Supreme Court of Appeal be reversed. Specifically, we do not agree that the amendment is immunised from scrutiny by the

[33] 36 of 2005.

doctrine of separation of powers or any doctrine of Executive decision-making. It was a decision purportedly taken under a statute that empowered it. And it had to comply with the requirements of that statute and of the Constitution. In our view, though for reasons that differ from those the Supreme Court of Appeal gave, the Amendment was unlawfully issued, in breach of the Minister's constitutional and statutory obligations. For the reasons set out here, that Court was right to set it aside.

[92] Our reasons draw on the constitutional and statutory framework whose powers the Minister purported to invoke. They also draw on, first, the role of rationality in policy-making by the Executive as an indispensable part of a constitutional democracy based on participatory democracy and, second, on a simple application of rationality in process that provides grounds for vitiating the Minister's decision here.

The constitutional and statutory framework that bound the Minister

[93] Where do we start? With the Constitution, of course. We do not consider it helpful to characterise the issue this case presents as one trenching on the separation of powers. No one disputes that the Minister has the constitutional and statutory authority to make policy under section 3(1) of the ECA. The courts do not have constitutional or statutory policy-making authority and no-one has suggested otherwise.

[94] What the courts do have under the Constitution is the judicial authority and duty to determine the constitutional and legal constraints that govern the making of policy by the Executive. Part of those constraints lie in the principle of legality, an aspect of the rule of law. That, too, no one disputes. A logical and necessary component of the rule of law and the principle of legality is that the exercise of public power may not be irrational. Another aspect by now trite, that no one disputes.

[95] So, when courts apply the test of rationality, both in process and substance, they are not intruding on the Executive's authority to make policy. The test of rationality does not ask whether the policy is substantively good or bad – only whether the reasons

given for the making of the policy, and the means used to arrive at the policy, are rationally connected to the end sought.

[96] But it is necessary to spell out more clearly, for this case, that the rationality we talk about must be determined in the context of our own brand of constitutional democracy. And that brand is one of participatory democracy, designed to ensure accountability, responsiveness and openness.[34] In *Doctors for Life* decision this Court stated:

> "[Public participation] strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling."[35]

[97] So, when one determines whether consultation as a prerequisite to the determination of policy by the Executive has been complied with, one must ascertain whether the consultation has been done in a manner that rationally connects the consultation with the constitutional purpose of accountability, responsiveness and openness. No superimposed judicial stratagem of undermining separation of powers is at work here. To the contrary, rationality in process and substance is umbilically linked to the pulse-beat of our constitutional democracy, one based on accountability, responsiveness and openness.

[98] Hence, if accountability, responsiveness and openness are fundamental to our Constitution, then a consultation process that lacks those attributes needs to be explained. Where there is no explanation there is no reason, and where there is no reason there is arbitrariness and irrationality. Neither rocket science nor judicial conspiracy are needed to understand the simplicity, logic and, yes, moral suasion of it. We see below how applying these precepts in practice should upend what happened here.

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[34] Section 1(d) of the Constitution.

[35] *Doctors for Life* above n 5 at para 115.

[99] For at the heart of this case is how government may exercise its power to regulate broadcasting. The Constitution shows us how. It does so very beautifully. It posits specific values for regulating broadcasting. And it invests so much importance in those values that it houses them in Chapter Nine, which sets up independent state institutions[36] supporting democracy.[37] After creating the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission, the Chapter sets up an independent authority to regulate broadcasting. Section 192 provides:

> "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."[38]

[100] What work does this provision do for our constitutional democracy? Is it a once off instruction, simply telling Parliament to pass a piece of legislation? And once Parliament has passed the statute, is the provision expended, its work done? Does it then become a relic of constitutional history with "very little, if anything, to do with the Minister's exercise of her policy-making powers"?[39] No. Definitely not. The provision does far more. It remains alive, an operative part of a living Constitution. It perches atop a potent premise – that there is a general constitutional duty to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

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[36] Section 181(1)(a)-(f).

[37] Section 181(2) provides that Chapter Nine institutions—

> "are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."

[38] It may be an anomaly resulting from late inclusion during the drafting process that the authority section 192 requires Parliament to create is not listed together with the other six Chapter Nine institutions in section 181(1). See Delaney "The Constitutional Fate of ICASA in a Converged Sector" (2009) 25 *SAJHR* 152.

[39] See [70].

[101] The Constitution uses a practical mechanism to give effect to these values. Section 192 requires that national legislation be passed to establish an independent authority to regulate broadcasting. The purpose of the legislation is not merely to endow the authority with a mandate to regulate broadcasting in the way the Constitution requires. It is to give institutional embodiment to a vivid constitutional notion – a commitment to regulating broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

[102] And this is exactly how Parliament understood its constitutional mandate when it enacted the Independent Communication Authority of South Africa Act[40] (ICASA Act) and the ECA. It locked the two statutes together. The ECA doesn't stand alone on a statutory island, isolated from the ICASA Act and from section 192. The two statutes lie entwined in a friendly, mutually inter-locking constitutional embrace, their provisions and purposes closely interlinked.

[103] They must be. Both owe their origin to section 192. And both seek, rightly, to fulfil its values. Thus, one of the express objects of the ECA is (subject to its provisions) to "promote, facilitate and harmonise the achievement of the objects of" the ICASA Act.[41] The object of the ICASA Act, in turn, is "to establish an independent authority", which it charges with a fourfold task.[42] This is "to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution."[43] It is also to "regulate

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[40] 13 of 2000.

[41] Section 2(o) of the ECA reads:

> "The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to–
>
> . . .
>
> (o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation."

The ECA defines "related legislation" as meaning the Broadcasting Act 4 of 1999, the ICASA Act and any regulations, guidelines and determinations made in terms of that legislation and not specifically repealed by the ECA.

[42] Section 2 of the ICASA Act.

[43] Section 2(a) of the ICASA Act.

electronic communications in the public interest"[44] as well as to regulate postal matters in the public interest.[45] And, the ICASA Act provides that ICASA's objects themselves include to "achieve the objects" of the ECA.[46]

[104] On top of this, the ECA expressly provides that the policies the Minister makes under it must be "consistent with the objects of" the ECA and the ICASA Act.[47] The Minister, of course, makes policies consistent with the ICASA Act only if her policies are true to the objects of that statute, which are drenched in the values section 192 spells out.

[105] And both statutes require, as a founding aspect of the constitutional order of which they form part, not only that decision-making under them must be rational, but that the processes by which decisions are reached are themselves rational. Rationality and process-rationality are not super-statutory add-ons. They are a fundamental prescription of the ECA itself, and not a loose-standing, super-imposed constitutional requirement. They are indeed an integral part of every decision-making process that any statute licenses.

[106] Let us pause for a moment to feel the force of this. The Minister is responsible for implementing the ECA. That statute's primary object is to provide for the regulation of electronic communications in the Republic "in the public interest".[48] The first-stated object of the ICASA Act is, in turn, to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, *as required by section 192 of the Constitution*.

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[44] Section 2(b) of the ICASA Act.

[45] Section 2(bA) of the ICASA Act requires the independent authority the statute establishes to "regulate postal matters in terms of the Postal Services Act".

[46] Section 2(c) of the ICASA Act provides that the object of the Act is to establish an independent authority which is to "achieve the objects contemplated in the underlying statutes".

The ICASA Act defines "underlying statutes" to mean the Broadcasting Act 4 of 1999, the Postal Services Act 124 of 1998 *and the ECA*.

[47] Section 3(1) of the ECA Act.

[48] Section 2 of the ECA.

[107] So, when the Minister makes policy under the ECA, she, too, does not stand alone on a statutory island. Not remotely. Her policy-making powers under the ECA are closely hemmed in by, enmeshed with and defined by not only the objects of the ICASA Act but by the constitutional values that underlie both statutes – including the fundamental constitutional requirement that all decision-making be rational. Indeed, how could the ECA possibly provide that ICASA – a constitutionally established body – "must consider policies made by the Minister" under the ECA,[49] unless the Minister, in formulating those policies, is bound to synchronise them constitutionally with ICASA's values and objects? How could the Minister make policy that must "be taken seriously by agencies and all other functionaries who needed guidance or direction on broadcasting digital migration"[50] if she could willy-nilly step outside the confines of the values and objects of those agencies that Parliament has prescribed?

[108] In hard-nosed practical terms, this interlocking statutory and constitutional web shows that the Minister wasn't ranging freely in a lofty Executive space where she was at large to formulate the policies she preferred. The statutes and the Constitution guided the Minister firmly when she purported to issue her Amendment. She was not free to disregard the constitutional imperative of regulating broadcasting in the public interest, and to ensure a diversity of views. Her Amendment not only had to be consistent with section 192. It also had to promote and facilitate convergence of telecommunications,[51] promote competition within the information, communications and technology (ICT) sector,[52] promote an environment of open, fair and non-discriminatory access to

[49] Section 3(4) of the ECA provides that ICASA in exercising its powers and performing its duties under both the ECA and the ICASA Act "must consider policies made by the Minister" in terms of section 3(1). The parallel provision in the ICASA Act is section 4(3A)(a).

[50] See [30].

[51] Section 2(a) of the ECA.

[52] Section 2(f), read with the definition of "ICT" in section 1 of the ECA.

broadcasting service[53] and promote the interests of consumers with regard to the price, quality and the variety of electronic communications services.[54]

[109] Most importantly, the Minister in making policy under section 3(1) had to promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public.[55] And she had to "provide access to broadcasting signal distribution for broadcasting and encourage the development of multi-channel distribution systems in the broadcasting framework".[56]

[110] Can one discount all this on the basis that the Amendment constitutes the exercise of Executive authority under the Constitution or that scrutinising its patent missteps is an impermissible encroachment on the powers of the Executive, as the first judgment finds? Was the Minister making national policy as contemplated by the Constitution?[57] No. Not remotely. Section 85(2)(b) of the Constitution gives the President and the other members of the Cabinet power to exercise Executive authority "by developing and implementing national policy".[58] This is a grand and elevated pointer in the constitutional scheme. It is not a nuts and bolts provision that says

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[53] Section 2(g) of the ECA.

[54] Section 2(n) of the ECA.

[55] Section 2(r) of the ECA.

[56] Section 2(x) of the ECA.

[57] See [26] to [30].

[58] Section 85 of the Constitution provides:

> "(1) The executive authority of the Republic is vested in the President.
>
> (2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and administrations;
>
> (d) preparing and initiating legislation; and
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

precisely *how* a particular policy must be developed in a specific statutory area. That the two statutes do.

[111] In delimiting the Minister's power to make policy, the ECA and the ICASA Act conform with section 85(2)(b). They give the Minister's constitutional policy-making power precision and content and boundaries and direction. They do not detract from the Executive's power. They regulate and define and delimit it, as is proper in a constitutional state subject to the rule of law. And her exercise of the power is subject to the courts' scrutiny, as is also proper in a constitutional state subject to the rule of law.

[112] Here we may contrast national policy-making in an everyday domestic area like the ICT sector with foreign policy. Foreign policy, this Court has said, "is essentially the function of the Executive".[59] And no piece of legislation regulates the Executive's power to determine foreign policy. By contrast, when a statute gives practical definition to a Minister's constitutional power to make national policy, as these two statutes do, it means that Parliament has exercised the legislative authority the Constitution confers on it.[60] Unless the statute is constitutionally invalid, it is a mistake to invoke the general constitutional power, and to treat it as hallowed, while ignoring its particular statutory embodiment.[61]

[113] The Minister's power to make policy isn't given practical realisation upstairs, in the heady heights of section 85(2)(b). That is done down here, in the gritty working mechanisms of the ECA and the ICASA Act. And the Legislature, exercising its

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[59] *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 77.

[60] Section 43 of the Constitution provides that, in the Republic, the legislative authority of the national sphere of government is vested in Parliament. Section 55 provides for the exercise by the National Assembly of its legislative power.

[61] This chimes with the principle of subsidiarity in invoking a right in the Bill of Rights. It is well established that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. See *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 140 (CC) at paras 44-66 (minority judgment) and paras 122, 159 and 181 (majority judgment).

constitutional authority, hemmed in the Minister's policy-making power. It provided that, in exercising that power under section 3(1) of the ECA, she must make policy that is "consistent with the objects of [the ECA] and of the [ICASA Act]". The Minister has not challenged these provisions. Rightly so. She is bound by them.

[114] Two details from section 3 of the ECA illuminate this. Making policies under section 3(1) is reserved exclusively for the Minister: the statute does not require her to consult Cabinet. This contrasts with the Minister's power under section 3(1A) to issue certain policy directions – that she may do only "after having obtained Cabinet approval".[62] Both provisions shelter comfortably under section 85(2)(b) – the one requiring Cabinet approval, the other eschewing it.

[115] The pure section 85(2)(b) national policy-making power is distinctive from both. For that is entrusted to the President "*together with* the other members of the Cabinet". Section 85(2)(b) contemplates primarily joint ("together") Executive policy-making in the national sphere. It is through statutes that the national Executive's general policy making power is particularised, informed and delimited – and conferred on Ministers. Exactly as the ECA and the ICASA Act do here.

[116] The detailed provisions of section 3(1) bear this out. The section 3(1) policy-making power is designed to give effect to the provisions of the ECA and the ICASA Act (and the other "related legislation") – more especially the objects of these statutes (which in turn aim to give effect to section 192 of the Constitution). It is a statutorily precise power that derives, but is not immunised, from scrutiny by section 85(2)(b) of the Constitution.

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[62] Section 3(1A) of the ECA provides:

> "The Minister may, after having obtained Cabinet approval, issue a policy direction in order to—
>
> (a) initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment; and
>
> (b) provide for a framework for the licensing of a public entity by the Authority in terms of Chapter 3."

[117] It is true that section 3(1) empowers the Minister to "make policies on matters of national policy applicable to the ICT sector". But the verbal echo of the Constitution's phrase "national policy" doesn't mean that in doing so the Minister bestrides the lofty spaces of section 85(2)(b), unencumbered by the statute, and that she can therefore claim immunity from scrutiny.[63] She must stay downstairs, implementing the statute, in accord with the injunctions of section 192 and the prescripts of the ECA and the ICASA Act.

[118] So we must conclude that the Minister in exercising her power under section 3(1) of the ECA to "make policies on matters of national policy applicable to the ICT sector" was exercising a statutory power, informed by constitutional values and deriving from high constitutional authority, but not protected from scrutiny by any lofty constitutional policy-making immunity.[64] This makes it hard to see how insisting that the Minister act in accordance with statutory prescripts binding on her – the constitutionality of which has not been challenged – can be impermissible judicial intrusion on Executive powers. To the contrary, this is a classic example of where "courts are not only entitled but are obliged to intervene".[65] The Minister's disregard of her constitutional and statutory obligations was patent.

Irrationality in substance and in process

[119] What legal controls govern the Minister's exercise of her section 3(1) policy-making power? We know she is bound by the statute and the prescripts of section 192. If she ignores any of the procedural requirements of section 3, her policy will be void for non-compliance with the statute. But if she commits no procedural misstep, does the Promotion of Administrative Justice Act[66] (PAJA) apply to check her

[63] See [27].

[64] See [26] to [30].

[65] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 183.

[66] 3 of 2000.

policy-making? The Supreme Court of Appeal, finding a procedural misstep, considered it unnecessary to decide this; and before us none of the parties claimed that PAJA applied. That may well be correct, for, in general, making policy does not constitute administrative action.[67] But we find it unnecessary to decide this. For even assuming PAJA doesn't apply, that does not mean section 3 leaves the Minister free to make policy without legal or constitutional constraint.

[120] In the courts below, the Minister accepted this. She conceded that her Amendment was subject to review under the principle of legality. When the matter came before this Court, she abandoned that stance. Now, for the first time, the Minister submitted, far-goingly, that her decision is "not subject to judicial review". This she said was because the policy does not in itself have any effect "and may never do so". It would have legal effect only if the Universal Service and Access Agency of South Africa (USAASA) decides to implement it.

[121] The ECA establishes USAASA as a state-owned entity of government.[68] The Minister herself appoints its board.[69] The ECA provides that it "must consider policies made by the Minister" under section 3(1).[70] And it "must" exercise its powers "in accordance with any policy direction issued by the Minister"[71] under section 3(2). The Fund USAASA controls, the Universal Service and Access Fund – the very Fund that government will use to fund the manufacture and distribution of the set top boxes at issue here – "must be administered by [USAASA] subject to the control and in accordance with the instructions of the Minister".[72] This is the body the Minister contends stands at first base to give her Amendment its first flush of legal effect – not

[67] The definition of administrative action in PAJA expressly excludes the section 85(2)(b) national policy-making function.

[68] Sections 80-91 of the ECA.

[69] Section 80 of the ECA.

[70] Section 3(4) of the ECA.

[71] Section 81(1) of the ECA.

[72] Section 87(4) of the ECA.

a moment before. "Must be administered." "Subject to the control and in accordance with the" Minister's instructions.

[122] These provisions make it idle to try to paint the Minister as issuing legally inconsequential advice to USAASA which it is free to adopt or ignore. USAASA is plainly bound by the Minister's instructions. This means the Minister's contentions about the legal impact of her Amendment are wrong. There can be no doubt that her decision to issue the Amendment hit the real world with a perceptible thud. It had a legally cognisable effect – even if only in obliging ICASA and USAASA to take account of it.[73] And then there's the Minister's direct, hands-on control over USAASA's Fund. Only in a world of legal fancy could it be imagined that her Amendment had no inherent effect. And, what's more, review under the principle of legality does not require, as PAJA does, that the decision has direct, external, legal effect for it to be reviewable.

[123] It follows that the Minister in issuing the Amendment was subject to legality scrutiny. In issuing policies she must act rationally. The principle of legality, which underlies our constitutional order, requires it. All exercises of public power must be "capable of being analysed and justified rationally".[74] Khampepe J recently emphasised that "review for rationality is about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved".[75] She summarised the position on behalf of the Court thus:

> "The principle of legality requires that every exercise of public power, including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well

[73] Section 3(4) of the ECA.

[74] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 84.

[75] *Motau* above n 24 at fn 101.

> established that the test for rationality is objective and is distinct from that of reasonableness."[76]

[124] But, more even, how the Minister works out her policy must be also rational. This is a principle of lawfulness itself that underlies her every exercise of her powers under the ECA. She cannot attain rationality in outcome if the means she employs to get there is irrational. This means that the process she follows in formulating policy must be rationally connected to the purpose for which the power to issue policy is conferred. The question this Court stated in *Democratic Alliance* is "whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality".[77]

[125] The Court went on to explain that, if in a particular case there is a failure to take into account relevant material, that failure would constitute "part of the means to achieve the purpose for which the power was conferred".[78] And if that failure had an impact on the rationality of the entire process, "then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole":

> "There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."[79]

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[76] Id at para 69.

[77] *Democratic Alliance* above n 23 at para 37.

[78] Id at para 39.

[79] Id.

[126] That is what happened here. The Minister adopted an irrational means of formulating the Amendment. The steps she took were not rationally related to her end in formulating the Amendment. And two unexplained aspects of her conduct underscore the conclusion that she acted irrationally. We now see why.

What happened here?

[127] The first judgment notes that the Minister's purpose in promulgating the Amendment was not to prevent decryption – it "was to save costs":[80] "Government wanted to save money while embarking on this already expensive but laudable exercise"[81] of bringing set top boxes to those who could least afford it. "And this it would achieve through a policy that dumps decryption capabilities".[82]

[128] This analysis is correct. The evidence shows that cost was pivotal to the decision to dump decryption by promulgating the Amendment. But how that happened shows a critical failure of rational policy-making. The Minister sought to save costs by dumping decryption – but costs were already to be saved via the proposal of the then Minister, Minister Carrim – and no further costs were to be saved by the Amendment. This was because e.tv was willing to fund the cost differential of including decryption. It supported Minister Carrim's proposed amendments requiring that it and other broadcasters eventually foot the bill, while government funds the costs upfront.

[129] But why should government even pay those costs upfront? Good question. That would entail an outlay of public funding for the benefit of commercial broadcasters who would use the decryption capability. The question should have been put to e.tv. e.tv was willing to pay the upfront costs – thereby insulating government from any additional outlay of public funds, at any stage. But the Minister was uncertain of the

[80] See [78].

[81] See [80].

[82] Id.

extent to which e.tv would cover the costs. Instead of asking e.tv, the Minister decided to dump decryption – to save costs. That was irrational process of the highest order.

[130] The first judgment holds that—

> "e.tv could, knowing the strong views held by all other broadcasters and in response to the Carrim policy draft, have proposed that costs, to be paid by free-to-air broadcasters who would prefer to encrypt and therefore use the inbuilt decryption capabilities, be paid in advance."[83]

That is true. Why did e.tv not do so? The reason is telling. It didn't have to *because it was invited to make submissions on the funding model proposed by Minister Carrim* – not to propose its own model. And that is precisely the point. The Minister did not have the information that was critical to make her decision rational – that is whether e.tv was prepared to cover the costs in advance. This after e.tv had already made it clear that the costs could be recovered from it. For it was only if e.tv was not prepared to cover the costs in advance that the Minister could rationally conclude that dumping decryption would in fact save government costs (in the form of immediately required funding). Instead, irrationally, she decided to save costs by dumping decryption without knowledge or consultation: decryption that Minister Carrim had unimpeachably concluded was necessary to advance the objects of the ICASA Act.

[131] The details show why the Minister's decision was irrational.

[132] The question of encryption versus non-encryption, and the excess cost of adding decryption, was a central issue from 2013. In that year, Minister Carrim stated that government was adverse to "subscription broadcasters unfairly benefiting from the [set top box] Control System" by government paying the additional costs of adding decryption capability to set top boxes. Minister Carrim proposed to amend the policy so that "[g]overnment's investment in the [set top box] Control System will be

[83] See [46].

recovered from those subscription broadcasters that choose to make use of the [set top box] Control system".[84] In other words, government would foot the decryption costs upfront, but would afterwards bill the broadcasters who would benefit.

[133] Why was the government prepared at all to advance the decryption costs upfront though later reclaiming them? One factor Minister Carrim spelled out was the need to "[r]educe the extent of monopolisation and encourage competition by creating space for new players in the pay television market without them unfairly benefiting from the Government subsidy".[85] In other words, to do so would encourage competition – but not at government expense. Encouraging competition, as shown earlier, plainly accorded with both the letter and spirit of section 192 of the Constitution and the ECA.[86]

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[84] Paragraph 5.1.2.7(A) of Minister Carrim's proposal. Proposed Amendment of Broadcasting Digital Migration Policy (As Amended), GN 954 *GG* 37120, 6 December 2013. Minister Carrim's explanatory statement of 20 December 2013 spelled this out:

> "(i) The cost to the government of control will be about R20 per subsidised box.
>
> (ii) Broadcasters wanting to use the control system will have to pay the government. They will pay the other costs related to the control system."

[85] Minister Carrim explained in the explanatory statement:

> "In deciding on government policy, we took the following criteria into account:
>
> (i) The need to begin implementing the migration as soon as possible, given that South Africa is five years behind schedule, the ITU June 2015 deadline looms and there is an urgent need to release radio frequency spectrum.
>
> (ii) Ensure that the Government subsidy is used productively.
>
> (iii) Stimulate the local electronics industry and create jobs.
>
> (iv) Benefit emerging entrepreneurs.
>
> (v) Reduce prospects of the South African market being flooded by cheap [set top boxes] that are not fully functional.
>
> (vi) Best serve the viewers' needs.
>
> (vii) Protect the interests of the SABC against commercial broadcasters.
>
> (viii) Be sensitive to rapid changes in the broadcasting and ICT sector as a whole.
>
> (ix) Recognise the increasing use of mobile phones, rather than televisions, for Internet and other services.
>
> (x) Reduce the extent of monopolisation and encourage competition by creating space for new players in the pay television market without them unfairly benefitting from the Government subsidy.
>
> (xi) Recognise the majority of the broadcasters are opposed to a control system.
>
> (xii) Reduce the prospects of the possibility of more challenging legal action from broadcasters and entrepreneurs that would hold-up the migration process."

[86] Section 2(f) of the ECA.

[134] e.tv in response commended government's decision. In its submission of 5 January 2014 to Minister Carrim's proposed amendments, it explained that indeed the decryption costs would be borne by the manufacturer and the broadcasters. Just what e.tv said becomes important later, since the Minister said it was unclear. Here's what e.tv said:

> "The cost of encryption is not a barrier to implementation of the 'smart' free-to-air [digital terrestrial television] platform. Since a low-cost encryption system would be used, it does not add significant additional cost to the [set top boxes]. The additional cost to the [set top boxes] would be a once-off encryption royalty of under $2 per [set top box], which is payable by the manufacturer. (This royalty is substantially less than the costs of making the [set top box] MPEG 4 and HO). All other costs are carried by the free-to-air broadcasters who choose to use the encryption system – the initial capital set-up costs (including capex), the [set top box] activation costs, and the operational and maintenance costs are minimal and constitute a negligible investment for the broadcasters choosing to encrypt their signals."

[135] This submission proceeds on the premise that government will fund the upfront cost differential of adding decryption (because government would have to pay the manufacturer, who would have to pay the "once-off encryption royalty"). e.tv also confirmed that it would definitely use the decryption capabilities – meaning it was prepared to stump up the costs.[87]

[136] These events following Minister Carrim's proposal evidence a clear understanding that government would include decryption capabilities in the subsidised set top boxes and that e.tv – whether alone or not – planned to use decryption and pay government back for its upfront outlay.

[87] It said it will be "making use of the [set top box] Control system to encrypt its [digital terrestrial television] channels irrespective of whether other free-to-air channels choose to do so".

[137] Then Minister Muthambi took over. In May 2014, she succeeded Minister Carrim. On 6 November 2014, she indicated that she needed to undertake extensive consultations on decryption with various stakeholders. These were not named, but included other government departments. This was because, she said, "the issue of Control Access or No Control Access will have a wide-ranging impact on the future of broadcasting, communications and on the majority of citizens in this country".

[138] The Minister did not explain why she considered the submissions already received through the formal, statutorily mandated process inadequate. Nor did she indicate that she considered further consultation necessary because of any major change to the existing policy or the draft amendments her predecessor promulgated.

[139] On 4 March 2015, Cabinet approved the Broadcasting Digital Migration Amendment Policy.[88] This included a control system in the set top boxes – but Minister Muthambi's department on 8 March 2015 for the first time indicated that the "control system" excluded "an encryption of the signal to control access to content by viewers".[89] And the Amendment, which Minister Muthambi published on 18 March 2015, provided that encryption "will be non-mandatory".[90] For the first time, the policy specified through the Amendment that the set top box control system shall "not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]".[91] Instead, individual broadcasters could "at their own cost" decide on encryption of content. The effect of this was that state-subsidised set top boxes would be specifically precluded from being manufactured with decryption capabilities.[92]

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[88] Released on 5 March 2015.

[89] The Department's statement welcomed "the Broadcasting Digital Migration Amendment Policy with the inclusion of the control system in the Set Top Box".

[90] Paragraph 5.1.2(A) of the Amendment.

[91] Paragraph 5.1.2(B) of the Amendment.

[92] All the parties understood this to be the effect of the Amendment, though the Minister's answering affidavit appears to display some confusion about this. That forms a separate basis on which e.tv seeks to review her decision – which in view of our conclusion is not necessary to consider here.

[140] e.tv wrote to the Minister. It asked her for reasons for the Amendment – particularly for excluding decryption. The Minister responded that this was a Cabinet decision and e.tv was not entitled to reasons.

[141] But the reasons finally emerged. They did, in this litigation. Minister Muthambi filed an affidavit in the High Court. It was deposed to on her behalf by the Acting Director-General of her Department, Mr Norman Ndivhuho Munzhelele. The deposition explained why the Minister dumped decryption.

[142] In its founding affidavit, e.tv alleged that the Minister's sole justification for the Amendment was that she sought to "clarify" that "government will not pay for encryption". Minister Muthambi did not deny this. She explained that the Amendment entailed "no encryption at government's expense". This was, amongst other reasons, because "the software for encryption is significantly expensive and would result in substantial additional costs for government". Decryption, the Minister warned, "also requires subscriber management, which would place an additional cost on government – in terms of financial and human resources."[93] "Significant costs and resources that are required to do so", the Minister's affidavit concluded, "are the main reason for not providing encryption capabilities". Summing up government's position, the Minister's affidavit explained:

> "It is not the policy of government to incur costs to ensure that the [free-to-air] broadcaster that chooses to encrypt must, effectively, be subsidised by government from the public purse to facilitate competition."

[143] The Minister went further. She accused e.tv of wanting "government to incur further public spending to facilitate encryption of broadcasts". This made it clear that

[93] The Minister's affidavit proceeds:

> "In order to honour the right of [free-to-air] broadcasters to decide for themselves whether they would wish to encrypt their broadcasts, the [Broadcasting Digital Migration] Policy leaves the choice to do so to [free-to-air] broadcasters, but at their expense. These include privately owned and funded [free-to-air] broadcasters, as well as the public broadcaster, the SABC."

government was resiling from Minister Carrim's position that it was willing to pay the added decryption costs upfront, though raking them back later. Government now, Minister Muthambi explained, was not prepared to stake any capital, at any stage, on decryption:

> "[G]overnment has no responsibility to spend public money in order to improve the position of [free-to-air] broadcasters from their current position to a better position post digital migration."

And:

> "As far as the government is concerned, the reason why the government refuses to pay the costs of encryption is simply a question of costs and the manner in which the government has prioritised its spending of taxpayers' money."

[144] In its replying affidavit, e.tv reiterated that it was prepared to cover the additional costs – and was in fact in negotiation with a supplier who would install the decrypting capabilities in the subsidised set top boxes, at e.tv's cost:

> "Indeed, e.tv's present position is that . . . subject to the successful conclusion of negotiations with Nagravision . . . . It is prepared . . . to pay for the additional encryption-related costs identified by the Minister in her answering affidavit."[94]

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[94] e.tv added that it was—

> "already at an advanced stage of its negotiations with Nagravision. Nagravision is an international company that specialises in providing encryption systems and software. It already provides, for example, the encryption system and software to be used by Sentech to encrypt the broadcast signals transmitted by satellite on a free-to-air basis to areas of the country which will not be able to receive terrestrial broadcasts once digital migration occurs. These encrypted broadcasts signals are also already fed by Sentech to the [digital terrestrial television] transmitters. The main costs in relation to encryption concerns the software license cost, which is charged on a per [set top box] basis. The SABC suggest, for example, in its answering affidavit that a figure of $2 per [set top box] is charged - meaning a total of R100 million for the five million boxes. The computation of and the precise amount involved are the main issues in the ongoing negotiations between e.tv and Nagravision. This is so given that e.tv accepts that it will bear this cost by virtue of its decision to encrypt, in accordance with clause 5.1.2(C) of the Policy. (Obviously if other broadcasters in due course wished to encrypt, e.tv and those broadcasters would have to share the costs concerned)."

[145] By now the extent of the misunderstanding – if we are to accept, in favour of the Minister, that what happened was a misunderstanding – had become plain. The impact of the Amendment was that e.tv would not be able to spend its own money on including decryption capabilities in the subsidised set top boxes. This was even though the Minister appreciated that the SABC, a public body, might in future also want to use these capabilities – in which case, the Minister's affidavit says, the SABC "shall take the necessary steps to finance that change of mind".

[146] But why did Minister Muthambi consider costs a wholly preclusionary factor – when e.tv had placed on record, before Minister Carrim, that it was willing to repay government any upfront costs it incurred? From the Minister's deposition, a two-fold answer emerges. First, the Minister – reversing Minister Carrim's stance – was now unwilling to expend any government capital, at all, at any stage, on decryption. Second, the Minister wasn't sure what e.tv meant when it said it would cover costs. The Minister's affidavit expressed uncertainty about the extent to which e.tv, or the manufacturer of the set top boxes, would in fact cover the costs. This emerges from the Minister's answering affidavit in response to paragraph 3.7 of e.tv's 2014 submission.[95] Her affidavit complained that in so far as e.tv there said that some of the costs are payable by the manufacturer—

> "it has not told anyone the terms thereof and whether such terms are terms which the government should accept insofar as the government subsidised [set top boxes] are concerned."

[147] This evinces a gross defect in the Minister's process. The Minister expresses mystification regarding "the terms" on which costs are payable – and about whether government should accept them. This was a critical element of the consultation process that took place under Minister Carrim. Yet the Minister took no step to clarify her uncertainty.

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[95] See [134].

[148] If the Minister was concerned about cost to government, and if cost was the reason why the Amendment dumped decryption, why not find out from e.tv what exactly the position was? What would the manufacturer cover – and what would e.tv cover? e.tv's replying affidavit rightly called the failure to engage with it on this "specially startling"—

> "given that e.tv was the only broadcaster whose stated plans would be hindered by the amendments and that e.tv was the only broadcaster, who could indicate to the Minister whether it was prepared to pay for the additional costs in allowing encryption capability on the subsidised [set top boxes]."

[149] As this Court said in *Democratic Alliance*, the steps in the process followed by the Minister have to be "rationally related to the end sought to be achieved".[96] And, if they are not, the question is whether the absence of a connection between a particular step is "so unrelated to the end as to taint the whole process with irrationality".[97]

[150] Here, the Minister sought to save costs. But the objective she sought to attain was illusory, since e.tv had already tendered to cover costs. And, to the extent that its tender was unclear, rational pursuit of her objective of cost-saving by dumping decryption required her to clarify with e.tv what its tender entailed. The means she pursued to attain the end of cost-saving was so glaring – so irrationally unrelated to that end – that the whole process she adopted in promulgating the Amendment was tainted by irrationality. It must be set aside.

[151] We also do not see what difference it makes that Minister Muthambi picked up a process that her predecessor Minister Carrim initiated. The crucial point is that neither Minister invited consultation, nor obtained any views or submissions, on the crucial question of whether e.tv was prepared, in the event that government was not, to foot the costs upfront.

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[96] *Democratic Alliance* above n 23 at para 37.

[97] Id.

[152] Two further aspects of how the Minister went about her work underscore this conclusion. The Minister does not explain two strange aspects of her consultation process. The first is whether she consulted ICASA and USAASA, the "Authority" and "Agency" respectively, whom she needed to consult in terms of section 3(5) of the ECA.[98] The second is her failure to disclose who she consulted with after the formal consultation process was allegedly completed.

[153] Nowhere in her papers does the Minister state, as a fact with documented proof, that notice was given to ICASA and USAASA. The first judgment skirts this:

> "Though cited as parties to this litigation, they [ICASA and USAASA] have decided not to oppose the Minister's application to protect the policy from being set aside by reason of the alleged non-consultation or invalidity. It must thus be reasonably assumed on their behalf that they find nothing wrong with the policy-formulation process as it affects them, and even as regards compliance with the provisions of section 3(5) of the ECA."[99]

[154] Whether ICASA and USAASA are content with the Minister's policy formulation is not the issue. The issue is whether they have been consulted in terms of the ECA. And they do not state that they did receive notice. Nor does the Minister. No explanation, no reason: unreason, arbitrariness, irrationality.

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[98] Section 3(5) provides:

> "When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister—
>
> (a) must consult the Authority or the Agency, as the case may be; and
>
> (b) must, in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the *Gazette*—
>
> (i) declaring his or her intention to issue the policy or policy direction;
>
> (ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than 30 days from the date of the notice;
>
> (c) must publish a final version of the policy or policy direction in the *Gazette*."

[99] See [41].

[155] Next is what happened after the Minister's alleged compliance with the statute's consultation requirements. The Minister admits that she went out and consulted other persons and entities, but not e.tv. She does not explain why she did so and she does not say who she consulted. The first judgment is rightly critical of this:

> "But this does not mean that a blind eye is to be turned to her concern-evoking evasive and 'suspicious' responses or lack thereof to pertinent questions raised by e.tv. For, we live in a constitutional democracy, whose foundational values include openness and accountability. It is thus inappropriate for the Minister to not have volunteered the identities of those she consulted with and what the consultation was about, as if she was not entitled to solicit enlightenment or did so in pursuit of an illegitimate agenda. This conduct must be frowned upon and discouraged."[100]

We agree wholeheartedly.

[156] But then the first judgment concludes:

> "It does not however constitute the necessary and unavoidable constitutional basis for judicial intrusion."[101]

With this we emphatically disagree.

[157] The Minister does not tell us why further consultation was necessary, nor who she consulted with. In this, she failed to adhere to fundamental constitutional values of accountability, responsiveness and openness. And for it she offers no explanation. She does not seek to explain why this is not an instance that opens the door to "secret lobbying and influence-peddling". No explanation, no reason: unreason, arbitrariness, irrationality.

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[100] See [61].

[101] Id.

[158] These two instances, on their own, sufficiently demonstrate irrationality in the consultation process, contrary to the fundamental constitutional demands of accountability, responsiveness and openness. These factors have absolutely nothing to do with any assessment of the merits of e.tv's claims, nor that of any of the parties who made their views on the policy known. There is no intrusion on the merits of policy-making by the Minister.

[159] The same applies to a further consideration. The change in policy that the Minister envisaged was an amendment both of the original policy of Minister Matsepe-Casaburri and that envisaged by Minister Carrim. In terms of section 3(6) of the ECA the consultation provisions of section 3(5) "do not apply in respect of any amendment by the Minister of a policy direction contemplated in subsection (2) as a result of representations received and reviewed by him or her after consultation or publication in terms of subsection (5)". The Minister issued a policy under section 3(1) and not a policy direction under section 3(2). Despite some fancy distinguishing footwork in argument it seems clear that an amendment of a policy by the Minister had to comply, again, with the provisions of section 3(5). This did not happen.

[160] For these reasons, too, the appeal has no merit.

[161] Laying lawyers' language aside, the Minister seems to have missed an opportunity to facilitate provision of access to encrypted signals for the poor at no cost to government – while at the same time fulfilling the objects of the ECA by encouraging the development of multi-channel distribution systems. e.tv's grievance that the Minister did not consult it is not a lawyers' stratagem. Its argument seeks to import common-sense into the process of consultation. And the requirement of process rationality should ensure that common-sense prevails.

[162] And, finally, what do we make of e.tv's about-face?[102] One might venture that the burdensome task of public-policy formulation is not a television gameshow, in which contestants are trapped by and penalised for their own previous protestations. The very point of rational governance, and of consultation to enable it, is to allow and even encourage shifts and nuances of position on both sides. On an issue as important as encrypting set top boxes for South Africa's poorest television viewers, consultation required nothing less.

Order

[163] We would therefore grant leave to appeal, but dismiss the appeal, with costs, including the costs of two counsel.

JAFTA J:

[164] I have had the benefit of reading the judgments prepared by the Chief Justice (first judgment), Cameron J and Froneman J (second judgment). The first judgment reaches a different outcome from the second and third. While I agree with the outcome proposed in the first judgment, I am unable to support some of the reasoning furnished for it. I disagree with the second judgment and the remedy it proposes.

[165] The facts are comprehensively set out in the first judgment and as a result it is not necessary to repeat them here.

[166] As I see them, the issues raised in this appeal are whether the Minister of Communications (Minister) had authority to effect the impugned amendment to the policy and if she did, the further issue is whether the amendment was rational.

[102] See [14].

[167] The resolution of these issues requires us to interpret and apply to the facts, the relevant legislative provisions. These are the provisions of section 3 read with section 2 of the Electronic Communications Act (ECA).[103] Section 2 stipulates that the primary objects of this Act are to provide for the regulation of electronic communications in the public interest. To facilitate the realisation of this purpose, the section lists a number of objects which may be pursued. These include promoting the convergence of broadcasting and information technologies; ensuring the provision of broadcasting services by diverse persons or communities; promoting an environment of open, fair and non-discriminatory access to broadcasting services and encouraging investment, including strategic infrastructure investment in the communications sector.

[168] Section 3 empowers the Minister to make national policy applicable to the information, communications and technology sector. Apart from being consistent with the objects of the ECA, such policy must relate to, among others, the application of new technologies pertaining to broadcasting services.

[169] In addition, section 3(1A) and (2) authorises the Minister to issue a policy direction consistent with the objects of the ECA and national policies, in relation to a number of issues listed in these subsections. Section 3(3) limits the Minister's power to make policy or policy direction with regard to the granting, renewal, transfer, suspension or cancellation of a licence, to the extent permitted by the ECA. It is apparent from this provision that the Minister is allowed to make policy or policy direction in respect of operational matters which fall within the domain of the Independent Communications Authority of South Africa (ICASA), established in terms of the Independent Communications Authority of South Africa Act (ICASA Act).[104] Some of those operational matters may fall under the jurisdiction of the Universal Service and Access Agency of South Africa (USAASA).

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[103] 36 of 2005.

[104] 13 of 2000.

[170] The authority to make policies which regulate ICASA's operational matters appears to be inconsistent with section 192 of the Constitution.[105] The Constitution requires Parliament to pass legislation establishing an independent authority to regulate broadcasting in the public interest. The ICASA Act is such legislation and ICASA is the authority mentioned in section 192. Ministerial policies on ICASA's operational matters like the granting of broadcasting licences would ordinarily be at odds with ICASA's independence.

[171] It is apparent from section 3(4) that Parliament was aware of this issue. The provision makes it plain that both ICASA and USAASA are not bound to follow policies or policy directions of the Minister when exercising their powers or performing their duties. Instead, these bodies are required to merely take such policies into consideration. In this way their independence is protected.

[172] Section 3(5) regulates the procedure which must be followed by the Minister when issuing a policy or granting a policy direction. It provides:

> "When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister—
>
> (a) must consult the Authority or the Agency, as the case may be; and
>
> (b) must, in order to obtain the view of interested persons, publish the text of such policy direction by notice in the *Gazette*—
>
> (i) declaring his or her intention to issue the policy direction;
>
> (ii) inviting interested persons to submit written submissions in relation to the policy direction in the manner specified in such notice in not less than 30 days from the date of the notice;
>
> (c) must publish a final version of the policy direction in the *Gazette*."

[105] Section 192 provides:

> "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

[173] A reading of section 3(5) reveals that it lays down three requirements, two of which must be met before the issuing of a policy. The first is that the Minister must consult ICASA or USAASA, as the case may be. The second is that she or he must obtain the views of interested parties on the proposed policy. To this end, the section requires the Minister to publish the text of the proposed policy in the Gazette. This publication must declare his or her intention to issue policy and invite interested persons to submit written submissions on the policy. The publication must afford the interested parties at least 30 days within which to submit written submissions and may also specify the form to be followed in lodging those submissions.

[174] The Minister is required to take those submissions into account when finalising the policy. The final version of the policy must also be published in the Gazette.

Lack of authority

[175] e.tv argued that the impugned amendment constituted a binding decision on ICASA by stipulating that:

> "The [set top box] control system for the free-to-air [digital terrestrial television] [set top boxes] shall . . . not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]."

[176] It was submitted that by so doing the amendment impermissibly intruded into the terrain of ICASA, an independent authority established by the Constitution to regulate broadcasting. It was contended that the Minister's authority to make policy or amend it, does not cover the making of binding decisions on set top boxes control issues because those issues form part of the regulation of broadcasting which falls exclusively under the jurisdiction of ICASA.

[177] This argument proceeds from an incorrect assumption. It is assumed that ICASA was bound to implement the amendment that said the set top boxes shall not have capabilities to decrypt broadcast signals for the subsidised set top boxes. This premise

overlooks the express terms of section 3(4) which require both ICASA and USAASA to merely consider policies when exercising their powers or performing their duties. The obligation to consider does not mean that these entities must implement those policies. The obligation is that they should take the policies into account. It is left to these entities to choose, out of their own free will, to follow or implement the policies in question or to deviate from them.

[178] It is the power to choose whether to implement a particular policy in performing duties which removes the inconsistency between the policy-making power and the institutional independence of these entities. Therefore, it is incorrect to contend that ICASA and USAASA are bound by policies and policy directions made by the Minister in terms of section 3 of the ECA. They are not.

Consultation

[179] e.tv submitted that section 3(5) applies to the process of amending a policy and since Minister Muthambi had failed to comply with this section, the amendment was invalid for want of compliance with the prescribed procedure. It is true that Minister Muthambi did not adhere to the requirements in section 3(5) before effecting the amendment. She did not publish the text of the amendment in the Gazette. Nor did she declare her intention to amend the policy. She also failed to invite interested persons to make written submissions on the amendment she contemplated effecting.

[180] But this is not the end of the matter. The antecedent question is whether section 3(5) applies to the process of amending policy. For if it does not, her failure to comply would have no effect on the validity of the amendment.

[181] The Minister, the South African Broadcasting Corporation (SABC) and the Electronic Media Network (Pty) Ltd (M-Net) argued that section 3(5) does not apply to an amendment. They submitted that the text of the provision expressly states that it applies when a policy or policy direction is issued. It is true that the section makes no reference to an amendment. But e.tv countered by submitting that the word "issuing"

must be given a wider meaning to include both the issuing of an original policy and its amendments. Construing section 3(5) as not applying to amendments would, contended e.tv, undermine openness and consultation promoted by the provision which must be interpreted purposively. It submitted further that the section must be read in a manner that promotes the values of openness, transparency and accountability.

[182] While one may not quibble with the approach advanced by e.tv to the interpretation of section 3(5), it must be pointed out that the approach concerned cannot be invoked to extend the scope of the provision beyond the limits of its language. The provision states in unequivocal terms that the duty to consult and obtain views of interested parties arises when issuing a policy or policy direction. The scope of the section is not determined by the word "issuing" but by the words "policy" and "policy direction".

[183] Ordinarily these words may include amendments to policy or policy direction. However, section 3(5) must not be read in isolation. It must be read together with other parts of section 3. For instance subsections (6), (7) and (8) make it clear that a policy direction referred to in section 3(5) does not include an amendment. These subsections regulate the procedure that must be followed in amending a policy direction. It would be remarkably odd for Parliament to use the word "policy" in an expansive sense that includes amendments and the words "policy direction" in a restrictive sense that excludes amendments, in the same sentence.

[184] The scheme of section 3, when read in its entirety, suggests that policy and policy direction as used in subsection (5) do not include amendments. Parliament considered it necessary to regulate procedure for amendments of policy directions separately. There appears to be no discernible reason for restricting this separation of procedure to policy directions only. The only reasonable explanation that presents itself is that it was an oversight on the part of Parliament not to include the amendment of a policy in the provisions of subsections (6), (7) and (8).

[185] These subsections read:

> "(6) The provisions of subsection (5) do not apply in respect of any amendment by the Minister of a policy direction contemplated in subsection (2) as a result of representations received and reviewed by him or her after consultation or publication in terms of subsection (5).
>
> (7) Subject to subsection (8), a policy direction issued under subsection (2) may be amended, withdrawn or substituted by the Minister.
>
> (8) Except in the case of an amendment contemplated in subsection (6), the provisions of subsection (3) and (5) apply, with the necessary changes, in relation to any such amendment or substitution of a policy direction under subsection (7)."

[186] What emerges from an examination of these provisions is that subsection (6) exempts the Minister from the procedural obligations under subsection (5) in the case of an amendment of a policy direction where representations had been received after publication in terms of subsection (5). This means that if at the time of issuing the original policy direction there was compliance with subsection (5) and representations were received, that process need not be repeated when the Minister seeks to amend the original policy direction. This makes perfect sense. Otherwise the process would be unnecessarily repetitious.

[187] But if no representations were received following the subsection (5) publication, the Minister must repeat the publication process in the Gazette before effecting an amendment. This is required by subsection (8).

[188] The Minister argued forcefully that when Parliament amended subsections (2), (3), (4) and (5) with effect from 21 May 2014, it overlooked to amend subsections (6), (7) and (8), to extend the latter subsections to cover the amendment of a policy. Apparently before the 2014 amendments, subsection (5) made reference to the issuing of a policy direction only. Hence subsections (6), (7) and (8) referred to amending a policy direction only. When a "policy" was included in subsection (5), these three subsections were not amended to refer to a policy as well, owing to an oversight.

[189] It does not appear that the distinction in the approach to procedure relating to amending policies and policy directions was deliberate. As mentioned, one cannot discern any reason for this distinction and the purpose it serves. In the present circumstances I accept that the source of the distinction is the oversight mentioned by the Minister. Consequently, subsections (6), (7) and (8) must be read as applying to the amendment of a policy.

[190] Reading words into a statutory provision in order to cure a defect, is a remedy that our courts frequently apply in appropriate circumstances. Sometimes this is done to remedy a constitutional defect.[106] On other occasions, it is done in an interpretation exercise.[107] Long before the adoption of the Constitution, our courts added words to a statute where it was practically impossible to have a "sensible meaning" without reading words into the provision.[108] In *Vauhghan-Heapy* the Court said:

> "It is, however, quite apparent from pronouncements such as these that the power in a Court to supplement the language of a statute is confined to those rare instances where incomprehensibility would be the alternative to doing so. It is necessity therefore that becomes the mother of intervention."[109]

[191] Here the necessity stems from the fact that without adding the word "policy" to subsections (6), (7) and (8), there would be no provision regulating an amendment of policy. It would be absurd to require the Minister to follow a consultation procedure when issuing a policy but to be free to do as she or he pleases when she or he amends the same policy. This is to happen where the ECA prescribes a procedure for amending

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[106] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

[107] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 66-8; *Govender v Minister of Safety and Security* [2001] ZASCA 80; 2001 (4) SA 273 (SCA).

[108] *Vauhghan-Heapy v Natal Performing Arts Council* 1991 (1) SA 191 (D); *S v De Abreu* 1975 (1) SA 106 (RA); *R v Le Roux* 1959 (4) SA 342 (C); *Ngwenya v Hindley* 1950 (1) SA 839 (C).

[109] *Vauhghan-Heapy* id at 196.

a policy direction. That could not have been contemplated at the time the 2014 amendments of the ECA were enacted.

[192] Accordingly, I conclude that Minister Muthambi was exempted by subsection (6) from repeating the subsection (5) process which was followed by Minister Matsepe-Casaburri when she issued the original policy. It is common cause that representations were received before the policy in question was issued. There was no need for Minister Muthambi to repeat the process.

Procedural rationality

[193] Relying on decisions of this Court in *Democratic Alliance*[110]and *Albutt*[111] as well as the decision of the Supreme Court of Appeal in *Scalabrini*,[112] e.tv argued that the amendment was procedurally irrational. Counsel for e.tv placed a heavy reliance on the following statement made in *Scalabrini*:

> "[T]here are indeed circumstances in which rational decision-making calls for interested persons to be heard. That was recognised in *Albutt v Centre for the Study of Violence and Reconciliation and Others*, which concerned the exercise by the President of the power to pardon offenders whose offences were committed with a political motive . . . it was held that the decision to undertake the special dispensation process under which pardons were granted, without affording the victims an opportunity to be heard, must be rationally related to the achievement of the objectives of the process."[113]

[194] It must be pointed out immediately that here we are concerned with the question whether e.tv should have been afforded the opportunity to make fresh or further representations to those made under the subsection (5) process before the original policy was made. We are not dealing with a case where there were no representations at all.

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[110] *Democratic Alliance* above n 23.

[111] *Albutt* above n 7.

[112] *Scalabrini* above n 25.

[113] Id at para 68.

The circumstances referred to in *Scalabrini* do not arise here in light of the exemption in section 3(6).

[195] Invoking *Albutt* and *Democratic Alliance*, e.tv submitted that there was no rational relation between the means adopted in the amendment it challenged and the object of the amendment. In *Democratic Alliance* this Court defined the procedural rationality standard in these terms:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose, for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."[114]

[196] Quite evidently what this statement means is that whatever means chosen must be rationally linked to the realisation of the purpose for which the power was conferred. In the case of multiple steps, the question is whether one of those steps is "so unrelated to the end as to taint the whole process with irrationality". This illustrates that the standard does not require each and every step taken to be rationally related to the purpose. The step that is not rationally related to the purpose must have undermined the achievement of the purpose for which the power was conferred, for it to have tainted the whole process with irrationality.

[197] Yacoob ADCJ outlined this part of the standard in *Democratic Alliance* thus:

> "We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence

[114] *Democratic Alliance* above n 23 at para 36.

> of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."[115]

[198] When applying the rationality test a court must always bear in mind this caution from *Affordable Medicines*:

> "As the *Lawrence* case makes it plain, the Court sought to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other. The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the legislature. In the exercise of its legislative powers, the legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the legislature its rightful role in a democratic society. It is this guiding principle that should inform the test for determining whether legislation that regulates practice but does not, objectively viewed, impact negatively on choice, passes constitutional scrutiny"[116]

[199] Underpinning this approach is the principle that a proper balance must be maintained between the role of other arms of Government and the courts.[117]

[200] Here it is not disputed that Minister Muthambi sought to achieve two purposes through the impugned amendment. The first was to secure the set top boxes and the second was to save costs. The question that arises for determination is whether there was a rational connection between the amendment (means) and the object of saving costs. The question of security is not disputed.

[201] It cannot be gainsaid that the decryption capability would increase costs of producing the set top boxes. Even e.tv asserted that if it were to produce set top boxes on its own the costs would be prohibitively high, hence it was in favour of the decryption

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[115] Id at para 37.

[116] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 86.

[117] Id at para 83.

capability being added to the set top boxes subsidised by Government. It was submitted that e.tv was willing to cover the additional costs and refund the Government later.

[202] It follows that excluding the decryption capability from the set top boxes would save costs. Accordingly, there is a rational connection between the amendment and the objective of saving costs.

[203] But e.tv contends that its offer to cover the additional costs and refund Government later bears a rational relation to the purpose of saving costs. It is not clear to me how a policy that says Government will pay for the additional costs during production of the set top boxes only to be refunded later, would be saving costs. It seems to me that such a policy would be requiring Government to advance money to e.tv on the promise of a refund later.

[204] e.tv does not offer to pay the additional costs at the time of production, which would avoid the paying of the costs by Government at the initial stage. Only if it were to be so, one might talk of the offer constituting a cost saving measure. This is because Government would not be required to carry the additional costs occasioned by the inclusion of the decryption capability. However, even if the offer by e.tv were to be rationally related to the purpose of saving costs, it would not mean that the means chosen by the Minister were not rationally related to that purpose. It would be a question of different means, both related to the same purpose. That is hardly a basis on which the procedural rationality ground may succeed.

[205] In *Albutt* this Court was at pains to point out that the discretion to choose the means to achieve the objectives of a statute is that of the Executive. And where that discretion has been exercised to select certain means, interference by courts is not warranted if the selected means are rationally connected to the objective sought to be achieved. There, Ngcobo CJ stated:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. *What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.* And if objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[118]

[206] It follows that even if the means identified by e.tv were more appropriate, it cannot be said that e.tv has established the ground of procedural irrationality.

[207] This matter is distinguishable from *Albutt* and *Democratic Alliance*. In *Albutt* the objectives sought to be achieved were "national unity and national reconciliation". This Court held that the means chosen by the President which excluded hearing the victims of the offences committed with a political motive, could not achieve those objectives. It was for this reason that it was said that there was no rational connection between the chosen means and the objectives in question.

[208] Similarly, in *Democratic Alliance* the President was empowered to appoint "a fit and proper person" as the National Director of Public Prosecutions. A commission of inquiry had pronounced that the candidate chosen by the President was not a person of honour and integrity. These attributes were stipulated by the empowering legislation. In assessing the suitability of the candidate, the President failed to investigate whether those findings accurately reflected the character of that candidate. In the light of the adverse findings by the inquiry, the President could not rationally have been satisfied that the chosen candidate met the requirements for appointment. Consequently the means selected could not have enabled him to attain the purpose for which the power was conferred.

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[118] *Albutt* above n 7 at para 51.

JAFTA J

[209] It is apparent from these cases that the means selected in them thwarted the achievement of the purposes for which the power was conferred. The present is not such a case.

[210] For these reasons I support the order proposed in the first judgment.

For the First Applicant:	D Unterhalter SC, M Norton SC and M Mokhoaetsi instructed by Werksmans Attorneys
For the Second Applicant:	W Trengrove SC and K Tsatsawane instructed by Gildenhuys Malatji Incorporated
For the Third Applicant:	A R Bhana SC instructed by Ncube Incorporated Attorneys
For the First Respondent:	S Budlender, J Berger and R Tshetlo instructed by Norton Rose Fulbright South Africa Incorporated
For the Third and Fourth Respondents:	M Du Plessis and L Kelly instructed by Nortons Incorporated

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COM 1

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Sent on: Friday, July 18, 2014 6:42:42 AM
To: Ashu <ashu@sahara.co.za>
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Attachments: 37839_15-7_ProcPSA ProofOut.pdf (2.88 MB)

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COM 2

Government Gazette
Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 589 Pretoria, 15 July Julie 2014 No. 37839

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CONTENTS • INHOUD

PROCLAMATION

by the

President of the Republic of South Africa

No. 47, 2014

TRANSFER OF ADMINISTRATION AND POWERS AND FUNCTIONS ENTRUSTED BY LEGISLATION TO CERTAIN CABINET MEMBERS IN TERMS OF SECTION 97 OF THE CONSTITUTION

In terms of section 97 of the Constitution of the Republic of South Africa, 1996, I hereby transfer the administration and powers and functions entrusted by the specified legislation, and all amendments thereto, to the specified Cabinet member as set out in the Schedule in English and isiZulu with effect from the date of publication of this Proclamation in the *Gazette*.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this 12th day of July, Two Thousand and Fourteen.

President

By Order of the President-in-Cabinet:

Minister of the Cabinet

SCHEDULE

1. The administration and the powers and functions entrusted by the legislation, mentioned in column 1 of the tables below, to a Cabinet member as executive authority of that department mentioned in column 2 of the tables, immediately before the President assumed office on 24 May 2014, are transferred to the Cabinet member mentioned in column 3 of the tables.

1.1 COMMUNICATION RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet Member**	**New Cabinet Member**
Post and Telecommunication-Related Matters Act, 1958 (Act No. 44 of 1958)	Minister of Communications	Minister of Telecommunications and Postal Services
Films and Publication Act, 1996 (Act No. 65 of 1996)	Minister of Home Affairs	Minister of Communications
Sentech Act, 1996 (Act No. 63 of 1996)	Minister of Communications	Minister of Telecommunications and Postal Services
Former States Posts and Telecommunications Act, 1996 (Act No. 5 of 1996)	Minister of Communications	Minister of Telecommunications and Postal Services
Former States Broadcasting Reorganisation Act, 1996 (Act No. 91 of 1996)	Minister of Communications	Minister of Telecommunications and Postal Services
Postal Services Act, 1998 (Act No. 124 of 1998)	Minister of Communications	Minister of Telecommunications and Postal Services
Department of Communications Rationalisation Act, 1998 (Act No. 10 of 1998)	Minister of Communications	Minister of Telecommunications and Postal Services
Broadcasting Act, 1999 (Act No. 4 of 1999)	Minister of Communications	Minister of Communications

Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000)	Minister of Communications	Minister of Communications
Media Development and Diversity Agency Act, 2002 (Act No. 14 of 2002)	Minister in The Presidency responsible for Performance Monitoring and Evaluation	Minister of Communications
Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002)	Minister of Communications	Minister of Telecommunications and Postal Services
Electronic Communications Act, 2005 (Act No. 36 of 2005)	Minister of Communications	Minister of Telecommunications and Postal Services
South African Post Bank Limited Act, 2010 (Act No. 9 of 2010)	Minister of Communications	Minister of Telecommunications and Postal Services
South African Post Office SOC Ltd Act, 2011 (Act No. 22 of 2011)	Minister of Communications	Minister of Telecommunications and Postal Services
State Information Technology Agency Act, 1998 (Act No. 88 of 1998)	Minister for the Public Service and Administration	Minister of Telecommunications and Postal Services
Telegraph Messages Protection Act, 1963 (Act No. 44 of 1963)	Minister of Communications	Minister of Telecommunications and Postal Services

1.2 ENVIRONMENTAL RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Sea-Shore Act, 1935 (Act No. 21 of 1935)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Prince Edwards Islands Act, 1948 (Act No. 43 of 1948)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Sea Birds and Seals Protection Act, 1973 (Act No. 46 of 1973)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Dumping at Sea Control Act, 1980 (Act No. 73 of 1980)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Section 38 of the Sea Fishery Act, 1988 (Act No. 12 of 1988)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Environment Conservation Act, 1989 (Act No. 73 of 1989)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Antarctic Treaties Act, 1996 (Act No. 60 of 1996)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Environment Conservation Act Extension Act, 1996 (Act No. 100 of 1996)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
Marine Living Resources Act, 1998 (Act No. 18 of 1998)	Minister of Water and Environmental Affairs to the extent that powers and functions had been transferred to that Minister by Proclamation No. 16 of 2013, published in *Government Gazette* No. 36527 of 31 May 2013	Minister of Environmental Affairs to the extent set out in paragraph 1.2.1 below
National Environmental Management Act, 1998, (Act No. 107 of 1998)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
World Heritage Convention Act, 1999 (Act No. 49 of 1999)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
South African Weather Service Act, 2001 (Act No. 8 of 2001)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs
National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)	Minister of Water and Environmental Affairs	Minister of Environmental Affairs

1.2.1 The administration of and the powers and functions entrusted to the Minister of Water and Environmental Affairs in relation to the provisions of the Marine Living Resources Act, 1998 (Act No. 18 of 1998), and subordinate legislation mentioned in column 3 of Proclamation No. 16 of 2013, published in *Government Gazette* No. 36527 of 31 May 2013, are hereby transferred to the Minister of Environmental Affairs.

1.3 GENDER RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Commission on Gender Equality Act, 1996 (Act No. 39 of 1996)	Minister of Women, Children and People with Disabilities	Minister in The Presidency responsible for Women

1.4 SMALL BUSINESS DEVELOPMENT RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Section 2A of the Small Business Development Act, 1981 (Act No. 112 of 1981)	Minister of Trade and Industry	Minister of Small Business Development
Close Corporations Act, 1984 (Act No. 69 of 1984)	Minister of Trade and Industry	Minister of Small Business Development
National Small Enterprise Act,1996 (Act No.102 of 1996)	Minister of Trade and Industry	Minister of Small Business Development
Co-operatives Act, 2005 (Act No.14 of 2005)	Minister of Trade and Industry	Minister of Small Business Development

1.5 STATISTICS RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Statistics Act, 1999 (Act No. 6 of 1999)	Minister in The Presidency responsible for Performance Monitoring and Evaluation	Minister in The Presidency responsible for Planning, Monitoring and Evaluation

1.6 TRANSPORT RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Wreck and Salvage Act, 1996 (Act No. 94 of 1996)	Minister of Water and Environmental Affairs	Minister of Transport

1.7 WATER AND SANITATION RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
Water Research Act, 1971 (Act No. 34 of 1971)	Minister of Water and Environmental Affairs	Minister of Water and Sanitation
Water Services Act, 1997 (Act No. 108 of 1997)	Minister of Water and Environmental Affairs	Minister of Water and Sanitation
National Water Act, 1998 (Act No. 36 of 1998)	Minister of Water and Environmental Affairs	Minister of Water and Sanitation

1.8 YOUTH RELATED LEGISLATION:

Column 1	Column 2	Column 3
Legislation	**Previous Cabinet member**	**New Cabinet member**
National Youth Development Agency Act, 2008 (Act No. 54 of 2008)	Minister in The Presidency responsible for Performance Monitoring and Evaluation	Minister in The Presidency responsible for Planning, Monitoring and Evaluation

2. The administration and the powers or functions entrusted by legislation to a Cabinet member mentioned in column 1 of the table below, immediately before the President assumed office on 24 May 2014, are transferred to the Cabinet member mentioned in column 2 of the table.

Column 1	Column 2
Previous Cabinet member	**New Cabinet member**
Minister of Correctional Services	Minister of Justice and Correctional Services
Minister of Justice and Constitutional Development	Minister of Justice and Correctional Services

3. With respect to the departments mentioned below, the powers and functions entrusted by the Public Service Act, 1994 (promulgated under Proclamation No. 103 of 1994), mentioned in column 1 of the tables in paragraphs 3.1 to 3.4 below, to a Cabinet member as executive authority of that department mentioned in column 2 of the tables, immediately before the President assumed office on 24 May 2014, are transferred to the Cabinet member mentioned in column 3 of the tables.

3.1 GOVERNMENT COMMUNICATION AND INFORMATION SYSTEM

Column 1	Column 2	Column 3
Powers and functions under the Public Service Act, 1994	**Previous Cabinet member**	**New Cabinet member**
All powers and functions of the executive authority of the Department	Minister in The Presidency responsible for Performance Monitoring and Evaluation	Minister of Communications

3.2 STATISTICS SOUTH AFRICA

Column 1	Column 2	Column 3
Powers and functions under the Public Service Act, 1994	**Previous Cabinet member**	**New Cabinet member**
All powers and functions of the executive authority of the Department, subject to the Statistics Act, 1999 (Act No. 6 of 1999)	Minister in The Presidency responsible for National Planning	Minister in The Presidency responsible for Planning, Monitoring and Evaluation

3.3 PERFORMANCE MONITORING AND EVALUATION

Column 1	Column 2	Column 3
Powers and functions under the Public Service Act, 1994	**Previous Cabinet member**	**New Cabinet member**
All powers and functions of the executive authority of the Department	Minister in The Presidency responsible for Performance Monitoring and Evaluation	Minister in The Presidency responsible for Planning, Monitoring and Evaluation

3.4 **WOMEN**

Column 1	Column 2	Column 3
Powers and functions under the Public Service Act, 1994	**Previous Cabinet member**	**New Cabinet member**
All powers and functions of the executive authority of the Department	Minister of Women, Children and People with Disabilities	Minister in The Presidency responsible for Women

ISIMEMEZELO

SikaMongameli

WaseRiphabhuliki yaseNingizimu Afrika

No. 47, 2014

UKUDLULISA UKUPHATHA NAMANDLA KANYE NEMISEBENZI ETHWESWE NGOMTHETHO KUMALUNGU ATHILE EKHABHINETHI NGOKWEMIGOMO YESIGABA SAMA-97 SOMTHETHOSISEKELO

Ngakho-ke ngokwemigomo yesigaba sama-97 soMthethosisekelo waseRiphabhuliki yaseNingizimu Afrika, 1996, ngidlulisa ukuphatha namandla kanye nemisebenzi ethweswe ngomthetho othile, kanye nezichibiyelo zawo, kulelo lungu elithile leKhabhinethi njengoba kuveziwe eSithasiselweni sesiNgisi kusukela ngosuku lokushicilelwa kwalesi Simemezelo kuSomqulu.

Nginikeza ngaphansi kwengalo yami nangesigxivizo saseRiphabhuliki yaseNingizimu Afrika kule ndawo ..... Pitoli ..... Mhlaka... 12 ....Unyaka ..... kuNtulikazi .....

Umongameli

Ngomyalelo kaMongameli kuKhabhinethi:

UNgqongqoshe wekhabhinethi

ISITHASISELO

1. Ukuphatha namandla kanye nemisebenzi ethweswe ngomthetho, evezwe Ikholamu 1 yethebula ngenzansi, kulungu leKhabhinethi njengesiphathimandla kulowo mnyango ovezwe Ikholamu 2 yethebula, ngaphambi kokuba uMongameli aqale ukusebenza mhlaka 24 Meyi 2014, kudluliselwe elungwini leKhabhinethi elivezwe Ikholamu 3 yamathebula.

1.1 UMTHETHO OHAMBISANA NEZOKUXHUMANA:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Post and Telecommunication-Related Matters Act, 1958 (Act No. 44 of 1958)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Films and Publication Act, 1996 (Act No. 65 of 1996)	Minister of Home Affairs	UNgqongqoshe Wezokuxhumana
Sentech Act, 1996 (Act No. 63 of 1996)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Former States Posts and Telecommunications Act, 1996 (Act No. 5 of 1996)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Former States Broadcasting Reorganisation Act, 1996 (Act No. 91 of 1996)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Postal Services Act, 1998 (Act No. 124 of 1998)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi

Department of Communications Rationalisation Act, 1998 (Act No. 10 of 1998)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Broadcasting Act, 1999 (Act No. 4 of 1999)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana
Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana
Media Development and Diversity Agency Act, 2002 (Act No. 14 of 2002)	Minister in The Presidency responsible for Performance Monitoring and Evaluation	UNgqongqoshe Wezokuxhumana
Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Electronic Communications Act, 2005 (Act No. 36 of 2005)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
South African Post Bank Limited Act, 2010 (Act No. 9 of 2010)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
South African Post Office SOC Ltd Act, 2011 (Act No. 22 of 2011)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
State Information Technology Agency Act, 1998 (Act No. 88 of 1998)	UNgqongqoshe Wezemisebenzi Kahulumeni Nokuphathwa kwayo	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi
Telegraph Messages Protection Act, 1963 (Act No. 44 of 1963)	UNgqongqoshe Wezokuxhumana	UNgqongqoshe Wezokuxhumana Ngezingcingo Nezamaposi

1.2 UMTHETHO OHAMBISANA NEZEMVELO:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Sea-Shore Act, 1935 (Act No. 21 of 1935)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Prince Edwards Islands Act, 1948 (Act No. 43 of 1948)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Sea Birds and Seals Protection Act, 1973 (Act No. 46 of 1973)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Dumping at Sea Control Act, 1980 (Act No. 73 of 1980)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Section 38 of the Sea Fishery Act, 1988 (Act No. 12 of 1988)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Environment Conservation Act, 1989 (Act No. 73 of 1989)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Antarctic Treaties Act, 1996 (Act No. 60 of 1996)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Environment Conservation Act Extension Act, 1996 (Act No. 100 of 1996)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
Marine Living Resources Act, 1998 (Act No. 18 of 1998)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo ngendlela okudluliswe ngayo amandla nemisebenzi kulowo Ngqongqoshe Ngesimemezelo Se-16 ngowe-2013, esishicilelwe kuSomqulu kaHulumeni Inombolo 36527 mhalaka 31 Meyi 2013	UNgqongqoshe Wezezindaba Zezemvelo ngendlela evezwe endimeni 1.2.1 ngenzansi
National Environmental Management Act, 1998, (Act No. 107 of 1998)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
World Heritage Convention Act, 1999 (Act No. 49 of 1999)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
South African Weather Service Act, 2001 (Act No. 8 of 2001)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo
National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezezindaba Zezemvelo

1.2.1 Ukuphatha namandla kanye nemisebenzi ethweswe uNgqongqoshe Wezamanzi Nezindaba Zezemvelo mayelana nemibandela ye-*Marine Living Resources Act, 1998 (Act No. 18 of 1998)*, nemithetho emincane evezwe Ikholamu 3 yesiMemezelo Se-16 ongowe-2013, esishicilelwe kuSomqulu kaHulumeni We-36527 mhlaka 31 Meyi 2013, ngakho-ke kudluliselwa kuNgqongqoshe Wezezindaba Zezemvelo.

1.3 UMTHETHO OPHATHELENE NOBULILI:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Commission on Gender Equality Act, 1996 (Act No. 39 of 1996)	UNgqongqoshe Wabantu Besifazane, Izingane Nabantu Abakhubazekile	UNgqongqoshe eHhovisi likaMongameli obhekele Abantu Besifazane

1.4 UMTHETHO OPHATHELENE NOKUTHUTHUKISWA KWEZAMABHIZINISI ASAFUFUSA:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Section 2A of the Small Business Development Act, 1981 (Act No. 112 of 1981)	UNgqongqoshe Wezokuhwebelana Nezimboni	UNgqongqoshe Wezokuthuthukiswa Kwamabhizinisi Asafufusa
Close Corporations Act, 1984 (Act No. 69 of 1984)	UNgqongqoshe Wezokuhwebelana Nezimboni	UNgqongqoshe Wezokuthuthukiswa Kwamabhizinisi Asafufusa
National Small Enterprise Act, 1996 (Act No. 102 of 1996)	UNgqongqoshe Wezokuhwebelana Nezimboni	UNgqongqoshe Wezokuthuthukiswa Kwamabhizinisi Asafufusa
Co-operatives Act, 2005 (Act No. 14 of 2005)	UNgqongqoshe Wezokuhwebelana Nezimboni	UNgqongqoshe Wezokuthuthukiswa Kwamabhizinisi Asafufusa

1.5 UMTHETHO OPHATHELENE NAMANANI:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Statistics Act, 1999 (Act No. 6 of 1999)	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuqapha Ukuqhutshwa Komsebenzi Nokuhlola	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuhlela, Ukuqapha Nokuhlola

1.6 UMTHETHO OHAMBISANA NEZOKUTHUTHA:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	Owayeyilungu Lekhabhinethi	Ilungu Lekhabhinethi Entsha
Wreck and Salvage Act, 1996 (Act No. 94 of 1996)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezokuthutha

1.7 UMTHETHO OPHATHELENE NAMANZI NOKUHLANZWA KWAWO:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	Owayeyilungu Lekhabhinethi	Ilungu Lekhabhinethi Entsha
Water Research Act, 1971 (Act No. 34 of 1971)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezamanzi Nokuhlanzwa kwawo
Water Services Act, 1997 (Act No. 108 of 1997)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezamanzi Nokuhlanzwa kwawo
National Water Act, 1998 (Act No. 36 of 1998)	UNgqongqoshe Wezamanzi Nezindaba Zezemvelo	UNgqongqoshe Wezamanzi Nokuhlanzwa kwawo

1.8 UMTHETHO OTHINTA INTSHA:

Ikholamu 1	Ikholamu 2	Ikholamu 3
Umthetho	Owayeyilungu Lekhabhinethi	Ilungu Lekhabhinethi Entsha
National Youth Development Agency Act, 2008 (Act No. 54 of 2008)	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuqapha Ukuqhutshwa Komsebenzi Nokuhlola	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuhlela, Ukuqapha Nokuhlola

2. Ukuphatha namandla kanye nemisebenzi ethweswe ilungu leKhabhinethi ngomthetho ovezwe Ikholamu 1 lethebula ngenzansi, ngaphambi kokuba uMongameli aqale ukusebenza mhlaka 24 Meyi 2014, adluliselwa elungwini leKhabhinethi elivezwe Ikholamu 2 lethebula.

Ikholamu 1	Ikholamu 2
Owayeyilungu Lekhabhinethi	**Ilungu Lekhabhinethi Entsha**
UNgqongqoshe Wezokuhlunyeleliswa Kwezimilo	UNgqongqoshe Wezobulungiswa Nokuhlunyeleliswa Kwezimilo
UNgqongqoshe Wezobulungiswa Nokuthuthukiswa Komthethosisekelo	UNgqongqoshe Wezobulungiswa Nokuhlunyeleliswa Kwezimilo

3. Mayelana neminyango ebalulwe ngenzansi, amandla nemisebenzi okuthweswe nge-*Public Service Act, 1994* (okusungulwe ngaphansi kwesiMemezelo Se-103 ngowe-1994), avezwe Ikholamu 1 yamathebula ezindimeni 3.1 ukuya 3.4 ngenzansi, ilungu leKhabhinethi njengesiphathimandla salowo mnyango ovezwe Ikholamu 2 yamathebula, ngaphambi kokuba uMongameli aqale ukusebenza mhlaka 24 Meyi 2014, kudluliselwa elungwini leKhabhinethi elivezwe Ikholamu 3 yamathebula.

3.1 EZOKUXHUMANA KUHULUMENI NOHLELO LWEZEMININGWANE

Ikholamu 1	Ikholamu 2	Ikholamu 3
Amandla nemisebenzi ngaphansi kwe-*Public Service Act, 1994*	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Wonke amandla nemisebenzi eziphathimandla zoMnyango	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuqhutshwa komsebenzi, Ukuqapha Nokuhlola	UNgqongqoshe Wezokuxhumana

3.2 ISILINGANISO MANANI ENINGIZIMU AFRIKA

Ikholamu 1	Ikholamu 2	Ikholamu 3
Amandla nemisebenzi ngaphansi kwe-*Public Service Act, 1994*	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Wonke amandla nemisebenzi eziphathimandla zoMnyango, ngokwe-*Statistics Act, 1999 (Act No. 6 of 1999)*	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuhlela Kuzwelonke	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuhlela, Ukuqapha Nokuhlola

3.3 UKUQAPHA UKUQHUTSHWA KOMSEBENZI NOKUHLOLA

Ikholamu 1	Ikholamu 2	Ikholamu 3
Amandla nemisebenzi ngaphansi kwe-*Public Service Act, 1994*	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Wonke amandla nemisebenzi eziphathimandla zoMnyango	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuqapha Ukuqhutshwa Komsebenzi Nokuhlola	UNgqongqoshe eHhovisi likaMongameli obhekele Ukuhlela, Ukuqapha Nokuhlola

3.3 ABANTU BESIFAZANE

Ikholamu 1	Ikholamu 2	Ikholamu 3
Amandla nemisebenzi ngaphansi kwe-*Public Service Act, 1994*	**Owayeyilungu Lekhabhinethi**	**Ilungu Lekhabhinethi Entsha**
Wonke amandla nemisebenzi eziphathimandla zoMnyango	UNgqongqoshe Wabantu Besifazane, Izingane Nabantu Abakhubazekile	UNgqongqoshe eHhovisi likaMongameli obhekele Abantu Besifazane

NOTICE – CHANGE OF TELEPHONE NUMBERS: GOVERNMENT PRINTING WORKS

As the mandated government security printer, providing world class security products and services, Government Printing Works has adopted some of the highly innovative technologies to best serve its customers and stakeholders. In line with this task, Government Printing Works has implemented a new telephony system to ensure most effective communication and accessibility. As a result of this development, our telephone numbers will change with effect from 3 February 2014, starting with the Pretoria offices.

The new numbers are as follows:

- Switchboard : 012 748 6001/6002
- Advertising : 012 748 6205/6206/6207/6208/6209/6210/6211/6212
- Publications Enquiries : 012 748 6052/6053/6058 GeneralEnquiries@gpw.gov.za

  Maps : 012 748 6061/6065 BookShop@gpw.gov.za

  Debtors : 012 748 6060/6056/6064 PublicationsDebtors@gpw.gov.za

  Subscription : 012 748 6054/6055/6057 Subscriptions@gpw.gov.za
- SCM : 012 748 6380/6373/6218
- Debtors : 012 748 6236/6242
- Creditors : 012 748 6246/6274

Please consult our website at www.gpwonline.co.za for more contact details.

The numbers for our provincial offices in Polokwane, East London and Mmabatho will not change at this stage.

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001
Publications: Tel: (012) 748 6052, 748 6053, 748 6058
Advertisements: Tel: (012) 748 6205, 748 6208, 748 6209, 748 6210, 748 6211
Subscriptions: Tel: (012) 748 6054, 748 6055, 748 6057
Gedruk deur en verkrygbaar by die Staatsdrukker, Bosmanstraat, Privaatsak X85, Pretoria, 0001
Publikasies: Tel: (012) 748 6052, 748 6053, 748 6058
Advertensies: Tel: (012) 748 6205, 748 6208, 748 6209, 748 6210, 748 6211
Subskripsies: Tel: (012) 748 6054, 748 6055, 748 6057

COM 3

From: Ashu<ashu@sahara.co.za>
Sent on: Friday, July 18, 2014 10:58:50 AM
To: Tony Gupta <tony@sahara.co.za>
Subject: Fwd: 37839_15-7_ProcPSA ProofOut.pdf
Attachments: 37839_15-7_ProcPSA ProofOut.pdf (2.88 MB)

Sent from my Samsung Galaxy smartphone.
-------- Original message --------
From: Faith Muthambi
Date:18/07/2014 06:47 (GMT+02:00)
To: Ashu
Subject: 37839_15-7_ProcPSA ProofOut.pdf
Sent from my i

COM 4

From: Faith Muthambi <faith.muthambi@gmail.com>
Sent on: Friday, July 18, 2014 6:45:21 AM
To: Ashu <ashu@sahara.co.za>
Subject: Effect of presidential proclamation.docx
Attachments: Effect of presidential proclamation.docx (14.8 KB)

Sent from my iPad

COM 5

Presidential Proclamation: Gazette No. 37839 dated 15 July 2014 Transfer of powers

Introduction

On 25 May 2014, the President announced the creation of two new Ministries: a Ministry of Telecommunications and Postal Services and a Ministry of Communications with responsibility for ICASA and the SABC amongst others. The assumption was then made that broadcasting including digital migration would report to the Minister of Communications. The proclamation published on 15 July 2014 did not give effect to this division.

Powers of the Minister of Communication as set out in the proclamation

The Minister of Communication was given the powers set out in the ICASA Act, 2000 (Act No. 13 of 2000) and the Broadcasting Act, 1999 (Act No. 4 of 1999). These two Acts establish and deal with *administrative and governance* matters relating to ICASA and the SABC such as the appointment, removal, performance management, staffing, etc. of the two institutions. They do not include substantive matters relating to regulation of broadcasting. Broadcasting is regulated by the Electronic Communications Act, 2005 (Act No 36 of 2005). The ability to make broadcasting policy and issue broadcasting policy directions are set out in section 3 of this Act. These powers have been transferred from the Minister of Communications to the Minister of Telecommunications and Postal Services. It is therefore the Minister of Telecommunications and Postal Service who will make policy and issue policy directives to ICASA for broadcasting, including public service broadcasting.

Uncertainty still exists

Uncertainty remains as to how the division will practically function especially in respect to ICASA. While the Minister of Communications appoints, removes and performance manages ICASA, she has no input into the substantive work to be done by ICASA. It's like having an employer being able to hire, fire and performance manage an employee but having no ability to set, direct, make input or give guidance on the work of that employee.

What should happen?

If it is the intention of the President that broadcasting and matters related to broadcasting should sit with the Minister of Communications, then the powers and functions of the Minister as set out in the Electronic Communications Act needs to be split between the Minister of Telecommunications and Postal Services and the Minister of Communications. T

The President has transferred the powers in the Films and Publication Act, 1996 (Act 65 of 1996) to the Minister of Communication. The Minister of Communications in this instance has substantive (not just administrative) powers in respect of content which is not regulated as traditional broadcasting content. This regulation is currently applicable to video on demand services which will become more prevalent as convergence becomes a reality. These content services pose a real threat to traditional broadcasters and will predominantly come from international operators who are not regulated in South Africa. One would have expected that all content, whether regulated as broadcasting by the Electronic Communications Act or film by the Films and Publication Act should be housed in one Ministry.

Com 6

From: Faith Muthambi <faith.muthambi@gmail.com>
Sent on: Friday, July 25, 2014 8:31:58 AM
To: Ashu <ashu@sahara.co.za>
Subject: proclamtion new 18 July 2014 (clean).docx
Attachments: proclamtion new 18 July 2014 (clean).docx (22.06 KB)

These sections must be transferred to the Minister of Communications.
Sent from my iPad

COM 7

The following powers, functions and duties in the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("ECA") should be transferred to the Minister of Communications to give effect to the separation of broadcasting from telecommunications and postal services

s3 **Deals with the power of the Minister to make policies and to issue policy directions to ICASA. This power must be exercised by the Minister of Communications to the extent that it deals in any way with a broadcasting service or matters related to broadcasting (e.g. broadcasting signal distribution, broadcasting infrastructure)**

The power assigned to the Minister in section 3 must be exercised by the Minister of Communications to the extent that it deals in any way with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service.

s4(5) **Deals with the duty imposed on ICASA to inform the Minister of its intention to make regulations and to provide the Minister with a copy of those regulations. To the extent that any such regulations deal in any way with a broadcasting service or matters related to broadcasting, ICASA must inform the Minister of Communications of its intention to make such regulations and must provide the Minister of Communications with a copy of those regulations.**

The reference to the Minister in section 4(5) must be construed as a reference to the Minister of Communications to the extent that ICASA intends to make regulations which in any way deal with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service.

s5(6) **Deals with the power of the Minister to issue a policy direction to ICASA in respect of applications for individual electronic communications network service licences. To the extent that it is intended that the electronic communications network service is to be used for the provision of broadcasting services, the Minister of Communications must exercise this power.**

The power assigned to the Minister in section 5(6) must be exercised by the Minister of Communications to the extent that it is intended that the electronic communications network service is to be used for the provision of a broadcasting service.

s34(2) **Deals with the power, function and duty of the Minister to approve the national radio frequency plan. To the extent that any part of the national radio frequency plan deals with broadcasting radio frequency bands, the Minister of Communications must approve that part of the plan.**

The power, and function and duty assigned to the Minister in section 34(2) must be exercised and performed by the Minister of Communications to the extent that any part of the national radio frequency plan deals with broadcasting radio frequency bands.

s34(7)(c)(iii) **Deals with the duty imposed on ICASA to consult with the Minister to co-ordinate a plan for the migration of existing users to make available radio frequency spectrum. To the extent that this relates to any part of the national radio frequency plan which deals with the broadcasting radio frequency bands or with the migration of any broadcasting services, ICASA must consult with the Minister of Communications.**

The reference to the Minister in section 34(7)(c)(iii) must be construed as a reference to the Minister of Communications to the extent that ICASA's preparation of the national radio frequency plan relates to any part of the national radio frequency plan which deals with the broadcasting radio frequency bands or with the migration of any broadcasting services

s60(1) **Deals with the duty imposed on ICASA to consult the Minister on sporting events of national interest. ICASA must consult with the Minister of Communications and the Minister of Sport.**

The reference to the Minister in section 60(1) must be construed as a reference to the Minister of Communications.

s65 and s66 **Deals with limitations on control of commercial broadcasting services. This reference in s65(7) and (8) and in s66(7) and (8) must be construed as a reference to the Minister of Communications.**

The reference to the Minister in section 65(7) and (8) and in section 66(7) and (8) must be construed as a reference to the Minister of Communications.

s79B **Deals with the power of the Minister to request data, information and documents from ICASA or any person. The Minister of Communications must exercise this power to the extent that it deals with broadcasting and broadcasting related matters.**

The powers assigned to the Minister in section 79B must be exercised by the Minister of Communications to the extent that it deals with a broadcasting service or an electronic communications service or an electronic communications network service used for or in the provision of a broadcasting service.

Com 8

From: Faith Muthambi <faith.muthambi@gmail.com>
Sent on: Friday, July 25, 2014 8:35:35 AM
To: Ashu <ashu@sahara.co.za>
Subject: Responsibility for InfraCo and Sentech.docx
Attachments: Responsibility for InfraCo and Sentech.docx (19.05 KB)

Sentech's signal distribution must rest with the Ministry of Communications
Sent from my iPad

Com 9

Responsibility for InfraCo and Sentech

Transferring the powers, functions and duties assigned to the Minister of Public Enterprises in the Broadband InfraCo Act, 2007 (Act No. 33 of 2007) to the Minister of Telecommunications and Postal Services

Broadband InfraCo was set up as a state owned enterprise to lower the cost of access to telecommunication network and facilities in order to lower the cost to communicate and specifically broadband access for South African consumers. If we are to reap the synergies from state owned enterprises who operate in the telecommunications space then responsibility for Broadband InfraCo should reside with the Minister of Telecommunications and Postal Services.

Transferring the powers, functions and duties assigned to the Minister of Telecommunications and Postal Services in the Sentech Act, 1996 (Act No. 63 of 1996) to the Minister of Communications.

Sentech's primary function is broadcasting signal distribution which it provides to the SABC and commercial broadcasters. Sentech's activities should be limited to this function and hence should report to the Minister of Communications.

Sentech did attempt to enter the telecommunications space but its commercial broadband services were a failure and the service ultimately had to close down. Treasury has also consistently refused to provide funding for Sentech to operate in the broadband retail market.

Sentech has valuable broadband spectrum. Again if we are to reap the synergies from state owned enterprises who operate in the telecommunications space then this spectrum should be transferred to InfraCo which should report directly to the Minister of Telecommunications and Postal Services. By doing this government will be in a better position to achieve its objectives for broadband in this country.

The transfer of spectrum from Sentech to InfraCo cannot be done in a proclamation but by application to ICASA for a transfer of spectrum.

Com 10 A

From: Ashu<ashu@sahara.co.za>
Sent on: Friday, July 25, 2014 8:41:41 AM
To: Tony Gupta <tony@sahara.co.za>
Subject: Fwd: proclamtion new 18 July 2014 (clean).docx
Attachments: proclamtion new 18 July 2014 (clean).docx (22.06 KB)

Sent from my Samsung Galaxy smartphone.
-------- Original message --------
From: Faith Muthambi
Date:25/07/2014 08:39 (GMT+02:00)
To: Ashu
Subject: proclamtion new 18 July 2014 (clean).docx
These sections must be transferred to the Minister of Communications.
Sent from my iPad

COM 10 B

The following powers, functions and duties in the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("ECA") should be transferred to the Minister of Communications to give effect to the separation of broadcasting from telecommunications and postal services

s3

Deals with the power of the Minister to make policies and to issue policy directions to ICASA. This power must be exercised by the Minister of Communications to the extent that it deals in any way with a broadcasting service or matters related to broadcasting (e.g. broadcasting signal distribution, broadcasting infrastructure)

The power assigned to the Minister in section 3 must be exercised by the Minister of Communications to the extent that it deals in any way with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service.

s4(5)

Deals with the duty imposed on ICASA to inform the Minister of its intention to make regulations and to provide the Minister with a copy of those regulations. To the extent that any such regulations deal in any way with a broadcasting service or matters related to broadcasting, ICASA must inform the Minister of Communications of its intention to make such regulations and must provide the Minister of Communications with a copy of those regulations.

The reference to the Minister in section 4(5) must be construed as a reference to the Minister of Communications to the extent that ICASA intends to make regulations which in any way deal with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service.

s5(6)

Deals with the power of the Minister to issue a policy direction to ICASA in respect of applications for individual electronic communications network service licences. To the extent that it is intended that the electronic communications network service is to be used for the provision of broadcasting services, the Minister of Communications must exercise this power.

The power assigned to the Minister in section 5(6) must be exercised by the Minister of Communications to the extent that it is intended that the electronic communications network service is to be used for the provision of a broadcasting service.

s34(2) **Deals with the power, function and duty of the Minister to approve the national radio frequency plan. To the extent that any part of the national radio frequency plan deals with broadcasting radio frequency bands, the Minister of Communications must approve that part of the plan.**

The power, and function and duty assigned to the Minister in section 34(2) must be exercised and performed by the Minister of Communications to the extent that any part of the national radio frequency plan deals with broadcasting radio frequency bands.

s34(7)(c)(iii) **Deals with the duty imposed on ICASA to consult with the Minister to co-ordinate a plan for the migration of existing users to make available radio frequency spectrum. To the extent that this relates to any part of the national radio frequency plan which deals with the broadcasting radio frequency bands or with the migration of any broadcasting services, ICASA must consult with the Minister of Communications.**

The reference to the Minister in section 34(7)(c)(iii) must be construed as a reference to the Minister of Communications to the extent that ICASA's preparation of the national radio frequency plan relates to any part of the national radio frequency plan which deals with the broadcasting radio frequency bands or with the migration of any broadcasting services

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s79B

Deals with the power of the Minister to request data, information and documents from ICASA or any person. The Minister of Communications must exercise this power to the extent that it deals with broadcasting and broadcasting related matters.

The powers assigned to the Minister in section 79B must be exercised by the Minister of Communications to the extent that it deals with a broadcasting service or an electronic communications service or an electronic communications network service used for or in the provision of a broadcasting service.

Com 11A

From: Ashu<ashu@sahara.co.za>
Sent on: Friday, July 25, 2014 8:41:31 AM
To: Tony Gupta <tony@sahara.co.za>
Subject: Fwd: Responsibility for InfraCo and Sentech.docx
Attachments: Responsibility for InfraCo and Sentech.docx (19.05 KB)

Sent from my Samsung Galaxy smartphone.
-------- Original message --------
From: Faith Muthambi
Date:25/07/2014 08:40 (GMT+02:00)
To: Ashu
Subject: Responsibility for InfraCo and Sentech.docx
Sentech's signal distribution must rest with the Ministry of Communications
Sent from my iPad

COM 11B

Responsibility for InfraCo and Sentech

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Com 12A

From: Ashu<ashu@sahara.co.za>
Sent on: Friday, July 25, 2014 9:24:26 AM
To: duduzani.zuma@gmail.com
Subject: Fwd: proclamtion new 18 July 2014 (clean).docx
Attachments: proclamtion new 18 July 2014 (clean).docx (22.06 KB)

Sent from my Samsung Galaxy smartphone.
-------- Original message --------
From: Faith Muthambi
Date:25/07/2014 08:39 (GMT+02:00)
To: Ashu
Subject: proclamtion new 18 July 2014 (clean).docx
These sections must be transferred to the Minister of Communications.
Sent from my iPad

COM 12B

The following powers, functions and duties in the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("ECA") should be transferred to the Minister of Communications to give effect to the separation of broadcasting from telecommunications and postal services

s3

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The power assigned to the Minister in section 3 must be exercised by the Minister of Communications to the extent that it deals in any way with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service.

s4(5)

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The reference to the Minister in section 4(5) must be construed as a reference to the Minister of Communications to the extent that ICASA intends to make regulations which in any way deal with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service.

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Deals with the power of the Minister to issue a policy direction to ICASA in respect of applications for individual electronic communications network service licences. To the extent that it is intended that the electronic communications network service is to be used for the provision of broadcasting services, the Minister of Communications must exercise this power.

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s79B

Deals with the power of the Minister to request data, information and documents from ICASA or any person. The Minister of Communications must exercise this power to the extent that it deals with broadcasting and broadcasting related matters.

The powers assigned to the Minister in section 79B must be exercised by the Minister of Communications to the extent that it deals with a broadcasting service or an electronic communications service or an electronic communications network service used for or in the provision of a broadcasting service.

Com 13A

From: Ashu<ashu@sahara.co.za>
Sent on: Friday, July 25, 2014 9:24:58 AM
To: duduzani.zuma@gmail.com
Subject: Fwd: Responsibility for InfraCo and Sentech.docx
Attachments: Responsibility for InfraCo and Sentech.docx (19.05 KB)

Sent from my Samsung Galaxy smartphone.
-------- Original message --------
From: Faith Muthambi
Date:25/07/2014 08:40 (GMT+02:00)
To: Ashu
Subject: Responsibility for InfraCo and Sentech.docx
Sentech's signal distribution must rest with the Ministry of Communications
Sent from my iPad

COM 13B

Responsibility for InfraCo and Sentech

Transferring the powers, functions and duties assigned to the Minister of Public Enterprises in the Broadband InfraCo Act, 2007 (Act No. 33 of 2007) to the Minister of Telecommunications and Postal Services

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The transfer of spectrum from Sentech to InfraCo cannot be done in a proclamation but by application to ICASA for a transfer of spectrum.

Com 14

From: Ashu
Sent on: Tuesday, July 29, 2014 5:06:07 PM
To: Tony Gupta
Subject: Fwd: LETTER TO THE MINISTER DR S CWELE.pdf

Sent from my Samsung Galaxy smartphone.
-------- Original message --------
From: Faith Muthambi
Date:29/07/2014 16:48 (GMT+02:00)
To: Ashu
Subject: LETTER TO THE MINISTER DR S CWELE.pdf
Hi Toni
Despite my request, the cde is determined to table the matter in cabinet tomorrow .. He called me that he was coming to Cape Town this morning ... I hope he still on his way...
Sent from my iPad

Com 15

MINISTRY:COMMUNICATIONS
REPUBLIC OF SOUTH AFRICA
Private Bag X745, Pretoria, 0001, Tel +27 12 473 0409
URL: http://www.gov.za

26 July 2014

Dr Siyabonga Cwele, MP

Minister of Telecommunications and Postal Services

120 Plein Street

CAPE TOWN

8000

BY HAND

Dear Colleague

CABINET MEMO 1 OF 2014 DATED 23RD JULY 2014: FINAL AMENDMENTS OF BROADCASTING DIGITAL MIGRATION POLICY

As part of the cabinet memoranda received for the 23 July cabinet meeting, I noted the inclusion in an ancillary file of the proposed amendments to the draft Broadcast Digital Migration Policy (the policy).

The policy was not discussed at the cabinet meeting of the 23rd but it's clear from a reading of the draft that it has a serious and material implication for the management and sustainability of the South African Broadcasting Corporation (SABC) both in terms of budget and human resources. Government has embarked on a process of

stabilizing the SABC and I am concerned that what is captured in the policy when read with the Broadcasting Digital Migration Regulations (DTT regulations) published by ICASA in 2012 may create challenges for the SABC.

By way of example I refer to the proposal in the policy to a revised commencement date of 01 November 2014. The DTT regulations require that the SABC commence digital broadcasting on the commencement date. Due to the numerous delays and the stop/start nature of the DTT process, broadcasters have scaled down their preparations for digital migration and dates such as a November start date previously proposed by broadcasters in their state of readiness meetings were based on what are now outdated plans. The SABC will not be ready to commence on this date and I have serious doubts as to whether any other commercial broadcaster will be ready. The SABC may well then find itself in contravention of the DTT regulations.

There are other areas of specific concern which affects the SABC. The policy indicates in item 6.3 that a minimum lead time of 3 months is required to produce the first batch of set top boxes (STB's) but this is for the retail, the unsubsidized market, those who can afford to pay for a box in full. This period does not appear to include a time for retail distribution, just for manufacture. It makes no sense for the SABC to rush to commence digital broadcasting when there are no STB's in the market.

The policy further indicates that the public acquisition of the subsidized STB's will happen as soon as the policy is finalized. This has to go through a public procurement process and no time-frame has been given for this process.

The policy indicates that there are approximately 13 million households of which 65% (8.45 million) rely exclusively on free to air broadcasting. The rest subscribe to Top TV, DSTV and now Open View HD – the ETV free to view satellite service. Those who can afford an STB have already migrated to the digital free to view and pay satellite platforms. Of the 8.45 million the policy indicates that 6.2 million "*would find it very difficult to afford STB's*" We are only supporting 5.2million of those and on a sliding scale of between 29 and 77%. These 6.2 million people are the core market of the SABC.

While serving on the Parliamentary Portfolio Committee of Communications it became clear to us that the migration policy should focus on these 6.2million people as switching off the analogue signal will depend on them – we can't simply deprive our people of the services of the public broadcaster in June 2015, the ITU date. We will have delivery protests in the streets and play into the hand of our detractors.

The policy also imposes obligations on the Minister of Communications. So in the proposed amendment of paragraph 3 of the Policy (the pages are unfortunately not numbered) the switch-off date for the analogue signal is to be determined by me after engaging with cabinet and the relevant stakeholders. I have not been consulted on this provision either.

I have not canvassed in detail the concerns I have with the policy given the serious consequences it has for the SABC except to detail some examples. I hereby request that the Minister of Telecommunications and Postal Services consult with the Minister of Communication before re-tabling the policy at cabinet for approval so that we may address these concerns in advance.

Yours faithfully

MS FAITH MUTHAMBI, MP

MINISTER OF COMMUNICATIONS

DATE 2014-07-26

Com 16

From: Faith Muthambi<faith.muthambi@gmail.com>
Sent on: Friday, August 1, 2014 11:29:11 AM
To: Ashu <ashu@sahara.co.za>; khumaloth@sabc.co.za
CC: Ellen <ellen@fortuneholdings.co.za>
Subject: final proclamation 01 August 2014.docx
Attachments: final proclamation 01 August 2014.docx (23.87 KB)

See proposed proclamation the President must sign
Sent from my iPad

Com 17

From: Ashu<ashu@sahara.co.za>
Sent on: Friday, August 1, 2014 11:33:04 AM
To: Tony Gupta <tony@sahara.co.za>
Subject: FW: final proclamation 01 August 2014.docx
Attachments: final proclamation 01 August 2014.docx (23.87 KB)

From: Faith Muthambi [mailto:faith.muthambi@gmail.com]
Sent: 01 August 2014 11:29 AM
To: khumaloth@sabc.co.za; Ashu
Cc: Ellen
Subject: final proclamation 01 August 2014.docx

See proposed proclamation the President must sign
Sent from my iPad

Com 18

PROCLAMATION

by the

President of the Republic of South Africa

No. XX , 2014

TRANSFER OF ADMINISTRATION AND POWER AND FUNCTIONS ENTRUSTED BY LEGISLATION TO CERTAIN CABINET MEMBERS IN TERMS OF SECTION 97 OF THE CONSTITUTION

In terms of section 97 of the Constitution of the Republic of South Africa, 1996, I hereby transfer the powers, functions and duties entrusted by the specified legislation, and all amendments thereto, to the specified Cabinet member as set out in the Schedule in English and ..... with effect from the date of publication of this Proclamation in the Gazette.

Given under my Hand and the Seal of the Republic of South Africa at ..... this ..... day of ....., Two Thousand and Fourteen.

President

By Order of the President-in-Cabinet:

Minister of the Cabinet

SCHEDULE

1. To the extent stated below, the administration, and the powers and functions entrusted by the legislation, mentioned in column 1 of the tables below, to a Cabinet member as executive authority of that department mentioned in column 2 of the tables, are transferred to the Cabinet member mentioned in column 3 of the tables.

1.1 Communications Related Legislation:

Column 1 Legislation	Column 2 Previous Cabinet Minister	Column 3 New Cabinet Minister
Electronic Communications Act, 2005 (Act No. 36 of 2005): (a) The power assigned to the Minister in section 3 to the extent that it deals in any way with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service. (b) The reference to the Minister in section 4(5) to the extent that ICASA intends to make regulations which in any way deal with a broadcasting service or an electronic communications facility, electronic communications service or electronic communications network service used for or in the provision of a broadcasting service. (c) The power assigned to the Minister in section 5(6) to the extent that it is intended that the electronic communications network service is to be used for the provision of a broadcasting service. (d) The power assigned to the Minister in section 34(2) must be exercised and performed to the extent that any part of the	Minister of Telecommunications and Postal Services	Minister of Communications

national radio frequency plan deals with broadcasting radio frequency bands. (e) The reference to the Minister in section 34(7)(c)(iii) to the extent that ICASA's preparation of the national radio frequency plan relates to any part of the national radio frequency plan which deals with the broadcasting radio frequency bands or with the migration of any broadcasting services. (f) The reference to the Minister in section 60(1). (h) The reference to the Minister in section 65(7) and (8) and in section 66(7) and (8). (i) The powers assigned to the Minister in section 79B to the extent that it deals with a broadcasting service or an electronic communications service or an electronic communications network service used for or in the provision of a broadcasting service.		

Sentech Act, 1996 (Act No. 63 of 1996)	Minister of Telecommunications and Postal Services	Minister of Communications
Broadband Infraco Act, 2007 (Act No. 33 of 2007)	Minister of Public Enterprises	Minister of Telecommunications and Postal Services

Com 19

From: Ellen<ellen@fortuneholdings.co.za>
Sent on: Friday, August 8, 2014 9:38:04 AM
To: Faith Muthambi <faith.muthambi@gmail.com>
CC: Ashu <ashu@sahara.co.za>; khumaloth@sabc.co.za
Subject: Re: final proclamation 01 August 2014.docx

Hon.Min.Muthambi
Sincere apologies for my late responses, my e-mail has been disabled for the last four days.
Thanks for the proposed proclamation.
Regards
Zandile
Sent from my iPad
On Aug 1, 2014, at 11:29 AM, Faith Muthambi <faith.muthambi@gmail.com> wrote:
> See proposed proclamation the President must sign
>
> <final proclamation 01 August 2014.docx>
>
>
>
> Sent from

GOVERNMENT NOTICE

DEPARTMENT OF COMMUNICATIONS

No. 232

18 March 2015

ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT 36 OF 2005)

AMENDMENT OF BROADCASTING DIGITAL MIGRATION POLICY ISSUED UNDER GOVERNMENT GAZETTE NO 31408 ON 08 SEPTEMBER 2008

I, Azwihangwisi Faith Muthambi, Minister of Communications, hereby amend the Broadcasting Digital Migration Policy issued in Government *Gazette* No 31408 on 08 September 2008 as amended by amendments published in Government *Gazette* No. 35014 on 17 February 2012, to the extent indicated below taking into consideration submissions made by stakeholders on the amendments proposed by the Department of Communications on 06 December 2013.

1. Insertion of an Acronym in the Policy

The following Acronym is hereby inserted to the List of Acronyms in the Policy

Inserted Acronym

MUX: 1 Multiplexer 1

2. Amendment of paragraph 5 of the Foreword by the Minister in the Policy

The following paragraph is substituted for paragraph 5 of the Foreword by the Minister in the Policy:

> "In conclusion, the time to migrate to a digital broadcasting system has inevitably arrived. We need to embrace it because it is a major step in improving our people's lives and I sincerely hope that this policy is a bold step in our quest to achieve that goal. The looming switch-on date requires us to work at the speed of light, consistent with our business unusual approach to enhance the benefits of digital television to all our people."

3. Amendment of subparagraphs 1 and 2 of paragraph 2 of the Executive Summary of the Policy

The following paragraphs are substituted for subparagraphs 1 and 2 of paragraph 2 of the Executive Summary of the Policy:

"The switch-on and switch-off date of the digital and analogue broadcasting digital terrestrial television signals will respectively be determined by the Minister of Communications in consultation with Cabinet".

The national broadcasting terrestrial television digital signal coverage shall aim to cover 84 percent of the total South African population. Areas that may be deemed difficult or uneconomical to reach will be covered by free-to-air DTH satellite using the DVB-S2 technology".

4. Amendment of paragraph 1.1.8 of the Policy

The following paragraph is hereby substituted for paragraph 1.1.8 of the Policy:

"1.1.8 In order to continue viewing television using the current analogue TV sets, the public will be required to use set-top boxes (STBs) as a transitional measure, which converts the transmitted digital terrestrial television signal to analogue. Otherwise, it will be necessary to acquire digital-enabled TV sets".

5. Amendment of paragraph 2.1.3 of the Policy

The following paragraph is hereby substituted for paragraph 2.1.3 of the Policy:

"2.1.3 Universal access, the availability and accessibility of broadcasting services to all citizens are a key component of successful digital migration. In order for households to continue to receive television services on their current analogue TV sets after the analogue signal is switched-off, set-top boxes (STBs), which convert the digital signals into analogue signals, are required. The total TV-owning households in South Africa are estimated at 13 million, of which approximately 65 per cent rely exclusively on free-to-air broadcasting services".

6. Amendment of paragraph 3.3.1 of the Policy

The following paragraph is hereby substituted for paragraph 3.3.1 of the Policy:

"3.3.1 Government is committed to ensure a successful migration in South Africa. Taking into account the different processes, that need to be completed before digital switch-on, Government has decided that the digital signal should be switched-on, on a date to be determined by the Minister in consultation with Cabinet. The date for the final switch-off of the analogue signal will similarly be announced by the Minister in consultation with Cabinet."

7. Amendment of paragraph 5.1.2 of the Policy

Paragraph 5.1.2 of the Policy is amended by the deletion of paragraphs 5.1.2.6 and 5.1.2.8.

The following paragraph is hereby substituted for paragraph 5.1.2.2 and 5.1.2.7 of the Policy:

"5.1.2.2 have a control system to prevent government subsidised free-to-air DTT STBs from functioning in non-South African DTT networks.

"5.1.2.7 have a robust control system that will be used to benefit the TV households by ensuring that they continue to receive free-to-air broadcasting services in their existing analogue television sets".

8. Paragraphs 5.1.2(A), (B) and (C) are inserted in the Policy:

"5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, STB control system in the free-to-air DTT will be non-mandatory.

"5.1.2(B) The STB control system for the free-to-air DTT STBs shall -
(a) not have capabilities to encrypt broadcast signals for the subsidised STBs; and
(b) be used to protect government investment in subsidised STB market thus supporting the local electronic manufacturing sector.

"5.1.2(C) Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content."

9. Amendment of paragraph 5.1.4 of the Policy

The following paragraph is substituted for paragraph 5.1.4 of the Policy:

"5.1.4 The South African Bureau of Standards will develop a conformance testing regime to ensure that STBs conform to the South African Standards for the South African DTT electronic communications network".

10. Amendment of paragraph 7.2 of the Policy

The following paragraph is substituted for paragraph 7.2 of the Policy:

"7.2. Transmission facilities for MUX 1, or any multiplex allocated for the public broadcaster, shall aim to cover 84 per cent of the population coverage. The remaining 16 per cent shall be covered by free-to-air DTH satellite network, which shall have a footprint covering the entire country. This will thus enable analogue switch-off in South Africa with 100% population coverage for the public broadcasting services".

MS AF MUTHAMBI, MP

MINISTER OF COMMUNICATIONS

PROCLAMATION

by the

President of the Republic of South Africa

No. 79, 2014

TRANSFER OF ADMINISTRATION OF AND POWERS AND FUNCTIONS ENTRUSTED BY LEGISLATION TO CERTAIN CABINET MEMBERS IN TERMS OF SECTION 97 OF THE CONSTITUTION

In terms of Section 97 of the constitution of the Republic of South Africa, 1996, I hereby transfer the administration of and the powers and functions entrusted by the specified legislation and all amendments thereto, to the specified Cabinet member as set out in the Schedule with effect from the date of publication of this Proclamation in the *Gazette*.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this 25 day of November Two Thousand and Fourteen.

PRESIDENT

MINISTER OF THE CABINET

MINISTER OF THE CABINET

SCHEDULE

1. The administration of and powers and functions entrusted by the legislation, mentioned in Column 1 of the table below, to a Cabinet member mentioned in Column 2 of that table, are hereby transferred to the Cabinet member mentioned in Column 3 of the table.

2. Column 3 of the table below states the relevant Minister and the extent of transfer of the administration of and powers and functions entrusted by legislation to that Minister.

Column 1	Column 2	Column 3
Legislation	**Cabinet member responsible**	**Cabinet member to whom function is transferred and extent of transfer**
Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000): Section 4(3)*(a)*	Minister of Communications	1. The Minister of Communications in so far as the Independent Communications Authority may make recommendations to that Minister on policy matters and amendments to the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), and the Broadcasting Act, 1999 (Act No. 4 of 1999), which accord with the objects of these Acts to promote development in

		the broadcasting sector. 2. The Minister of Telecommunications and Postal Services, in so far as the Independent Communications Authority may make recommendations to that Minister on policy matters and amendments to the Electronic Communications Act, 2005 (Act No. 36 of 2005), and the Postal Services Act, 1998 (Act No. 124 of 1998), which accord with the objects of these Acts to promote development in the electronic transactions, postal and electronic communications sectors.
Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000): Section 4(3)*(o)*	Minister of Communications	Minister of Telecommunications and Postal Services: The administration of the section referred to in Column 1.

Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000): Section 4(3A)*(a)*	Minister of Communications	1. The Minister of Communications in so far as policy made, and policy directions issued, by that Minister in terms of the Broadcasting Act, 1999 (Act No. 4 of 1999), the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), and any other applicable law. 2. The Minister of Telecommunications and Postal Services in so far as policy made, and policy directions issued, by that Minister in terms of the Postal Services Act, 1998 (Act No. 124 of 1998), the Electronic Communications Act, 2005 (Act No. 36 of 2005), and any other applicable law.
Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000): Section 6A(2)*(a)* and *(b)*	Minister of Communications	1. The Minister of Communications in so far as appropriate key performance indicators and measurable performance targets contemplated in the section

		referred to in Column 1 relate to the laws administered by that Minister. 2. The Minister of Telecommunications and Postal Services in so far as appropriate key performance indicators and measurable performance targets contemplated in the section referred to in Column 1 relate to the laws administered by that Minister.
Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000): Section 15(1A)	Minister of Communications	1. The Minister of Communications in so far as the administration of and powers and functions entrusted by the section referred to in Column 1 relate to the laws administered by that Minister. 2. The Minister of Telecommunications and Postal Services in so far as the administration of and powers and functions entrusted by the section

		referred to in Column 1 relate to the laws administered by that Minister.
Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000): Section 16(1) and (2)	Minister of Communications	The Minister of Communications and the Minister of Telecommunications and Postal Services: The administration of and powers and functions entrusted by the section referred to in Column 1.
Electronic Communications Act, 2005 (Act No. 36 of 2005): Section 3	Minister of Telecommunications	1. The Minister of Communications in so far as policies contemplated in the section referred to in Column 1 relate to the Broadcasting Act, 1999 (Act No. 4 of 1999), and the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000). 2. The Minister of Telecommunications and Postal Services in so far as policies contemplated in the section referred to in Column

		1 relate to the Electronic Communications Act, 2005 (Act No. 36 of 2005).
Electronic Communications Act, 2005 (Act No. 36 of 2005): Section 4(5)	Minister of Telecommunications	1. The Minister of Communications in so far as regulations proposed in terms of the section referred to Column 1 relate to the Broadcasting Act, 1999 (Act No. 4 of 1999), and the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000). 2. The Minister of Telecommunications and Postal Services in so far as regulations proposed in terms of the section referred to Column 1 relate to the Electronic Communications Act, 2005 (Act No. 36 of 2005).
Electronic Communications Act, 2005 (Act No. 36 of 2005): Section 5(6)	Minister of Telecommunications	1. The Minister of Communications in so far as a policy direction contemplated in the section

		referred to Column 1 relates to the Broadcasting Act, 1999 (Act No. 4 of 1999), and the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000). 2. The Minister of Telecommunications and Postal Services in so far as a policy direction contemplated in the section referred to Column 1 relates to the Electronic Communications Act, 2005 (Act No. 36 of 2005).
Electronic Communications Act, 2005 (Act No. 36 of 2005): Chapter 9	Minister of Telecommunications	The Minister of Communications: The administration of the Chapter referred to in Column 1.
Electronic Communications Act, 2005 (Act No. 36 of 2005): Section 79B	Minister of Telecommunications	1. The Minister of Communications in so far as the administration of and powers and functions entrusted by the section referred to in Column 1 relates to the functions of the Minister.

AFM

		2. The Minister of Telecommunications and Postal Services in so far as the administration of and powers and functions entrusted by the section referred to in Column 1 relates to the functions of the Minister.

A REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 23 OF 2013/2014

"When Governance and Ethics Fail"

A REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, SYSTEMIC CORPORATE GOVERNANCE DEFICIENCIES, ABUSE OF POWER AND THE IRREGULAR APPOINTMENT OF MR. HLAUDI MOTSOENENG BY THE SOUTH AFRICAN BROADCASTING CORPORATION (SABC)

ISBN 978-1-920692-13-1

'When governance and ethics fail, you get a dysfunctional organization. Sadly those in charge cannot see that their situation is abnormal. That has been the case at the SABC for a long time…'

Former member of the SABC Board

Executive Summary

(i) *"When Governance and Ethics Fail"* is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).

(ii) The report communicates my **findings** and what I consider to be appropriate **remedial action** following an investigation into a complaint lodged on 11 November 2011 by Ms Phumelele Ntombela-Nzimande, who requested an investigation into allegations relating to various corporate governance failures in the management of the affairs of the South African Broadcasting Corporation (SABC) by its management Board, financial mismanagement at the SABC involving the spiralling of financial expenditure, undue interference by the Minister and Department of Communications and alleged maladministration with regard to her own exit from the SABC.

(iii) Shortly after the investigation commenced, Ms Charlotte Mampane a former Senior Executive at the SABC and several other former SABC employees, lodged a substantially similar complaint which included further allegations. The further allegations included the irregular appointment of Mr Hlaudi Motsoeneng to the position of the Acting Chief Operations Officer (COO) by the SABC despite not having a matriculation (matric) certificate and the required qualifications; Mr Motsoeneng's gross fraudulent misrepresentation of facts by allegedly declaring himself to be in possession of a matric certificate obtained at Metsimantsho High; the purging of staff by the latter and the former Acting Group Chief Executive Officer (GCEO), Mr. Robin

Nicholson, the subsequent unprecedented escalation of the SABC's salary bill, attributed primarily to Mr Motsoeneng's purging of senior and qualified SABC officials by the latter and the former Acting Group Chief Executive Officer (GCEO) Mr Robin Nicholson, an unprecedented escalation of the SABC's salary bill, attributed primarily to Mr Motsoeneng's purging of senior officials, irregular employee appointment and irregular salary increments including Mr Motsoeneng's own 3 salary increases taking his remuneration increments, package from R1.5 million per annum to R2.4 million per annum in a single year.

(iv) As the investigation drew towards a conclusion, the investigation team was approached by a whistle-blower on 20 May 2013, who alleged that the SABC had irregularly appointed a Chief Financial Officer (CFO) whose recruitment had allegedly been initiated and facilitated by a senior official of the Department of Communications on the then Minister's instructions.

(v) On analysis of the complaints the following eight (8) issues were considered and investigated:

(a) Whether the alleged appointment and salary progression of Mr. Motsoeneng, the Acting Chief Operations Officer, were irregular and accordingly constitute improper conduct and maladministration;

(b) Whether Mr. Motsoeneng fraudulently misrepresented his qualifications to the SABC, including stating that he had passed matric when applying for employment;

(c) Whether the alleged appointment(s) and salary progression of Ms. Sully Motsweni were irregular and accordingly constitute improper conduct and maladministration;

(d) Whether the alleged appointment of Ms Gugu Duda as CFO was irregular and accordingly constitutes improper conduct and maladministration;

(e) Whether Mr Motsoeneng purged senior officials at the SABC resulting in unnecessary financial losses in CCMA, court and other settlements and, accordingly, financial mismanagement and if this constitutes improper conduct and maladministration;

(f) Whether Mr Motsoeneng irregularly increased the salaries of various staff members, including a shop steward, resulting in a salary bill increase in excess of R29 million and if this amounted to financial mismanagement and accordingly improper conduct and maladministration;

(g) Whether there were systemic corporate governance failures at the SABC and the causes thereof; and

(h) Whether the Department and former Minister of Communications unduly interfered in the affairs of the SABC, giving unlawful orders to the SABC Board and staff and if the said acts constitute improper conduct and maladministration.

(vi) The investigation included research and analysis of relevant laws and other applicable regulatory prescripts, correspondence, sourcing and analysis of corporate documents, telephonic and face to face interviews with current and former officials of the SABC and the Department of Communications (DOC), former Board Members of the SABC and the former Minister of Communications.

(vii) In arriving at the **findings**, I have been guided by the standard approach adopted by the Public Protector South Africa as an institution, which simply

involves asking: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amount to improper conduct or maladministration and, in this case, also abuse of power?

(viii) As is customary, the "what happened" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. I must indicate though that we rely primarily on official documents such as memoranda and minutes and less on *viva voce* evidence. The question regarding what should have happened on the other hand, relates to the standard that the conduct in question should have complied with. In determining such standard I was guided, as is customary, by the Constitution, national legislation and applicable policies and guidelines, including corporate policies and related sector and international benchmarks. Key among corporate policies, were the general SABC Articles of Association and the Broadcasting Act 4 of 1999. The benchmarks considered included guidelines contained in the King III Report on corporate governance.

(ix) Principles developed in relevant previous Public Protector Reports, referred to as *touchstones*, were also taken into account as customary and in pursuit of consistency. A key report relied on in regard to corporate governance is the report titled *"Not Above Board",* report no 2 of 2013/14 dealing with findings and remedial action relating to allegations of maladministration by the Eastern Cape Gambling Board relating to the irregular appointment of the Chief Executive Officer.

(x) I also took into account submissions made by relevant parties, including former employees, the current SABC Board and the complainants, following the Provisional Report being made available to them.

(xi) In compiling their responses to the Provisional Report, all implicated recipients were assisted by their attorneys. Ms Pule, MP and DOC Acting Deputy Director General (DDG) Mr. Themba Phiri, were assisted by Malan and Mohale Attorneys. Mr Mngqibisa was assisted by F R Pandelani Incorporated Attorneys. Mr Motsoeneng was assisted by Majavu Incorporated Attorneys. Ms Duda was assisted by Ndlovu and Sedumedi Attorneys Incorporated while the SABC was assisted by Mchunu Attorneys.

(xii) It must be noted upfront that the arguments presented by some of the respondents, including Mr Motsoeneng, the current chairperson of the SABC Board and Mr Mngqibisa, in response to my Provisional Report, are, with respect, premised on a misunderstanding of the issues investigated and the laws regulating the operations of my office.

(xiii) If we take the issue regarding the matric certificate, for instance; the issue was not whether or not the SABC Board and management knew that Mr Motsoeneng did not have a matric certificate on appointment to various posts at the SABC. The issue was simply whether or not Mr Motsoeneng had fraudulently misrepresented his qualifications to get a job he was not entitled to as the job required a matric certificate. An ancillary issue was whether it could be reasonably concluded that he had something to do with the disappearance of his human resources file and records. The propriety of changing the advert for the COO post with the effect doing away qualification requirements while Mr Motsoeneng was the acting incumbent was also a source of concern.

(xiv) The other issue misunderstood by the current SABC Board, whose submission I have since been advised, was prepared by a lawyer on the instructions of the current Chairperson, Ms Zandile Tshabalala and to the exclusion of the rest of the Board, involves failure to appreciate the distinction between jurisdiction and discretion. In the body of the report, I explain that there is no bar on my handling a matter that is older than 2

years and that the requirement is that if I am requested to investigate a matter that is older than 2 years, the Complainant must furnish me with compelling reasons why I should consider the request favourably. It is not for me to convince the respondent that I have compelling reasons to accept an investigation as argued. If that were the case the discretional power would shift to the respondent. In any event the main complaint related to alleged on going systemic governance problems and harassment of senior staff by Mr Motsoeneng allegedly because some of them question his qualifications or alleged fraudulent misrepresentation about same. For example, the first complainant, Ms Ntombela-Nzimande alleged that her contract was terminated prematurely because she had raised several corporate governance issues with the then Acting GCEO, Mr Nicholson. She alleged that many of the issues she had raised related to the alleged irregular employment and subsequent conduct of Mr Motsoeneng.

(xv) The current Board Chairperson, and Mr Motsoeneng also argued that the provisions of section 9 of the Public Protector Act preclude me from "investigating matters that have become litigious".

(xvi) In the body of the report I point out that the objections are primarily due to a failure to understand the relevant provisions of the Constitution and the Public Protector Act. Suffice to say that section 182(3) of the Constitution and section 6(6) of the Public Protector Act, prohibit the review of court decisions. There is no bar on investigating matters that were not canvassed in or decided by a court of law. In this regard, it must be noted that employment matters are generally taken to court on the basis of employee rights violations. Issues of maladministration or governance failure are rarely canvassed and if mentioned, that would be done as ancillary issues. I have clarified that the investigation did not investigate alleged unfair labour practices. It was simply confined to testing the allegation that Mr Motsoeneng systematically purged senior and qualified officials in a manner

that flouted legal and corporate procedures resulting in the loss of millions of Rand, and that the Board allowed this to happen or actively participated.

(xvii) I am satisfied that the complaints lodged regarding the propriety of various actors at the SABC were correctly lodged in accordance with section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, and, accordingly, fall within my remit.

(xviii) Other odd arguments made by Mr Motsoeneng and the submission ostensibly made on behalf of the current SABC Board, are fully addressed in the body of the report. I must indicate that, in this regard, I found it rather discouraging that the current SABC Board appears to have blindly sprung to Mr Motsoeneng's defence on matters that precede it and which, in my considered view, require a Board that is serious about ethical governance to raise questions with him. In fact at times the submission made on behalf of the Board appeared more defensive on his behalf than himself. This is the case on the alleged fraudulent misrepresentation of his qualifications. The submission appeared to be unconcerned over the allegation that:

> *"Mr Motsoeneng committed an act of gross fraudulent misrepresentation of facts by declaring himself to be in possession of a matriculation certificate obtained at Metsimantsho High School in Qwaqwa"*

(xix) In contrast, **Mr Motsoeneng admitted,** during his recorded interview, **that he had falsified his matric qualifications and blamed Ms Swanepoel, whom he said** gave him the application form **to fill in anything** to get the job. On the completed application form availed by one of the Complainants, Mr Motsoeneng indicated that he passed Standard 10 ('matric') in 1991 at the age of 23 years and indicated five(5) symbols he had purported to have obtained in this regard.

(xx) Mr Motsoeneng further conceded during his interview, as did other Members of the erstwhile board during their recorded interview, that there were systemic corporate governance lapses in the SABC, although Mr Motsoeneng took no responsibility for any of such lapses, blaming everything on the Board, fellow executives and the Department of Communications. There was a general admission that a culture of expediency and 'quickie gains' had dominated Board and management decisions.

(xxi) During my informal meeting with the SABC Board Chairperson, Mrs Tshabalala, on Friday 14 February 2014, she graciously acknowledged that the submission she forwarded in response to the provisional report was prepared by her lawyer who had been assisting the SABC prior to her appointment as she was not familiar with the issues then and that she had considered it unnecessary to involve the current Board Members, as members would not have been privy to the issues.

(xxii) I must indicate that, I would not recommend a similar approach in the future. As the Chairperson of the SABC Board is not an Executive Chairperson, board decisions should be made by the Board. Furthermore, the issues raised in my provisional report needed to be brought to the attention of the current Board for it to apply its mind to the corporate governance and ethical challenges it was stepping into. During our meeting I shared my views on the role of a non-executive chairperson with Ms Tshabalala, who did not object to such views.

(xxiii) The essence of the allegations investigated was that there was systemic corporate governance failure at the SABC at the core of which was a expediency, acutely poor human resources management and a dysfunctional Board, all of which was said to be primarily due to manipulative scheming by the SABC's Acting COO, who allegedly lacked

the requisite competencies for the post and manipulated, primarily new Boards and GCEOs to have his way and to purge colleagues that stood in his way.

(xxiv) My findings are the following:

(a) Regarding the alleged irregular appointment and salary progression of Mr. Hlaudi Motsoeneng, I find that:

1) The allegation that the appointment of Mr Motsoeneng as the Acting COO was irregular is substantiated. By doing allowing Mr Motsoeneng to act without requisite qualifications and for a period in excess of three (3) months without the requisite Board resolution and exceeding the capped salary allowance, the SABC Board acted in violation of the SABC's 19.2 Articles of Association which deals with appointments, SABC Policy No HR002/98/A-Acting in Higher Scale and Chapter 5 of the Broadcasting Act, which regulates acting appointments and this constitute improper conduct and maladministration.

2) The former SABC Board's Chairperson, Dr Ben Ngubane further acted irregularly when he ordered that the qualification requirements for the appointment to the position of COO be altered to remove academic qualifications as previously advertised, which was clearly aimed at tailor making the advert to suit Mr Motsoeneng's circumstances. This constitutes improper conduct maladministration and abuse or unjustifiable exercise of power.

3) The allegation that Mr. Motsoeneng's salary progression was irregular is also substantiated in that Mr Motsoeneng received

salary appraisals three times in one year as, hiking his salary as Group Executive Manager: Stakeholder Relations from R 1.5 million to R2.4 million. His salary progression as the Acting Chief Operations Officer concomitantly rose irregularly from R122 961 to R211 172 (63% increase) in 12 months and was in violation of Part IV of SABC's Personnel Regulations and SABC Policy No HR002/98/A-Acting in Higher Scale and this constitute improper conduct and maladministration.

4) While I have accepted the argument presented by Mr Motsoeneng, the current GCEO and the chairperson of the current Board that salary increases at the SABC are negotiated without any performance contracts or notch increase parameters, I am unable to rule out bad faith in Mr Motsoeneng in the circumstances that allowed 3 salary increases in one fiscal year resulting in Mr Motsoeneng's salary being almost doubled. My discomfort with the whole situation is exacerbated by the fact that all were triggered by him presenting his salary increase requests to new incumbents who would have legitimately relied on him for guidance on compliance with corporate prescripts and ethics. It cannot be said that he did not abuse power and/or his position to unduly benefit himself although on paper the decisions were made by other people. The approval of Mr Motsoeneng's salary increments by the GCEO's and the Chairperson of the Board at the time, Dr Ben Ngubane was, accordingly, irregular as it was in violation of Part IV of SABC's Personnel Regulations and SABC Policy No HR002/98/A-Acting in Higher Scale and constitutes improper conduct, abuse of power and maladministration.

5) The SABC Human Resources Department failed to keep proper records regarding Mr Motsoeneng's documentation and other

Human resources matters dealt with in this report and this constitutes improper conduct and maladministration.

6) The SABC Board's failure to exercise its fiduciary obligations in the appointment and appropriate remuneration for the Acting Chief Operations Officer for the SABC was improper and constitutes maladministration.

(b) Regarding Mr Motsoeneng's alleged fraudulent misrepresentation of his qualifications to the SABC when applying for employment including stating that he had passed matric, I find that:

1) The allegation that Mr Motsoeneng committed fraud by stating in his application form that he had completed matric from Metsimantsho High School is substantiated. By his own admission during his interview, Mr Motsoeneng provided stated in his application form that he had passed standard 10 (matric), filled in made-up symbols in the same application form and promised to supply a matric certificate to confirm his qualifications. He did so knowing that he had not completed matric and did not have the promised certificate. His blame of Mrs Swanepoel and the SABC management that stating that they knew he had not passed matric, is disconcerting. If anything, this defence exacerbates his situation as it shows lack of remorse and ethical conduct. Mr Motsoeneng's conduct regarding his matric results has been unethical continuously since 1995. The conduct is improper and constitutes a dishonest act as envisaged in 6(4)(a)(ii) and (iii) of the Public Protector Act.

2) The allegation that Mr Motsoeneng was appointed to several posts at the SABC despite having no qualifications as required for such posts, including a matric certificate, is substantiated and this constitutes improper conduct and maladministration.

3) Mr Motsoeneng would have never been appointed in 1995 had he not lied about his qualifications. He repeated the matric misrepresentation in 2003 when he applied for the post of Executive Producer: Current Affairs to which he, accordingly should never have been appointed.

4) I am also concerned the Mr Motsoeneng's employment file disappeared amid his denial of ever falsifying his qualification and that at one point he used the absence of such information to support his contention that there was no evidence of this alleged fraudulent misrepresentation. The circumstantial evidence points to a motive on his part although incontrovertible evidence to allow a definite conclusion that he indeed cause the disappearance of his employment records, particularly his application forms and CV could not be found.

5) The SABC management and Human Resources unit failed to exercise the necessary due diligence or risk management to avoid the misrepresentation and/or to act decisively when the misrepresentation was discovered. He also failed to ensure information as required by law. This constitutes improper conduct and maladministration.

(c) Regarding the alleged irregular appointment(s) and salary progression of Ms Sully Motsweni, I find that:

1) The allegation of irregularities in the appointment of Ms Sully Motsweni to the position of General Manager: Compliance and Operation and Stakeholder Relations and Provinces on 30 June 2011 to 31 January 2012; Head: Compliance and Operation on 01 February 2012 to date; Acting Group Executive: Risk and Governance on June 2012 to date and subsequent salary increments taking her from R960 500.00 per annum to R1.5 million per annum are substantiated. The HR records show that Ms Sully Motsweni's appointments and salary progressions were done without following proper procedures and was in violation of sub-section G3 of DAF and Part IV of the Personnel Regulations was irregular and therefore this constitutes abuse of power and maladministration.

(d) Regarding the alleged irregular appointment of Ms Gugu Duda as the Chief Financial Officer (CFO), I find that:

1) The allegation regarding Ms Gugu Duda being irregularly appointed to the position of CFO, through the interference of the Department of Communications, is substantiated.

2) Ms Duda, who was appointed to the position of CFO during February 2012, was not an applicant for the position, which was advertised. Interviews were conducted with shortlisted applicants and a recommendation was made by the SABC Board to the Minister of Communications, Ms Pule as the shareholder. Mr Phiri, from the Department of Communications, and Mr Motsoeneng, from the SABC orchestrated the appointment of Ms Duda long

after the recruitment and selection process had been closed. Ms Duda was interviewed on 07 February 2012, without having applied for said post. The interview occurred after the submission of the Board's recommendation, of the appointment of a legitimately selected candidate, Mr Daca, to Ms Pule on 31 January 2012, which, recommendation was rejected by her.

3) The conduct of the SABC management, particularly Mr Motsoeneng and the Board, in the appointment of Ms Duda, as the CFO of the SABC, was in violation of the provisions of section 19.1.1 of the Articles of Association and Broadcasting Act and accordingly unlawful. The appointment was grossly irregular and actions involved constitute improper conduct, maladministration and abuse of power.

4) Although I could not find conclusive evidence that Ms Pule personally ordered that Ms Duda's CV be handed over to the SABC and that the Board interview her against the law as alleged, there is sufficient evidence that suggests an invisible hand from her direction and that of Mr Mngqibisa, to which we can legitimately attribute this gross irregularity. In any event, if we accept that Ms Pule was not involved as per her denial, it is unclear why she would have speedily approved the appointment as she did, when the irregularities were obvious. The conduct of Ms Pule as Minister of communications was accordingly improper and constitutes maladministration.

(e) Regarding Mr Motsoeneng's alleged purging of senior staff members of the SABC resulting in unnecessary financial losses in CCMA, court and other settlements, which amounts to financial mismanagement, I find that:

1) The allegation that Mr Motsoeneng purged senior staff members leading to the avoidable loss of millions of Rand towards salaries in respect of unnecessary and settlements for irregular terminations of contracts is justified in the circumstances SABC human resources records of the circumstances of termination and Mr Motsoeneng's own account show that he was involved in most of these terminations of abuse of power and systemic governance failure involving irregular termination of employment of several senior employees of the SABC and that the SABC lost millions of Rand due to procedural and substantive injustices confirmed in findings of the CCMA and the courts. Some of these matters were settled out of court with the SABC still paying enormous amounts in settlements. The fact that the evidence shows Mr Motsoeneng's involvement in most of this matters and the history of conflict between him and the majority of the employees and the former employees makes it difficult to rule out the allegation of purging. Even if purging is discounted, recklessness appears to have been endemic supporting the narrative on the culture of expediency.

2) SABC records show that Mr Motsoeneng played the following role in the dismissals:

Direct involvement

(aa) Mr Motsoeneng directly initiated the termination of the employment of Messrs Bernard Koma, Hosia Jiyane, Sello Thulo, Montlenyane Diphoko and Mesd Mapule Mbalathi and Ntswoaki Ramaphosa who participated in Mr Motsoeneng's disciplinary hearing held in Bloemfontein.

Advice to the board

(aa) Mr Motsoeneng advised the Board not to renew the employment contracts of Mesd Ntombela-Nzimande and Mampane.

History of conflict

(aa) Mr Motsoeneng had a dispute with Ms Duda before her suspension as well as an altercation with Ntombela-Nzimande, who later alleged with the corroboration of others that Mr Motsoeneng influenced the premature termination of her employment contract.

(bb) Although one or more witnesses pointed a finger at Mr Motsoeneng regarding the termination of the employment of Dr Saul Pelle, Ms Ntsiepe Mosoetsa, Ms Cecilia Phillips, Ms Sundi Sishuba, Ms Lorraine Francois, Ms Nompilo Dlamini, no credible evidence was found to back the allegation.

(cc) Mr Motsoeneng's actions in respect of the abovementioned suspensions and terminations, where evidence clearly shows his irregular involvement, constitutes improper conduct, abuse of power and maladministration.

The results of many of the individuals in questions support the allegation that there was maladministration in the processes involved leading to avoidable financial losses as can be seen below:

(aa) Mr Bernard Koma was the lead witness in his disciplinary hearing received a 12 months' settlement award at the CCMA with his attorneys on condition that he withdrew his civil case against the SABC after spurious charges had been levelled against him;

(bb) Mr Montlenyane Diphoko who had testified against Mr Motsoeneng in his disciplinary hearing, was reinstated after CCMA ruling, almost three years after SABC had terminated his contract;

(cc) Mr Hosia Jiyane, who had testified against Mr Motsoeneng in his disciplinary hearing, endured a disciplinary process that dragged for two years before he won the case against the SABC. However, Mr Motsoeneng opposed the finding of not guilty;

(dd) Dr Saul Pelle won his case at the Labour court for reinstatement but SABC refused to reinstate him and offered him 12 months' settlement payout;

(ee) Ms Ntsiepe Masoetsa was reinstated after her labour dispute case against the SABC dragged for three years in the Labour court ;

(ff) Ms Cecilia Phillips was suspended for four months without charges being brought against her by the SABC;

(gg) Mr Sello Thulo, who had testified against Mr Motsoeneng in his disciplinary hearing, was dismissed, allegedly after Mr Motsoeneng said '…get that man out of the system';

(hh) Mr Thabiso Lesala received a substantial settlement award offered to him through his attorney at the CCMA and he was asked to withdraw his case as a condition of the settlement;

(ii) Ms Charlotte Mampane's employment contract was terminated prematurely in March 2012 instead of October 2013 for being redundant. A settlement award was given to her for the remainder of her contract;

(jj) Ms Phumelele Ntombela-Nzimande's employment contract was terminated prematurely, and she was awarded settlement payment for the remainder of 13 months of her contract;

(kk) Ms Gugu Duda was suspended indefinitely since September 2012 to date without expeditious finalisation of the disciplinary proceedings against her;

(ll) Ms Sundi Sishuba has been suspended for two and half years, so far no charges have been brought against her;

(mm) Ms Loraine Francois was suspended for months but won her case at the CCMA and was reinstated to her post; and

(nn) Ms Nompilo Dlamini won her case in the Labour court, the SABC appealed the ruling to the High court, the matter is due to be heard in April 2014.

(f) Whether Mr Motsoeneng irregularly increased the salaries of various staff members, including a shop steward, resulting in a salary bill increase in excess of R29 million and if this amounted to financial mismanagement and accordingly improper conduct and maladministration

1) The allegation that Mr Motsoeneng irregularly increased the salaries of various staff members is substantiated.

2) Mr Motsoeneng unilaterally increased salaries of, Ms Sully Motsweni, Ms Thobekile Khumalo, a shop steward and certain freelancers without following Part IV of the SABC Personnel Regulations.

3) These irregular and rapid salary progressions contributed to the National Broadcaster's unprecedented salary bill escalation by R29 million.

4) Had the SABC Board stopped him, Mr Motsoeneng's would have also recklessly proceeded to convert contract staff members without proper financial planning in compliance with Human Resources Policies.

5) Mr Motsoeneng's conduct was irregular and amounts to improper conduct and maladministration.

(g) Regarding the alleged systemic corporate governance failures at the SABC and the causes thereof, I find that:

1) All the above findings are symptomatic of pathological corporate governance deficiencies at the SABC, including failure by the SABC Board to provide strategic oversight to the National Broadcaster as provided for in the SABC Board Charter and King III Report.

2) The Executive Directors (principally the GCEO, COO and CFO) failed to provide the necessary support, information and guidance to help the Board discharge its fiduciary responsibilities effectively and that, by his own admission Mr Motsoeneng caused the Board to make irregular and unlawful decisions.

3) The Board was dysfunctional and on its watch, allowed Dr Ngubane to effectively perform the function of an Executive Chairperson by authorizing numerous salary increments for Mr Motsoeneng.

4) Mr Motsoeneng has been allowed by successive Boards to operate above the law, undermining the GCEO among others, and causing the staff, particularly in the Human Resources and Financial Departments to engage in unlawful conduct.

(h) Regarding the allegation that the Department and Minister of Communications unduly interfered in the affairs of the SABC, giving unlawful orders to the SABC Board and staff, I find that:

1) The allegation that the Department and Minister of Communications unduly interfered in the affairs of the SABC, is substantiated.

2) Former Minister Pule acted improperly in the handling of her role as the Shareholder Reprehensive in the SABC and Executing Authority.

3) Amongst her most glaring transgressions was the manner in which she rejected the recommendation made by the Board for the appointment of the CFO and the orchestrated inclusion of Ms Duda's CV. Her withdrawal of certain power from the Board was also not in line with the principles of Corporate Governance.

4) Her conduct accordingly constitutes a violation of the Executive Ethics Code and amounts to an abuse of power.

5) Mr Phiri the Acting DDG of Department of Communication, acted unlawfully in submitting Ms Duda's CV to Mr Motsoeneng for her inclusion in the subsequent interview by the Board after the selection process had been concluded and recommendations already submitted to the Minister for approval of the CFO's appointment and his conduct in this regard was improper and constitutes maladministration.

6) In its unlawful interference, the department of Communications was aided and abated by Mr Motsoeneng who irregularly accepted receiving Ms Duda's CV from Mr Phiri and arranged that she be interviewed as a single candidate after Ms Pule had declined the recommendation by the Board and ordered the process to start anew. The conduct of Mr Phiri, Mr Motsoeneng, the Human

Resources Unit and that of the Board was unlawful and had a corrupting effect on the SABC Human Resources' practices. The conduct of the parties involved was grossly improper and constitutes maladministration.

(xxv) Appropriate remedial action to be taken on my findings of maladministration as envisaged by section 182(1) (c) of the Constitution is the following:

(a) Parliament Joint Committee on Ethics and Members' interests

1) To take note of the findings against the former Minister of Communications, Ms Pule in respect of her conduct with regard to the irregular appointment of Ms Duda as the SABC's CFO and her improper conduct relating to the issuing of unlawful orders to the SABC Board and staff.

(b) The current Minister of the Department of Communications: Hon. Yunus Carrim

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

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

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

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

(c) The SABC Board to ensure that:

1) All monies are recovered which were irregularly spent through unlawful and improper actions from the appropriate persons.

2) Appropriate disciplinary action is taken against the following:

(aa) Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of 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;

(bb) Ms Lulama Mokhobo, the outgoing GCEO for her improper conduct in the approval of the salary increment of Mr Motsoeneng;

(cc) Any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to Mr Motsoeneng, Ms Motsweni, Ms Khumalo, a shop steward and the freelancers, is recovered from the appropriate persons;

(dd) In future, there is strict and collective responsibility by the SABC Board members through working as a collective and not against each other, in compliance with the relevant legislation, policies and prescripts that govern the National Broadcaster;

(ee) A public apology is made to Ms P Ntombela-Nzimande, Ms C Mampane and all its former employees who had suffered prejudice due to the SABC management and Board's maladministration involving failure to handle the administration of its affairs in accordance with the laws, corporate policies and principles of corporate governance.

(ff) All their HR processes pertaining to creation of new posts, appointments and salary scales and progressions are reviewed to avoid a recurrence of what happened

(gg) The roles and relationship of the SABC Board and COO are defined, particular in relation to the role of a relationship with the GCEO to avoid the paralysis and premature exist of GCEO's while adhering to established principles of corporate governance.

A REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, SYSTEMIC GOVERNANCE DEFICIENCIES, ABUSE OF POWER AND THE IRREGULAR APPOINTMENT OF MR. HLAUDI MOTSOENENG BY THE SOUTH AFRICAN BROADCASTING CORPORATION (SABC)

1. INTRODUCTION

1.1 "*When Governance and Ethics Fail"* my report as the Public Protector issued in terms of 182(1)(b) of the Constitution of the Republic of South Africa,1996 (the Constitution),read with section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), following allegations of systemic governance failure, financial mismanagement and various forms of maladministration in the management of the affairs of the South African Broadcasting Corporation (SABC).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act 23 of 1995, to:

1.2.1. Hon. Minister of Communications – Mr Yunus Carrim;

1.2.2. The suspended Chief Financial Officer – Ms Gugu Duda;

1.2.3. Chairperson: SABC Board – Ms Zandile Tshabalala ("Ms Tshabalala"); and

1.3 To take cognizance of the report, copies are provided to the following people in terms of section 8(3) of the Public Protector Act:

1.3.1. The Complainants, Ms Phumelele Ntombela-Nzimande and Ms Charlotte Mampane;

1.3.2 The Chairpersons of the Joint Ethics Committee, the Honourable Prof Benjamin Turok and the Honourable Budang Mashile;

1.3.3 Former Minister of Communications, Hon D Pule, MP;

1.3.4 Former Chairperson of the Board, Dr B Ngubane;

1.3.5 The Group Chief Executive Officer - Ms Lulama Mokhobo;

1.3.6 The Acting Chief Operations Officer – Mr. Hlaudi Motsoeneng

1.4. The report relates to an investigation into a complaint of allegations of maladministration, systemic governance deficiencies, abuse of power involving, among others the irregular appointment of Mr. Hlaudi Motsoeneng, Ms Sully Motsweni and Ms Gugu Duda by the SABC, irregular termination of the employment contracts of several senior staff members, among then Ms P Ntombela-Nzimande and Ms C Mampane and financial mismanagement involving a spiralling salaries bill.

2. THE COMPLAINT

2.1 The investigation was conducted in pursuit of complaints lodged by former SABC employees, Ms Phumelele Ntombela-Nzimande, former Group Executive: Human Capital at the SABC ('Ms Ntombela-Nzimande') and Ms Charlotte Mampane, former Acting Chief Operating Officer at the SABC ('Ms Mampane'), between 11 November, 2011 and 26 February 2012. The essence of the complaint focused on the alleged irregular appointment and conduct of Mr Motsoeneng the Acting Chief Operations Officer (COO) and systemic maladministration mainly relating to human resources and financial management, governance failure at the SABC and irregular interference by the then Minister of Department of Communications. The Complainants' allegations included that:

2.1.1. Mr Motsoeneng, an employee of the SABC, was allegedly appointed to the position of the Acting COO, despite not having the requisite formal qualifications, including a matriculation (matric) certificate;

2.1.2. Mr Motsoeneng received salary appraisals three times within a period of one year because of alleged nepotism, favouritism and corruption by the SABC and the SABC Board;

2.1.3. Since assuming duty as the Acting COO, Mr Motsoeneng had unilaterally increased the salaries of a shop steward, his personal assistant, Ms Thobekile Khumalo his own and that of Ms Sully Motsweni;

2.1.4. As a consequence of Mr Motsoeneng's unilateral raise of staff salaries, the SABC salary bill increased by R29 million within three months of his appointment as the Acting COO;

2.1.5. Mr Motsoeneng had allegedly committed an act of gross fraudulent misrepresentation of facts by declaring himself to be in possession of a matric certificate obtained at Metsimantsho High School in Qwaqwa; and

2.1.6. Mr Motsoeneng had allegedly been involved in the systemic purging of approximately 14 qualified and experienced senior SABC officials without following proper disciplinary procedures in any of the suspensions and dismissals.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. Mandate of the Public Protector

3.1.1. The Public Protector is an independent constitutional institution established in terms of section 181(2) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.1.2. Section 182(1) of the Constitution provides that the Public Protector has the power to **investigate any conduct in state affairs** or in the public administration in any sphere of government, that is **alleged or suspected to be improper** or to result in any impropriety or prejudice, **to report** on that conduct and **take appropriate remedial action**. Section 182(2) directs that the Public Protector **has additional powers** prescribed by **legislation.**

3.1.3. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs; to **make findings** and; to **resolve the disputes** through conciliation, mediation, negotiation or **any other means deemed appropriate** by him or her.

3.1.4. Section 7(1)(b)(i) provides that the **format and procedure** to be followed in conducting an investigation shall be **determined by the Public Protector** with due regard to the circumstances of each case.

3.1.5. Section 6(5)(a) of the Public Protector provides that the Public Protector shall, **on his or her own initiative** or **on receipt of a complaint** be competent to investigate any alleged:

3.1.5.1. Maladministration in connection with the affairs of any institution in which the state is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999.

3.1.6. The SABC is a state-owned entity and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector's mandate.

3.1.7. Further thereto, section 7(4)(a) of the Public Protector Act provides that, for purposes of conducting an investigation, the Public Protector may direct

any person to submit an affidavit or affirmed declaration to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on a matter being or to be investigated.

3.1.8. Section 7(4)(b) provides that, the Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on the matter being or to be investigated.

3.1.9. In their response to the Provisional Report I issued before finalising the investigation, the former and current Chairpersons of the SABC Board, Dr Ngubane and Ms Zandile Tshabalala as well as Mr Mngqibisa and Mr Phiri challenged my jurisdiction and powers to investigate the matter using arguments, that in my considered view show a lack of understanding of the difference between jurisdiction and discretion and the import of the provisions of section 6(9) of the Public Protector Act, which grants me discretional power not to investigate matters that are older than two years if I am not convinced the compelling circumstances exist in favour of my undertaking of such investigation. They also showed failure to appreciate the import of the constitutional and statutory bar on my review of court decisions. In their submission, they incorrectly submitted that:

3.1.9.1. In terms of the Public Protector Act, I am not empowered to investigate complaints that are brought to my attention in relation to matters that occurred within two (2) years of such complaint being submitted and that I can only overstep this limitation if, and only if, I can show the existence of special circumstances that warrant the extension of my jurisdiction.

3.1.9.2. It was further argued that I have no power to investigate matters "which have become litigious" and which are or were dealt with by the Courts of law or settled by agreement between the parties.

3.1.9.3. The argument purported to be based on the provisions of section 6 of the Public Protector Act saying, that I am only entitled to investigate complaints which are brought to my office within two (2) years of the conduct complained of taking place.

3.1.9.4. The contention that I am legally barred from investigating matters that "have become litigious", oddly claimed to be premised on the provisions of section 9 of the Constitution and 6 despite those provisions expressly limiting the prohibition of Public Protector investigations to matters that have been decided by a court of law.

3.2 Investigative Powers

3.2.1 Mr Mngqibisa and Mr Phiri contended that an implicated person has a right to cross-examine witnesses who appeared before me and implicated them. They argued that such right is entrenched section 7(9)(a) and (b)(ii) of the Public Protector Act which empowers an implicated person, who has been subpoenaed under section 7(4), to "question" witnesses who gave adverse evidence against him or her and made reference to decided cases dealing with the importance of the right to cross-examine in disputed hearings.

3.2.2 The Supreme Court of Appeal (SCA) judgement in the ***Natal Joint Municipal Pension Fund v Endumedi Municipality 2012(4) SA 593 (SCA)****, was* mentioned by one of the parties, who highlighted the principles set out in the SCA decision with regard to affording an implicated person the right to cross-examine any person who has given adverse evidence against him or her. They correctly argued that the Public

Protector must be absolutely certain of the facts upon which he or pronounces and if necessary seek corroboration of same. They further argued that in conducting the investigation, I had not asked for all relevant information that had a bearing on the matter under investigation and as such, I cannot make a determination on whether or not the pieces fit together.

3.3. Evaluation of the arguments on investigative powers and jurisdiction

3.3.1 I must indicate that while I agree fully on the right to a fair hearing as a fundamental component of administrative justice, I could not quite comprehend some of the peculiar points the parties were attempting to make.

3.3.3 I could only conclude that some of the odd arguments regarding the perceived gaps in the investigation process stem from the misconception of the mandate, powers and functions of the Public Protector as enshrined in section 182 of the Constitution and section 6 and 7 of the Public Protector Act.

3.3.4 Let us start with the issue of jurisdiction. The seems to be a misconception that I as Public Protector I have the duty to persuade implicated parties that I have compelling reasons to investigate a matter reported to me after two years of the conduct complained of occurring.

3.3.4 It is important to note that the provision in the Public Protector Act that such arguments rely on, is section 6, which deals with "*Reporting matters to the Public Protector" and additional powers of the Public Protector". The specific subsection, section 6(9) provides that:*

*"**Except where the Public Protector in special circumstances within his or her discretion, so permits**, a complaint or matter referred to the*

Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned."

3.3.5 It really is unclear where the parties that argued that I had to persuade them that special circumstances exist, base their argument. A correct interpretation of the Act should clearly appreciate that the section is an empowering rather than limiting clause. It empowers the Public Protector as an Ombudsman to say no if she or he deems it fit. This is an essential part of the independence of the Public Protector.

3.3.6 In any event, the main complaint regarding systemic governance failure at the SABC involving human resources and financial mismanagement with Mr Motsoeneng allegedly at the centre of corporate governance failure and related organisational dysfunctionality, was lodged within less than two years of occurrence of the alleged acts as such acts were said to be on-going. The same applies to the alleged interference of the former Minister and the Department of Communication as the said interference was alleged to be continuous. The allegation regarding Mr Motsoeneng not having the correct qualifications was though old, a continuous problem as he continued to rise and allegedly continued to harass and purge those that raised this as a concern.

3.3.7 In any event, even if such matters could be successfully argued to be older than 2 years, it is my discretion to determine if it would be a worthwhile investment in good governance to investigate. In the case of the SABC, which has been reported widely regarding alleged corporate governance failure, primarily involving human resources and financial mismanagement, I would be remiss in my duties as Public Protector, if I chose to look the other way in the face of complaints being lodged with my office. Indeed in terms of section 6(4)(a) of the Public Protector Act, I

could even investigate without a complaint in terms of section 182 of the Constitution and section 6(4)(d) of the Public Protector Act.

3.3.8 The complaints lodged regarding the management of corporate affairs at the SABC were, accordingly, correctly lodged in accordance with section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, and accordingly fall within my remit.

3.3.9 I now turn to submissions made by the current SABC Chairperson and Mr Mngqibisa, among others, regarding fair procedure.

3.3.4 Section 7(1)(b)(i) of the Public Protector Act provides that the format and procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

3.3.5 In exercising the powers conferred on me by section 7(1)(b)(i) of the Public Protector Act, I determined the format and procedures to be utilised in conducting the investigation of the matter.

3.3.6 The parties are right that everyone is entitled to due process. They are further right in arguing that evidence, particularly in the form of *viva voce* evidence, must be verified and/ or corroborated. In our case we primarily rely on documentary evidence such as minutes, memoranda and court papers. Witness statements are primarily used to guide the fact finding mission. Evidence is always corroborated as can be seen in the sections dealing with evidence and evaluation of evidence. In fact although as an Ombudsman, I am entitled to make findings on the balance of probabilities, a rigorous process, which relies primarily on evidence corroborated by official records, is employed primarily when dealing with conduct failure.

3.3.7 I am aware, however, that the confusion arises from different interpretations of Section 7(9) of the Public Protector Act, which provides that:-

"9(a) if it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

(b)(i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence;

(ii) Such person or his or legal representative shall be entitled, through the Public Protector, to question other witnesses determined by the Public Protector, who have appeared before the Public Protector in terms of this section."

3.3.8 As an Ombudsman office, our processes are inquisitorial and not adversarial and all parties are allowed ample opportunity for them to present their side of the story from the beginning to the end of the investigation. As indicated in the introduction, all implicated parties, including Mr Phiri, Dr Ngubane and the entire erstwhile SABC Board were sent correspondence indicating allegations against them allegations and asked for responses at the beginning of the process and later interviewed during the investigation. A provisional report, with intended findings was sent to them in a process of further presenting them with an opportunity to tell their side of the story before I finalise my findings on what I consider probably happened and the wrongfulness thereof. In an effort to enhance

due process, the provisional report indicated where each party was being implicated and on the basis of what evidence and advised that, on the evidence I had then, I was considering adverse findings against them.

3.3.9. Dr Ngubane, Mr Phiri and other recipients of the Provisional Report were therefore afforded ample opportunity to respond to the contents of the Provisional Report and the intended findings that might be made against them. They used the opportunity, with the assistance of their legal representatives.

3.3.10. The last issue I wish to deal with is the contention that I have no power to investigate matters "which have become litigious" and which are or were dealt with by the courts of law or settled by agreement between the parties.

3.3.11. While it is clear from section 182(3) of the Constitution that I may not investigate court **decisions,** the mere fact that a matter is a subject matter or aspects thereof are the subject matter of judicial proceedings does not preclude me from considering an investigation into such a complaint. What is understood by investigating court decisions is that I may not look at actual decisions or judgement of a court of law in the manner that a superior court would do in terms of review or appeal proceedings.

3.3.12. It is also worth noting that the mere fact that the allegations that are before me are also a subject matter of a civil or criminal proceeding does not warrant an assumption that my investigation would interfere with such proceedings because the *'two processes involve separate sets of charges,*

are decided against separate standards and result in two separate outcomes- even if they concern the same alleged act of impropriety'[1]*.*

3.3.13. It is common cause that parties to a matter are only concerned with issues relating to the matter involving them. The relief sought only relates to the specific issue at court, in this instance the resolution of a labour dispute. My role as a Public Protector is primarily concerned with maladministration while courts primarily focus on rights infringed. I only deal with rights in the context of prejudice that may have been suffered due to maladministration. The issues considered in the context of proper conduct or maladministration, transcend legality, concerning themselves with good governance and ethical governance.

3.3.14. The constitutional mandate of my office is to strengthen democracy and to serve the general **public interest** by helping to improve the quality of administration and of service rendered to the citizens by the state including state owned enterprises such as the SABC and holding such entities accountable to the Constitution. In the SABC matter, no court proceeding had ever dealt with allegations of systemic governance failure primarily involving human resource, financial mismanagement and a dysfunctional board. Addressing issues of systemic corporate governance failures by state owned enterprises is in the public interest. I accordingly would have been in dereliction of duty if I had chosen to look the other way.

3.3.15. It will therefore be a discretionary matter for me to decide if I would accept a complaint for investigation where the matter is also the subject of judicial proceedings and where allegations of bad administration are an issue.

[1] Public Service Accountability Monitor, The President, the Public Protector and the *sub judice* myth in the Zuma Affair http:/www.psam.org accessed on 19 March 2013.

4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR

On analysis of the complaints and allegations, the following eight (8) issues were considered and investigated:

4.1. Whether the alleged appointment and salary progression of Mr. Motsoeneng, the Acting Chief Operations Officer, were irregular and accordingly constitute improper conduct and maladministration;

4.2. Whether Mr. Motsoeneng fraudulently misrepresented his qualifications to the SABC, including stating that he had passed matric when applying for employment;

4.3. Whether the alleged appointment(s) and salary progression of Ms. Sully Motsweni were irregular and accordingly constitute improper conduct and maladministration;

4.4. Whether the alleged appointment of Ms. Gugu Duda as CFO was irregular and accordingly constitutes improper conduct and maladministration;

4.5. Whether Mr Motsoeneng purged senior officials at the SABC resulting in unnecessary financial losses in CCMA, court and other settlements and, accordingly, financial mismanagement and if this constitutes improper conduct and maladministration;

4.6. Whether Mr Motsoeneng irregularly increased the salaries of various staff members, including a shop steward, resulting in a salary bill increase in excess of R29 million and if this amounted to financial mismanagement and accordingly improper conduct and maladministration;

4.7. Whether there were systemic corporate governance failures at the SABC and the causes thereof; and

4.8. Whether the Department and former Minister of Communications unduly interfered in the affairs of the SABC, giving unlawful orders to the SABC Board and staff and if the said acts constitute improper conduct and maladministration.

5. THE INVESTIGATION

The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act.

Scope of the investigation

5.1.1 The scope of the investigation was limited to the items listed in paragraph 4 above.

5.1.2 The timeline of the investigation was limited to November 2011 to November 2013.

5.2 Methods of gathering evidence and nature of source documents / information

5.2.1 Interviews and Meetings

Interviews and meetings were conducted with the following persons:

On 11 March 2013 meetings were held with:

5.2.1.1 Ms Dina Pule – former Minister of Communication;

5.2.1.2 Other 9 members of the SABC Board;

5.2.1.3 Ms Lulama Mokhobo – Group Chief Executive Officer: SABC;

On 15 March 2013 meetings were held with;

5.2.1.4 Dr Ben Ngubane – Chairperson of the SABC Board;

5.2.1.5 Mr Lerato Nage – Former Acting Chief Financial Officer: SABC;

5.2.1.6 Ms Gugu Duda – Suspended Chief Financial Officer: SABC;

5.2.1.7 Mr Itani Tseisi – Former Group Executive: Risk and Compliance;

5.2.1.8 Mr Thabiso Lesala – Former Head: Human Resources, SABC;

5.2.1.9 On 19 March 2013 a meeting was held with Ms Phumelele Ntombela-Nzimande – Former Group Executive: Human Capital, SABC;

5.2.1.10 On 21 March 2013 a meeting was held with Ms Loraine Francois – Head: SABC Group Internal Audit;

5.2.1.11 On 20 May 2013 a meeting was held with Ms Phoebe Malebane - Former Chief Finance Controller for the SABC; and

5.2.1.12 On 19 July 2013 a meeting was held with Mr. Hlaudi Motsoeneng- Acting Chief Operations Officer.

5.2.1.13 The investigation team met on various dates with other SABC former employees including Mr Bernard Koma, Ms Charlotte Mampane and Ms Nompilo Dlamini.

5.2.1.14 After I issued the provisional report, my investigation team also met with Mr Nicholson on 14 January 2014.

5.2.2 Correspondence

The original complaints were contained in letters dated 26 February 2012 and 29 March 2012 from the Complainants to the Public Protector. The following correspondence was entered into and related information analysed.

5.2.2.1. Letter dated 13 March 2013 from the Public Protector to His Excellency President JG Zuma.

5.2.2.2. Letter dated 5 April 2012 from Dr Ben Ngubane, Chairperson of the SABC Board to the Public Protector.

5.2.2.3. Letters dated 4 April 2012; 4 June 2012; 12 June 2012; 28 August 2012 and 3 September 2012 from Ms Lulama Mokhobo – Group Chief Executive Officer: SABC to the Public Protector.

5.2.2.4. Letter dated 15 July 2013 and 29 July 2013 from Mr. Hlaudi Motsoeneng- Acting COO to the Public Protector.

5.2.2.5. E-mails dated 29 January 2013; 30 January 2013; 11 February 2013 and 15 July 2013 from Ms Theresa Geldenhuys – SABC Company Secretary to the Public Protector.

5.2.2.6. Letter dated 28 March 2012 from Ms Ntombela-Nzimande – former Group Executive: Human Capital, SABC and E-mails dated 4 April 2012; 18 April 2013 and 12 June 2013 to the Public Protector.

5.2.2.7. Letters dated 28 March 2012; 10 December 2012; 6 February 2013 and 12 June 2013 from Ms Mampane – former Chief Operating Officer: SABC to the Public Protector.

5.2.2.8. E-mails dated 18 September 2012 and 13 March 2013 from Mr Koma–former Manager: News Resources, SABC to the Public Protector.

5.2.2.9. E-mails dated 12 October 2012; 18 October 2012; 20 May 2013 and 21 May 2013 from SpencerStuart Recruitment Agency to the Public Protector.

5.2.3 Documents

Corporate documents such as Human Resources files or records, memoranda, correspondence, minutes of meetings, Board resolutions, salary advices and emails were obtained and analysed. Documents relating to the following were also obtained and analysed:

5.2.2.1 The composition of the SABC Board;
5.2.2.2 The authority to appoint Executive members at the SABC;
5.2.2.3 The appointment(s) and salary progression of Mr. Hlaudi Motsoeneng;
5.2.2.4 The appointment(s) and salary progression of Ms Sully Motsweni; and
5.2.2.5 The appointment of Ms Gugu Duda; and
5.2.2.6 Various e-mails, letters, minutes and transcripts.
5.2.2.7 Various documents relating to the labour disputes including the CCMA arbitration awards and settlements.

5.3 Compliance with the obligation of the Public Protector to follow due process

5.3.1 All parties were afforded an adequate opportunity to answer to allegations directed at them, advised on the right to legal assistance and those who chose to be assisted by lawyers, allowed to utilise such assistance. In this regard all recipients of the Provisional Report were assisted by lawyers in the compilation of their responses thereto.

5.3.2 The investigation further complied with the stipulation in the Public Protector Act that if it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall, in terms of section 7(9)(a) of the Public Protector Act, afford

such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

5.3.3 Affected parties were also afforded an opportunity to respond to the contents of the Provisional Report of the Public Protector pertaining to the matters investigated to ensure fairness and transparency.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1. Mr. Hlaudi Motsoeneng's appointments and removal as Acting COO

6.1.1. Appointment as Executive Manager – Stakeholder Relations in the office of the GCEO

Evidence received from the Complainant

6.1.1.1. As part of her complaint Ms Ntombela-Nzimande submitted a document which she had drafted, which was addressed to the GCEO, titled *"Request approval to create and fill the position of an Executive Manager (Stakeholder Relations): Office of the Group CEO on the establishment of the Group Chief Executive Officer"*

6.1.1.2. According to the document, the purpose was to obtain approval to create and fill the position of Executive Manager (Stakeholder Relations) – Office of the Group CEO(Scale 120) with a gross pensionable remuneration of R500 000 per annum. Funding for the position would be obtained from the budget of the Group CEO – Cost Centre 1713. Ms Ntombela-Nzimande drafted and signed the request on 23 July 2010 and Mr Solly Mokoetle ('Mr Mokoetle') as GCEO approved it on 22 July 2010. From this it seems as if the approval was authorised prior to the request being issued.

Response received from SABC

6.1.1.3. In response to a request for information from my office dated 4 June 2012, the SABC provided a document titled "*Enhancing of Capacity in the GCEO's Office – Reasons for Submission: Appointment of an Executive Manager: Stakeholder Relations Office of the GCEO (Date 27/07/2010)*".

6.1.1.4. This document indicated that the purpose of the motivation was fo*r the implementation of the appointment of Executive Manager: Stakeholder Relations in the office of the GCEO. The motivation further indicated that the position o*f Executive Manager: Stakeholder Relations had become necessary and was critical to the success of the GCEO and the SABC at large, as it would provide critical support to the office of the GCEO and effectively manage external stakeholders on news-related matters and give support to the regions.

6.1.1.5. The GCEO's (at that point Mr Solly Mokoetle) decision was to appoint Mr Motsoeneng in the position of Executive Manager: Stakeholder Relations. On 28 July 2010 Mr Mokoetle's recommended this motivation and on 29 July 2010 Dr Ngubane as SABC Board Chairperson approved the appointment.

6.1.1.6. On 30 July 2010, Mr Mokoetle, the then GCEO sent a letter to Mr Motsoeneng advising him that with effect from 1 August 2010, he would be appointed as Executive Manager: Stakeholder Relations (Scale 120) with a gross pensionable remuneration of R500, 000.00 per annum. An employment contract, dated 29 July 2010, which preceded the offer, was signed between Mr Motsoeneng and Mr Mokoetle and Dr Ngubane on behalf of the SABC.

6.1.1.7. On 1 November 2010 the SABC concluded another employment contract with Mr Motsoeneng through the signing of an amended version to the previous contract with him, and this was signed by Mr Mokoetle the then GCEO and Mr Ron Morobe, the then Group Executive Capital Services(Acting).

6.1.1.8. Another contract was signed with Mr Nicholson in December 2010. However, he inexplicably appended an inaccurate date on the document inserting 10 December 2012 instead of 10 December 2010 as signed by Mr Motsoeneng. This is inexplicable because people tend not to postdate but rather to revert to the year before particularly early in the year. Though suspicious this was not pursued during the investigation.

6.1.1.9. On 6 and 7 December 2010, the SABC Board of Directors resolved (per resolution 2010/34/35) that Mr Motsoeneng (then Executive Manager in the Office of the GCEO: Stakeholder Relations) be delegated the responsibility of all Board communications and stakeholder engagements.

6.1.1.10. On 1 April 2011, yet another employment contract was concluded between Mr Motsoeneng and the SABC represented by Mr Nicholson, bringing amendments to his employment status to four times within a period of five (5) months, all of which also effected salary adjustments to Mr Motsoeneng.

6.1.1.11. During a meeting with me on 11 March 2013, Mr Cedric Gina ("Mr Gina") – Member of the SABC Board indicated that when the Board started to have problems in 2010 with the performance of Mr Mokoetle– former GCEO, the Board gave Mr Mokoetle the authority to appoint people in his *"turnaround planning unit"*. Mr Mokoetle then appointed Mr Motsoeneng to his office in the capacity of Executive Manager – Stakeholder Relations in the office of the GCEO.

6.1.2. Appointment as Group Executive – Stakeholder Relations and Regions of the SABC

6.1.2.1. Mr Motsoeneng was appointed as Executive: Stakeholder Relations and Regions – SABC (Scale 115) at a total package (CTC) of R1, 461,539.00.

6.1.2.2. This fixed term contract was for a period of 5 years (commencing on 1 April 2011) and was signed by both Mr Nicholson and Mr Motsoeneng on 1 April 2011. Mr Nicholson again inexplicably omitted to insert the year on the date, while the handwriting is similar on the contract where both signatures were appended. Again although this raises question of authenticity, the matter was not pursued during the investigation.

6.1.3. Appointment as Acting COO: SABC

Advertisement of COO's position

6.1.3.1. According to a copy of the advertisement received from SpencerStuart, the SABC's recruitment agency, the agency placed an advertisement on behalf of the SABC in the Sunday Times and City Press of 9 July 2006 for the filling of the vacant position of COO which became vacant in 2005 / 2006.The advertisement indicated under the heading 'Qualifications', that the applicant should have an ***"...Appropriate academic background, preferably postgraduate qualification."***

6.1.3.2. In 2008, an internal advertisement was once again placed for the appointment of a COO. The requirement for ***"appropriate academic requirement, preferably post graduate qualification"*** as per the advertisement in 2006 was removed and replaced by the following: ***"...Commercially astute executive, with broad-ranging operational track record of success in broadcasting."***

6.1.3.3. The same internal advertisement as mentioned in the paragraph above was circulated on Thursday, 28 January 2012 with the closing date being 31 January 2012.

6.1.3.4. In reply to my questions, Ms Mokhobo, on 12 June 2012 stated that *"the SABC committed an act of forgery and uttering (sic) in changing the advertisement for the position of the COO issued in April 2008 by* ***removing the requirement for academic qualifications so as to suit Mr Motsoeneng who is without qualification*** *to meet the criteria for the advertised position":*

"The advertisement was an exact replica of previous advertisements dating as far back as 2006."

6.1.3.5. During my meeting with Ms Mokhobo on 11 March 2013, Ms Mokhobo indicated that the Chairperson of the Board indicated to her that she was not allowed to change the requirements of the advertisement and that it had to go out exactly as the one in 2008. Ms Mokhobo indicated that the Chairperson was adamant that he did not want to see any qualifications reflected in the advertisement. This sentiment was echoed by Adv Cawe Mahlati ("Adv Mahlati") – former member of the SABC Board.

6.1.3.6. This was disputed by Dr Ngubane who indicated to me on 15 March 2013, that the advertisement had not come before the Board for approval and that it was something that was done by management.

6.1.3.7. On 30 January 2012, the Sunday Independent Newspaper reported on the alleged appointment of Mr Motsoeneng. The article stated that:

"A top supporter of President Jacob Zuma, with neither a matric certificate nor top management experience is set to land the R2m job as chief operating officer (COO) of the financially-crippled SABC.
And the SABC has decided to advertise the strategic, second-most powerful post only internally, for only three working days and, according to newly appointed Group Chief Executive Officer Lulama Mokhobo, matric is not a requirement for the post.

The requirements for the job, one of the key positions in the Broadcaster's turn-around strategy, have been tailor-made to suit Hlaudi Motsoeneng – essentially an ANC deployee at the SABC – because he has no matric and has no managerial experience at that level, according to insiders.
He is the same man fingered by an SABC internal audit probe as having lied about having a matric certificate when he applied for a position at the broadcaster's Bloemfontein office several years ago..."

6.1.3.8. On 30 January 2012 the Star newspaper reported that:

"In a controversial move, the SABC appears to have tailor-made the requirements for its second-most senior position to suit an applicant who failed matric, falsified his qualifications, is regarded as a firm backer of President Jacob Zuma and who enjoys the protection of SABC board Chairperson Ben Ngubane. Indications that Hlaudi Motsoeneng, the acting Chief Operations Officer, may be appointed permanently have infuriated some SABC board members and the opposition DA.
The Star understands that a decision to advertise the position internally was taken when the board met last week. New SABC Chief Executive Officer Lulama Mokhobo and the Board decided that no academic qualifications were necessary for the top job.
An advert for the post was distributed internally on Thursday, with three working days given for applications.
A board member told The Star on Sunday that the entire process of finding a new chief operations officer was "not only against the policies governing the SABC but also against good corporate governance".
The board member said the process of appointing the chief operating officer was "fundamentally flawed".
The matter would be raised at the board's next meeting, sometime next week…"

6.1.3.9. This process was interrupted by the court challenge lodged by Mr Mvuso Mbebe.

<u>Appointment of Mr Motsoeneng as Acting COO</u>

6.1.3.10. During a meeting with me on 11 March 2013, Mr Gina indicated that after Ms Mampane vacated her position as Acting COO, but the position remained vacant for a considerable time.

6.1.3.11. At that stage, Dr Ngubane made a recommendation that Mr Motsoeneng should be considered for the position of Acting COO. The understanding at that stage was that Mr Motsoeneng would only act for a couple of months (approximately 2 -3 months) until such time as the recruitment process for a new COO was completed.

6.1.3.12. A special Board meeting was convened on 14 November 2011 where it was resolved to appoint Mr Motsoeneng as the Acting COO with effect from 18 November 2011 until such time that the Chief Operating Officer is appointed.

6.1.3.13. However, when interviewed by me, the Board members indicated that the resolution by the Board was to appoint Mr Motsoeneng for a period of 2-3 months in line with the SABC's Acting in Higher Scale Policy.

Salary progression of Mr Motsoeneng

6.1.3.14. According to the SABC payroll records a copy of the memorandum motivating the salary increase dated 8 November 2011 written and signed by Mr. Thabiso Lesala was sent to Dr Ngubane requesting an increase in the total remuneration package of Mr Motsoeneng as his package was well below the average of the rest of the Group Executive members of the SABC and recommended that his package be increased to R1,7 million per annum. This was approved by Dr Ngubane and as of December 2011, Mr Motsoeneng's salary was increased.

6.1.3.15. A second memorandum motivating the salary increase, dated 27 March 2012, was submitted to Dr Ngubane by Mr Lesala wherein he once again requested an increase in the total package of Mr Motsoeneng as to narrow the gap between his salary package and that of the other executives at the SABC. The motivation contained a recommendation that Mr Motsoeneng's salary be increased from R1.7 million per annum to

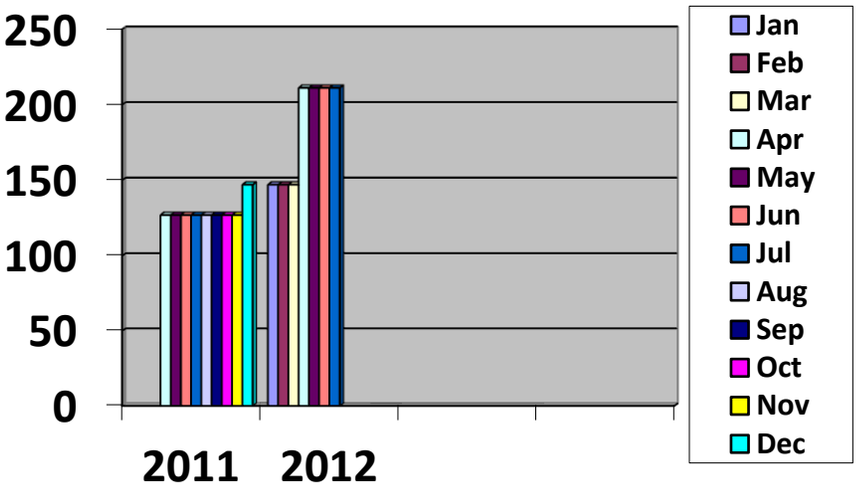
R2.4 million which was more in line with his roles and responsibilities at the SABC.

6.1.3.16. The memorandum request/motivation was supported by Ms Mokhobo and approved by Dr Ngubane as Chairperson of the Board of Directors.

6.1.3.17. Documents extracted from the SABC payroll system indicate that Mr Motsoeneng's salary increased by 66.33% from a total monthly cost of R126,961.14 to R211,172.58 during the period 1 April 2011 and 1 April 2012 (12 months). For the period 18 November 2011 to 28 February 2013, whilst being employed as acting COO, Mr Motsoeneng received an additional R115,033.33 as acting allowance.

6.1.3.18. The table and graph below indicate a summary of Mr Motsoeneng's salary progression (reflected per designation) for the period April 2011 to April 2012 as obtained from evidence.

Date	Designation	Monthly Total Cost
Apr 2011	Executive: Stakeholder Relations and Regions	R126,961.14
May 2011	Executive: Stakeholder Relations and Regions	R126,961.14
Jun 2011	Executive: Stakeholder Relations and Regions	R126,961.14
Jul 2011	Executive: Stakeholder Relations and Regions	R126,961.14
Aug 2011	Executive: Stakeholder Relations and Regions	R126,961.14
Sep 2011	Executive: Stakeholder Relations and Regions	R126,961.14
Oct 2011	Executive: Stakeholder Relations and Regions	R126,961.14
Nov 2011	Acting COO & Executive: Stakeholder Relations and Regions	R126,961.14
Dec 2011	Acting COO & Executive: Stakeholder Relations and Regions	R147,062.68
Jan 2012	Acting COO & Executive: Stakeholder Relations and Regions	R147,062.68
Feb 2012	Acting COO & Executive: Stakeholder Relations and Regions	R147,062.68
Mar 2012	Acting COO & Executive: Stakeholder Relations and Regions	R147,062.68
Apr 2012	Acting COO & Executive: Stakeholder Relations and Regions	R211,172.58



Mr Motsoeneng's alleged misrepresentation of qualification

6.1.3.19. According to HR recruitment documents submitted by the SABC including Mr Motsoeneng's CV and an undated application for employment Mr Motsoeneng commenced with his employment at the SABC on 1 March 1995 when he was appointed as a Trainee Journalist. Mr Motsoeneng's curriculum vitae ('CV') state that he occupied the following positions during his tenure at the SABC:

Period	Position
March 1995 – January 1999	Trainee Journalist
February 1999 – June 2000	Journalist
July 2000 – May 2003	Specialist Producer (Lesedi FM)
June 2003 – March 2007	Executive Producer (Lesedi FM)
May 2007 – March 2008	Media Liaison Officer (Free State Government)
April 2008 – October 2009	Manager: Special Projects
November 2009 – July 2010	Acting Regional Editor: Free State & Northern Cape News
August 2010 – March 2011	Executive Manager: Stakeholder Relations in the office of the GCEO
April 2011 – to Date	Group Executive: Stakeholder Relations & Regions of the SABC
November 2011 – to Date	Acting COO

6.1.3.20. Attached to the complaint from Ms Mampane was an "Application for Employment" completed by Mr Motsoeneng.

6.1.3.21. On the completed application form Mr Motsoeneng, indicated that he passed Standard 10 ('matric') in 1991 at the age of 23 years with the following subjects:

Subject	**Symbol**
English	E
South Sotho	E
Afrikaans	E
Bibs (*sic*)	E
History	F

6.1.3.22. On the application form that Mr Motsoeneng completed, he only noted five (5) subjects completed and not the usual six (6). During the interview**, Mr Motsoeneng admitted falsifying his matric qualification and blamed a Mrs Swanepoel, whom he said gave him the application form to fill in anything**, in other words to make up the symbols from the top of his head, which he did. With regard to the matric certificate, the form says 'outstanding', giving the impression that the certificate exists and would be submitted in due cause. A copy of a transcript of the interview held with Mr Motsoeneng on 19 July 2013 with me is annexed to the report. Below is an extract from the transcript:

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

remember okay in English I think it was "E", because it was you know after ... it was 1995.
If you check there we are talking about 1991, now it was 1995 and for me I had even to go to ... I was supposed to go to school to check. Someone said, "No, no, no, you know what you need to do? Just go to Pretoria". At that time Public Protector, taxi, go and then check, they said, "No, you fail", I went and (indistinct). That one is ... and people who are putting this, Public Protector ... and I'm going to give you ... I know it is Phumelele and Charlotte and this people when SABC were charging me, they were my witness.
Mr Madiba *: I think if ... I want to understand you correctly. You say you were asked by the SABC to put in those forms ... I mean to put in those ...*
Adv Madonsela *: To make up the symbols.*
Mr Madiba *: To make up the symbols. Do you recall who said that to you?*
Mr Motsoeneng *: Marie Swanepoel.*
Mr Madiba *: Marie Swanepoel?*
Mr Motsoeneng *: Yes."*

6.1.3.23. A letter dated 27 March 1996 written and signed by Mr Paul Tati ('Mr Tati') – SABC Human Resources Consultant was sent confirming a conversation between the two of them during which Mr Motsoeneng undertook to write the outstanding subjects towards obtaining his matric certificate during October 1996. Again this gives the impression that he had written and passed the 5 stated in his application.

6.1.3.24. Another letter dated 12 October 1999, was also sent to Mr Motsoeneng by Ms. H. Mofokeng ('Ms Mofokeng') – SABC Human Resources Consultant: Free State, referring to the letter of Mr Tati of 27 March 1996. Ms Mofokeng again requested Mr Motsoeneng to hand in a copy of his matric certificate.

6.1.3.25. A further letter dated 4 May 2000, was sent to Mr Motsoeneng by Mr Tati confirming that numerous reminders to produce his matric certificate were sent to him, but that it was still outstanding. In this letter, Mr Tati insisted that the certificate be submitted by no later than 12 May 2000. Mr Tati further draw Mr Motsoeneng 's attention to the fact that in 1995 he

indicated on his application for employment that his highest standard passed was standard 10 (matric).

6.1.3.26. In an undated response, Mr Motsoeneng acknowledged receipt of Mr Tati's letter of 4 May 2000 and indicated that he was still not in possession of the said certificate. He undertook to provide it as soon as he received it. A handwritten note on Mr Motsoeneng's letter by one "M Swanepoel" indicated a date of "15/5 at 8:30".

6.1.3.27. According to the Ms Mokhobo, an investigation into Mr Motsoeneng's alleged misrepresentation was commenced on 11 August 2003, on the instruction of Group Internal Audit of the SABC.

6.1.3.28. A 2003 SABC Group Internal Audit into an investigation into the allegation that Mr Motsoeneng misrepresented that he had indeed misrepresented himself by stating that he passed matric in 1991.

6.1.3.29. The Group Internal Audit also established that when Mr Motsoeneng applied for an Executive Producer's post at Lesedi FM in 2003, the requirements for the post was a Degree or Diploma in Journalism with 8 years' experience in the production of Radio Current affairs programme.

6.1.3.30. The Group Internal Audit found that Mr Motsoeneng was interviewed and was appointed to the post despite not having a Matric certificate, a degree or diploma.

6.1.3.31. The Group Internal Audit stated that in their opinion Mr Motsoeneng had indeed misrepresented his qualifications to the SABC, and that despite numerous reminders he had failed to inform the SABC that he is not in possession of a Matric certificate.

6.1.3.32. In conclusion they stated that in their opinion Mr Motsoeneng should not have been on the shortlist, as he did not meet the required education and experience criteria.

6.1.3.33. The Group Internal Audit Report released on 11 September 2003 revealed that the Department of Education confirmed that Mr Motsoeneng had not obtained his matric.

6.1.3.34. The recommendations made in the Group Internal Audit report included that management should consider instituting action against Mr Motsoeneng for misrepresenting his qualifications on his 1995 application submitted to the SABC.

6.1.3.35. The recommendations were never implemented by the SABC.

6.1.3.36. On 5 April 2012, Dr Ben Ngubane ('Dr Ngubane'), the Chairperson of the Board responded in writing to questions I raised in respect of Mr Motsoeneng's alleged misrepresentation to the SABC. In his written response Dr Ngubane stated that "*the SABC perused* Mr Motsoeneng*'s file and could find no evidence that he misrepresented his qualifications."*

6.1.3.37. Dr Ngubane made this remark despite the findings of the 11 September 2003 Group Internal Audit report which indicated that the content of Mr Motsoeneng's application for employment was false.

6.1.3.38. During a meeting between the SABC Board members, myself and the investigation team on 11 March 2013, Ms Suzanne Vos ("Ms Vos") and Prof Pippa Green ("Prof Green") – former members of the SABC Board indicated that they were aware of the fact that Mr Motsoeneng did not have a matric certificate. The question from me was however not if he had matric, as it was common cause that he did not have, but rather if he lied about having successfully completing matric and obtaining a matric certificate.

6.1.3.39. Adv Mahlati indicated that when she tried to ascertain during the Board meetings whether Mr Motsoeneng had initially lied about his qualifications when he applied to the SABC, she was suppressed by the Chairperson (with the support of the majority of the Board members) and that it was not necessary for the Board to establish the true fact. Adv Mahlati further drew my attention to the findings and verdict of the Appeals Panel of the Ombudsman for the Press Council who *inter alia* found that "the Sunday Independent was justified in saying that Mr Motsoeneng had lied about having a matric certificate. Adv Mahlati also indicated that she had information about how the Chairperson of the Board hounded and threatened the previous acting Company Secretary of the SABC – Ms Jane Mbatiya ("Ms Mbatiya") and indicated to her that she was not allowed to hand over any information to outsiders.

6.1.3.40. Mr Motsoeneng lodged a complaint with the Ombudsman for the Press Council. The Deputy Ombudsman, Mr Johan Retief ("Mr Retief") had found *inter alia* that "the Sunday Independent was justified in saying that Mr Motsoeneng had lied about having a matric certificate" and dismissed Mr Motsoeneng's complaint.

6.1.3.41. Mr Motsoeneng appealed this decision by Deputy Ombudsman and on 21 June 2012, the Appeals Panel of the Press Council of South Africa sat to consider his appeal against the ruling of the Deputy Ombudsman on 17 April 2012.

6.1.3.42. According to the findings of the Appeal Panel, the only issue left in contention to consider was whether Mr Motsoeneng had lied about having a matric certificate. The Sunday Independent relied on the Application for Employment form, completed by Mr Motsoeneng on which he wrote that he passed standard 10.

6.1.3.43. The Appeal Panel noted that it was common cause that he did not have a matric certificate but that the contention was that faced with the knowledge that he needed a matric to be allowed to join the SABC as a full-time staff member, lied, in writing, when he completed "10" on the Application for Employment form.

6.1.3.44. Under questioning by Ms Ethel Manyaka ("Ms Manyaka"), a member of the Appeal Panel, Mr Motsoeneng himself described how after working as a freelancer for the SABC, a number of attempts were made to appoint him to the full-time staff of the Broadcaster. He described to the Panel how the then head/regional editor of the SABC in Bloemfontein would not appoint him due to the fact that he did not have a matric.

6.1.3.45. The Panel noted that Mr Motsoeneng said that after he had again been refused appointment by the regional editor in Bloemfontein, who told him "*I am not going to appoint you because you do not have a matric"*, he was asked "*by other people*" to fill in the application form which he did. He was then appointed. Mr Motsoeneng did not dispute that he had written "10" in the space for highest standard passed, or that he had written the subjects and the symbols, or the date when he claimed to have passed standard 10.

"He knew that he was lying. He could have chosen to write "9" or "pending results" but he did not."

6.1.3.46. The Panel also addressed new evidence submitted to them after the hearing. They were deeply disturbed by what had been submitted as it seemed to be a *"cynical attempt to cover up an inconvenient truth – to that* Mr Motsoeneng *lied on his 1995 Application for Employment form"*.

6.1.3.47. The Panel further noted that it was extraordinary that Mr Mohlolo Lephaka ("Mr Lephaka") who was at the hearing but did not give

evidence, admitted to removing the Application for Employment form from Mr Motsoeneng's personnel file in 2003 – some eight years after it was compiled. It is even more extraordinary that Mr Lesala, the Group Executive of Human Capital Services attempted to rely on the removal of the offending evidence to assert that "*no such document was found in the files of* Mr Motsoeneng".

6.1.3.48. According to the Panel, when Mr Lesala wrote this on 27 June 2012, he was fully aware as he had been told by Mr Lephaka in writing just five (5) days earlier *"that the Application for Employment form did indeed exist and that it had been removed in 2003 because it gave the impression that* Mr Motsoeneng *passed Std 10"*. What makes Mr Lesala's denial even more puzzling is that he even refers to having received "Mr Lephaka's enquiry".

6.1.3.49. The Panel therefore found[2] that Mr Motsoeneng lied, in writing on the Application for Employment form which he completed in 1995 about whether he had passed matric and that the Sunday Independent newspaper was justified in saying that Mr Motsoeneng had lied about having a matric certificate.

6.1.3.50. An appeal headed by the Appeals Panel of the Ombudsman for the Press Council noted that it was common cause that Mr Motsoeneng did not have a matric certificate but that the only contentious issue was if Mr Motsoeneng had lied about having one.

6.1.3.51. I requested information from the SABC on 4 June 2012. In response to this request the SABC, provided two letters from SABC employees on 12 June 2012. The first letter was from Mr Alwyn Kloppers ('Mr Kloppers'), the Manager: Regional Resources, SABC News. The second letter was from Mr Pulapula Mothibi ('Mr Mothibi'), the Station Manager: Lesedi FM.

[2] www.presscouncil.org.za

Both of them indicated that in 1995 they were aware of the fact that Mr Motsoeneng did not have a matric certificate.

6.1.3.52. They had however, felt that his appointment was the correct appointment and thus endorsed it. Mr Mothibi also indicated that they were 'awaiting his results' - 18 years after his initial appointment.

6.1.3.53. As part of the investigation conducted by me, Mr Sello David Thulo ("Mr Thulo") – former employee of the SABC in Bloemfontein, provided the investigation team with an affidavit and annexures.

6.1.3.54. In this affidavit, Mr Thulo explained that in 2003, he was one of the applicants for the position of Executive Producer – Lesedi Current Affairs and attached his CV as well as the CV's of Mr Khothule Solomon Mphatsoe, Ms Phuleng Arcilia Mokhoane and Mr Motsoeneng as being the other applicants for the position.

6.1.3.55. Mr Thulo indicates that in 2003, despite the fact that Mr Motsoeneng has only been employed by the SABC, his CV which was part of the application for the position indicated that he was *"Appointed as Head of Communications at the Department of Tourism and Economical Affairs in Northern Cape".*

6.1.3.56. The investigation team met with Mr Robin Nicholson, the former CFO and also acting GCEO on 14 January 2014. He informed my investigation team that the SABC had embarked on a Turnaround Strategy under which they were directed to shed 48 of their Executives' positions which then meant non-renewal of contracts that were coming to an end soon.

6.1.3.57. According to him, Ms Ntombela-Nzimande and Ms Mampane fell under the category of employees whose jobs had been identified as redundant, and therefore had to be placed elsewhere or be offered exit packages.

6.1.3.58. He further submitted that Ms Ntombela-Nzimande's running battles with the SABC Board led to the breakdown of the relationship with them and this also became as a catalyst to the premature of her contract as it was felt that she was no longer contributing positively to the National Broadcaster.

6.1.3.59. During his interview he was asked about his role with regard to Mr Motsoeneng's appointment and salary progression. He denied playing a role in the appointment of Mr Motsoeneng from the Free State. He stated that it was Mr Mokoetle and Ms Ntombela-Nzimande who were responsible for the said appointment. He however, acknowledged that he approved the salary progressions of Mr Motsoeneng on two occasions, 10 December 2010 and 1 April 2011.

6.1.4. Removal of Mr. Hlaudi Motsoeneng as Acting COO

6.1.4.1. According to Board Meeting minutes received by the investigation team, a special SABC Board meeting was held on 25 and 26 February 2013, which Dr Ngubane did not attend. The SABC Board resolved that, with immediate effect, Mr Motsoeneng would be removed from the Acting COO's position and revert to his original position as Group Executive: Provinces and that Mr Mike Siluma ("Mr Siluma") be appointed as acting COO of the National Broadcaster.

6.1.4.2. On 26 February 2013, the Deputy Chairperson of the Board – Mr Thami Ka Plaatjie ("Mr Ka Plaaitjie"), advised Ms Pule on the resolution the Board had taken. However, strangely on 1 March 2013, Mr Ka Plaaitjie withdrew this letter of Mr Motsoeneng's removal as the Acting COO. This however, was without the knowledge and / or resolution from the SABC Board.

6.1.4.3. On 6 March 2013, Ms Pule responded to Dr Ngubane in relation the resolution taken by the SABC Board on the removal and reinstatement of the Acting COO and suspension of the CFO.

6.1.4.4. In this letter, Ms Pule acknowledged the letter from the Deputy Chairperson of the Board dated 26 February 2013, informing her of the resolution taken by the Board and further addressed the subsequent letter she had also received from the Deputy Chairperson on 1 March 2013. Ms Pule indicated that she viewed the mentioned suspension, reinstatement and appointment as un-procedural and directed the Board to follow the law in dealing with the matter.

6.1.4.5. Subsequent to the letter from Ms Pule on 6 March 2013, Ms Mokhobo, on 9 March 2013, clarified in writing the issue raised by Ms Pule and re-affirmed the resolution of the Board of 25 and 26 February 2013.

6.1.4.6. During a meeting with me on 15 March 2013, Dr Ngubane indicated that he considered the meeting of 25 and 26 February 2013 as *"irregular"* as he was not there and *"the law requires a quorum is formed with a Chairperson to take any decision"*.

6.1.4.7. A review of the legislation however indicates that in order to form a quorum at any meeting, the Chairperson or the Deputy Chairperson must be present. As this meeting which was chaired by the Deputy Chairperson, Mr Ka Plaaitjie, the resolution taken would have been constitutional and could thus only be overturned by another resolution of the Board and certainly not by the withdrawal of the notice by Mr Ka Plaaitjie

6.1.4.8. Despite the resolution passed by the previous Board on 26 February 2013, Mr Motsoeneng is still working as the Acting COO of the SABC after the interim Board overturned the decision to remove him.

6.2. The appointments and salary progression of Ms Sully Motsweni ('Ms Motsweni')

6.2.1. General Manager: Compliance and Operations, Stakeholder Relations and Provinces

6.2.1.1. As part of their response to my investigation the SABC provided various supporting documents relating to the employment of Ms Motsweni, including her CV. According to her CV, Ms Motsweni occupied the following positions at the SABC:

Period	Position
August 2002 – 28 February 2003	Internal Auditor (contract position)
1 March 2003 – 31 December 2005	Senior Forensic Auditor
1 January 2006 – 30 September 2007	Risk and Governance Manager
1 October 2007 – 30 June 2011	Manager: Corporate Risk
30 June 2011 – 31 January 2012	General Manager: Compliance and Operations Stakeholder Relations and Provinces
1 February 2012 – Date	Head: Compliance, Monitoring and Operations
June 2012 – Date	Acting Group Executive: Risk and Governance

6.2.1.2. According to evidence received, a memorandum for deviation from the normal recruitment processes, dated 22 June 2011 was sent by the SABC General Manager: Stakeholder Relations and Provinces, Mr Keobokile Mosweu ('Mr Mosweu') to the Acting Group Executive, Mr Justice Ndaba ('Mr Ndaba').

6.2.1.3. In this memorandum, Mr Mosweu indicated that according to the recruitment policy, all positions should be advertised, either internally or externally before being filled, but further indicated that due to the urgency of these appointments these provisions were not suitable.

6.2.1.4. Mr Mosweu indicated that certain positions were being downgraded and that approval was being sought to appoint Ms Motsweni to the position of

General Manager: Compliance and Provincial Operations (SC 120) and Mr Abram Madue to the position of General Manager: Stakeholder Relations and Provinces (SC 120). Both these positions were in the division of Stakeholder Relations and Provinces and the incumbent would report directly to the Group Executive: Stakeholder Relations and Provinces, being Mr Motsoeneng.

6.2.1.5. Mr Mosweu signed the request on 22 June 2011 and Mr Ndaba approved it, but failed to complete the date of his approval on the request form.

6.2.1.6. On 27 June 2011 the SABC extended an offer of employment to Ms Motsweni. The offer indicated that the commencement date of her employment was 1 July 2011 with an "*All-inclusive Total Guaranteed Remuneration Package"* amounting to R960, 500.00 (p/a). The contract had a fixed end-date of 30 June 2014. Ms Motsweni accepted the offer and entered into a formal Fixed Term General Manager Service Agreement on 1 July 2011. Both the offer of employment as well as the fixed term contract entered into with Ms Motsweni was signed by Mr Motsoeneng.

6.2.1.7. During a meeting with me on 11 March 2013, Adv Mahlati indicated that she consistently requested to be given sight of Ms Motsweni's CV as she had concerns regarding her employment history.

6.2.2. <u>Head: Compliance, Monitoring & Operations</u>

6.2.2.1. According to the undated Fixed Term Agreement entered into by Ms Motsweni and the SABC which was received by the investigation team, Ms Motsweni was appointed to the position Head: Monitoring, Compliance and Operation Service for the period 1 February 2012 to 30 January 2017 at a total cost to company package of R1,500,000.00 per annum (SC120). This contract was signed by Mr Lesala in his capacity

as Acting Group Executive: Human Capital Services (HCS) and Mr Motsoeneng in his capacity as Acting COO.

6.2.2.2. In response to my enquiries, the SABC replied and indicated that *"a need arose in the office of the Chief Operating Officer for Monitoring Compliance and Operations. Ms Motsweni was transferred to this office as General Manager Compliance Monitoring and Operations."*

6.2.3. Acting Group Executive: Risk and Governance and the Head: Monitoring and Operations

6.2.3.1. Ms Motsweni entered into another fixed term contract for the position of Acting Group Executive: Risk and Monitoring and Head: Monitoring, Compliance and Operations as of 1 April 2012 at a total cost to company package of R1, 5 million per annum (SC 120). The contract was signed by Mr Lesala and Mr Motsoeneng as the Acting COO.

6.2.3.2. During a meeting with me on 11 March 2013, Ms Mokhobo indicated that the change in positions/designations of Ms Motsweni was effected directly by the Acting COO – Mr Motsoeneng but that it should have gone to the Group Executive Committee ("Exco") and that it was not only a change in title. For her position to be created and filled it had to be approved by the CFO and finally approved by the Exco and that this was never the case.

6.2.4. Salary Progression of Ms Motsweni (1 January 2011 – 31 March 2013)

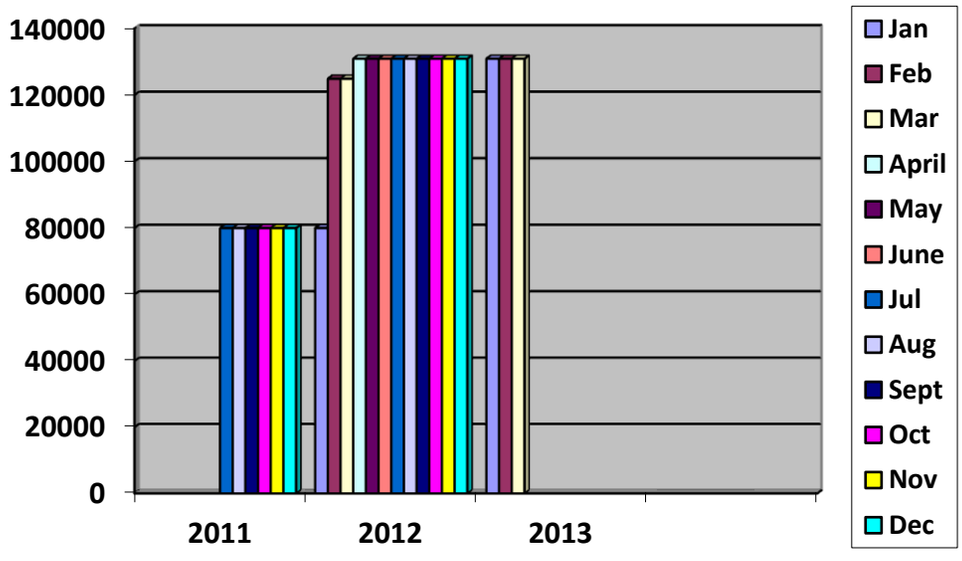
6.2.4.1. From the response received from Ms Mokhobo on 17 April 2013 , it was determined that during the period 1 July 2011 to 1 April 2012 (10 months) Ms Motsweni's total monthly costs has increased with an estimated 63.67% from R79,966.88 to R130,883.02 which were approved by Mr Motsoeneng.

6.2.4.2. During this period, Ms Motsweni has been appointed to three different positions (i.e. General Manager: Provincial Compliance & Operations, The Head: Monitoring, Compliance and Operations and Acting Group Executive: Risk & Governance) without applying, being short-listed or attending interviews. All three of these appointees reported to Mr Motsoeneng.

6.2.4.3. The table and graph below contain a summary of Ms Motsweni's salary progression (reflected per designation) for the period January 2011 to March 2013:

Date	Designation	Monthly Total Costs
July 2011	General Manager: Provincial Compliance & Operations	R79,966.88
August 2011	General Manager: Provincial Compliance & Operations	R79,966.88
September 2011	General Manager: Provincial Compliance & Operations	R79,966.88
October 2011	General Manager: Provincial Compliance & Operations	R79,966.88
November 2011	General Manager: Provincial Compliance & Operations	R79,966.88
December 2011	General Manager: Provincial Compliance & Operations	R79,966.88
January 2012	General Manager: Provincial Compliance & Operations	R79,966.88
February 2012	The Head: Monitoring, Compliance and Operations	R124,875.52
March 2012	The Head: Monitoring, Compliance and Operations	R124,875.52
April 2012	The Head: Monitoring, Compliance and Operations	R130,883.02
May 2012	The Head: Monitoring, Compliance and Operations	R130,883.02
June 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
July 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
August 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
September 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
October 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
November 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
December 2012	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
January 2013	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02

Date	Designation	Monthly Total Costs
February 2013	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02
March 2013	Acting Group Executive: Risk & Governance and The Head: Monitoring, Compliance and Operations	R130,883.02



6.3. The appointment of Ms Gugu Duda ('Ms Duda')

6.3.1.1. The allegation from a former employee of the SABC on 20 May 2013 was that Ms Duda was irregularly appointed as CFO of the SABC due to the interference of the former Minister and Department of Communications at a point where the selection ad recruitment process had been finalised and a recommendation made by the SABC board to the Minister.

<u>The evidence received from SpencerStuart revealed that:</u>

6.3.1.2. On 4 August 2011, an internal advertisement was circulated within the SABC for the position of CFO. This was followed up by an external advertisement placed by SpencerStuart in the Sunday Times of 19 October 2011.

6.3.1.3. The agency together with the Board interviewed and assessed all selected prospective interviewees between 7 and 24 December 2011 from the applications received.

6.3.1.4. Out of these, four (4) candidates were shortlisted and invited for interviews on 11 January 2012.

6.3.1.5. The recommended candidate's name, Mr Msulwa Daca's name was submitted to the former Minister Pule for his appointment as the CFO through a submission made in the form of a memo by Dr Ngubane.

6.3.1.6. In a letter dated 31 January 2012 from Hon D Pule to Dr Ngubane, Ms Pule informed Dr Ngubane that she did not approve the recommendation sent to her office and requested the Board of the SABC to re-start the recruitment process.

6.3.1.7. The recruitment process was not restarted. Instead, a fifth candidate, Ms Duda, was interviewed on 7 February 2012 by the same Board members at SpencerStuart's offices for the position of CFO. The interview panel comprised the following:

(i) Dr Ben Ngubane (Chairperson);
(ii) Mr Sembie Danana;
(iii) Mr Lumko Mtimde;
(iv) Ms Pippa Green;
(v) Mr Cedric Gina;
(vi) Mr Hlaudi Motsoeneng; and
(vii) Ms Clare O'Neil

6.3.1.8. The candidates were scored as follows:

Name	Total Score	Average Score
Hunadi Manyatsa	59	8.4
Patrick Malaza	114	16.3
Msulwa Daca	117	16.7
Precious Sibiya	86	12.3
Gugu Duda	81	11.6

Name	Total Score	Average Score

6.3.1.9. On the same date, the SABC Board again resolved that Mr Msulwa Daca, Ms Gugu Duda and Mr Patrick Malaza as preferred candidates and subject to referencing and integrity checks, should be recommended to the former Minister of Communications (Ms Pule) for selection and appointment to the position of CFO. It must be noted that Ms Duda had the second lowest total and average scores, being 81 and 11.5.

6.3.1.10. According to a letter written by Ms Pule, on 14 February 2012 to Dr Ngubane, she confirmed that she had considered the recommendation for the appointment of the CFO which was submitted as required in terms of article 11.1.2 of the Articles of Association of the SABC. In this letter Ms Pule indicated that she had approved the appointment of Ms Duda as the CFO.

6.3.1.11. During a meeting with me on 11 March 2013, Prof Green indicated that the Board initially sat for interviews and thereafter sent one name to the former Minister for approval / rejection. This recommendation was rejected by the former Minister and the Board was informed to send three (3) names. After a last minute interview by the Board, three names were sent to the Minister. It is not clear why the three names from the proper process were not simply sent to the Minister without inserting and interviewing Ms Duda without re-advertising

6.3.1.12. During the said interview, Mr Danana – former SABC Board Member also acknowledged that the name of the person interviewed at the last minute after the then Minister had rejected the first name, was not on the initial short-listed list of names.

6.3.1.13. Ms Vos indicated that the Minister nominated this person to be interviewed for the position of CFO and that this person was

subsequently appointed to the position. This was corroborated by Ms Malebane during our interview with her on 20 May 2013.

6.3.1.14. Ms Lisa Mariano of SpencerStuart in a response to our inquiry on 21 May 2013 confirmed that they had received Ms Duda's CV from Ms Winnie Kubheka of the SABC's HR department after requesting for same from Mr Lesala the Group Executive: Human Capital Services at the SABC.

6.3.1.15. Ms Mariano further stated that SpencerStuart had been instructed by the SABC to interview an additional candidate, which resulted in the 2nd round of interviews being conducted for one person by the Board on 7 February 2012. Ms Duda was the lone candidate for the purported second round.

6.3.1.16. Ms Malebane a former Chief Finance Controller and a former confidante of Ms Duda was interviewed by the investigation team. In her interview she revealed to the investigation team exactly how Ms Duda was recruited and interviewed by the Board. She gave first account details of how Ms Duda's CV was submitted, various meetings held by Ms Duda with Mr Phosane Mngqibisa, and the finalisation of the first interview process for the position of the SABC CFO.

6.3.1.17. Ms Malebane also informed the investigation team how she had been continuously informed by Ms Duda of her recruitment and eventual appointment by the SABC.

6.3.1.18. Ms Malebane also outlined the different role players who, according to her, were behind the appointment of Ms Duda, namely, Mr Mngqibisa; Mr H Motsoeneng; the Chairperson of the SABC Board; some Board members and the former Minister of Communications.

6.3.1.19. According to Ms Malebane, Mr Mngqibisa 'offered' Ms Duda to choose from the various vacant positions in the state owned enterprises resorting

under Department of Communications. These included the CFO position at SABC, CFO position at Post Bank and CFO of Post Office. Ms Duda then chose the SABC CFO post. Mr Mngqibisa then 'recommended' Ms Duda for the position of CFO to Ms Pule. Various meetings were held during the period December 2011 and February 2012.

6.3.1.20. According to Ms Malebane Ms Duda's CV was submitted directly to Ms Pule who then transmitted it to Mr Phiri with an instruction to the Board to interview the said candidate.

6.3.1.21. Ms Malebane further informed the investigation team how Ms Duda threw a tantrum when there was a delay by the Minister to approve and announce her as the successful candidate for the CFO's position.

6.3.1.22. According to her, Ms Duda's tantrum was allegedly applauded/hailed by the Minister as this portrayed the right temperament for the position Ms Duda was to occupy.

6.3.1.23. Not long after the tantrum Ms Duda was informed by Mr Mngqibisa of plans to announce her appointment as the CFO at a special function in Cape Town.

6.3.1.24. Ms Malebane informed the investigation team that flight and accommodation arrangements were made by Mr Mngqibisa for Ms Duda to be in Cape Town where Ms Duda was announced as the SABC's CFO.

6.3.1.25. Ms Malebane informed the investigation team that she was also recruited to join the SABC as the second in command (babysitter) to Ms Duda in order to assist the latter in the challenges that lay ahead as Ms Duda had never been a CFO prior to being employed by the SABC. It was confirmed through Ms Duda CV that she had never been a CFO before.

6.3.1.26. Ms Malebane was offered a salary of R150 000 per month as the Chief Finance Controller. Ms Malebane also revealed how the initially recommended candidates for the CFO's post were rejected by the Minister while Ms Duda's documents were being processed. According to her, five (5) Board Members were lobbied to ensure that Ms Duda was appointed during the second round of interviews. According to Ms Malebane the recruitment agency which handles the SABC screening process is owned by one of the Board members.

6.3.1.27. According to Ms Malebane, she had been offered a 5 year contract which was then reduced to 2 years, but signed an interim 6 month contract after being assured by Ms Duda that the contract would be over-ridden by a permanent one within 2 months. However ,Ms Malebane's contract never materialised as she was suspended by the SABC.

6.3.1.28. During our meeting and interview on 19 July 2013, the Acting COO confirmed Ms Malebane's version verbally and later in writing, that he was the one who received Ms Duda's CV from Mr Themba Phiri, the Acting Director General of the Department of Communications, and submitted it to the SABC's HR office. He also admitted that this happened after interviews for the CFO had been finalised and recommendation to the Minister made. He could not explain why he violated established recruitment procedures and SABC's own policies in submitting the CV irregularly. In fact he took no responsibility for his actions, putting the blame on the Board as the panel. Below is an extract of the interview:

*"**Adv Madonsela** : (Indistinct) alleged that the appointment of Ms Duda was predetermined and the interview process was just a formality, what is your comment?*
***Mr Motsoeneng**: My comment Public Protector, is the panel taking responsibility on the appointment because all of us we interview her and we were happy from where I'm sitting, the panel itself, we did interview her.*

***Adv Madonsela**: Right. You do remember though that you were happy, but you don't remember who else you interviewed on that day? Surely you couldn't have interviewed more than a handful of people?*
***Mr Motsoeneng**: Yes, Public Protector, I agree with you. It is just that I don't remember exactly whether it was only Gugu that day or ... but I do remember that we did make some interviews. I will just go and check because I don't want to say there were two or three when there were not.*
***Adv Madonsela**: So in what way was Ms Duda better than the original Mr Mbulelo person that you had initially recommended?*
***Mr Motsoeneng**:No, to be honest Minister, the first candidate from where I'm sitting he did very well. I'm just talking about the first process that we did, the first candidates did very well. When the Minister reject and then we go back and interview Gugu and then ... because we sent the names that ... the Minister was supposed to select within those names, but what I'm saying Public Protector, here is ... I mean the panel taking responsibility on Gugu because it is us who sent Gugu's name to the shareholder.*

***Adv Madonsela**: Well, Gugu now has become a controversial one, surely you would remember if you sent her CV? Do you remember sending her CV?*
***Mr Motsoeneng**: Yes, Public Protector, I do remember.*
***Adv Madonsela**: You sent her CV?*
***Mr Motsoeneng**: Yes.*
***Adv Madonsela**: When did you send her CV, at the beginning of the process or when the new ... when Process B commenced?*
***Mr Motsoeneng**: I sent the CV ... I just want to double check Public Protector, but I sent ... it was not Gugu, it was other people also. It was not just Gugu alone. I did send the CV's.*
***Mr Madiba** : Sent them to who?*
***Mr Motsoeneng**: Sent it to HR. All the CV's that I get I send them to HR.*
***Adv Madonsela**: Where did you get Gugu's CV?*
***Mr Motsoeneng**: I receive Gugu's CV from Themba.*
***Mr Madiba** : Themba Phiri?*
***Mr Motsoeneng**: Yes, I receive Gugu's from Themba.*
***Adv Madonsela**: Do you recall when exactly was this?*
***Mr Motsoeneng**: That is the issue that I just need to go and check, Public Protector.*
***Adv Madonsela**: We would appreciate it (indistinct).*
***Mr Motsoeneng**: Yes, I will just go and check whether it was after we have closed the ... what I'm saying about the three ... the two ... the three people, I will just check.*
***Mr Madiba** : Look, let me give him the dates Madam, so that if we don't ...*
***Adv Madonsela**: Yes. Okay, we can give him the date.*

Mr Madiba *: Can you give me that ... what happened here Mister Motsoeneng, is that you conducted interviews on the 11th of January and after conducting the interviews on the 11th of January you submitted a recommendation to Minister and then on the 31st of January ...*
Mr Motsoeneng *: In this case ... sorry Public Protector, in this case the Board?*
Mr Madiba *: The Board, yes.*
Mr Motsoeneng *: Oh, okay.*
Mr Madiba *: I think the number one person that you submitted was Mbulelo(?) (indistinct) from the Eastern Cape.*
Mr Motsoeneng *: Yes, I remember the Eastern Cape.*
Mr Madiba *: Yeah and then the Minister was not satisfied.*
Adv Madonsela *: Okay, when did the Minister then ...*
Mr Madiba *: Replied on the 31st of January 2012 to Dr Ngubane. That is why I was asking you that question about telephone calls thereafter.*
Mr Motsoeneng *: Dr Ngubane?*
Mr Madiba *: Yeah.*
Mr Motsoeneng *: Okay.*
Mr Madiba *: And indicated that she did not approve the recommendation and that you have had to restart the recruitment process.*
Adv Madonsela *: Okay and then when did you get the CV of Ms ...*
Mr Madiba *: She was interviewed on the 7th of February.*
Mr Motsoeneng *: 7th of ...*
Adv Madonsela *: Yeah, but when did you submit the CV to HR?*
Mr Motsoeneng *: That one Public Protector, is ... this is what I'm saying, I just need to remember when, because to be honest I don't remember when."*

<u>Termination of several senior staff members' service by the SABC</u>

6.3.1.29. As indicated earlier, one of the allegations was that Mr Motsoeneng was systematically purging senior staff members at the SABC who disagreed with him and getting them out procedurally at enormous expense to the Corporation in the form of settlements, paid leave or salaries paid while a suspended executive idled at home.

6.3.1.30. Several letters of suspension and termination of employment services of Ms P. Ntombela-Nzimande, Ms Charlotte Mampane, Mr Thabiso Lesala,

Mr Bernard Koma, Ms Gugu Duda, and Ms Nompilo Dhlamini among others, were provided to proof the allegation.

6.3.1.31. The termination of a fixed contract of employment of Ms Ntombela-Nzimande through a letter dated 21 February 2011 showed that the termination of her contract was premature as it had thirteen (13) months remaining on it and for which she was paid in full.

6.3.1.32. Ms Ntombela-Nzimande indicated to me that her contract was terminated prematurely because she had raised several corporate governance issues with Mr Nicholson. She alleged that many of the issues she had raised related to the alleged irregular employment and subsequent conduct of Mr Motsoeneng.

6.3.1.33. Another termination of employment letter dated 20 March 2012 was served on Ms Mampane whose contract was set to expire on 31 October 2013.

6.3.1.34. Prior to receiving termination of her contract notice, a letter written by the then Deputy Chairperson of the Board, Mr Ka Plaatjie, dated 19 March 2012 informed Ms Mampane that the SABC Board had decided that she does not fall within the structural requirements of the SABC and therefore that she should discuss a settlement with the SABC Human Resources unit.

6.3.1.35. During an interview with the investigation team on 15 March 2013, Mr Lesala the former Chief of HR informed them that he reported directly to Mr Motsoeneng who in turn purportedly reported to the GCEO. However, Mr Motsoeneng did as he pleased without being reined in by the GCEO. For instance the GCEO would sign salary increments to Mr Motsoeneng despite the lack of motivation and justification for such increment from HR.

6.3.1.36. Mr Lesala stated that his resignation came as a result of this constant abuse of Human Resource policies. He subsequently approached the CCMA on grounds of alleged constructive dismissal. At the CCMA a settlement agreement to withdraw the dispute, dated 31 January 2013 was entered into between the SABC and Mr Lesala. The amount of R 2,000,000 (R2 million) was paid to Mr Lesala in terms of the settlement agreement.

6.3.1.37. As indicated earlier Ms Duda was suspended with full remuneration and benefits five months into her commencement of contract as the SABC CFO. It must further be noted that at the time of the interview with the investigation team, Ms Duda was still receiving her full remuneration and benefits despite her suspension being affected several months ago.

6.3.1.38. Mr Koma informed my investigation team that he was suspended and charged by Mr Motsoeneng with spurious offences which related to allegations of irregular procurement of a fleet of vehicles from Mercedes Benz. He was then paid an undisclosed amount in settlement by SABC.

6.3.1.39. A suspension letter to Ms Dlamini dated 10 September 2012 from Ms Mokhobo informed Ms Dlamini of her suspension with full remuneration and benefits, pending investigations for alleged misconduct of a serious nature.

6.3.1.40. Ms Dlamini was interviewed by the investigation team on 26 March 2013. She stated that she was still paid her full remuneration and benefits despite having been suspended in September 2012. She further informed that the reasons for her suspension were spurious or vague.

6.4. The irregular salary progressions of staff resulting in a salary bill increase of R29 million

6.4.1. This issue is entwined with the irregular salary increase of Mr Motsoeneng, Ms Motsweni and Ms Khumalo canvassed in 6.1 and 6.3 above. In addition to these people, other employees including freelancers, shop steward and call centre staff all contributed in the enormous increase of the salary bill of R29 million.

6.4.2. The labour dispute settlement awards canvassed in 6.5 above also contributed to the escalation of the salary bill.

6.5. Systemic corporate governance deficiencies at the SABC and the causes thereof

6.5.1. Part of the allegations raised by the complainants relate to systematic maladministration with regard human resource, financial management and governance failure.

Appointments of staff

6.5.2. In July 2013, Ms Malebane who describes herself as a former "confidante" of Ms Duda gave the investigation team a detailed written account of how Ms Duda was recruited and eventually appointed to the SABC's CFO position.

6.5.3. During a meeting with Ms Malebane on 20 May 2013 she informed the investigation team of the very first approach she had from Mr Mngqibisa (who is referred to as Mr P) who apparently received Ms Duda's CV from the former Minister of Department of Communications, Ms Pule and eventually gave it to Mr Phiri, the Acting Deputy Director General of the Department of Communications who then gave it to Mr Motsoeneng.

6.5.4. During a meeting with me on 19 July 2013, Mr. Motsoeneng the SABC's Acting COO admitted that he was the one who delivered Ms Duda's CV to the SABC after he had received it from Mr Phiri.

6.5.5. Mr Motsoeneng further informed me that he was part of the Board members who interviewed Ms Duda but surprisingly he failed to remember whether Ms Duda was the only candidate interviewed on the said date.

6.5.6. Mr Motsoeneng admitted that he was responsible for Ms Motsweni's appointments and provided reasons for the need of such an appointment to deal with Audit issues which had been picked up by the Auditor General.

Salary Progressions

6.5.7. The salary progressions of several officials including Mr Motsoeneng, Ms Motsweni, Ms Thobekile Khumalo, call centre staff and freelancers were authorised without following SABC policies, processes and prescripts. Mr Motsoeneng unilaterally increased salaries of these employees including his.

6.5.8. SABC's records and information availed to my office show that Mr Motsoeneng, Ms Mokhobo, Mr Mokoetle, Mr Nicholson and Dr Ngubane signed for the said employees' salary increments despite cost-cutting initiatives that had been mooted as part of the SABC Turn-Around Strategy.

6.5.9. The SABC's payroll records revealed that Mr Motsoeneng's salary was at R1, 4 million. According to Mr Lesala, Ms Makhobo then suggested that it be raised to R1,7 million and that this threshold not be exceeded. However, in four months' time she again said that it should be increased to R2,4 million and proceeded to sign the HR motivation.

6.5.10. Mr Lesala, the Group HR Manager put the blame on Ms Mokhobo's shoulders for failure to deal with Mr Motsoeneng.

Labour disputes settlements

6.5.11. During an interview on 15 March 2013 with Ms Lorraine Francois, the suspended and now reinstated internal auditor, informed the investigation team that the corporate governance structures at the SABC were dysfunctional. According to her, she had suggested that an external company be outsourced to review the SABC Corporate Governance practices.

6.5.12. SizweNtsaluba-Gobodo(SNG) was subsequently appointed. SNG thereafter issued a damning draft report revealing that a lot of Exco dynamics were dysfunctional and were due for management's consideration.

6.5.13. Ms Francois had apparently written to the Board for the review of SNG report on 1 November 2012. However, Mr Motsoeneng refused for the report to be released and reviewed by the Board as it implicated several Board members. Mr Motsoeneng then threatened to get rid of Ms Francois if she proceeded with release of the report.

6.5.14. She was subsequently summoned to the Chairperson's office on 6 November 2012 where she was given a letter of suspension with no reasons. Ms Francois then challenged her suspension at the CCMA, and this led to her reinstatement by the SABC. Ms Francois stated that the SABC has been without a strategic plan but has been changing the organogram on numerous occasions. For example, Ms Motsweni has been acting in four (4) different executive positions concurrently which in her view, point to further corporate governance failure in the SABC.

6.5.15. The investigation team further established from Ms Francois that indeed several former employees were paid substantial amounts of money as labour dispute settlement awards against the SABC and/or severance packages.

6.5.16. However, during my interview of the SABC Board members and the Chairperson, other than blame one another, they all denied knowing about the escalation of the SABC salary bill. For instance the Chairperson and the Board when questioned and informed by me about Mr Motsoeneng's rapid salary progression up to the current one of R2,4 m per annum as well as the National Broadcaster's unprecedented salary bill escalation by R29 million, they expressed shock and ignorance of this state of affairs.

6.5.17. On 15 March 2013, Ms Duda also informed the investigation team that she had been suspended 5 months into her position as the CFO, and that this was after altercations with Mr Motsoeneng who had been verbally abusive towards her and Ms Mokhobo.

6.5.18. According to Ms Duda, Mr Motsoeneng did not take kindly to being cautioned whenever certain payments he sought to have made, were not in line with financial prescripts. For instance, she had proposed for an offset of R32 million which the SABC owed to SAFA as against the R23 million the latter owed to the former which Mr Motsoeneng clearly opposed despite it making a sound business proposition.

6.5.19. In his interview with me on 15 March 2013, Mr Lesala indicated that subsequent to his resignation, he instituted a constructive dismissal dispute against the SABC at the CCMA, and that a satisfactory settlement award was given to him.

Dereliction of duty by the Board

6.5.20. During an interview with the investigation team on 15 March 2013, Mr Itani Tseisi the former Group Executive Risk and Governance of the SABC informed the team that Mr. Motsoeneng was very influential and verbally abusive towards SABC staff members and the SABC Board, even before he was even appointed to the position of the COO.

6.5.21. He indicated that Mr Motsoeneng always attended the Board meetings even before he was appointed as the Acting COO notwithstanding the fact that he was prohibited by corporate governance rules to attend such Board meetings as he was not an executive member. Mr Motsoeneng's attendance had been suggested by the Chairperson of the Board. Ms Mokhobo was also subjected to the abusive behaviour of Mr Motsoeneng.

6.5.22. Ms Duda further stated that Mr Motsoeneng at times called her even at night to scream and insult her if things did not go his way. According to Ms Duda, most of the SABC Board members were compromised in their relationship with Mr Motsoeneng. For instance one of the erstwhile Board member's daughter had been offered an advertising billboards contract by Mr Motsoeneng. The SABC Chairperson himself is said to have been at times called to Mr Motsoeneng's office instead of it being the other way round.

6.5.23. In a response to my question about the resignations/termination of senior staff members of the SABC, which had allegedly been attributed to him, Mr Motsoeneng denied being responsible for the exodus of staff. But he admitted that some of it was in the best interest of the SABC despite astronomical costs being incurred in labour dispute settlements and litigation costs.

6.5.24. Mr Motsoeneng advised that he initiated discussions relating to his salary raise which was always motivated by HR and supported by his superior,

the GCEO before approval by the Board's Chairperson. Mr Motsoeneng also informed me that for the work he was doing at the SABC, he believes that he deserves what he earns and perhaps even more. When asked if this was in line with the Corporation's policy and if he advised the Board as such, he said it was the Board's duty to do the right thing and his right to ask for whatever he deemed he deserved.

6.5.25. The SABC Board Chairperson, the Board members and the GCEO informed me that they were not aware of such high salaries being paid to the said employees.

6.5.26. I was also informed that the SABC had "governance issues" which according to Mr Motsoeneng, were at the heart of most of the challenges the National Broadcaster was grappling with.

6.5.27. Mr Lesala informed the investigation team on 15 March 2013 that he reported directly to Mr Motsoeneng who in turn purportedly reported to Ms Mokhobo. However, Mr Motsoeneng did as he pleased without being reined in by her. For instance Ms Mokhobo would sign salary increments to Mr Motsoeneng despite the lack of motivation and justification for such increment from HR.

6.6. The Department and Minister of Communications' alleged undue interference in the affairs of the SABC, giving unlawful orders to the Board and staff and if the said acts constitute improper conduct and maladministration

6.6.1. The alleged unlawful orders and improper conduct of the former Minister of Communications in the recruitment and appointment of Ms Duda as the CFO for SABC is discussed in detail on the issue regarding the said appointment in paragraph 6.4 above.

6.7. Responses to the Provisional Report of the Public Protector issued on 15 November 2013.

6.7.1. A Provisional Report was issued and distributed to the complainants; other parties involved, including the former Minister of Communications, Ms. Pule.

6.7.2. The Provisional Report was distributed on the basis of confidentiality to provide the recipients with an opportunity to respond to its contents.

6.7.3. All the parties' attention was specifically directed to the provisions of section 7(9) of the Public Protector Act which provides that:

> "If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may be result, the Public Protector ***shall afford such a person an opportunity to respond in connection therewith in any manner that may be expedient under the circumstances".*** (Emphasis added)

6.7.4. Subsequent to issuing the Provisional Report, the Public Protector received correspondence on different dates from various attorneys who claimed to represent the recipients of the Provisional Report.

6.7.5. The Public Protector responded directly to the recipients of the Provisional report advising them that her office allowed legal assistance and not legal representation, and that therefore she would be dealing directly with them and not through their lawyers. But that they were free to be assisted by lawyers in preparing their documents in response to the Provisional Report.

6.7.6. All except two of the recipients of the Provisional Report requested to be provided with certain audio recordings of the meetings held with the

Public Protector and her investigation team, and this request was acceded to.

6.8. Response of the GCEO of SABC, Ms Lulama Mokhobo

6.8.1. Ms. Lulama Mokhobo, the SABC's GCEO responded to the Provisional Report on 29 November 2013. She was generally unhappy with the intended findings and remedial action in the report in so far as it related to her role in the issues investigated by the Public Protector.

6.8.2. Ms. Mokhobo commenced her inputs by clarifying the fact most of the issues investigated by the Public Protector occurred prior to her tenure as the SABC's GCEO as she properly took office on 24 January 2012.

6.8.3. According to her, much of what she is alleged to have been party to pre-dates her term and had nothing to do with her.

6.8.4. Notwithstanding the afore-going, Ms Mokhobo proceeded to make comments and clarifications of what she called "my version of the truth as I know it".

6.8.5. Ms Mokhobo stated that when she joined the SABC as the GCEO, she found the Board whose reliance on Mr Motsoeneng, as Acting COO to act on matters that the Board classified as crucial, highly confidential and urgent, extremely high.

6.8.6. Ms Mokhobo stated that Mr Motsoeneng shared a relationship with Dr Ngubane and some Board members so close that she was frequently not aware of discussions and/or actions that were being planned.

6.8.7. Ms Mokhobo indicated that among the responsibilities that Mr Motsoeneng was entrusted with prior to 24 January 2012 and continuing beyond that were the following (list not exhaustive):

6.8.7.1. Addressing and bringing closure to the Auditor General (AG) and Special Investigations Unit (SIU) findings. These had not been addressed by the previous SABC Executives.

6.8.7.2. Addressing the murky matters surrounding the fulfillment of a Debis Fleet Management contract which resulted in the delivery of Mercedes Benz fleet of cars for use by mainly journalists in the News department, and had generated into a scandal of massive proportions (leading to complainant Mr Koma's disciplinary process).

6.8.7.3. Ensuring the removal of certain Executives (including complainant Ms Mampane) that the Board had deemed no longer suitable to continue working at the SABC.

6.8.7.4. Generally assisting the Board with political stakeholder and labour matters that no one seemed capable of carrying out. To this extent, Mr Motsoeneng was credited with stemming labour unrest and effectively managing Labour Unions.

6.8.7.5. To further illustrate the trust quotient Mr Motsoeneng had with the Board, he was delegated to act as the GCEO in the brief period between her appointment and actual assumption of office (instead of the former Acting GCEO and Group Executive of News, Mr Molefe being requested to do so).

6.8.7.6. Mr. Motsoeneng was therefore seen as a hero, operating at a realm far above of all other Executives, and therefore deserving of being considered as the next COO.

6.8.8. Ms. Mokhobo further stated that it was common knowledge that her arrival at the SABC did nothing to shift the workings of the Board and its reliance on Mr. Motsoeneng to a point where she would be given space

and requisite levels of trust and acknowledgement, particularly that of Dr Ngubane and the Board, to do all things necessary as would be required of a normal CEO. In fact Dr Ngubane famously stated in his speech at the ANC Mangaung conference TNA breakfast show (broadcast live on December 21, 2012) that Mr. Motsoeneng had stabilized the SABC, suggesting that he did so single-handedly.

6.8.9. Ms. Mokhobo stated that it therefore came as no surprise that Dr Ngubane and Mr. Ka Plaatjie not only chose to declare unlawful the Board meeting that resolved to remove Mr. Motsoeneng from his role as acting COO, but also elected to resign from their positions as Chairman and Deputy Chairman respectively.

6.8.10. With regard to the appointments and promotions of Mr Motsoeneng over the period beginning in March 1995, or in the appointments, promotions and salary increases of Ms. Motsweni, Ms. Mokhobo stated that it was a well-known fact that she had played no role in that regard.

6.8.11. In conclusion, Ms. Mokhobo also referred to several documents she had attached to her comments as proof that she had played no role in most of the issues alluded to in the Provisional Report, as a result of which she requested that certain findings and remedial action linked to her should be expunged from the final report of the Public Protector.

6.9. Response of the former Chairperson of the SABC Board, Dr Ben Ngubane

6.9.1. Dr Ngubane, former Chairperson of the erstwhile SABC Board responded to the Provisional Report on 18 December 2013.In general the response was not in agreement with the contents of the Provisional Report.

6.9.2. Dr Ngubane expressed his dissatisfaction in particular with regard to the findings and remedial action that the Public Protector recommended to be taken against him.

6.9.3. He stated that the provisional findings cover a wide period of his tenure at the SABC, and that this made it difficult for him to respond fully out of memory to accusations as those contained in the Provisional Report.

6.9.4. Dr Ngubane further denied that he went out of his way to act as an Executive Chairperson of the SABC Board, and that he was the point of contact of the Executive Authority with the Board, as well as being the person who managed the affairs of the Board between the Board meetings however frequent they might have been.

6.9.5. With regard to Mr. Motsoeneng's salary progression, Dr Ngubane indicated that this was a recommendation from the SABC's Human Resources department, which was effected in line with SABC's policies, and that the progression was based on the ground that Mr Motsoeneng's salary was far below the level then enjoyed by other related positions within the SABC.

6.9.6. On the issue relating to the irregular appointment and salary progression of Ms. Motsweni, Dr Ngubane stated that it occurred during the time the SABC had to implement the findings of the Auditor General and Ms. Motsweni assisted in co-ordinating a team under Mr Motsoeneng and that her appointment was done in accordance to SABC's policies.

6.9.7. Dr Ngubane contended that the Public Protector in dealing with the termination of service of staff by the SABC, lumped together various employees which in his view should be treated under different categories, and that there was no evidence of termination or suspension of staff, or settlement amounts or litigation costs in the Provisional Report.

6.9.8. He further contended that there was no indication of the amount which constituted fruitless and wasteful expenditure, and also the basis on which it should be refunded by the GCEO, the Acting COO and himself, and that therefore he denied any liability in that regard.

6.10. Response of Mr Themba Phiri, the Acting Deputy Director General of Department of Communications

6.10.1. Mr Themba Phiri responded to the Provisional Report on 29 November 2013 through the signature of his attorneys, Malan and Mohale Attorneys.

6.10.2. Mr Phiri denied any involvement in the submission of Ms Duda's CV to the SABC and that he was just asked telephonically about the CV by Mr Motsoeneng who by then had been expecting "something" from the former Minister, Ms. Pule.

6.10.3. He also denied that he acted on instructions from the Minister to the Board to interview Ms Duda as stated by Ms Malebane, and also denied Mr Motsoeneng's statement to the Public Protector that he received Ms Duda's CV from him.

6.10.4. Mr Phiri explained that he had referred Mr Motsoeneng's telephonic enquiry to the then Minister's PA, Ms Nthabiseng Borotho and that therefore he merely acted as a conduit to the enquiry about a CV, the underlying background to which he was not privy.

6.10.5. In conclusion, Mr Phiri argued that he did not act unlawfully as indicated in the Provisional Report, and that therefore the Public Protector should revisit her findings and recommendations against him for the purposes of her final report.

6.11. Response of Mr Phosane Mngqibisa

6.11.1. Mr Mngqibisa responded to the Provisional Report on 10 December 2013 through the signature of his attorneys, F R Pandelani Incorporated.

6.11.2. Mr Mngqibisa stated that he was never afforded an audience prior to the issuing of the Provisional Report in order to exercise his right reply to the allegations or to rebut same.

6.11.3. Mr. Mngqibisa stated that the allegations against him by Ms Malebane were never corroborated by any of the persons interviewed, including Ms Duda during her meeting with the investigation team.

6.11.4. Mr Mngqibisa contended that Ms Malebane's evidence should therefore be regarded as "hearsay" and that therefore it could not assist in proving the essential fact of linking him to the appointment of Ms Duda at the SABC.

6.11.5. He further stated that Ms Malebane does not herself offer any personal knowledge of the serious facts or allegations and relies on what she alleged was told by Ms Duda which the latter ought to either confirm or deny having made such utterances as alluded to.

6.11.6. Mr Mngqibisa finally stated that there was no basis either in fact or law upon which the Public Protector would be justified in relying on such piece of evidence or allegations made by Ms Malebane.

6.12. Response of the Complainants, former SABC employees

6.12.1. The Complainants responded to the Provisional Report on 28 November 2013. In general they expressed their satisfaction and appreciation to the Public Protector for the issuing of the report and also welcomed the findings and recommendations made.

6.12.2. The Complainants expressed their concern that Mr Nicholson, former CFO of SABC and also acting GCEO at the time, his role in the transgressions though being mentioned, but there seemed to be no firm findings or remedial action against him.

6.12.3. The Complainants further stated that Mr Koma was unfairly forced out of his position based on false and unfounded reports that had been made by Mr Motsoeneng regarding the purchase of 20 Mercedes Benz vehicles from Debis Fleet Management.

6.12.4. The Complainants recommend that Mr Koma should be compensated for being unfairly forced out of the SABC against his will and for tarnishing his good name and emotional torture that he was subjected to.

6.12.5. In conclusion the Complainants recommended that Mr Motsoeneng and Mr Nicholson should be charged criminally for their offences, as such remedial action would serve as a deterrent to those in senior positions at the SABC.

6.13. Response of Ms. Clare O'Neil, former SABC Board Member

6.13.1. Ms. O'Neil responded to the Provisional Report by e-mail on 28 November 2013. She had requested to be furnished with a copy thereof after she had read about it in the "leaked" report in a weekend newspaper article.

6.13.2. Ms. O'Neil expressed her dismay at what had been related to the Public Protector by Ms. Duda about the Board members being compromised in their relationship with Mr. Motsoeneng.

6.13.3. She stated that she was astounded by the specific mention of her name in the Provisional Report with regard to her having a daughter to whom a billboards advertising contract have been offered by Mr. Motsoeneng.

6.13.4. Ms. O'Neil emphasised that not only does she not have a daughter, she does not have children and therefore this should prove categorically that Ms. Duda's allegations are untrue and also a blatant mis-information to the Public Protector.

6.14. Response of Ms.Zandile Tshabalala, current SABC Board Chairperson

6.14.1. Even though the Provisional Report was submitted to her for her information as Chairperson of the incoming Board, Ms Tshabalala, took the liberty to respond extensively to the Provisional Report.

6.14.2. Ms.Tshabalala argued that the Public Protector's investigation has taken a number of complaints out of context when the investigation was concluded and the intended findings were formulated. For example, the Matric certificate and the fourteen employees.

6.14.3. Ms. Tshabalala then proceeded to deal with each of the Public Protector's findings and conclusions, ostensibly denying the basis of each of them and the fact that they constituted improper conduct and/or maladministration.

6.14.4. She also mentioned the names of certain individuals and law firms who in her view should have been interviewed by the Public Protector for a broader understanding of the terms of the Government Guarantee and the Turn-around Strategy, Ms. Irene Charnley, Mr. Nicholson, Ross Alcock and Associates, Deloitte and Edward Nathan Sonnenbergs, respectively.

6.14.5. On the departure of both Ms. Ntombela-Nzimande and Ms. Mampane, Ms. Tshabalala said that in line with the SABC's policies these employees' positions were declared redundant and settlement agreements were reached with them in respect of the remainder of their contracts, and that payments were made to them which they accepted, willingly.

6.14.6. On the alleged escalation of the salary bill by R29 million, Ms Tshabalala indicated that the SABC had to address the legacy of the past, in terms of which certain personnel were permanently engaged as freelancers for periods in excess of twenty (20) years. There were also issues of parity which according to her, were required to be addressed by the Board to ensure cessation of past discriminatory practices in the organisation.

6.14.7. According to Ms. Tshabalala, the SABC is compelled to compete for talent, and that this applied to both sourcing and retention of talent. Therefore the escalation complained of was done to ensure that the SABC has a competitive edge and within the available resources of SABC.

6.14.8. In conclusion, Ms. Tshabalala stated that on the basis of the above, the SABC disputed allegations of maladministration and abuse of power and expressed a view that most of the findings that the Public Protector intends making would require her office to conduct a further and more in-depth objective investigation before they are made.

6.14.9. My subsequent response to Ms Tshabalala's comments on 20 December 2013 was as follows:

"I am currently studying the comments you have made in response to the specific issues contained in my Provisional Report. If warranted, I will incorporate the comments you have made in my final report once I have related these comments to my investigation.

However, I am astonished by the response from you as the incoming Chairperson of the new Board as my investigation covered a period which preceded your tenure. Of particular surprise to me is that you say the matters were not investigated yet documents were requested and received from the SABC administration and Board, interviews were held with witnesses and the entire SABC Board with questions asked on all allegations, and the Provisional Report itself was an opportunity to engage me on each intended finding to provide evidence to the contrary.

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

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1. Regarding the alleged appointments and salary progression of Mr. Motsoeneng

7.1.1. It is common cause that in 2010, Mr Mokoetle with the approval of Dr Ngubane, created the position of Executive Manager: Stakeholder Relations in the office of the GCEO and recruited Mr Motsoeneng from the SABC's Free State office for this position, without advertising the post or going through a selection process stipulated in the SABC's Delegation of Authority Framework which regulates creation of new positions.

7.1.2. It is also common cause that Mr Motsoeneng did not apply, nor was he interviewed for this position, having left the SABC under a cloud following an investigation into allegations that he had committed fraud in his application for employment when he first joined the SABC in 1995 on a full time basis. On 1 August 2010, the SABC appointed Mr Motsoeneng as Executive Manager: Stakeholder Relations in the office of the GCEO (salary scale 120) at a salary of R500, 000 per annum,

7.1.3. This appointment was followed by three further appointments or amendments to Mr Motsoeneng employment contract within a period of five (5) months effected by the previous GCEO Mr Mokoetle and the then Acting GCEO, Mr Nicholson, respectively.

7.1.4. All of these amendments or appointments although not changing his designation as the Executive Manager: Stakeholder Relations always effected an astronomical adjustment to his salary scale.

7.1.5. Dr Ngubane acknowledged that Mr Motsoeneng was recruited from the Free State by Mr Mokoetle to work in his office as the person responsible to deal with the unions on the issues relating to the turnaround of the SABC. The said appointment was not approved by Exco as required by the SABC's Delegation of Authority Framework (DAF).

7.1.6. At the SABC Board meeting held on 14 November 2011, the SABC Board resolved to appoint Mr Motsoeneng Acting COO after the position of COO was vacated by Ms Mampane, Dr Ngubane recommended that Mr Motsoeneng be appointed to the position in an acting capacity.

7.1.7. During the period 1 April 2011 to 1 April 2012, Mr Motsoeneng's total monthly cost to company salary signed for approval by Dr Ngubane, the Chairperson of the Board, increased from R126, 961 to R211, 172 (66,3%).

7.1.8. Dr Ngubane addressed a letter to Ms Pule on 15 November 2011 advising her on the resolution of the Board taken during its meeting on 14 November 2011 to appoint Mr Motsoeneng as acting COO until such time that the Chief Operating Officer was appointed, and this was duly approved by Ms Pule on 28 November 2011.

7.1.9. In reply to questions from me, Ms Mokhobo, on 12 June 2012 responded as follows to the statement that *"the SABC committed an act of forgery and uttering (sic) in changing the advertisement for the position of the COO*

issued in April 2008 by removing the requirement for academic qualifications so as to suit who is without qualification to meet the criteria for the advertised position":

"The advertisement was an exact replica of previous advertisements dating as far back as 2006."

7.1.10. On 11 March 2013 Ms Mokhobo indicated that the Chairperson of the Board indicated to her that she was not allowed to change the requirements of the advertisement and that it had to go out exactly as the one in 2008. Ms Mokhobo indicated that the Chairperson was adamant that he did not want to see any qualifications reflected in the advertisement. This sentiment was echoed by Adv Cawe Mahlati ("Adv Mahlati") – former member of the SABC Board.

7.1.11. This was disputed by Dr Ngubane who indicated to me on 15 March 2013, that the advertisement never came before the Board for approval and that it was something which was done by management.

7.1.12. During January 2013 / February 2013, the SABC placed another advertisement for the position of COO. In this advertisement the requirements for the position was indicated as "...*A relevant degree/diploma and/or equivalent qualification."*

7.1.13. This was a watered down version of the initial advertisement placed by SpencerStuart in Sunday Times and City Press of 9 July 2006 which indicated that the requirements for the position were "a*ppropriate academic background, preferably postgraduate qualification"* whilst the internal advertisement only required a "c*ommercially astute executive, with broad-ranging operational track record of success in broadcasting."*

7.1.14. On my question to her regarding the changing of the advertisements to suit Mr Motsoeneng, Ms Mokhobo indicated that on 12 June 2012 the 2008 advertisement was *"an exact replica of previous advertisements dating as far back as 2006"*. Contrary to Ms Mokhobo's statement, this advertisement was a watered down version of the advertisement placed in 2006 indicated that the requirements for the position were an appropriate academic background and therefore not an exact replica as indicated by Ms Mokhobo.

7.1.15. On 11 March 2013, Mr Gina indicated that after Ms Mampane vacated her position as acting COO, the position remained vacant for a considerable time. At that stage, Dr Ngubane made a recommendation that Mr Motsoeneng be considered for the position of acting COO. The understanding at that stage was that would only act for a couple of months (approximately 2-3 months) until such time as the recruitment process for a new COO was completed.

7.1.16. On 19 July 2013 Mr Motsoeneng indicated that his appointment as the SABC's Acting COO was to persist until the appointment of a COO was made by the SABC, and he subsequently provided me and the investigation team with proof thereof in a form of a letter signed by the Chairperson of the Board on 15 November 2011.

7.1.17. At the same meeting he informed me that he is the one who requested for salary increments as he believed that for the good work he was doing at the SABC, he deserved the increments, and even more.

7.1.18. Mr Motsoeneng also informed me that the salary increments he had received were motivated for by the then Group HR Managers, Mr Morobe and Lesala and approved initially by his previous superiors, Mr S Mokoetle

and Mr Nicholson, then later by the outgoing GCEO, Ms Mokhobo prior to being authorised by the former SABC Board Chairperson, Dr Ngubane.

7.1.19. On 14 January 2014 and subsequent to the release of the Provisional Report, my investigation team met with Mr. Nicholson the former SABC CFO and Acting GCEO in order to get clarity from him and also afford him an opportunity to be heard.

7.1.20. Mr. Nicholson confirmed his role as the Acting GCEO pertaining to Mr. Motsoeneng's appointment/promotions and salary progression. He insisted that what he did in signing Mr Motsoeneng's contracts and salary increments was in terms of the Delegation of Authority Framework (DAF).

7.1.21. Mr Nicholson indicated that although he did not know how much Mr Motsoeneng earned, the rapid salary increments offered to him were as a result of his effectiveness and the good work he was performing at the SABC, and were probably above board.

7.1.22. However, Mr. Nicholson failed to explain the questionable signatures on the documents he had signed with Mr Motsoeneng on 10 December 2010 and 1 April 2011 except to say that it was due to a mistake on his part when he appended his signature.

7.2 Mr Motsoeneng's alleged misrepresentation of qualifications

7.2.1 It was established that Mr Motsoeneng does not have a matric certificate. This was established through analysis of human resource documents received from the SABC as well as admitted by Mr Motsoeneng during my meeting with him on 19 July 2013.

7.2.2 It was further established that Mr Motsoeneng did indeed misrepresent the fact that he has a matric certificate when in fact he does not have one.

7.2.3 Various documents received by my office indicated that on various occasions after his appointment, he was requested to provide a copy of his matric certificate, but failed to do so.

7.2.4 A 2003 SABC Group Internal Audit report into the allegation that Mr Motsoeneng misrepresented that he had a matric certificate found that he did not have matric and recommended that management should consider instituting action against him. The recommendations were never implemented and no action was ever taken against.

7.2.5 An evaluation of two CV's submitted by Mr Motsoeneng (one in 2003 when he applied to the position of Executive Producer: Current Affairs and one supplied by the SABC upon my request) indicates that there is a discrepancy in that on the 2003 CV indicated that he was employed as Head of Communications in the Northern Cape whilst the CV supplied to me indicated that he was only employed by the SABC.

7.2.6 The affidavit provided by, Mr Thulo to the investigation team revealed a further discrepancy in Mr Motsoeneng's CV.

7.2.7 In this affidavit, Mr Thulo explained that in 2003, he was one of the applicants for the position of Executive Producer – Lesedi Current Affairs and attached his CV as well as the CV's of Mr Khothule Solomon Mphatsoe, Ms Phuleng Arcilia Mokhoane and Mr Motsoeneng as being the other applicants for the position.

7.2.8 Mr Thulo indicated that in 2003, despite the fact that Mr Motsoeneng had only been employed by the SABC, his CV which was part of the application for the position indicated that he was *"Appointed as Head of Communications at the Department of Tourism and Economical Affairs in Northern Cape".*

7.2.9 When the CV of Mr Motsoeneng was provided by the SABC upon my request, is evaluated against the CV of Mr Motsoeneng attached to the affidavit of Mr Thulo, it is clear that the position as *Head of Communications at the Department of Tourism and Economical Affairs in Northern Cape* is not reflected on the CV as supplied by the SABC. There is thus a disparity between the two CV's.

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

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

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

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

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

7.3 Whether the alleged appointments and salary progression of Ms Sully Motsweni were irregular and thus constitutes maladministration.

7.3.1 During her employment at the SABC, Ms Motsweni occupied various positions which started as Internal Auditor in August 2002.

7.3.2 In June 2011, the SABC deviated from normal recruitment policy and indicated that due to the urgency of the appointment, approval was sought to appoint Ms Motsweni to the position of General Manager: Compliance and Provincial Operations (Scale 120)

7.3.3 On 27 June 2011, an offer of employment was extended to Ms Motsweni at a remuneration package of R960, 500 per annum which she accepted. This position was in the office of the Group Executive: Stakeholder Relations and Provinces, occupied by Mr Motsoeneng.

7.3.4 Eight months later, on 1 February 2012, the SABC appointed Ms Motsweni as Head: Monitoring, Compliance and Operation Service at a remuneration package of R1, 500,000 per annum (Scale 120). This position was also within the office of the COO which was occupied by Mr Motsoeneng.

7.3.5 During the period 1 July 2011 to 1 April 2012, Ms Motsweni has been appointed to three (3) different positions without applying, being shortlisted or attending interviews. All these three positions reported to Mr Motsoeneng directly.

7.3.6 During this period, Ms Motsweni's total monthly cost to the SABC which was approved by Mr Motsoeneng, increased from R79,966 to R130,883 (63,7%).

7.3.7 During a meeting with me, Ms Mokhobo indicated that this change in position of Ms Motsweni was effected directly by Mr Motsoeneng and that it should have been presented to Exco for approval.

7.3.8 During a meeting with me on 19 July 2013, Mr Motsoeneng indicated that when he became the Acting COO, he identified a need for a position similar to the one Ms Motsweni is occupying for the whole of the SABC, which was

largely driven by the increased focus of Auditors on Compliance matters as identified by the Auditor-General.

7.3.9 Mr Motsoeneng indicated that he thought that it would be a duplication to appoint another person to strengthen compliance and monitoring. He then thought it prudent to elevate Ms Motsweni's division to deal with corporate-wide compliance and report to his office, which then resulted in Ms Motsweni joining the Acting COO's office with her entire division.

7.3.10 Mr Motsoeneng stated that as the filling of the position of General Manager: Compliance and Operations was urgent, HR applied for approval of deviation from recruitment policy in respect of the said position as well as that of General Manager: Finance.

7.3.11 Mr Motsoeneng further informed me that Ms Motsweni's salary increases were motivated for by him, supported by HR division and always approved by the line Manager, the GCEO.

7.3.12 However, according to Ms Mokhobo, Ms Motsweni's salary was regularly increased by the Acting COO as she has done various other things for him (i.e. *"she writes his e-mails, writes his documents and explains what is contained in there, she writes his responses, she does everything for him. So, this was a reward"*).

7.3.13 The SABC could not provide information relating to the internal advertisement of the above-mentioned position, applications received for the position, record of short listed candidates as well as list of candidates interviewed. It is clear that the SABC deviated from their recruitment policy in order to appoint Ms Motsweni to his office.

7.4 Whether the alleged appointment of Ms Gugu Duda as the Chief Financial Officer was irregular and thus constitutes maladministration.

7.4.1 Information received from SpencerStuart by my investigation team on 17 November 2011 revealed that they were briefed by the Board about the recruitment of a CFO by the SABC. This information further revealed that the selection and assessment of candidates took place between 7 December 2011 and 24 December 2011.

7.4.2 After internal and external advertisements were placed for the position of CFO, four (4) candidates were invited for interviews on 11 January 2012. A presentation of shortlisted candidates was done on the same day by SpencerStuart. Ms Duda was not shortlisted with the first four candidates as she had not submitted an application for the said position.

7.4.3 A recommendation for appointment of a suitable candidate, one Mr Msulwa Daca, was made to Minister Dina Pule who on 31 January 2012, replied to Dr Ngubane and the SABC Board indicating that she did not approve the recommendation made by the Board and that the SABC had to re-start the recruitment process.

7.4.4 On 7 February 2012, SpencerStuart presented and along with other Board members interviewed an additional candidate, Ms Duda subsequent to which the Board resolved to send three (3) names in alphabetical order to the former Minister for selection and appointment of the CFO subject to further referencing and integrity checks. On 14 February 2012, Ms Pule approved the appointment of Ms Duda as CFO.

7.4.5 Former SABC Board member, Mr Danana indicated that the person who was interviewed by the Board at the last minute, Ms Duda, was not one of the initially short-listed candidates for the position, but was appointed

subsequently as CFO after the second recommendation was submitted to the former Minister for approval.

7.4.6 Ms Malebane, a former Chief Finance Controller revealed to the investigation team Ms Duda's CV was received from the former Minister of Department of Communications by Mr Mngqibisa and subsequently submitted to Mr Phiri who gave it to the SABC after finalisation of the first interview process for the position of the SABC CFO.

7.4.7 Ms Malebane a former "confidante" of Ms Duda also informed the investigation team how she had been continuously informed by Ms Duda of her recruitment and eventual appointment by the SABC.

7.4.8 Ms Malebane also revealed the different role players who were behind the events leading to the appointment of Ms Duda, namely, Mr P Mngqibisa; Mr H Motsoeneng; the Chairperson of the SABC Board; some Board members and the former Minister of the Department of Communications.

7.4.9 During a meeting with me on 19 July 213, Mr Motsoeneng confirmed that, subsequent to the selection processes, he submitted Ms Duda's CV to the SABC after he had received it from Mr Phiri subsequent to which it was submitted by Ms Wendy Khubeka of SABC HR to SpencerStuart where Ms Duda was subsequently interviewed alone.

7.4.10 The above evidence reveals that Ms Duda's appointment was not in compliance with the SABC's recruitment policy as no prior record of her submission of an application and short-listing could be supplied by the SABC to my office, except for the recommendations for approval of her appointment by the former Minister of the Department of Communications.

7.5 Whether Mr Motsoeneng purged senior staff members at the SABC resulting in unnecessary financial loses in CCMA, court and other settlement, which amounts to financial mismanagement and if this constitutes improper conduct and maladministration.

7.5.1. My investigation established that several senior and experienced staff members were hounded out of their jobs after voicing and showing difference of opinions in how the SABC should be run.

7.5.2. These staff members' termination and/or suspensions had led to protracted and unnecessary and prolonged labour dispute proceedings and litigations involving lawyers and stretching the already overburdened budget of the SABC.

7.5.3. Consequently this inevitably led to settlement awards and offers being made by and/or against the SABC for substantial amounts of money as the SABC often refused to reinstate the employees, or allow them to work the full terms of their contracts.

7.5.4. I established from the documentation and information availed by the SABC that the termination of service of most former senior executive employees of the SABC was not procedurally and substantively fair and therefore not justified.

7.5.5. During a meeting with me on 19 July 2013, Mr Motsoeneng denied he had been behind the resignations/termination of senior executive staff members' employment.

7.5.6. Mr. Motsoeneng also failed to convince me why the premature termination of these staff members' employment contracts was preferred instead of

allowing them to finish the remainder of their terms of contracts, except to state that it was in the best interest of the SABC to pay them off.

7.5.7. Mr Nicholson informed my investigation team that the SABC had embarked on a Turnaround Strategy under which they were directed the National Broadcaster to shed 48 of their Executives' positions which then meant non-renewal of contracts that were coming to an end soon.

7.5.8. According to him, Ms Ntombela-Nzimande and Ms Mampane fell under the category of employees whose jobs had been identified as redundant, and therefore had to be placed elsewhere or be offered exit packages.

7.5.9. Ms Ntombela-Nzimande's running battles with the SABC Board led to the breakdown of the relationship with them and this also became as a catalyst to the premature of her contract as it was felt that she was no longer contributing positively to the National Broadcaster.

7.6 Whether Mr Motsoeneng irregularly increased the salaries of various senior staff members including a shop steward, resulting in a salary bill increase in excess of R29 million and if this amounted to financial mismanagement

7.6.1 The salary progression of employees of SABC is regulated by SABC DAF. Salary progression is initiated by the line manager, supported by HR, recommended by the GCEO and approved by Exco. In addition the SABC had embarked on cost-cutting initiatives as part of their Turn-Around Strategy to contain over expenditure.

7.6.2 However, the SABC's records and information availed to my office show that the Acting COO, the GCEO's and the Board's Chairperson signed for

the said employees' salary increments despite cost-cutting initiatives that had been mooted as part of the SABC Turn-Around Strategy.

7.6.3 Mr. Motsoeneng, however, denied being solely responsible for such salary increases and/or pay-outs as he always had the support of HR and approval of his superior, the GCEO. He indicated that some of the astronomical labour dispute pay-outs were in the best interest of the SABC.

7.6.4 My investigation team also established that indeed several former employees were paid substantial amounts of money as labour dispute settlement awards against the SABC and/or severance packages thereby causing the National Broadcaster to incur unnecessary and avoidable costs.

7.6.5 However, during my interview of the SABC Board members and the Chairperson, other than blame one another, they all denied knowing about the escalation of the SABC salary bill. For instance the Chairperson and the Board when questioned and informed by me about Mr Motsoeneng's rapid salary progression up to the current scale of R2,4 million per annum as well as the National Broadcaster's unprecedented salary bill escalation by R29 million, they expressed shock and ignorance of this state of affairs.

7.6.6 The afore-going points towards apparent dereliction of duty by the Board and also its failure to exercise its fiduciary responsibilities in the running of the SABC and thus acting contrary to established corporate governance principles.

7.6.7 During an interview with the investigation team on 15 March 2013, Mr Itani Tseisi the former Group Executive Risk and Governance of the SABC informed the team that Mr. Motsoeneng was very influential and verbally

abusive towards SABC staff members and the SABC Board even before he was appointed to the position of the Acting COO.

7.6.8 He indicated that Mr Motsoeneng always attended the Board meetings even before he was appointed as the Acting COO notwithstanding the fact that he was prohibited by corporate governance rules to attend such meetings as he was not an Executive Member. Mr Motsoeneng's attendance had been suggested by the Chairperson of the Board. Ms Mokhobo was also subjected to the abusive behaviour of Mr Motsoeneng.

7.6.9 On 15 March 2013, Ms Duda also informed the investigation team that she had been suspended 5 months into her position as the CFO, and that this was after altercations with Mr Motsoeneng who had been verbally abusive towards her and Ms Mokhobo.

7.6.10 According to Ms Duda, Mr Motsoeneng did not take kindly to being cautioned whenever certain payments he sought to have made, were not in line with financial prescripts. For instance, she had proposed for an offset of R32 million which the SABC owed to SAFA as against the R23 million the latter owed to the former which Mr Motsoeneng clearly opposed despite it making a sound business proposition.

7.6.11 Ms Duda further stated that Mr Motsoeneng at times called her even at night to scream and insult her if things did not go his way. According to Ms Duda, most of the SABC Board members were compromised in their relationship with Mr Motsoeneng. For instance one of the Board member's daughter had been offered an advertising billboards contract by Mr Motsoeneng. The SABC Chairperson himself is said to have been at times called to Mr Motsoeneng's office instead of it being the other way round.

7.6.12 Mr Lesala the former Group Executive of HR, informed the investigation team on 15 March 2013 that he reported directly to Mr Motsoeneng who in turn purportedly reported to Ms Mokhobo. However, Mr Motsoeneng did as he pleased without being reined in by Ms Mokhobo. For instance Ms Mokhobo would sign salary increments to Mr Motsoeneng despite the lack of motivation and justification for such increment from HR.

7.6.13 For instance, when Mr Motsoeneng's salary was at R1, 4 million, the GCEO suggested that it be raised to R1, 7 million and that this threshold not be exceeded. However, in four months' time Ms Mokhobo said that it should be increased to R2, 4 million and proceeded to sign the HR motivation. Mr Lesala put the blame on Ms Mokhobo's shoulders for failure to deal with Mr Motsoeneng. Mr Lesala indicated that subsequent to his resignation, he instituted a constructive dismissal dispute against the SABC at the CCMA, and that a satisfactory settlement award was given to him.

7.6.14 During an interview with Ms Francois, the suspended and now reinstated internal auditor, on 15 March 2013, the investigation team learned that the corporate governance structures at the SABC were dysfunctional. According to her, she had suggested that an external company be outsourced to review the SABC Corporate Governance practices. SizweNtsaluba-Gobodo(SNG) was subsequently appointed. SNG thereafter issued a damning draft report revealing that a lot of Exco dynamics were dysfunctional and due for management's consideration.

7.6.15 Ms Francois had apparently written to the Board for the review of SNG report on 1 November 2012. However, Mr Motsoeneng refused for the report to be released and reviewed by the Board as it implicated several Board members. Mr Motsoeneng then threatened to get rid of Ms Francois if she proceeded with release of the report.

7.6.16 She was subsequently summoned to the Chairperson's office on 6 November 2012 where she was given a letter of suspension with no reasons. Ms Francois then challenged her suspension at the CCMA, and this led to her reinstatement by the SABC. Ms Francois stated that the SABC has been without a strategic plan but has changed the organogram on numerous occasions. For example, Ms Motsweni has been acting in four (4) different Executive positions concurrently which in her view, point to further corporate governance failure in the SABC.

7.6.17 On 20 May 2013, Ms Phoebe Malebane who describes herself as a former "confidante" of Ms Duda gave the investigation team a detailed and written account of how Ms Duda was recruited and eventually appointed to the SABC's CFO position.

7.6.18 According to Ms Malebane, Ms Duda informed her of the very first approach she had from Mr Mngqibisa (who is referred to as Mr P) who apparently received Ms Duda's CV from the former Minister of Department of Communications, Ms Pule and eventually gave it to Mr Motsoeneng who then gave it to the SABC's Board Chairperson.

7.6.19 During a meeting with me on the 19 July 2013, Mr Motsoeneng the SABC's Acting COO admitted that he was the one who delivered Ms Duda's CV to the SABC after he had received it from Mr Phiri, the Acting Deputy Director General of the Department of Communications.

7.6.20 Mr Motsoeneng further informed me that he was part of the Board members who interviewed Ms Duda but surprisingly he failed to remember whether Ms Duda was the only candidate interviewed on the said date.

7.6.21 In a response to my question about the resignations/termination of senior staff members of the SABC, which had allegedly been attributed to him, Mr

Motsoeneng denied being responsible for the exodus of staff. But he admitted that some of it was in the best interest of the SABC despite astronomical costs incurred in labour dispute settlements and litigation costs.

7.6.22 Mr Motsoeneng admitted that he was responsible for Ms Motsweni's appointments and salary progressions and provided reasons for the need of such an appointment to deal with Audit issues which had been picked up by the Auditor General.

7.6.23 Mr Motsoeneng advised that he initiated discussions relating to his salary raise which was always motivated by HR and supported by his superior, the GCEO before approval by the Board's Chairperson. Mr Motsoeneng also informed me that for the work he was doing at the SABC, he believes that he deserves what he earns and perhaps even more. When asked if this was in line with the corporation's policy and if he advised the Board as such, he said it was the Board's duty to do the right thing and his right to ask for whatever he deemed he deserved.

7.6.24 Mr Motsoeneng informed me that his appointment as the Acting COO was not for a few months, but was until the SABC appointed a permanent COO.

7.6.25 The SABC Board Chairperson, the Board members and the GCEO informed the Public Protector that they were not aware of such high salaries being paid to the said employees.

7.6.26 I was also informed that the SABC had "governance issues" which according to Mr Motsoeneng, were at the heart of most of the challenges the National Broadcaster was grappling with.

7.6.27 During a meeting with my investigation team on 14 January 2014, Mr Nicholson the former SABC CFO and Acting GCEO, confirmed to several problems within the SABC Board that are attributable to the interference by the Board in SABC management issues and the lack of insight as to their exact role.

7.7 Whether the Department and Minister of Communication unduly interfered in the affairs of the SABC, giving unlawful orders to the SABC Board and staff and if the said acts constitute improper conduct and maladministration

7.7.1 The analysis of the evidence pertaining to the allegations of unlawful orders and improper conduct of the former Minister of Communications in the recruitment and appointment of Ms Duda as the CFO for SABC is discussed in detail on the issue regarding the said appointment in paragraph 7.4 above.

7.8 Evaluation of the responses from the recipients to the Provisional Report

7.8.1 The evaluation of the bulk of the submissions made by the recipients of the Provisional Report raised issues relating to my powers, mandate and jurisdiction. This aspect is dealt with in paragraph 3 above.

7.8.2 Ms Mokhobo corroborated the evidence of the complainants with regard to Mr Motsoeneng's abuse of power, relationship with the Board as well as his relationship with Dr Ngubane and the SABC staff in general.

7.8.3 While it is true that some of the issues precede her tenure on 27 March 2012, she supported a request for the increase of the total salary package of R2,4 million to Mr Motsoeneng. This salary increase was contrary to SABC's

remuneration policy as it was approved by Dr Ngubane and not by the entire Board.

7.8.4 Ms Mokhobo's submissions regarding the dismissals of former employees indicate that she does not appreciate the concept of constructive dismissal. It also ignores the underlying causes which made the working conditions intolerable. For instance, in the case of Ms Ntombela-Nzimande after being informed that there will be restructuring at the SABC, and subsequent to her not being in favour of the proposed restructuring her access card, laptop, 3G, and cellphone were confiscated on 15 February 2011.

7.8.5 Although Dr Ngubane denies that he played a role of an Executive Chairperson (as opposed to non-executive) of the SABC Board, the evidence provided to my office, confirms otherwise. For instance, his approval of Mr Motsoeneng's salary increases on 27 March 2012.

7.8.6 Mr Phiri made a bare denial regarding his role in the appointment of Ms Duda despite corroboration of Ms Malebane's evidence by Mr Motsoeneng.

7.8.7 Mr Mngqibisa also questioned the credibility of Ms Malebane with regard to his role in the appointment of Ms Duda. However, Ms Malebane's evidence tallied with the evidence that was presented to me by SpencerStuart, the recruitment agency contracted by SABC.

7.8.8 Ms O' Neil emphatically denied the allegation relating to her daughter's billboard contract which had been offered by Mr Motsoeneng. The allegation by Ms Duda could not be substantiated.

7.8.9 Ms Tshabalala provided a response to the Provisional Report on behalf of the SABC. After raising issues relating to my powers and jurisdiction, she proceeded to reject my provisional findings.

7.8.10 On the dismissal of the complainants, she submitted that their positions were declared redundant and settlements agreements were reached with them in line with SABC's policy. The evidence presented to me is however at odds with this view. For example, during the interview with Mr Nicholson, he pointed out the reason for the complainants' dismissal was the alleged breakdown in the relations with their employer. The evidence presented to me also supports constructive dismissal by making the working environment unbearable. Ms Mampane was for instance barred from attending a strategic planning whilst Ms Ntombela-Nzimande had her access card, laptop, 3G and cellphone confiscated.

7.8.11 An analysis of the salary bill of the SABC as well as the CCMA arbitration awards is at odds with the submission that the escalation of the salary bill was as a result of attempts to address the legacy of the past administration.

7.8.12 The submission regarding the matric certificate indicates that the Chairperson of the board falls short of addressing the issue. It is common cause that Mr Motsoeneng does not have matric. The issue considered and investigated by me relates to not whether or not Mr Motsoeneng has a matric certificate (or equivalent qualification) but whether he misrepresented this when he applied for a number of positions at the SABC first in 1995 then later in 2003.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 Legislation and other prescripts and precedents

8.1.1 The Constitution of the Republic of South Africa, 1996;

8.1.2 The Public Protector Act,23 1994;

8.1.3 The Broadcasting Act, 4 of 1999;

8.1.4 The Public Finance Management Act, 1 of 1999

8.1.5 The SABC Articles of Association;

8.1.6 The SABC Delegation of Authority Framework;

8.1.7 The SABC Acting on Higher Grade Policy (policy number HR002/98/A);

8.1.8 The SABC Personnel Regulations (January 2000);

8.1.9 The SABC Board Charter;

8.1.10 The King III Report - 2002;

8.1.11 The SABC Turnaround Strategy (September 2011); and

8.1.12 Public Protector Touchstones.

8.2 The Broadcasting Act 4, 1999

8.2.1 Section 12 of the Act prescribes the composition of the Board. The issue of the powers and obligations of the SABC Board is regulated by section 12 of the Broadcasting Act together with section 14 which provides for the functions and powers of the Executive Committee.

8.2.2 Section 12 of the Act provides that the Board should consist of at least the following members:

8.2.2.1 Twelve non-executive members; and

8.2.2.2 A Group Chief Executive Officer, a Chief Operations Officer and a Chief Financial Officer or their equivalents. They form the Executive members of the Board.

8.2.3 Section 13 focus on the appointment of the non-executive members and state that:

8.2.3.1 The twelve non-executive members of the Board must be appointed by the President on the advice of the National Assembly.

8.2.3.2 Nine members of the Board, which must include the Chairperson or the Deputy Chairperson, will constitute a quorum at any meeting of the Board.

8.2.3.3 The Board is the accounting authority of the Broadcaster.

8.2.4 The Executive of the Broadcaster is defined under Section 14 (Executive Committee) and state that:

8.2.4.1 The affairs of the Broadcaster are administered by an Executive committee (Exco) consisting of the Group Chief Executive Officer, Chief Operating Officer, Chief Financial Officer and no more than 11 other members;

8.2.4.2 The Executive committee is accountable to the Board; and

8.2.4.3 The Executive committee (Exco) must perform such functions as may be determined by the Board.

8.3 Articles of Association – South African Broadcasting Broadcaster Limited

8.3.1 The issue of appointments of COO, CFO and GCEO is regulated by chapter 5 of the Broadcasting Act as well as section 19.1.1 of the Articles of Association. Section 19.1.1 provides that:

"Any Executive Director appointed in terms of the Broadcasting Act and of these Articles shall:

be appointed by the Board after due process described in article 11.1.2 above and shall have her or his contract of employment approved by the Minister;

…

9 have a contract for a period not exceeding 5 (five) years;
10 be eligible for re-appointment at the expiry of any period of appointment; and
11 in her of his contract specified the minimum amount of time she or he is required to spend on the business of the Broadcaster."

8.3.2 The issue of acting appointments for GCEO, COO and CFO, is regulated by section 19.2 of Articles of Association. Section 19.2 of the Articles of Association provides that:

"The Board may appoint any employee of the Broadcaster whom it deems fit subject to the approval/rejection by the Member and subject to conditions that may be imposed by the Member from time to time to act in the positions of Group Chief Executive Officer, Chief Operations Officer or Chief Financial Officer."

8.4 Delegation of Authority Framework (DAF)

8.4.1 The issue of staff appointments at SABC is regulated by the Delegation of Authority Framework, in particular section G, sub-sections G1and G3 which include the level of authority required for recommendation and approval of levels 115 and above.

8.4.2 The issue of appointments of new positions at the SABC is regulated by the SABC Delegation of Authority Framework in particular section G, sub-section G1 which includes the level of authority required for recommendation of levels 120 and above.

8.4.3 Section G1 provides as follows:

8.4.3.1 Creation of new positions at SC 120 and above should be recommended by the relevant line manager (SC115 or above in consultation with the GCEO,GE Human Capital and the CFO, and should be approved by Exco.

8.4.3.2 Creation of new positions at SC 125 and below during the year which have not been included in the budget should be recommended by the line manager(SC 120 or above) in consultation with the relevant Human Capital manager for the division and should be approved by the CFO.

"G. HUMAN CAPITAL: APPOINTMENT OF PERSONNEL

No	***AREA***	***AUTHORITY***	***RECOMMEND***	***APPROVE***
G1	*New*	*Creation of new positions*	*Relevant line manager*	*Exco*

	Positions	*at SC 120 and above, during the year and which have not been included in the budget*	*(SC 115 or above) in consultation with GCEO, GE Human Capital and the CFO*	

G. HUMAN CAPITAL: APPOINTMENT OF PERSONNEL

No	***AREA***	***AUTHORITY***	***RECOMMEND***	***APPROVE***	***NOTIFY / MONITOR***
G3	*Other staff appointments*	*Employees at SC 120 (excluding temporary staff and independent contractors)*	*Relevant line manager (SC 115 or above)*	*Interview panel constituted by the relevant cluster*	*Exco*

8.4.3.3 SABC Policy number HR002/98/A – Acting in Higher Scale (effective 1 April 2011) regulates the issue of appointment of employees at the SABC whom are from time to time, required to act in higher graded positions than the position they occupy as well as the payment they must receive whilst acting in those positions.

8.4.3.4 SABC's Turnaround Strategy (September 2011) deals with the Broadcasters' objective to achieve its vision: "to improve cash flow, independent of bail-outs and government guarantees" as a short term priority. The Turnaround Strategy included the financial recovery plan.

8.5 The Public Finance Management Act (PFMA)

8.5.1 The management of the finances of the SABC as a public entity is regulated by the PFMA. The main objective of the PFMA is to regulate the financial management of national or provincial governments and public entities. This is to ensure that they utilize their resources efficiently and effectively.

8.5.2 The SABC is listed as a major public entity in schedule 2 of the PFMA. As such, it is bound by the provisions of the PFMA. The SABC Board has an obligation to ensure that the SABC adheres to the applicable provisions of the PFMA.

8.5.3 The PFMA put the responsibility mainly on the accounting authority of an entity or government department. An accounting authority is defined as those persons mentioned in section 49 of the Act. Section 49 provides that the Board is the accounting authority for a public entity such as the SABC. The accounting authority must ensure that the entity is managed in accordance with the PFMA.

8.5.4 Section 50 of the PFMA sets out the fiduciary duties of the accounting authority (the SABC Board in this instance). Section 50 provides that:

"(1) The accounting authority for a public entity must-

(a) Exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of the accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A Member of an accounting authority or, if the accounting authority is not a Board or other busy, the individual who is the accounting authority, may not:-

(a) act in a way that is inconsistent with responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person."

8.5.5 The general responsibilities of the accounting authority are set out in section 51 of the PFMA. Section 51 (1) provides:-

"(1) an accounting authority for a public entity-:

(a) must ensure that public entity has and maintains;

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective

(d) must take effective and appropriate disciplinary steps against any employee of the public entity;-

(i) contravenes or fails to comply with provisions of this Act"

8.6 The SABC Board Charter

8.6.1 The issue of corporate governance of the SABC is regulated in the main by the SABC Board Charter. The Charter regulates the parameters within which the Board should operate and it is to ensure the application of the principles of good corporate governance in all dealings by SABC and the Board, in respect and on behalf of the Broadcaster.

8.6.2 The purpose of the Charter is to:

"3.1.1. set out vision, mission, roles and responsibilities of the Board of the South African Broadcasting Broadcaster SOC Limited;

3.1.2. ensure that all board members are aware of their collective and individual responsibilities

3.1.4. ensure that the principles of corporate governance are in their dealings in respect of, and on behalf of the SABC"

8.6.3 The role of the Board

8.6.3.1 Chapter 8 of the Board Charter makes the following provisions;

"*8.1. The Board constitutes the fundamental base of corporate governance in the SABC. Accordingly, the SABC must be headed and controlled by an effective and efficient Board, comprising of Executive and Non-Executive Directors, of whom the majority must be Non-Executive Directors in order to ensure independence and objectivity in decision - making.*

8.2. The Board of the SABC has absolute responsibility for the performance of the entity and is accountable for such performance. As a result, the Board should give strategic direction to the SABC and, in

concurrence with the Executive Authority and the President, appoint the Group Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer and ensure that an effective succession plan is in place and adhered to for all Directors and key executives.

8.3. The Board must retain full and effective control over the SABC and monitor management in implementing Board decisions, plans and strategies.

8.4. The Board must ensure that the SABC has and maintains a system of Internal Audit under the control and direction of an Audit Committee in compliance with and operating in accordance with regulations and instructions prescribed in terms of the Companies Act (as amended) and sections 76 and 77 of the PMFA (as amended).

8.5. The Board must ensure that the SABC is fully aware of and complies with applicable laws, regulations, government policies and codes of business practice and communicates with its Shareholder and relevant stakeholders openly and promptly with substance prevailing over form.

8.6. All Board Members should ensure that they have unrestricted access to all relevant and timely information of the SABC. Directors are required to act on a fully informed basis, in good faith, with diligence, skill and care and in the best interest of the SABC, whilst taking account of the interests of the Shareholder and other stakeholders, including employees, creditors, customers, suppliers and local communities. To this end, the Board must monitor the process of disclosure and communication and exercise objective judgment on the affairs of the SABC, independent of management. In so doing, each

individual member of the Board must keep confidential all confidential matters of the SABC;

8.11. The Board must take effective and appropriate steps to:

8.11.1. Collect all revenue due to the SABC;

8.11.2. Prevent irregular fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the SABC;

8.11.3. Manage available working capital efficiently and economically;

8.11.4. Take effective and appropriate disciplinary steps against any employee of the SABC who:

8.11.4.1. Contravenes or fails to comply with a provision of the PMFA;

8.11.4.2. Commits an act, which undermines the financial management and internal control system of the SABC; or

8.11.4.3. Makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

8.19. The Board must always maintain the highest standard of integrity, responsibility and accountability and ensure that it finds a fair balance between conforming to corporate governance principles and the performance of the SABC."

8.7 The King III Report

8.7.1 The issue of corporate governance is further regulated by the King III report which deals with the standards of corporate governance within companies. It seeks to provide an accountable and effective corporate governance practices.

8.7.2 Chapter 1 of the Report makes provision for the role and functions of the Board, and it provides that:

> *"1. Companies should be headed by a board that should direct, govern and be in effective control of the company. Every board should have a charter setting out its responsibilities.*
>
> *2. The Board should collectively provide effective corporate governance that involves managing the relationships between the management of the company, its board, its shareholders and other relevant stakeholders.*
>
> *3. The Board is the focal point of the corporate governance structure in the company and is the link between the stakeholders and the company. The board's paramount responsibility is the positive performance of the company in creating value for its shareholders. In doing so, it should appropriately take into account the interests of other stakeholders.*
>
> *4. The Board should exercise leadership, enterprise, integrity and judgment in directing the company so as to achieve continuing survival and prosperity for the company.*
>
> *5. An important role of the board is to identify the stakeholders relevant to the business of the company. Although the board is accountable to the company it should take account of the legitimate expectations of all the company's stakeholders in its decision-making.*
>
> *6. The Board should ensure that stakeholders are engaged in such a manner as to create and maintain trust and confidence in the company."*

8.8 The SABC Personnel Regulations (Jan 2000)

8.8.1 In terms of Clause 11 of Part VI of the Personnel Regulations, Disciplinary action may be taken against an employee in the following circumstances:

(a) If the employee commits an offence as laid down in the SABC Disciplinary Procedure and Code of Conduct;
(b) if the employee contravenes a provision of Regulation 2;
(c) If the employee takes an active part in political affairs that the Group Chief Executive Officer believes to be to the detriment of the Corporation. In this regard, "active participation" shall mean, amongst other things, the holding of an official political office or any office with duties requiring exposure of such participation to the public; and
(d) For any other reason recognized in law as being sufficient grounds for taking disciplinary action.

8.8.2 Clause 12 makes provisions for suspension of an employee.

8.8.2.1 According to the clause "Where, prima facie, an employee has inter alia committed an act of serious misconduct such as assault or theft or fraud, the employee may be suspended pending an investigation and/or the holding of a disciplinary hearing. The employee shall be advised that the Corporation is considering suspending the employee pending an investigation or the holding of a disciplinary hearing and the employee shall be given an opportunity to respond to the proposed suspension before a decision is made to suspend such employee. If the employee is suspended, the employee shall be advised of the suspension in writing. Any such suspension shall be on full pay."

8.8.3 Clause 9 of Part V of the Personnel Regulations makes provision for termination of service of employees.

8.8.3.1. An employee's services may be terminated at any stage for misconduct, incapacity, poor performance or for operational requirements of the Corporation or for any reason justified in law.

8.8.3.2. With the exception of staff appointed on extraordinary terms and conditions of employment, and subject to the provisions of Part VI of these regulations, the services of any employee may be terminated in writing as follows:

(i) one (1) week's notice if the employee has been employed for four (4) weeks or less;

(ii) Two (2) weeks' notice if the employee has been employed for more than four (4) weeks but not more than one year;

(iii) Four (4) weeks' notice if the employee has been employed for one (1) year or more.

8.8.3.3. The notice period of those employees who commenced employment before 1 January 1987 and whose employment contract stipulates a three (3) month notice, remains unchanged.

8.8.3.4. The Group Chief Executive may, in his discretion, agree to a shorter period of notice given by an employee. Where an employee gives a shorter period of notice and the Group Chief Executive accepts the shorter period of notice, the employee shall not be entitled to receive notice pay in lieu of that period of notice which the Group Chief Executive has agreed to waive.

8.8.3.5 In terms of Clause 4 of Part IV of the Personnel Regulations, the Group Chief Executive determines the remuneration of employees, subject to the general guidelines that the Board may set. The Corporation may review employees' salaries without any obligation on its part to increase same.

8.9. The Public Protector Touchstones: Previous report applicable to corporate governance in state-owned institutions as expected from their Board members

8.9.1. "Not Above Board" Report Number 2 of 2013/14

8.9.1.1 The Corporate governance issue was whether or not Chairperson of the Eastern Gambling Board had the authority to act on its behalf when the matter of the alleged irregular appointment of the CEO was settled at the CCMA. The CEO had allegedly been appointed without meeting the minimum qualifications requirements for the said position, and he had challenged the decision to nullify his appointment.

8.9.1.2 The finding was that the Chairperson acted unlawfully as there was no Board resolution or minutes confirming that the Board had authorised him to act on its behalf at the CCMA as was required under the Gambling Board Act,1997, and as a result thereof the settlement agreement reached was invalid.

9. ANALYSIS AND CONCLUSION

9.1. On the alleged irregular appointment and salary progression of Mr Motsoeneng as the Acting COO constituting an act of maladministration:

9.1.1. It has been established in the legal framework, that the SABC's Articles of Association and the Broadcasting Act state that the authority to appoint an acting COO, CFO and GCEO lies with the Minister on the recommendation of the Board. The period of acting appointment of Senior Executives is also regulated by the Articles of Association which is a period not exceeding

three (3) months. The Board can however authorise a period longer that three (3) months.

9.1.2 Contrary to the above, the evidence shows that Mr Motsoeneng's appointment as the Acting COO was initiated by Dr Ngubane and later endorsed by the Board. The Board's powers were further ignored when resolved that he should be appointed for a period not exceeding three months within which the position will be filled with a permanent incumbent only to find that its chairperson countermanded its resolution.

9.1.3 The issuing of a letter of appointment letter to Mr Motsoeneng signed by Dr Ngubane on 15 November 2011 appointed Mr Motsoeneng, in the position until the appointment of a permanent incumbent meant an indefinite period of acting in contravention of the Board resolution, which resolution was in line with the provisions of the SABC's Articles of Association.

9.1.4 The contravention of the Board resolution by Dr Ngubane invariably means a contravention of the Articles of Association of the SABC. Section 19.2 of the Articles of Association the appointment was supposed to have been initiated by the Board. Also, in accordance with SABC Policy number HR002/98/A – Acting in Higher Scale, the maximum period for acting on higher position should not exceed three months except with the approval of the Board. The fact that Mr Motsoeneng has been acting as the COO for well over 2 years, entails a contravention of the Articles of Association.

9.1.4 The payment of an allowance in excess of the threshold stipulated in the SABC's Acting Policy, which provides that employees appointed to acting positions will be paid a fixed acting allowance during their occupation of such positions, constitutes a further disregard of internal policies in the handling of Mr Motsoeneng's appointment and remuneration

9.2. On whether Mr Motsoeneng fraudulently misrepresented his qualifications to the SABC, including stating he had passed matric when applying for employment:

9.2.1 Fraudulent misrepresentation is both a form of misconduct and a criminal act that can be prosecuted. By his own admission, Mr Motsoeneng did falsify his qualifications, not once but at least twice. The question is, what do we make of that conduct Clearly the conduct was unethical and in violation of the corporation's Code of Ethics.

9.3 On the alleged irregular appointment(s) and salary progression of Ms. Sully Motsweni and possibly constituting improper conduct and maladministration:

9.3.1 Having established in the legal and regulatory framework, the SABC's specific processes and procedures that should have been followed in the appointment of particular with regard to various levels, it is clear that what happened deviated remarkably from what should have happened. The DAF makes no provision for approval for deviation from the said policy by any person.

9.3.2 Ms Motsweni was appointed to three positions, namely General Manager: Compliance and Provincial Operations; Group Executive: Stakeholder Relations and Provinces; Head: Monitoring Compliance and Operation Services. In all three instances the procedure required by section G of DAF to have prior approval of Exco was not complied with.

9.3.3 During the period 1 July 2011 to 1 April 2012, the SABC appointed Ms Motsweni to three (3) different positions without advertising, shortlisting or holding interviews prior to her placement in these positions contrary to the SABC's DAF.

9.3.4 Mr. Motsoeneng admitted in a meeting with me on 19 July 2013 to have been responsible for Ms Motsweni's appointment, but indicated that the salary increases offered to Ms Motsweni were initiated by him, supported by HR and approved by his superior.

9.3.5 The SABC DAF required Exco approval for the creation of this position. Ms Motsweni's appointment was therefore in contravention of the SABC's recruitment policies.

9.4 On the alleged irregular appointment of Ms Gugu Duda and such possibly constituting improper conduct and maladministration:

9.4.1 The evidence showing that her CV was brought to Mr Motsoeneng by Mr Phiri in the process initiated after the recruitment and selection process was concluded and a recommendation made to and rejected by Ms Pule as Minister of Communications, clearly establishes that what happened was at odds with the law and corporate policies.

9.4.2 In the legal framework, it is clear that the SABC's Articles of Association and Broadcasting Act require that the recruitment and appointment of the Executive Directors be conducted in a transparent and competitive manner. It requires the position to be advertised, for suitable candidates to be shortlisted and interviewed before being appointed by the Minister on recommendation by the Board.

9.4.2 After internal and external advertisements were placed by the SABC for the position of the CFO, four (4) candidates were interviewed on 11 January 2012 by seven (7) SABC Board members.

9.5 On Mr Motsoeneng's alleged purging of senior staff members at the SABC resulting in unnecessary financial losses in CCMA, court and other settlements, which amounts to financial mismanagement and if this constituting maladministration

9.5.1 A comparison between the processes followed in respect of the suspensions and termination of contracts with relevant employees reveals gross deviations from the standards required in respect of human resources policies.

9.5.2 The SABC's Personnel Regulations and Disciplinary Procedure and Code of Conduct stipulate processes and procedures which need to be explored when dealing with employees' appointments and termination of their services.

9.5.2 The SABC had allegedly instituted disciplinary proceedings against several staff members whose services were either suspended or terminated. Most of their disciplinary proceedings went before the CCMA for pre-dismissal arbitration and/or final dispute resolution.

9.5.3 I established that the SABC in a number of such proceedings had been found to have acted improperly and was consequently compelled to reinstate some of the said employees, while others had to be awarded astronomical sums of money for settlement packages.

9.5.4 The suspensions and/or service terminations of staff by the SABC were not in compliance with their Part V and VI of the Personnel Regulations.

9.6 On the whether there were systemic corporate governance deficiencies at the SABC and the causes thereof

9.6.1 The lack of corporate governance at the SABC is a matter conceded by virtually all key role players, including Ms Pule, the Board and the senior managers that were interviewed.

9.6.2 Virtually all key role players, including Mr Motsoeneng that he SABC management and Board decision-making were characterized by a culture of expediency and quickie gains. It would appear that the high turnover of board members contributed in that Board members wanted quick delivery. It did not help that as shown in the evidence, persons like Mr Motsoeneng, who should have directed the Board otherwise, encouraged expediency at the expense of corporate governance. It would appear that the GCEOs somehow acquiesced in what I can only refer to as a "cowboy" corporate culture.

9.6.3 Examples of gross disregard of law and internal policies include the appointment and salary progression of Mr Motsoeneng, salary progressions of others, suspensions and termination of contracts of staff members and failure to adhere to Board Resolutions.

9.6.4 The question I had to answer in the investigation, was whether acts complained of were against the law, thus constituting maladministration. I address this matter in the specific findings.

9.7 The allegation that the Department and the former Minister of Communications unduly interfered of the affairs of the SABC and gave unlawful orders to the SABC Board and staff and if the said acts constitute improper conduct and maladministration

9.7.1 The Minister of Communication is required to exercise an oversight function over the administration of the public enterprise entities including the SABC.

9.7.2 The appointment of the CFO was pre-empted by the former Minister of Communications' rejection of the recommendation for appointment which was based on her interest to appoint a candidate that was handpicked by her in consultation with Mr Mngqibisa.

9.7.3 The HR records incontrovertibly show that Ms Duda's appointment followed an extraordinary process, involving gross deviation from corporate processes and established recruitment and selection norms. I have also noted the strong indication that the recruitment and appointment of Ms Duda was preceded by lobbying and discussions outside the recruitment process. However, due to lack of documentary evidence, I have decided not to base my decision on the information in question.

9.7.4 The official records clearly show that Ms Duda did not apply for the position of CFO in the normal course as required by the SABC recruitment policy. Instead, her CV was sent to the Department of Communications, whose Mr Phiri then ensured that it reached the SABC, through Mr Motsoeneng.

9.7.5 According to the SABC Articles of Association and the Broadcasting Act, applicants are considered upon application, shortlisting and interviews. The Board then recommends the appointment of a suitable candidate to the former Minister for approval.

9.7.6 Ms Duda's appointment was not fair and competitive. Despite her not being the best candidate according to the scoring of the panel, the former Minister nonetheless proceeded to appoint her. According to the overall scoring, Ms Duda was the second last candidate.

10. FINDINGS

My findings on the allegations and issues investigated are the following:

10.1. Regarding the alleged irregular appointment and salary progression of Mr. Hlaudi Motsoeneng, I find that:

10.1.1. The allegation that the appointment of Mr Motsoeneng as the Acting COO was irregular is substantiated. By doing allowing Mr Motsoeneng to act without requisite qualifications and for a period in excess of three (3) months without the requisite Board resolution and exceeding the capped salary allowance, the SABC Board acted in violation of the SABC's 19.2 Articles of Association which deals with appointments, SABC Policy No HR002/98/A-Acting in Higher Scale and Chapter 5 of the Broadcasting Act, which regulates acting appointments and this constitute improper conduct and maladministration.

10.1.2. The former SABC Board's Chairperson, Dr Ben Ngubane further acted irregularly when he ordered that the qualification requirements for the appointment to the position of COO be altered to remove academic qualifications as previously advertised, which was clearly aimed at tailor making the advert to suit Mr Motsoeneng's circumstances. This constitutes improper conduct maladministration and abuse or unjustifiable exercise of power.

10.1.3. The allegation that Mr. Motsoeneng's salary progression was irregular is also substantiated in that Mr Motsoeneng received salary appraisals three times in one year as, hiking his salary as Group Executive Manager: Stakeholder Relations from R 1.5 million to R2.4 million. His salary progression as the Acting Chief Operations Officer concomitantly rose irregularly from R122 961 to R211 172 (63% increase) in 12 months and was in violation of Part IV of SABC's Personnel Regulations and SABC Policy No HR002/98/A-Acting in Higher Scale and this constitute improper conduct and maladministration.

10.1.4. While I have accepted the argument presented by Mr Motsoeneng, the current GCEO and the chairperson of the current Board that salary increases at the SABC are negotiated without any performance contracts or notch increase parameters, I am unable to rule out bad faith in Mr Motsoeneng in the circumstances that allowed 3 salary increases in one fiscal year resulting in Mr Motsoeneng's salary being almost doubled. My discomfort with the whole situation is exacerbated by the fact that all were triggered by him presenting his salary increase requests to new incumbents who would have legitimately relied on him for guidance on compliance with corporate prescripts and ethics. It cannot be said that he did not abuse power and/or his position to unduly benefit himself although on paper the decisions were made by other people. The approval of Mr

Motsoeneng's salary increments by the GCEO's and the Chairperson of the Board at the time, Dr Ben Ngubane was, accordingly, irregular as it was in violation of Part IV of SABC's Personnel Regulations and SABC Policy No HR002/98/A-Acting in Higher Scale and constitutes improper conduct, abuse of power and maladministration.

10.1.5. The SABC Human Resources Department failed to keep proper records regarding Mr Motsoeneng's documentation and other Human resources matters dealt with in this report and this constitutes improper conduct and maladministration.

10.1.6. The SABC Board's failure to exercise its fiduciary obligations in the appointment and appropriate remuneration for the Acting Chief Operations Officer for the SABC was improper and constitutes maladministration.

10.2. Regarding Mr Motsoeneng's alleged fraudulent misrepresentation of his qualifications to the SABC when applying for employment including stating that he had passed matric, I find that:

10.2.1. The allegation that Mr Motsoeneng committed fraud by stating in his application form that he had completed matric from Metsimantsho High School is substantiated. By his own admission during his interview, Mr Motsoeneng provided stated in his application form that he had passed standard 10 (matric), filled in made-up symbols in the same application form and promised to supply a matric certificate to confirm his qualifications. He did so knowing that he had not completed matric and did not have the promised certificate. His blame of Mrs Swanepoel and the SABC management that stating that they knew he had not passed matric, is disconcerting. If anything, this defence exacerbates his situation as it

shows lack of remorse and ethical conduct. Mr Motsoeneng's conduct regarding his matric results has been unethical continuously since 1995. The conduct is improper and constitutes a dishonest act as envisaged in 6(4)(a)(ii) and (iii) of the Public Protector Act.

10.2.2. The allegation that Mr Motsoeneng was appointed to several posts at the SABC despite having no qualifications as required for such posts, including a matric certificate, is substantiated and this constitutes improper conduct and maladministration.

10.2.3. Mr Motsoeneng would have never been appointed in 1995 had he not lied about his qualifications. He repeated the matric misrepresentation in 2003 when he applied for the post of Executive Producer: Current Affairs to which he, accordingly should never have been appointed.

10.2.4. I am also concerned the Mr Motsoeneng's employment file disappeared amid his denial of ever falsifying his qualification and that at one point he used the absence of such information to support his contention that there was no evidence of this alleged fraudulent misrepresentation. The circumstantial evidence points to a motive on his part although incontrovertible evidence to allow a definite conclusion that he indeed cause the disappearance of his employment records, particularly his application forms and CV could not be found.

10.2.5. The SABC management and Human Resources unit failed to exercise the necessary due diligence or risk management to avoid the misrepresentation and/or to act decisively when the misrepresentation was discovered. He also failed to ensure information as required by law. This constitutes improper conduct and maladministration.

10.3. Regarding the alleged irregular appointment(s) and salary progression of Ms Sully Motsweni, I find that:

10.3.1. The allegation of irregularities in the appointment of Ms Sully Motsweni to the position of General Manager: Compliance and Operation and Stakeholder Relations and Provinces on 30 June 2011 to 31 January 2012; Head: Compliance and Operation on 01 February 2012 to date; Acting Group Executive: Risk and Governance on June 2012 to date and subsequent salary increments taking her from R960 500.00 per annum to R1.5 million per annum are substantiated. The HR records show that Ms Sully Motsweni's appointments and salary progressions were done without following proper procedures and was in violation of sub-section G3 of DAF and Part IV of the Personnel Regulations was irregular and therefore this constitutes abuse of power and maladministration.

10.4. Regarding the alleged irregular appointment of Ms Gugu Duda as the Chief Financial Officer (CFO), I find that:

10.4.1. The allegation regarding Ms Gugu Duda being irregularly appointed to the position of CFO, through the interference of the Department of Communications, is substantiated.

10.4.2. Ms Duda, who was appointed to the position of CFO during February 2012, was not an applicant for the position, which was advertised. Interviews were conducted with shortlisted applicants and a recommendation was made by the SABC Board to the Minister of Communications, Ms Pule as the shareholder. Mr Phiri, from the Department of Communications, and Mr Motsoeneng, from the SABC orchestrated the appointment of Ms Duda long after the recruitment and selection process had been closed. Ms Duda was interviewed on 07 February 2012, without having applied for said post. The interview occurred after the submission of the Board's recommendation, of the appointment of a legitimately selected candidate, Mr Daca, to Ms Pule on 31 January 2012, which, recommendation was rejected by her.

10.4.3. The conduct of the SABC management, particularly Mr Motsoeneng and the Board, in the appointment of Ms Duda, as the CFO of the SABC, was in violation of the provisions of section 19.1.1 of the Articles of Association and Broadcasting Act and accordingly unlawful. The appointment was grossly irregular and actions involved constitute improper conduct, maladministration and abuse of power.

10.4.4. Although I could not find conclusive evidence that Ms Pule personally ordered that Ms Duda's CV be handed over to the SABC and that the

Board interview her against the law as alleged, there is sufficient evidence that suggests an invisible hand from her direction and that of Mr Mngqibisa, to which we can legitimately attribute this gross irregularity. In any event, if we accept that Ms Pule was not involved as per her denial, it is unclear why she would have speedily approved the appointment as she did, when the irregularities were obvious. The conduct of Ms Pule as Minister of communications was accordingly improper and constitutes maladministration.

10.5. Regarding Mr Motsoeneng's alleged purging of senior staff members of the SABC resulting in unnecessary financial losses in CCMA, court and other settlements, which amounts to financial mismanagement, I find that:

10.5.1. The allegation that Mr Motsoeneng purged senior staff members leading to the avoidable loss of millions of Rand towards salaries in respect of unnecessary and settlements for irregular terminations of contracts is justified in the circumstances SABC human resources records of the circumstances of termination and Mr Motsoeneng's own account show that he was involved in most of these terminations of abuse of power and systemic governance failure involving irregular termination of employment of several senior employees of the SABC and that the SABC lost millions of Rand due to procedural and substantive injustices confirmed in findings of the CCMA and the courts. Some of these matters were settled out of court with the SABC still paying enormous amounts in settlements. The fact that the evidence shows Mr Motsoeneng's involvement in most of this matters and the history of conflict between him and the majority of the employees and the former employees makes it difficult to rule out the allegation of

purging. Even if purging is discounted, recklessness appears to have been endemic supporting the narrative on the culture of expediency.

10.5.2. SABC records show that Mr Motsoeneng played the following role in the dismissals:

Direct involvement

10.5.2.1. Mr Motsoeneng directly initiated the termination of the employment of Messrs Bernard Koma, Hosia Jiyane, Sello Thulo, Montlenyane Diphoko and Mesd Mapule Mbalathi and Ntswoaki Ramaphosa who participated in Mr Motsoeneng's disciplinary hearing held in Bloemfontein.

Advice to the board

10.5.2.2. Mr Motsoeneng advised the Board not to renew the employment contracts of Mesd Ntombela-Nzimande and Mampane.

History of conflict

10.5.2.3. Mr Motsoeneng had a dispute with Ms Duda before her suspension as well as an altercation with Ntombela-Nzimande, who later alleged with the corroboration of others that Mr Motsoeneng influenced the premature termination of her employment contract.

10.5.2.4. Although one or more witnesses pointed a finger at Mr Motsoeneng regarding the termination of the employment of Dr Saul Pelle, Ms Ntsiepe

Mosoetsa, Ms Cecilia Phillips, Ms Sundi Sishuba, Ms Lorraine Francois, Ms Nompilo Dlamini, no credible evidence was found to back the allegation.

10.5.2.5. Mr Motsoeneng's actions in respect of the abovementioned suspensions and terminations, where evidence clearly shows his irregular involvement, constitutes improper conduct, abuse of power and maladministration.

The results of many of the individuals in questions support the allegation that there was maladministration in the processes involved leading to avoidable financial losses as can be seen below:

10.5.2.6. Mr Bernard Koma was the lead witness in his disciplinary hearing received a 12 months' settlement award at the CCMA with his attorneys on condition that he withdrew his civil case against the SABC after spurious charges had been levelled against him;

10.5.2.7. Mr Montlenyane Diphoko who had testified against Mr Motsoeneng in his disciplinary hearing, was reinstated after CCMA ruling, almost three years after SABC had terminated his contract;

10.5.2.8. Mr Hosia Jiyane, who had testified against Mr Motsoeneng in his disciplinary hearing, endured a disciplinary process that dragged for two years before he won the case against the SABC. However, Mr Motsoeneng opposed the finding of not guilty;

10.5.2.9. Dr Saul Pelle won his case at the Labour court for reinstatement but SABC refused to reinstate him and offered him 12 months' settlement payout;

10.5.2.10. Ms Ntsiepe Masoetsa was reinstated after her labour dispute case against the SABC dragged for three years in the Labour court ;

10.5.2.11. Ms Cecilia Phillips was suspended for four months without charges being brought against her by the SABC;

10.5.2.12. Mr Sello Thulo, who had testified against Mr Motsoeneng in his disciplinary hearing, was dismissed, allegedly after Mr Motsoeneng said '…get that man out of the system';

10.5.2.13. Mr Thabiso Lesala received a substantial settlement award offered to him through his attorney at the CCMA and he was asked to withdraw his case as a condition of the settlement;

10.5.2.14. Ms Charlotte Mampane's employment contract was terminated prematurely in March 2012 instead of October 2013 for being redundant. A settlement award was given to her for the remainder of her contract;

10.5.2.15. Ms Phumelele Ntombela-Nzimande's employment contract was terminated prematurely, and she was awarded settlement payment for the remainder of 13 months of her contract;

10.5.2.16. Ms Gugu Duda was suspended indefinitely since September 2012 to date without expeditious finalisation of the disciplinary proceedings against her;

10.5.2.17. Ms Sundi Sishuba has been suspended for two and half years, so far no charges have been brought against her;

10.5.2.18. Ms Loraine Francois was suspended for months but won her case at the CCMA and was reinstated to her post; and

10.5.2.19. Ms Nompilo Dlamini won her case in the Labour court, the SABC appealed the ruling to the High court, the matter is due to be heard in April 2014.

10.6. Whether Mr Motsoeneng irregularly increased the salaries of various staff members, including a shop steward, resulting in a salary bill increase in excess of R29 million and if this amounted to financial mismanagement and accordingly improper conduct and maladministration

10.6.1. The allegation that Mr Motsoeneng irregularly increased the salaries of various staff members is substantiated.

10.6.2. Mr Motsoeneng unilaterally increased salaries of, Ms Sully Motsweni, Ms Thobekile Khumalo, a shop steward and certain freelancers without following Part IV of the SABC Personnel Regulations.

10.6.3. These irregular and rapid salary progressions contributed to the National Broadcaster's unprecedented salary bill escalation by R29 million.

10.6.4. Had the SABC Board stopped him, Mr Motsoeneng's would have also recklessly proceeded to convert contract staff members without proper financial planning in compliance with Human Resources Policies.

10.6.5. Mr Motsoeneng's conduct was irregular and amounts to improper conduct and maladministration.

10.7. Regarding the alleged systemic corporate governance failures at the SABC and the causes thereof, I find that:

10.7.1. All the above findings are symptomatic of pathological corporate governance deficiencies at the SABC, including failure by the SABC Board to provide strategic oversight to the National Broadcaster as provided for in the SABC Board Charter and King III Report.

10.7.2. The Executive Directors (principally the GCEO, COO and CFO) failed to provide the necessary support, information and guidance to help the Board discharge its fiduciary responsibilities effectively and that, by his own admission Mr Motsoeneng caused the Board to make irregular and unlawful decisions.

10.7.3. The Board was dysfunctional and on its watch, allowed Dr Ngubane to effectively perform the function of an Executive Chairperson by authorizing numerous salary increments for Mr Motsoeneng.

10.7.4. Mr Motsoeneng has been allowed by successive Boards to operate above the law, undermining the GCEO among others, and causing the staff, particularly in the Human Resources and Financial Departments to engage in unlawful conduct.

10.8. Regarding the allegation that the Department and Minister of Communications unduly interfered in the affairs of the SABC, giving unlawful orders to the SABC Board and staff, I find that:

10.8.1. The allegation that the Department and Minister of Communications unduly interfered in the affairs of the SABC, is substantiated.

10.8.2. Former Minister Pule acted improperly in the handling of her role as the Shareholder Reprehensive in the SABC and Executing Authority.

10.8.3. Amongst her most glaring transgressions was the manner in which she rejected the recommendation made by the Board for the appointment of the CFO and the orchestrated inclusion of Ms Duda's CV. Her withdrawal of certain power from the Board was also not in line with the principles of Corporate Governance.

10.8.4. Her conduct accordingly constitutes a violation of the Executive Ethics Code and amounts to an abuse of power.

10.8.5. Mr Phiri the Acting DDG of Department of Communication, acted unlawfully in submitting Ms Duda's CV to Mr Motsoeneng for her inclusion in the subsequent interview by the Board after the selection process had been concluded and recommendations already submitted to the Minister for approval of the CFO's appointment and his conduct in this regard was improper and constitutes maladministration.

10.8.6. In its unlawful interference, the department of Communications was aided and abated by Mr Motsoeneng who irregularly accepted receiving Ms Duda's CV from Mr Phiri and arranged that she be interviewed as a single candidate after Ms Pule had declined the recommendation by the Board and ordered the process to start anew. The conduct of Mr Phiri, Mr Motsoeneng, the Human Resources Unit and that of the Board was unlawful and had a corrupting effect on the SABC Human Resources' practices. The conduct of the parties involved was grossly improper and constitutes maladministration.

11. REMEDIAL ACTION

Appropriate remedial action to be taken as envisaged in section 182(1) (c) of the Constitution, is the following:

11.1. Parliament Joint Committee on Ethics and Members' interests

11.1.1. To take note of the findings against the former Minister of Communications, Ms Pule in respect of her conduct with regard to the irregular appointment of Ms Duda as the SABC's CFO and her improper conduct relating to the issuing of unlawful orders to the SABC Board and staff.

11.2. The current Minister of the Department of Communications: Hon. Yunus Carrim

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

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

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

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

11.3. The SABC Board to ensure that:

11.3.1. All monies are recovered which were irregularly spent through unlawful and improper actions from the appropriate persons.

11.3.2. Appropriate disciplinary action is taken against the following:

11.3.2.1. Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of 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;

11.3.2.2. Ms Lulama Mokhobo, the outgoing GCEO for her improper conduct in the approval of the salary increment of Mr Motsoeneng;

11.3.2.3. Any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to Mr Motsoeneng, Ms Motsweni, Ms Khumalo, a shop steward and the freelancers, is recovered from the appropriate persons;

11.3.2.4. In future, there is strict and collective responsibility by the SABC Board members through working as a collective and not against each other, in compliance with the relevant legislation, policies and prescripts that govern the National Broadcaster;

11.3.2.5. A public apology is made to Ms P Ntombela-Nzimande, Ms C Mampane and all its former employees who had suffered prejudice due to the SABC management and Board's maladministration involving failure to handle the administration of its affairs in accordance with the laws, corporate policies and principles of corporate governance.

11.3.2.6. All their HR processes pertaining to creation of new posts, appointments and salary scales and progressions are reviewed to avoid a recurrence of what happened

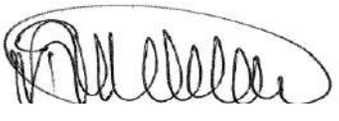
11.3.2.7. The roles and relationship of the SABC Board and COO are defined, particular in relation to the role of a relationship with the GCEO to avoid the paralysis and premature exist of GCEO's while adhering to established principles of corporate governance.

12. MONITORING

12.1. The Minister of Communications is to submit an implementation plan indicating how the remedial action referred to in paragraph 11.1.2 above will be implemented, within 30 days from the date of my final report.

12.2. The SABC Board is to submit an implementation plan indicating how the remedial action referred to in paragraph 11.1.3 above will be implemented, within 30 days from the date of my final report.

12.3. All actions requested in this report as part of the remedial action I have taken in terms of my powers under section 182(1)(c) of the Constitution to be finalized within six months and a final report presented to my office by 16 August 2014.



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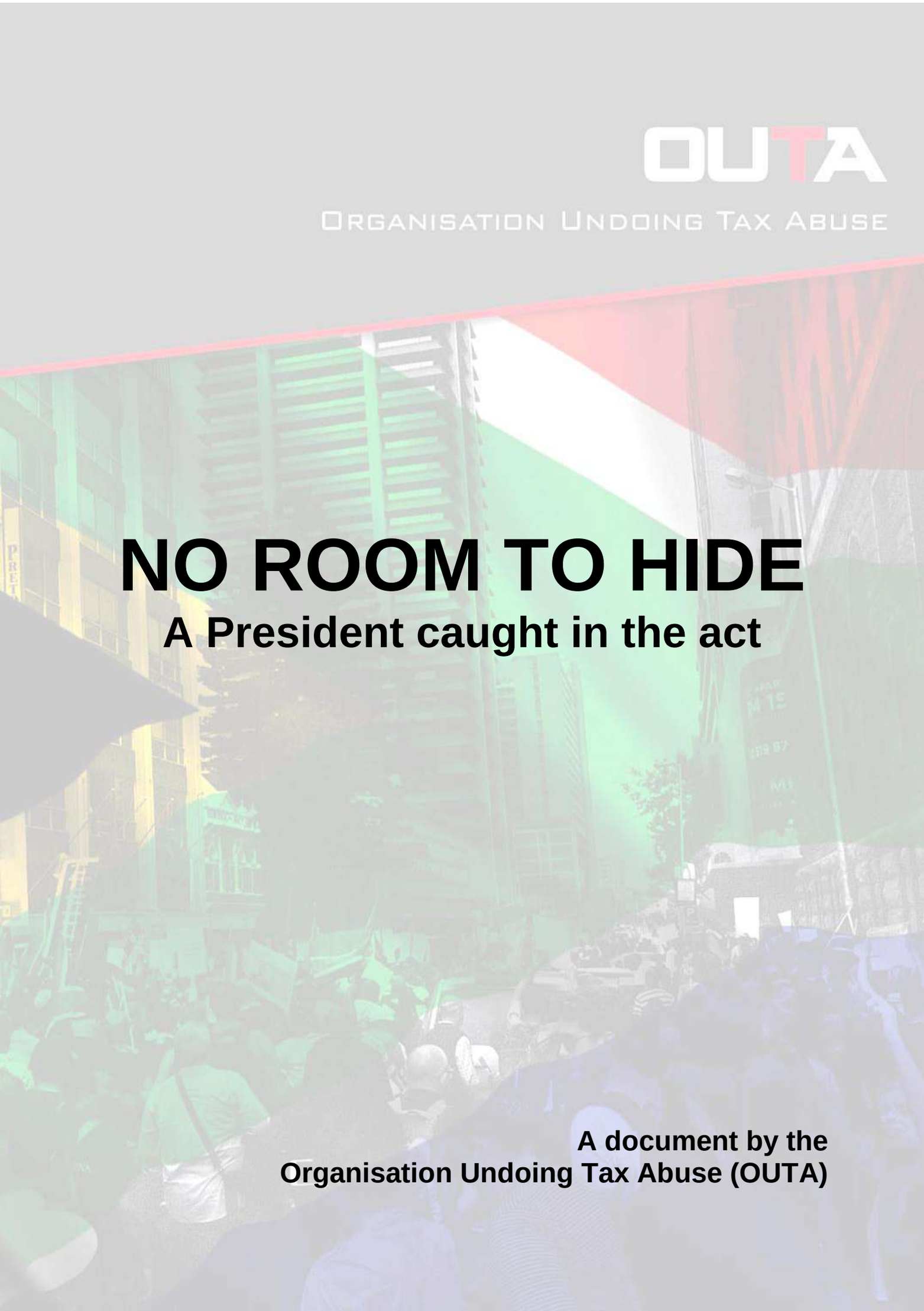
ADV THULI N. MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
Date: 17 February 2014
Assisted by:
Adv. Nkebe Kanyane: Chief Investigator, Good Governance and Integrity (GGI)
Mr Rodney Mataboge: Lead Investigator and Senior Investigator, GGI
Mr Thembinkosi Sithole: Investigator, GGI

OUTA

ORGANISATION UNDOING TAX ABUSE



NO ROOM TO HIDE

A President caught in the act

A document by the
Organisation Undoing Tax Abuse (OUTA)

Foreword

Over the past few years, various formal attempts have been made to remove Jacob Zuma from his position as the President of South Africa, through Parliamentary motions of no confidence and debates within the ANC's National Executive Committee (NEC) structures.

OUTA believes that significant and sufficient input has been provided on President Zuma's questionable conduct - be it various investigative media reports and the recent Public Protector's reports on Nkandla and State Capture - to warrant his removal. President Zuma's supporters on the other hand, have often claimed insufficient evidence against him at the time when Members of Parliament or the ANC's NEC were asked to vote or decide on his removal.

Normally in democratic societies where good governance prevails and those in authority are expected to act in the interests of the people, it takes just one of the incidents or events presented in this document to be sufficient cause to remove a sitting president from power. For some unexplained reason, the removal of President Zuma requires far more compelling evidence to convince those in authority to act in the interests of the country. This document provides the links and detail in a range of compelling cases against Zuma.

A document with focus and strategic intent

While that the evidence stacked against President Zuma has been substantive and

sufficient, what we believed to be essential was a compelling case document that could piece together the facts and evidence in a manner that placed beyond doubt, the veracity of the claims against him. This document was developed in the format of a court application encompassing strong and compelling legal arguments.

Furthermore, OUTA took advice that instead of turning in haste to the courts, we should present our case document to Parliament, with a view to requesting the same to be tabled for discussion with the House of Assembly. In doing so, we believe all MP's will be sufficiently empowered with substantive information about President Zuma's conduct, during the forthcoming Vote of No Confidence, whether by secret ballot or not.

Our case document shows that President Zuma has without doubt:

- Allowed himself to be influenced in his appointment of Cabinet members;
- Appointed poorly qualified and incompetent individuals in decision making positions (and retained them when he had ample reason and opportunity to remove them);
- Allowed corrupt individuals to benefit from state coffers or failed to institute action when he became aware of such conduct;
- Mismanaged his Cabinet in a manner that has had a detrimental effect on the country and the economy;
- Used or manipulated state resources or appointments to avoid prosecution for at least 783 charges;

- Willfully and maliciously lied or misled Parliament and the nation; and
- Abused his position to enrich himself, his family, his friends and his cronies.

The building of this case document has taken several months, with a team of experienced investigators, researchers and legal counsel.

The 'winds of evidence for change' get Stronger

Well into OUTA's project and case building process, two reports surfaced in May 2017 that added to the sordid picture of state capture, these being:-

- The first was a report on a probe by the South African Council of Churches – SACC, titled "Unburdening Panel", released on 18 May 2017.
- The second followed shortly thereafter, being a report released on 25 May 2017 by a team of academics under the Public Affairs Research Institute – PARI: "Betrayal of the Promise -How South Africa is being Captured."

Then came the gripping saga of the "Gutpa E-Mail Leaks" at the end of May 2017, which has continued unabated throughout June. The facts and documents from these E-Mail Leaks, have no doubt provided significant support and strength to the claims presented in our case document and we thus recognize and thank the investigation teams at AmaBungane, Scorpio and the Times Media, who have trawled through the content of thousands of documents and e-mails obtained from a server within Sahara - a Gupta owned company.

The format of the narration within our case document, has been carefully laid out in several chapters to provide a solid basis for informed decision making by those in authority to act with clear conscience. Indeed, it paints the picture of a President who has much more to account for than previously exposed.

The Journey Forward

Following the presentation of this document to the Speaker of Parliament on 28th June 2017, OUTA will ensure that all MP's will receive the same, preferably through the formal engagement processes as requested of the Speaker by OUTA.

OUTA will also present this case document to other relevant institutions and people in authority, such as the African National Congress's NEC, the Hawks, the Minister of Police, the National Prosecuting Authority and the Public Protector.

As the case document has also been prepared and compiled in a manner that makes it suitable for presentation in a court of law, OUTA will contemplate turning to the Constitutional Court when convinced that it would meaningful to do so.

Removing President Zuma from power is the primary step that needs to be taken, before South Africa can start the journey and period of redressing the debilitating effects that his conduct and the situation of state capture has had on our country.

A Judicial Commission of Inquiry into State Capture doesn't halt our action.

While we welcome the undertaking from the President to signal the formation of a Judicial Commission of inquiry into state capture, we trust that this decision will not be used as a reason or excuse by some to stave off decisions or actions available to them in the quest to remove President Zuma.

Commissions of inquiry are known take years to unfold and the extent of our current problems and plundering of the states coffers does not allow South Africa the luxury of wasting any more time in addressing the matter at hand.

OUTA thus believes that while a full and credible judicial commission of inquiry should be encouraged, this should not preclude all other attempts to remove President Zuma from power sooner rather than later.

OUTA's Mandate and call to action

OUTA is a non-profit civil action organisation, funded by tens of thousands of individuals and businesses, whose main aim is to hold government accountable for the abuse of power, corruption and maladministration. In doing our work, we ensure that more tax revenues are made available to the benefit all in South Africa, especially the poor and vulnerable.

To date, we have conducted several successful actions and interventions that have saved South Africa from unnecessary and wasteful expenditure, whilst holding those

responsible to account for their actions. We believe that our work, combined with that of many others within civil society to remove the State President from power, should be welcomed as an attempt to ensure that South Africa is managed in the best interests of the people.

We submit this document with the trust and hope that those in authority will reflect thereon and commit to a future in which leadership is held accountable for their actions. We do so in the belief that the evidence herein is substantive and strong enough to convince those in doubt as to the seriousness and veracity of the President's transgressions and furthermore, with the intention of taking this matter as far as is required, to bring about President Zuma's removal.

We look forward to working with those who take this matter seriously.

Wayne Duvenage

Organisation Undoing Tax Abuse (OUTA) - Chairperson

Contents

CHAPTER 1: INTRODUCTION

The purpose of this report

1 In its *Nkandla* judgment, the Constitutional Court reminded the nation and its highest public office-bearers, the President and members of Parliament, that –

> *"One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy."*[1]

2 This report is a sad testament to how far removed from this Constitutional vision we have been led by President Zuma. President Zuma and his Cabinet have allowed and enabled rampant abuse of State Power and Resources, for the benefit of the President, his family, their associates in the Gupta family[2] and others. In the process President Zuma and his associates have been responsible for a succession of Constitutional violations. President Zuma has repeatedly lied to Parliament about his misconduct, and his government, has with impunity trampled over the fundamental rights of ordinary South Africans.

3 This report has been prepared to assist Parliament to exercise its Constitutional obligation to hold President Zuma and his Cabinet accountable in the

[1] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) ("*Nkandla* judgment") at para 1, with reference to sections 1(c) and (d) of the Constitution.

[2] Gupta Family includes Messrs Atul, Ajay and Rajesh Gupta

forthcoming vote of no confidence. Much of the unconstitutional conduct of President Zuma and his Cabinet concerns facts that are in the public domain. We do not deal with those facts in the main body of this report because they concern matters of public knowledge. The main body of the report details facts that have recently emerged from the "Gupta emails" leaked from the Sahara Computers' server and that have not previously been assembled in one place.

4 The disclosures from the "Gupta emails" justify the removal of President Zuma and his Government. Viewed alongside the succession of other publicly documented Constitutional violations, they make the case for the removal of President Zuma and his Government unanswerable.

5 In this introduction, we briefly describe these publicly documented Constitutional violations of President Zuma and his Government before outlining the facts flowing from the "Gupta emails" that are addressed in the main body of the report.

The unconstitutional interference with the Criminal Justice System

6 President Zuma came to power with the cloud of hundreds of corruption charges hanging over his head. These charges related to his corrupt relationship with Schabir Shaik in the period in which he was a member of the provincial government of KwaZulu Natal.

7 Since assuming office as President, President Zuma has systematically sought to avoid any trial on the corruption charges brought against him and has unconstitutionally abused his powers over the Criminal Justice System to protect himself from prosecution.

8 In this regard, he and his Government have been responsible for:

8.1 Repeated instances of unconstitutional interference with the Office of the National Director of Prosecutions:

8.1.1 The unlawful removal of Mr Pikoli from the Office of the National Director of Public Prosecutions (NDPP);[3]

8.1.2 The unlawful appointment of Mr Simelane from the Office of the NDPP;[4]

8.1.3 The acting appointment of Ms Jiba to the Office of NDPP when she was unfit for office as an advocate;[5] and

8.1.4 The attempt to buy Mr Nxasana out of his Office as NDPP by paying him more than R17 million to leave office.[6]

8.2 Repeated instances of unconstitutional interference with the institutions required to investigate corruption independently:

8.2.1 The unlawful replacement of the Directorate of Special Operations ("the Scorpions") by the Directorate for Priority Crimes ("the Hawks")

[3] Pikoli v President of the Republic of South Africa and Others 2010 (1) SA 400 (GNP)

[4] Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC)

[5] General Council of The Bar of South Africa v Jiba and Others 2017 (1) SACR 47 (GNP)

[6] The precise circumstances of Mr Nxasana's departure from office are the subject of pending litigation. It is undisputed that the President concluded an agreement with Mr Nxasana in terms of which he recognised that Mr Nxasana was a fit and proper person to hold office as NDPP but paid Mr Nxasana R17.3 million in a settlement agreement that provided for his departure from the office. A copy of the relevant agreement is Annexure **INT 1**. Mr Nxasana states that he did not want to leave office but was pressurized by the President to do so. He links this pressure to the President's mistaken belief that Mr Nxasana had been meeting with Bulelani Ngcuka, the former NDPP who had instituted charges against Mr Zuma. Copies of the affidavits of Mr Nxasana and the President in this regard are attached – **INT 2 and INT 3**.

without sufficient safeguards to ensure that corruption in government is independently investigated and prosecuted;[7]

8.2.2 The unlawful removal of General Dramat from his position as head of the Hawks;[8]

8.2.3 The unlawful appointment of General Ntlemeza to the position as Head of the Hawks; [9]

8.2.4 The unlawful removal of Mr McBride from his position as Head of the Independent Police Investigative Directorate (IPID) for failing to go along with the attempts to remove General Dramat.[10]

9 While President Zuma and his government have pre-occupied themselves with attempts to ensure that he is not prosecuted, the Criminal Justice System has sustained damage. As a result, violent crime and corruption have increased dramatically.

The Nkandla debacle

10 The Nkandla debacle is notorious. While millions of South Africans live in abject poverty, President Zuma's government misappropriated hundreds of millions of rands for upgrades of his Nkandla homestead.

[7] Glenister v President of the RSA 2011 (3) SA 347 (CC)

[8] Helen Suzman Foundation v Minister of Police and Others (1054/2015) [2015] ZAGPPHC 4 (23 January 2015);

[9] Helen Suzman Foundation v Minister of Police and Others (1054/2015) [2015] ZAGPPHC 4 (23 January 2015); Helen Suzman Foundation and Another v Minister of Police and Others 2017 (1) SACR 683 (GP)

[10] McBride v Minister of Police and Others (Helen Suzman Foundation As Amicus Curiae) 2016 (2) SACR 585 (CC)

11 When the Public Protector investigated the matter she concluded that the President had violated the Executive Members' Ethics Act and the Executive Ethics Code. As Remedial Action she ordered the President to pay back the amount by which he had unlawfully been enriched, to reprimand the responsible Ministers for their handling of the Nkandla project and to report to Parliament on what he had done.

12 The President simply ignored the Remedial Action handed down by the Public Protector. As a result, he was found by the Constitutional Court to have acted in a manner inconsistent with the Constitution.[11]

Misleading Parliament

13 The Nkandla affair also showed the capacity of the President to mislead Parliament. On 15 November 2012, in response to parliamentary questions, President Zuma said the following:

> "*By the time government came, the contractors were on site that had been enlisted by the family and not by the government or Public Works. Government had a plan regarding what it wanted to do. Government wanted to improve the fence, etc. I told government that I had my own plan – which was a comprehensive plan – to extend my home. What then happened was that I allowed government to meet with the contractors who*

[11]EFF v Speaker, NA 2016 (3) SA 580 (CC)

were already on site because government, from a security point of view, insisted that they needed to participate." [12]

14 This statement was misleading. It suggests that President Zuma's private construction project was already underway when the Department of Public Works first met with the private contractors. The statement created the impression that the publicly funded upgrades still had to be arranged around a private construction project. The true facts were that the Department of Public Works were meeting with President Zuma and his architect Mr Minehle **before** the private construction project had commenced.

As Mr Minehle reported to the Public Protector:

14.1 There was a meeting on site with the Department of Public Works and the President on 12 August 2009;

14.2 There was another meeting with the Department of Public Works on 20 August 2009 at which Mr Minehle made a presentation on the design of the three new houses that comprised President Zuma's private construction project.

14.3 Construction on these three private dwellings commenced only after that meeting, on 24 August 2009.[13]

[12] FULL TRANSCRIPT OF PARLIAMENTARY EXCHANGE WITH PRESIDENT ZUMA ON NKANDLA SCANDAL. Available at: http://constitutionallyspeaking.co.za/full-transcript-of-parliamentary-exchange-with-president-zuma-on-nkandla-scandal/

[13] Public Protector Report "Secure in Comfort", Report 6 of 2016/2017 pp 132-3 paras 6.5.8 to 6.5.12.

15 President Zuma also stated that *"My residence Nkandla has been paid for by the Zuma family. All the buildings and every room we use in that residence was built by ourselves as a family, and not by Government."* He insisted in Parliament that Government had only paid for *"security enhancements"* or *"security upgrades"* at his Nkandla residence. This was patently false, as government fitted the bill for the building of the visitors' centre, an amphitheatre, a cattle kraal, a chicken run and the swimming pool – all at President Zuma's private Nkandla residence and none of which could reasonably be construed as *"security enhancements"*.[14] His misleading statements in this regard led to the absurd spectacle of public officials trying to justify the swimming pool as a fire fighting measure.

16 President Zuma also misled Parliament in relation to the Public Protector's *State of Capture* report.

16.1 During October 2016, the President attempted to interdict the Public Protector from releasing the *State of Capture* report.

16.2 On 25 October 2016, in an oral question session in the National Council of Provinces, President Zuma was asked why he attempted to interdict the release of the report. In his response, President Zuma said:

> "*I interdicted it because she was going to issue a report having not talked to me or asked me questions.*"

[14] http://constitutionallyspeaking.co.za/full-transcript-of-parliamentary-exchange-with-president-zuma-on-nkandla-scandal/

16.3 This was untrue. A few days after this, the erstwhile Public Protector released recordings of her interview with President Zuma and his attorney. The transcript of this interview demonstrates that the President was afforded an opportunity to answer these questions, but failed to do so.[15] Instead, through his attorney, he sought to avoid the questions by asking for the meeting to be postponed.

The social grants debacle

17 The social grants debacle is possibly even more disturbing than the Nkandla debacle. It presented, as the Constitutional Court put it, "*a potential catastrophe*", as the Government placed in jeopardy the livelihood of over 17 million social grant beneficiaries.[16] The Department of Social Development and the South African Social Security Agency (SASSA) put at risk the payment of social grants to millions of impoverished South Africans by failing to arrange a new delivery mechanism during the three year period in which the Constitutional Court's suspended order of invalidity of the existing contract with Cash Paymaster Services (Pty) Ltd ("CPS")was in force.[17]

18 When the Black Sash approached the Constitutional Court earlier this year to ensure the continued payment of social grants and to ensure court oversight over

[15] The transcript of this recording can be located from the following website: http://www.pprotect.org/library/investigation_report/2016-17/Annexure_A1_Interview_between_President_Zuma%20_and_the%20Public_Protector.pdf

[16] Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017) ("Black Sash Trust v Minister of Social Development") at para 15

[17] See Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SA Social Security Agency 2014 (4) SA 179 (CC)

a proposed new contract between SASSA and CPS, the Constitutional Court commented on the shameful manner in which government had conducted itself:

> *"This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament."*[18]

19 Affidavits subsequently filed by the current and former CEO's of SASSA reveal that the Minister of Social Development, Minister Bathabile Dlamini, was responsible for this state of affairs. She had taken charge of the project to put in place a new grant delivery mechanism, appointed work streams responsible for this project and directed that they should report to her, not to SASSA.[19] Furthermore, she had misled the Court by failing to disclose these facts and leaving the blame to be carried by the SASSA executives from whom she had removed responsibility for the project.[20]

20 As the Cabinet Member responsible for ensuring the proper administration of grant payments, Minister Dlamini had to be held accountable for what was possibly the greatest failure of the Constitutional requirements of service delivery

[18] Black Sash Trust v Minister of Social Development and Others at para 8.

[19] See the letter addressed by Minister Dlamini to the CEO of SASSA on 9 July 2015 which is reproduced in footnote 20 of the judgment of the Constitutional Court in Black Sash Trust v Minister of Social Development

[20] Black Sash Trust v Minister of Social Development at para 20

since the advent of democracy. Inexplicably, President Zuma not only retained her in his Cabinet in the reshuffle of 30 March 2017 but left her in charge of the Social Development Portfolio she had so manifestly mismanaged.

An outline of this report

21 The facts set out above are all in the public domain. What has not been in the public domain until recently are the documents leaked from the Sahara Computers Server. These documents are plainly relevant to Parliament's duties in relation to the vote of no confidence. They show how the Gupta family has managed, with the assistance of the President, to control state resources and state power for their private benefit. This report is designed to present Parliament with the facts in relation to these documents in a readily available and accessible form.

22 In Chapter 2 we describe the links between President Zuma and the Gupta family.

22.1 We show that the Gupta family has been cultivating close relations with President Zuma from the point at which he was elected President of the African National Congress (ANC) and thus earmarked for election as President of the Republic.

22.2 We describe the reciprocal manner in which the Gupta family has looked after the financial interests of President Zuma's family and how President Zuma, in turn, has protected the Gupta family's business interests and

ceded control to them of important government decisions including appointments of Ministers and senior public officials.

23 In the remaining chapters, we describe how this process has played out in relation to the four Government Departments that are of most significance to the Gupta family:

23.1 The Department of Public Enterprises which exercises control over the State-Owned Enterprises (SoEs) from which billions of rands have been diverted to Gupta companies[21];

23.2 The Department of Mineral Resources, which exercises authority over the Mining Industry in which Gupta companies are heavily invested;

23.3 The Department of Communications, which is important to the Guptas because of their broadcasting interests; and

23.4 The Ministry of Finance that has attempted to protect State resources from being unlawfully diverted to Gupta companies.

24 Chapter 3 describes how President Zuma, and his appointed Ministers for Public Enterprises, Malusi Gigaba and Lynne Brown, have overseen the plundering of billions of rands of public resources through the unlawful conclusion of contracts by SoE's to the benefit of companies owned and controlled by the Gupta family, President Zuma's son Duduzane Zuma and their business associates. These contracts include:

[21] Company details are provided in more detail in Chapter 2 and 3.

24.1 Transnet's unlawful award of a R50 billion tender for freight locomotives on 17 March 2014 from which the Gupta-linked company, Tequesta (Pty) Ltd earned more than R5.2 billion in a 21% "service fee" from the successful bidder, China South Rail (Hong Kong) Co. Ltd.

24.2 Transnet's award to Neotel of a R300 million network equipment contract and a five-year network service contract worth R1.8 billion in 2014 and early 2015, which resulted in kickbacks of R66 million to a Gupta-linked company, Homix (Pty) Ltd;

24.3 Eskom's award of an estimated R11.7 billion rands worth of coal-supply contracts at inflated prices to Tegeta Exploration and Resources (Pty) Ltd between 2015 and 2016. The Guptas' Oakbay Investments company holds a 34.5% stake in Tegeta; Duduzane Zuma's Mabengela Investments (Pty) Ltd holds a 28.5% stake.

24.4 Eskom's conclusion of a R43 million contract with the Guptas' media company, TNA (Pty) Ltd, in October 2014. South African Airways, Transnet and Denel concluded similar contracts with TNA Media for millions of rands.

24.5 Denel's conclusion of a joint venture with a Gupta-linked company, VR Laser Asia, in January 2016 in terms of which VR Laser Asia, would acquire Denel's intellectual property and a 49% stake in Denel Asia's expansion into the Asian market.

25 These contracts have been facilitated by Ministers Gigaba and Brown's appointment of Gupta-linked individuals to the Boards of Transnet, Eskom and Denel.

26 The Gupta family's improper access to billions of rands in the procurement budgets of SoE's has been more recently been secured by President Zuma's appointment of Mr Richard Seleke as Director-General of Public Enterprises.

26.1 Long before Mr Seleke had any formal role in the Department of Public Enterprises he had an established record of being used as a secret conduit for the supply of confidential government information to the Guptas.

26.2 He was appointed to his post as Director General of Public Enterprises after he submitted his CV to Duduzane Zuma.

27 In Chapter 4 we consider the role of Mr Mosebenzi Zwane, Minister of Mineral Resources, and the inferences to be drawn from President Zuma's appointment and retention of Minister Zwane in his Cabinet. We show that:

27.1 Mr Zwane was appointed as Minister of Mineral Resources by President Zuma after first being vetted by members of the Gupta family, and without the prior knowledge of the ANC National Executive Committee.

27.2 Minister Zwane has a longstanding improper relationship with the Gupta family going back to his days as MEC for Agriculture in the Free State Province and was directly involved in facilitating the landing of an aircraft with Gupta wedding guests at the Waterkloof Air Force Base.

27.3 Prior to his appointment to Cabinet, Mr Zwane attended numerous meetings with Tony Gupta. Minister Zwane was also flown to Dubai, and accommodated at the luxury Oberoi Hotel in Dubai, in the company and at the expense of the Guptas on at least two other occasions in 2013.

27.4 As Minister of Mineral Resources, Mr Zwane utilised his Public Office to facilitate the sale of Optimum Coal Mine from Glencore to the Gupta-linked Tegeta Exploration & Resources (Pty) Ltd.

27.5 While the dispute over Optimum Coal was taking place, and Eskom was supposed to be at arm's length with the Guptas and Tegeta, Mr Richard Seleke who had been Mr Zwane's Director-General in the Free State Department of Economic Development prior to Mr Zwane's appointment as Minister of Mineral Resources (and who had no legitimate role whatsoever in relation to the Optimum Coal dispute) was used as a conduit to leak confidential Eskom documents to Tony Gupta[22].

27.6 Minister Zwane's Department of Mineral Resources also authorised the release of Koornfontein Mine's R280 million rehabilitation trust fund and Optimum Coal Mine's R1.43 billion rehabilitation trust fund into Bank of Baroda accounts, without ensuring that these funds were properly ring-fenced, secure and would be utilised for their proper purpose.

27.7 As Minister of Mineral Resources, Mr Zwane has been instructed in his public and media statements by Gupta family members and known Gupta

[22] The facts in this regard are set out in Chapter 3.

associates, including Tony Gupta (former Oakbay CEO), Mr Nazeem Howa, Duduzane Zuma and the Gupta-hired public relations firm, Bell Pottinger.

27.8 In his capacity as Chair of an Inter-Ministerial Committee to investigate the closure of the Guptas' South African bank accounts, Minister Zwane issued a public statement announcing that Cabinet had agreed that a judicial inquiry would investigate why South Africa's banks had blacklisted Gupta-owned businesses. In fact, Cabinet had done nothing of the sort.

27.9 Despite the fact that Minister Zwane had publicly misrepresented what Cabinet had decided; he has been retained in the Cabinet by President Zuma and remains responsible for the Mineral Resources Portfolio that is of obvious importance to the Gupta family.

28 In Chapter 5 we consider the role of another Minister who has been "captured" by the Gupta family, Minister Faith Muthambi, who was Minister of Communications before her transfer to the Public Administration Portfolio. We show that:

28.1 During the course of July and August 2014 (shortly following her appointment as Minister of Communications), Minister Muthambi personally sent e-mails to Tony Gupta on confidential matters of national government policy and on the assistance, she wanted from him to assume powers which were, at the time, assigned to the Minister of Posts and Telecommunications.

28.2 On 8 July 2014, Minister Muthambi appointed Hlaudi Motsoeneng as permanent COO of the SABC, in defiance of the Public Protector's Findings against him of abuses of power, fraud and maladministration at the SABC. Mr Motsoeneng facilitated the SABC's effective sponsorship of the Guptas' media outlet, The New Age.

28.3 In December 2015, Minister Muthambi reportedly offered to appoint Ms Vuyo Batyi as the Chairperson of the Independent Communications Authority of South Africa (ICASA) on condition that she grant the Guptas' ANN7 media company, Infinity Media (Pty) Ltd, a free-to-air television licence. Duduzane Zuma also has a stake in Infinity Media. When Ms Batyi refused to comply with this condition for appointment, Minister Muthambi declined to gazette her appointment.

28.4 In May 2016, Minister Muthambi attended meetings that the Inter-Ministerial Committee held with banks on the closure of the Guptas' bank accounts, despite her not having been appointed by Cabinet to this committee.

28.5 Minister Muthambi appointed Mr Lungisani Daniel Mantsha and Mr Mzwanele Manyi as her legal and special advisors. Both have close ties to the Guptas.

29 We note that Minister Muthambi has been subject to strident criticism by the Courts and Parliament in relation to the performance of her functions as a Minister. Nevertheless, she has been retained in the Cabinet by President Zuma.

30 In Chapter 6 we consider the role of the Guptas in relation to appointments to the position of Minister of Finance.

30.1 We describe the offer made by the Gupta family and Duduzane Zuma for Mr Mcebisi Jonas to become Minister of Finance.

30.2 We describe the circumstances in which Minister Nene was briefly replaced by Minister van Rooyen as Minister of Finance.

30.3 We show the clear influence that the Gupta family exercised in relation to the brief appointment of Mr van Rooyen as Finance Minister and how the advisors who accompanied Mr van Rooyen into office immediately contrived to leak confidential government information to the Guptas through Mr Seleke.

30.4 We describe the attempts by Treasury to prevent public resources from being plundered for the benefit of Gupta-linked companies and we record the sustained conflict between Minister Gordhan and the Gupta family leading up to his removal from Office by President Zuma.

30.5 We conclude that the inference is inescapable that the interests of the Gupta family influenced the decision of President Zuma to replace Minister Gordhan.

31 In the final chapter, we set out the legal principles that the Constitutional Court has held to be applicable to the National Assembly and its members when they consider a vote of no confidence. We show that on a proper application of these principles, the National Assembly and its members would be failing in their

Constitutional duty if they voted to allow President Zuma and his Cabinet to remain in office beyond the forthcoming vote of no confidence.

CHAPTER 2: PRESIDENT ZUMA AND THE GUPTAS

President Zuma's ties to the Gupta Family

1 To understand the influence exercised by President Zuma's patronage network, one must consider the links between the Zuma family and the Gupta family. In this chapter, we explore the close relationship between President Zuma, his family and the Gupta family.

2 The exact date on which President Zuma befriended the Gupta family is unclear. In a 2016 advertisement — taken out in *The New Age* newspapers by Oakbay entitled "*Gupta family, An Inconvenient Truth*,"[23] — the Gupta family stated as follows:

> "*Like many other South African businesses, we interact with the Government. Our interaction with the current president began in 2000, which was before he became president. In fact, friendship with the previous president was as strong…*"

3 The advertisement makes clear that the Gupta family have a long-standing relationship with President Zuma spanning seventeen years. In their own words, the Gupta family describe this relationship as a "friendship". The suggestion in the advertisement that the particular relationship with President Zuma is no stronger than the relationship that the Gupta family had with his predecessor, President Mbeki is immaterial. The Gupta family have deliberately cultivated

[23] News24. (2017). Guptas: We were friends with Zuma before he was president. [online] Available at: http://www.news24.com/SouthAfrica/News/guptas-we-were-friends-with-zuma-before-he-was-president-20160318.

friendships with whomever has held positions of power in the Government or the ANC. The invitation lists to their family weddings and family parties reads like a Who's Who of ruling party politics.[24] The reason for this is obvious – the Gupta family look to cultivate close relationships with all holders of political power who are in a position to benefit their business interests.

4 The President is obviously permitted to have friends. The issue is the President's utilisation of the power and influence attached to his position to benefit those friends, and through them, himself or members of his family. The President came to power under the cloud of pending corruption charges relating to his "friendship" with Schabir Shaik while he held office in the KwaZulu Natal provincial government. His "friendship" with the Gupta family has been far more damaging for good governance in South Africa.

5 A search for direct links and correspondence between the President and the Gupta family would be both naïve and futile. The malfeasance committed by President Zuma is rarely recorded in correspondence. The President often uses intermediaries. An example of this came to light on 18 June 2017, in an article published by the *Sunday Times* newspaper.[25]

5.1 During 2009, Mr Jacinto Rocha was employed as the Deputy Director-General in the Department of Mineral Resources.

[24] Copies of these invitation lists are attached **ZGF 1** & **ZGF 3**

[25] Pressreader.com. (2017). *PressReader.com - Connecting People Through News*. [online] Available at: https://www.pressreader.com/south-africa/sunday-times/20170618/281479276407139.

5.2 Shortly after President Zuma's first inauguration in 2009, Rocha was invited to a meeting at the Presidential Guesthouse, Mahlamba Ndlopfu.

5.3 The meeting was also attended by President Zuma, Rajesh "Tony" Gupta, and Duduzane Zuma. At this meeting, President Zuma introduced Mr Rocha to his son, Duduzane Zuma. The *Sunday Times* quotes Mr Rocha as saying that President Zuma stated:

> "*Duduzane is my only child involved with money. I would appreciate it if you could help him wherever you could.*"

5.4 Mr Rocha's involvement with the Gupta family since then is notorious. In his capacity as Deputy Director General of Mineral Resources, Mr Rocha was the official who awarded Imperial Crown Trading 231 (Pty) Ltd ("ICT") prospecting rights over the iron ore resource in respect of the Sishen Mine. ICT was a company with no track record in mining but it was 50% owned by the Gupta company JIC Mining in which Duduzane is a major shareholder. The iron ore resource to which Mr Rocha gave ICT exclusive rights was one valued at more than R1 billion. Mr Rocha's awarded the prospecting right over Sishen to ICT on 30 November 2009. This was within six months of his meeting with President Zuma, Duduzane Zuma and Tony Gupta.

5.5 According to Mr Rocha, Duduzane Zuma and Tony Gupta later recruited him to be an advisor to Ben Martins in anticipation of his appointment as Transport Minister in June 2012. Significantly, they were aware of the

pending cabinet reshuffle and the portfolio to be given to Mr Martins, several days before it took place.[26]

6 The incidents described by Mr Rocha show:

6.1 First, that the President improperly used his influence to provide undue assistance to the Guptas from the beginning of his first term in office;

6.2 Second, that State patronage of the Gupta family is directly linked to the business interests of Duduzane Zuma;

6.3 Third, that the business interests of Duduzane Zuma are particularly important because, in the words of President Zuma, "*…he is my only child involved with money,*"[27] and

6.4 Fourth, that Duduzane Zuma and the Gupta family know about cabinet reshuffles in advance of their implementation and appear to have the power to place advisors of their choice with Cabinet Members in the hope that these advisors will advance their business interests.

7 In relation to the latter, there is mounting evidence that the Gupta family has the power improperly to influence the President's decisions on Cabinet appointments. Gupta family offers of Cabinet positions have been confirmed under oath on two separate occasions.

[26] See Annexure **ZGF 3**.

[27] Anon, (2017). *'Duduzane is my only son involved with money. Help him wherever you can'*. [online] Available at: https://www.timeslive.co.za/sunday-times/investigations/2017-06-17-duduzane-is-my-only-son-involved-with-money-help-him-wherever-you-can/.

8 Mabel Petronella ("Vytjie") Mentor, was an ANC member of parliament. In 2004, Ms Mentor was elected as Chairperson of Parliament's Portfolio Committee on Public Enterprises — Parliament's oversight body into, *inter alia*, South Africa's state owned enterprises. In an affidavit deposed to by Ms Mentor and filed in the North Gauteng High Court, she swore to the following facts:[28]

> *"[7] I have been a member of the African National Congress since the 1980s. In 2002, I was elected as a member of parliament. In 2004, I was elected as Chairperson of the Portfolio Committee on Public Enterprises.*
>
> *[8] In or around 2010, I received a telephone call from a woman (I do not know her name) inviting me to a meeting, ostensibly with the President at the Union Buildings. I boarded a flight from Cape Town to Johannesburg to attend this meeting.*
>
> *[9] When I arrived at OR Tambo International Airport, Mr Gupta met me. I was surprised and had never met Mr Gupta before. Mr Gupta informed me that the President was unavailable.*
>
> *[10] Mr Gupta took me unknowingly to the Gupta's Sahara office where he introduced me to the senior Gupta brother. When I left the Sahara office, I was still under impression that I was being taken to Pretoria in order to meet with the President. However, I was taken to the Gupta's residence in Saxonwold, where I was introduced to the other brothers. Within fifteen*

[28] President of the Republic of South Africa v Office of the Public Protector and Another, case no.: 79808/16.

minutes of my arrival at their home, members of the Gupta family had already offered me the position of Minister of Public Enterprises.

[11] There was a condition attached to their offer: upon my appointment as Minister of Public Enterprises, I was required to cancel South African Airways' ("SAA") routes to India. This route would be taken over by an airline in which the Gupta family had shares.

[12] My impression was that the members of the Gupta family whom I met had knowledge of the fact that cabinet positions were to be reshuffled. They were after all brazen enough to offer me the position of Minister of Public Enterprises.

[13] I declined the offer and told the Gupta representatives that they lacked the authority to make such an offer. As I was leaving, the President entered the room. I recounted the offer and advised him that I could not, in good conscience, accept the offer. The President responded and said 'It's okay ntombazana, you have come such a long way in crutches' and saw me out.

[14] Approximately one week later and to my surprise, the President shuffled his cabinet. As part of this reshuffle, he replaced Ms Hogan with Mr Gigaba as Minister of Public Enterprises."

9 Ms Mentor's affidavit directly implicates President Zuma. It places President Zuma at the Gupta household when the improper offer was made to her. It thus

demonstrates that President Zuma (i) knew that the Gupta family members were peddling Cabinet posts; and (ii) was complicit in this.

10 Mcebisi Jonas, the former Deputy Minister of Finance, reported a similar incident, which we detail in Chapter 6 of this report. In short, on 23 October 2015, Mr Jonas was invited to a meeting with Duduzane Zuma. Duduzane Zuma moved the meeting to the Gupta Household in Saxonwold. There, Mr Jonas met with Ajay Gupta and Mr Fana Hlongwane. Ajay Gupta offered Mr Jonas R600 000.00 in cash to accept the position of Minister of Finance, then being occupied by Nhlanhla Nene.

11 The Guptas also have ready access to the President when they require his intervention on their behalf. By way of illustration, emails from the Sahara Server also show that during 2015, an employee at Oakbay arranged for a private aviation company to meet with the President at short notice so that arrangements could be made to spare the Guptas the inconvenience of having to depart South Africa from International Departures at OR Tambo Airport.

11.1 Duduzane Zuma, Shanice Zuma and members of the Gupta family (including Tony Gupta) were scheduled to depart Johannesburg for Mauritius using Oakbay's private jet, with call sign "ZSOAK".[29]

11.2 They were using the services of Fireblade Aviation and did not want to subject themselves to the experience of having to pass through customs and immigration at International Departures. Fireblade Aviation operates

[29] See Annexure **ZGF 4.**

a business services terminal at OR Tambo International Airport. It is separate from the main terminals at OR Tambo. However, at the time Fireblade could not offer Customs and Immigration facilities at their terminal. So Fireblade passengers still needed to pass through Customs and Immigration at the International Departures Terminals at OR Tambo.

11.3 The Gupta family procured the intervention of the President to change this state of affairs. This is apparent from an exchange of emails on 5 and 6 June 2015 between Mr Bernhardt de Kock and Ms Ronica Ragavan, the CEO of Oakbay Investments, and Mr Robbie Irons of Fireblade.[30]

12 President Zuma has also surrounded himself with advisors who have close relationships with the Gupta family.

12.1 Ms Lakela Kaunda is Chief Operations Officer in the office of the Presidency. She has worked for President Zuma since 2000 and has been a senior advisor in the Office of the Presidency since 2009.

12.2 Prior to taking up her position in the Presidency, and while she was an employee of the ANC at Luthuli House, Ms Kaunda had drawn R20 000 per month as a director in the Gupta linked company, Wavestone Computers (Pty) Ltd. She resigned her directorship late in 2008.

12.3 Emails show that between November 2012 and January 2013, Ms Kaunda attended four meetings at the Gupta household — a fact which she admits. On 23 January 2013, Kaunda sent an email to Ashu Chawla, attaching the

[30] Annexure **ZGF 5.**

CIPC documents of a company called Ntomb'Nkulu Investments CC. She wrote: "*Document for Mr T [Tony Gupta]. We will use this vehicle. He has the ID.*" [31] In response to an enquiry by the Sunday Times newspaper, Ms Kaunda said:

> "*Mr Gupta made an offer for me to join one of their companies and asked for an existing company to be a partner. I confirm that I sent the e-mail to Chawla about Ntomb'Nkulu Investments. I later contacted him to inform that I wish to decline and indicated that I do not want to participate in any business or other activities with them.*" [32]

12.4 Ms Kaunda says she did not take further part in the business. Yet, her version is inherently suspicious. When she sent her email to Tony Gupta advising him to use Ntomb'Kulu as the vehicle to be used by the Gupta family, she had two days previously resigned her membership in the CC and transferred her interest to her son, Siphesihle Fezeka Njabulo Kaunda.[33] A draft resolution dated 22 March 2013, obtained from the Sahara Server, and to be signed as Directors by Duduzane Zuma and Tony Gupta, provided for the transfer of six ordinary shares in Dixie Investments (Pty) Ltd to Ntomb'Nkulu.[34] In the circumstances, it appears that Ms Kaunda intended to take advantage of the Gupta family offer of

[31] See Annexures **ZGF 6.**

[32] Anon, (2017). *Guptas courted president's aide, Lakela Kaunda*. [online] Available at: https://www.timeslive.co.za/sunday-times/news/2017-06-11-guptas-courted-presidents-aide-lakela-kaunda/.

[33] See Annexure **ZGF 7.**

[34] See Annexure **ZGF 8.**

largesse but took care to ensure that the interest in Ntomb'Nkulu would be held by her son, not her, by the time that it was issued shares by the Guptas.

12.5 Ms Kaunda was made a non-executive director of Ubank in December 2013. The following year, the Guptas began making enquiries in connection with a purchase of the bank. By August, they had signed a non-disclosure agreement with a view to tabling an offer for Ubank.[35]

13 The closeness of the relationship between President Zuma and the Gupta family is reflected in the fact that Tony Gupta was involved in drafting a letter, in President Zuma's name, to Sheikh Mohammed Bin Rashid Al Maktoum of the UAE, requesting assistance with proposed residency status in the UAE.[36] The letter was sent from Mr Ashok Narayan to Tony Gupta under cover of an email dated 20 January 2016 which stated "*Sir ji, revised letter*".[37] The file name of the letter is *"JZ letter to Sheikh Mohammed rev 2001.16.docx"* which suggests that this was not the first revision to its contents.

14 The letter itself states the following above the signature line of President Zuma:

> "*I fondly remember our meeting in the UAE and the gracious hospitality and warmth extended to me during my visit. It is with this sentiment that I am happy to inform you that my family has decided to make the UAE, and specifically Dubai, a second home and have already acquired a*

[35] See Annexure **ZGF 9** and **ZGF 10.**

[36] See Annexure **ZGF 11.**

[37] See Annexure **ZGF 12.**

residence located at Emirates Hills, Dubai (Villa No. L-35, Lailak Street No.1). It will be a great honor for me and my family to gain your patronage during our proposed residency in the UAE especially around security issues since my son and the family will be travelling quite extensively in and out of the UAE.

To this end I would be grateful if would kindly grant an audience to my son, Mr. Duduzane Zuma to meet with you and formally introduce the family to you."

15 The President denies any knowledge of this letter. If that were the case one would expect the President to have been outraged at the presumptuousness of the Gupta family in drafting a letter in his name to another head of state, and to have taken steps against Tony Gupta. However, nothing of the sort has happened.

16 This is not the first time that the President has been content to suffer embarrassment through the use of his name in matters relating to the Guptas. In Chapter 4 below we describe in detail the events relating to the unauthorised use of the Waterkloof Airbase as a landing strip for guests coming from India to a Gupta family wedding. For present purposes we point out that Mr Vusi Bruce Koloane was the official in the Department of International Relations and Cooperation who unlawfully pressurised members of the South African Airforce at Waterkloof to allow the Gupta aeroplane to land there by claiming that he was under pressure from President Zuma to do so. Again, if Mr Koloane had used the name of President Zuma in vain, one would have expected President Zuma

to have been outraged with him. However, when Mr Koloane left the Department of International Relations and Cooperation, President Zuma rewarded him by appointing him as Ambassador to the Netherlands.

17 In matters relating to the Guptas, it seems that the President, is content for people to use his name with impunity.

Zuma family members' ties to the Gupta family

18 Apart from President Zuma, there appear to be three known points of contact between the Zuma and Gupta families, namely:

18.1 The President's wife, Gloria Bongi Ngema-Zuma, whom he married in 2012;

18.2 Duduzile Zuma, the President's daughter from his third wife, the late Kate Matsho; and

18.3 Duduzane Zuma, the President's son from this third wife, the late Kate Matsho.

19 The bulk of this chapter is dedicated to Duduzane Zuma, given the extent of his relationship with the Gupta family. Before addressing this relationship, however we briefly set out the ties between the Guptas and Gloria Bongi Ngema-Zuma and Duduzile Zuma.

(i) Gloria Bongi Ngema-Zuma

20 Ngema-Zuma's relationship with the Gupta family appears to have started in 2010, when she was rumoured to be engaged to President Zuma.

21 Public records reveal that, during 2010, the Gupta family assisted to purchase a property for Ngema- Zuma.[38]

21.1 CIPC documents show that, in the first quarter of 2010, Ngema-Zuma registered the Sinqumo Trust.[39] Ngema-Zuma is the only listed Trustee of the Sinqumo Trust.

21.2 In April 2010, shortly after the Sinqumo Trust was registered, the trust purchased a house in the affluent suburb of Waterkloof Ridge, Pretoria ("the Property").[40] Shortly thereafter, Ngema-Zuma took occupation of the Property.

21.3 According to reports, the Property cost R5.4 million. The Bank of Baroda registered a bond over the property in the amount of R3.8 million. On 7 April 2016, the City Press reported that it had been granted access to the records and share registers of some Gupta-owned companies, including JIC Mining. City Press reported that an extract of the minutes of a JIC Mining board meeting held on 10 February 2010 recorded that the Bank of Baroda agreed to grant a facility to the Sinqumo Trust in the amount of R3.84 million, on condition that JIC would guarantee all amounts owed by Sinqumo Trust under the facility. The JIC Board agreed to do this.[41]

[38] See Annexure **ZGF 13**. Also see Comrie, S. (2017). *First Lady's house backed by Guptas*. [online] CityPress. Available at: http://city-press.news24.com/News/first-ladys-house-backed-by-guptas-20160417

[39] See Annexure **ZGF 14**. Also see Code for South Africa. (2017). *Trusts | Open Data | Code for South Africa*. [online] Available at: https://data.code4sa.org/dataset/Trusts/3jhi-ewix/data?q=Sinqumo**.**

[40] See Annexure **ZGF 15.**

[41] See Annexure **ZGF 16**.

21.4 Mabengela Investments (Pty) Ltd is a Gupta linked company in which Tony Gupta and Duduzane Zuma each hold a 25% shareholding. Documents recently obtained from the Sahara Company server show that Mabengela Investments (Pty) Ltd pays R65 000.00 per month,[42] which is labelled as a "monthly investment".[43] It is difficult to see how these payments could be described as "investments" unless Mabengela Investments (Pty) Ltd regards the gratuitous payment of R65 000 per month for the benefit of President Zuma's wife as an investment in political protection of its business interests and those of its associated Gupta companies.

21.5 This inference as to the true reason underlying the Gupta family assistance for the purchase of Ngema-Zuma's home is reinforced by the fact that the Gupta family have sought to conceal the facts in this regard. In November 2012, the Gupta family spokesperson, Gary Naidoo, denied that the Gupta family or its businesses contributed in any way to the raising or paying of the bond for Ms Ngema Zuma.[44]

(ii) Duduzile Zuma

22 On 13 August 2008, approximately eight months after President Zuma's election as president of the ANC, Duduzile Zuma was appointed to the Board of Sahara Sahara Computers (Pty) Ltd and Sahara Consumables (Pty) Ltd.

[42] See Annexures **ZGF 17** and **ZGF 18.**

[43] See Annexure **ZGF 19.**

[44] See Annexure **ZGF 20.** Also see Craig McKune, S. (2017). *Guptas 'bankroll' Mrs Zuma's bond*. [online] The M&G Online. Available at: https://mg.co.za/article/2012-11-30-00-guptas-bankroll-mrs-zumas-bond.

23 Duduzile Zuma spent 13 months on the boards of these companies. On 30 September 2009, Duduzile Zuma resigned from her directorships of Sahara Computers and Sahara Consumables.

24 When she was appointed to Sahara's Board, Duduzile was only 26 years old. It is unclear whether she had any tertiary qualifications. She certainly had no business experience that could qualify her for such responsibility in a company of the size of Sahara. The only reasonable conclusion is that her appointment was an attempt by the Gupta family to ingratiate themselves to President Zuma.

25 The timing of her appointment was no coincidence. It took place just after President Zuma's election as ANC President and when it was now inevitable that he would become South Africa's next President.

(iii) Duduzane Zuma

26 During a 2011 interview with the *City Press* newspaper,[45] Duduzane Zuma is reported to have said:

> "'*I was introduced to the Gupta family by my father in late 2001, just like I met many people…At that time, my father said, I've got an interest in taking an IT direction in my life, and at that point they were doing the Sahara thing. It just made sense.*'

[45] News24. (2017). *'I would have been further if my surname wasn't Zuma'*. [online] Available at: http://www.news24.com/Archives/City-Press/I-would-have-been-further-if-my-surname-wasnt-Zuma-20150429.

'*If it wasn't for the Guptas, I would've gone the tenderpreneur route. 100%. What other options do I have? Then there would've been plundering'.*"

27 It is difficult to imagine an innocent explanation for Duduzane Zuma's meteoric rise within the Sahara organisation.

27.1 He was first appointed to Sahara's board of directors on 13 August 2008. At the time, he was only 26 years old and could boast no obvious qualifications.

27.2 Duduzane Zuma was appointed to the board together with his twin sister, Duduzile. As pointed out above, their appointments coincided with President Zuma's election as President of the ANC, and with that election, his assumption of an office that designated him to be President of the Republic in 2009.

28 At the age of 35, Duduzane Zuma has amassed a vast fortune. He has multiple business interests many of which involve the Gupta family. A spreadsheet of Gupta Group companies saved on the Sahara Server[46] demonstrates that, through Mabengela Investments, Duduzane holds interests in the following entities:

28.1 Afripalm Technology;

28.2 Infinity Media Networks;

[46] See Annexure **ZGF 21.**

28.3 Localiga;

28.4 Islandsite Investments;

28.5 Idwala Coal;

28.6 Goldridge Trading;

28.7 Gemini Mood Trading;

28.8 Oakbay Metals;

28.9 Elgasolve; and

28.10 Dixie Investments.

29 Duduzane Zuma provides access to his father. By way of illustration we refer to an email chain from the Sahara company's server[47] which shows how he facilitated a meeting between President Zuma and Mr Vladimir Evtushenkov, the Chairman of a Russian investment company called Sistema.

29.1 On 23 December 2014 Sistema's Managing Director, Evginy Chuikov, wrote an email to Duduzane Zuma. From the tone of this email, this was not the first time the two had corresponded. In the email, Chuikov wrote:

> "*I hope you are well and enjoying the run up to Christmas and New Year. I wanted to touch base with you as Vladimir Evtushenkov is planning to be in Davos on the 21st and 22nd January and we wanted to schedule a meeting with the delegation*

[47] See Annexure **ZGF 22 (A-F).**

from South Africa. I understand that President Jacob Zuma may also be present and we would very much welcome a meeting with him. I would appreciate your guidance in this matter or perhaps a contact of the relevant person in his administration that could help us set this up. I look forward to hearing from you."

29.2 Duduzane Zuma responded on 1 January 2015. He told Chuikov that he was travelling at the time, and could only attend to the request upon his return on 15 January 2015.

29.3 On 18 January 2015, Chuikov reminded Duduzane Zuma about his commitment to make an appointment with President Zuma at Davos. He wrote:

"*I hope you are well and back following your travels. I wanted to follow up on our correspondence over the Christmas break to see if there may be an opportunity for our Chairman Vladimir Evtushenkov to meet with President Zuma at Davos. I appreciate that his schedule must be very busy but we would naturally aim to find the most convenient time. Please let me know if this could be arranged.*"

29.4 On 20 January 2015 Duduzane Zuma sent the details of George Moloisi who is the man who could arrange the meeting. It was clear from this email that Duduzane had spoken to Moloisi or the President, because he indicated that "*He is expecting your call…*"

29.5 Sistema appears to have succeeded in arranging the meeting. Chuikov stated the following in reply:

> "*Thank you very much for putting me in touch with Mr Moloisi. We have spoken and are now discussing suitable time for the meeting. Please let me know if you also plan to be in Davos as Mr Evtushenkov and I would be delighted to see you too.*"

29.6 President Zuma met Evtushenkov in Davos and on 27 January 2015. Chuikov wrote to thank Duduzane Zuma for arranging the meeting:

> "*Thank you for setting up the meeting with President Zuma for our Chairman Vladimir Evtushenkov. We met in Davos and had a very productive and warm catch up.*
>
> *In the meeting Mr Evtushenkov raised the topic of possible investments in South Africa with particular focus on healthcare and "Smart City" technologies. As you know Sistema is very keen to nurture our relationship and identify joint business opportunities. President Zuma expressed his support for these efforts and mentioned that both areas of focus may be of interest in South Africa.*"

30 Duduzane Zuma uses his influence to benefit Gupta companies.

30.1 We have already alluded to:

30.1.1 the incident where Duduzane Zuma facilitated a meeting between Ajay Gupta and Mcebisi Jonas, at which Ajay Gupta attempted to bribe Mr Jonas into accepting the post of Minister of Finance, and

30.1.2 the role played by Duduzane Zuma in the appointment of Mr Rocha as advisor to Minister Martins.

30.2 In Chapters 3 and 4 below, we show how individuals friendly to the Guptas were appointed to high public offices after their CVs were forwarded to Duduzane Zuma:

30.2.1 Minister Zwane was appointed Minister of Mineral Resources after his CV was forwarded to Duduzane Zuma;

30.2.2 Mr Richard Seleke was appointed Director General of Public Enterprises after his CV was forwarded to Duduzane Zuma;

30.2.3 Mr Colin Matjila was appointed to the Board of Eskom after his CV was forwarded to Duduzane Zuma; and

30.3 In Chapter 5 below, we show how the President reassigned powers to Minister Muthambi after a request for such reassignment was forwarded to Duduzane Zuma.

(iv) The abuse of the President's powers in favour of the Gupta family

31 President Zuma has shown a readiness to utilise his position, and the influence with which it comes, to benefit the Gupta family.

32 We have referred above to -

32.1 President Zuma's apparent willingness to turn a blind eye to the conduct of the Guptas and their supporters in relation to the Waterkloof Airbase fiasco and the letter to Sheikh Mohammed Bin Rashid Al Maktoum, and

32.2 his intervention with Mr Rocha in support of Duduzane Zuma and the Guptas.

33 In Chapter 6 below we describe the Cabinet Committee appointed to look into the conduct of banks that refused to do business with the Guptas. That Committee was appointed by the Cabinet over which President Zuma presides. It's establishment can accordingly be seen as another instance of the use of Presidential power to support the interests of the Guptas.

34 Mr Themba Maseko, the erstwhile CEO of the Government Communications and Information System ("GCIS") has gone on record publicly to describe another instance of direct Presidential intervention to support the Guptas.

35 In late 2010, the Gupta family were in the process of establishing their newspaper, *The New Age*. GCIS is mandated to, *inter alia*, handle State expenditure on advertising. Mr Maseko was responsible for overseeing an annual advertising budget of R600 million. Mr Maseko gave the following account to the Public Protector, which is paraphrased below from the *State of Capture* report:[48]

[48] Public Protector, *'State of Capture report'*, Report 6 of 2016/2017 at p97, para 5.20

35.1 In late 2010 Maseko received several requests for meetings from members of the Gupta family. Maseko agreed to the meeting.

35.2 On the day of the meeting, while *en route* to the venue, Maseko received a telephone call from the President's office. The personal assistant indicated that the President desired to speak with Maseko. When the President came on the line, he greeted Maseko and said "*kuna labafana bakwaGupta badinga uncedo lwakho. Ngicela ubancede.*" Loosely translated, this meant that the following: "*The Guptas need your help. Please help them.*"

35.3 Maseko told the President that he was *en route* to Saxonwold, when the President said: "*Kulungile ke baba.*" (*"It's fine then."*).

35.4 Mr Maseko met with Ajay Gupta and one of his brothers. During the meeting, Ajay Gupta asked Mr Maseko to channel advertising spent to *The New Age*. When Mr Maseko raised the fact that the advertising spent in fact lay with the individual departments, Mr Ajay Gupta was undeterred. He said that if Mr Maseko encountered any problems with Ministers, the Gupta brothers would summon those Ministers to Saxonwold.

35.5 A few weeks later, a senior staffer at *The New Age* demanded a meeting with Maseko on the following day. Mr Maseko was on his way to the Nedbank Golf Challenge in Sun City, and indicated that he was unable to make such an appointment. An hour later, Ajay Gupta telephoned Mr Maseko, demanding a meeting the following day. When Mr Maseko

refused, Ajay Gupta said: "*I will talk to your seniors in Government and you will be sorted out.*"

36 These examples illustrate the control of Presidential power to assist the Guptas and the assumption on the part of the Guptas that they can depend on executive power to be exercised in a manner that protects their interests. In the four chapters that follow, we show how this assumption of the Guptas is borne out by events in relation to the four Government Departments that are of most significance to them:

36.1 The Department of Public Enterprises which exercises control over the state owned enterprises from which billions of rands have been diverted to Gupta companies,

36.2 The Department of Mineral Resources, which exercises authority over the mining industry in which Gupta companies are heavily invested;

36.3 The Department of Communications, which is important to the Guptas because of their broadcasting interests; and

36.4 The Ministry of Finance that has attempted to protect State resources from being unlawfully diverted to Gupta companies.

CHAPTER 3: THE GUPTA-ZUMA PLUNDERING OF PUBLIC RESOURCES THROUGH STATE-OWNED ENTERPRISES

Overview: The key facts

1 President Zuma, and his appointed Ministers for Public Enterprises, Malusi Gigaba and Lynne Brown, have overseen the plundering of billions of rands of public resources through the unlawful conclusion of contracts by State-Owned Enterprises (SoEs) to the benefit of companies owned and controlled by the Gupta family, Duduzane Zuma and their business associates.[49] This includes, but is evidently not limited to –

1.1 Transnet's unlawful award of a R50 billion tender for freight locomotives in 17 March 2014. From and associated with this tender –

1.1.1 The Gupta-linked company, Tequesta (Pty) Ltd – whose sole director is the Gupta's business partner, Salim Essa – earned a staggering 21% "service fee" from the primary successful bidder, China South Rail (Hong Kong) Co. Ltd, totalling R5 billion;

1.1.2 The Gupta family and Duduzane Zuma stood to earn lucrative sub-contracts with the successful bidders, through their newly-acquired stake in the local steel cutting and processing company, VR Laser Services (Pty) Ltd;

[49] A spreadsheet prepared by Sahara of "the Sahara Group of companies" is attached **SOE 1**. It describes many (but not all) of the Gupta companies.

1.1.3 The advisory services company, Regiments Capital (Pty) Ltd – whose executive director, and 32% shareholder, Mr Eric Wood, is a business associate of the Guptas and Mr Essa – earned hundreds of millions of rands in service fees from Transnet.

1.1.4 Trillian Capital Partners – a company in which Mr Essa holds a 60% stake and Wood a 25% stake and to which Mr Wood took the financial advisory business he had previously conducted in the name of Regiments Capital, has since late 2015, earned more than a hundred million rands in service fees in Transnet.

1.2 Transnet's award to Neotel of a R300 million network equipment contract and a five-year network service contract worth R1.8-billion in 2014 and early 2015, which resulted in kickbacks of R66m to a Gupta-linked front company, Homix (Pty) Ltd;

1.3 Eskom's award of an estimated R11.7 billion worth of coal-supply contracts at inflated prices to Tegeta Exploration and Resources (Pty) Ltd between 2015 and 2016. The Guptas' Oakbay Investments company holds a 34.5% stake in Tegeta; Duduzane Zuma's Mabengela Investments (Pty) Ltd holds a 28.5% stake; and Mr Essa's Elgasolve a 21,5% stake.

1.4 Eskom's conclusion of a R43 million contract with the Gupta's media company, TNA (Pty) Ltd in October 2014. South African Airways, Transnet and Denel have concluded similar contracts with TNA Media for millions of rands.

1.5 Denel's conclusion of a joint venture with Gupta-linked company VR Laser Asia in January 2016, in terms of which VR Laser Asia would acquire Denel's intellectual property and a 49% stake in Denel Asia's expansion into the Asian market.

2 In its analysis of the capture and exploitation of SoEs, the State Capacity Research Project describes the "repurposing *modus operandi*" that has been employed by the Guptas and their associates, with the apparent complicity of Zuma's appointed Ministers of Public Enterprises.[50]

3 In essence, the *modus operandi* entails four steps:

- A new minister changes the board composition of a SoE;
- The SoE announces a major new acquisition or build project;
- People brought on to the board who have close personal links to some of the bidders; and
- The tender is awarded in circumstances where there is a clear conflict of interest.[51]

4 Notwithstanding the media's exposure of the corruption and conflicts that have been exploited on the SoE Boards, the current Minister of Public Enterprises, Lynne Brown has continued to appoint to – and recycle across – SoE Boards the very individuals who are identified as colluders with the Guptas and their

[50] *Betrayal of the Promise: How South Africa is Being Stolen*, May 2017. Available online at: http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf.

[51] *Betrayal of the Promise: How South Africa is Being Stolen*, May 2017. See p 47.

business associates. These include Mr Brian Molefe, Mr Anoj Singh, Mr Iqbal Sharma, Dr Ben Ngubane, Mr Colin Matjila and Mr Matshela Koko.

5 Ministers Gigaba and Brown's appointment and re-appointment of these compromised individuals is evidently done with the blessing of President Zuma. Notwithstanding the public controversies around maladministration and corruption in public enterprises, President Zuma retained Ms Brown as Minister of Public Enterprises in his latest Cabinet reshuffle of 30 March 2017. He also appointed Mr Gigaba as Minister of Finance to replace Minister Gordhan.

6 Further, as former Minister of Public Enterprises, Barbara Hogan advised the Public Protector that, President Zuma took a special interest in appointments to the Boards of Eskom and Transnet.[52]

7 Moreover, President Zuma has exercised his powers under section 12(1)(a) of the Public Service Act 1994 to appoint as Director General of the Department of Public Enterprises, Mr Richard Seleke, a person who has a lengthy track record of abusing his office to promote the interests of the Guptas and Duduzane Zuma. By so doing, President Zuma has facilitated the improper use of public resources for the benefit of the Guptas and his son.

8 In the light of these facts, the following conclusions appear inescapable:

8.1 Ministers Malusi Gigaba and Lynne Brown have abused the public office of Minister of Public Enterprises by appointing compromised and

[52] Public Protector, State of Capture report. Report 6 of 2016/2017 at p 90, para 5.16(e).

conflicted directors to SoE companies, to the benefit of the Gupta family and their business associates, including Duduzane Zuma;

8.2 President Zuma has abused his appointment powers in appointing and retaining Minister Gigaba and Minister Brown in his Cabinet and by appointing Mr Seleke as Director General of Public Enterprises;

8.3 An improper relationship exists between President Zuma and the Gupta family.

9 The remainder of this chapter details the key facts and the supporting evidence. We start with the appointment of Mr Seleke because this is an appointment which most clearly evidences the improper use of Presidential Power.

MR SELEKE, THE PRESIDENT'S APPOINTMENT AS DIRECTOR GENERAL

10 The power to appoint the Directors General of a National Department vests exclusively in the President in terms of section 12(1)(a) of the Public Service Act. The President appointed Mr Seleke Director General of Public Enterprises in December 2015. He did so after Mr Seleke had forwarded his curriculum vitae to Duduzane Zuma on 29 June 2015, apparently for consideration by others for appointment to the then vacant position of Director General of Public Enterprises.[53]

11 Mr Seleke has had an unlawful and improper relationship with the Gupta family since at least the start of 2015.

[53] A copy of the email from Mr Seleke and the attached CV and certificates are Annexures **SOE 2, SOE 3 & SOE 4**

11.1 Mr Seleke has an anonymous email address infoportal1@zoho.com from which he conducts Gupta related business under the pseudonym "Businessman".

11.2 Using his infoportal1 address Mr Seleke had acted as a conduit between persons associated with South China Railways and the Gupta family. On 7 January 2015, close to a year before he was appointed Director General of Public Enterprises, Mr Seleke received an email from zhangminyu54642@qq.com which is the email address for China South Railways' Indian subsidiary, CSR ZELC (India) Private Limited.[54] On 22 March 2015, Mr Seleke forwarded this email to Mr Chawla of the Gupta's Sahara company. Attached to the forwarded email was a spreadsheet indicating how Gupta linked companies were to be paid hundreds of millions of US dollars for their role in brokering Transnet's purchase of locomotives from China South Railways.[55] There is no conceivable basis upon which Mr Seleke might lawfully have been involved in email correspondence of this nature.

11.3 In the context of the Eskom/Tegeta controversy which is discussed below, Mr Seleke used his infoportal1 email to act as a conduit for Mr Matshela Koko, the then former Eskom Group Executive: Technical and Commercial, unlawfully to share confidential Eskom documents with the

[54] See http://www.mycorporateinfo.com/in/business/csr-zelc-(india)-private-limited/U52100MH2015FTC261540.
[55] The email and the spreadsheet are attached as Annexure **SOE 5** & **SOE 6**. The Gupta role in the Transnet / CSR locomotive purchase is discussed below.

Gupta family so as to advantage Tegeta in its attempts to purchase the Optimum coal mine from Glencore.

11.3.1 On 7 August 2015, Mr Koko forwarded to Mr Seleke a letter that the business rescue practitioners for Optimum Coal Holdings (Pty) Ltd had sent to Eskom. Mr Seleke, in turn, forwarded this letter to Mr Chawla;[56] and

11.3.2 On 4 November 2015, Mr Koko forwarded to Mr Seleke a privileged legal opinion that Eskom had received from senior counsel advising on Eskom's rights in terms of its coal supply agreement with Optimum Coal. Mr Seleke, in turn, forwarded this letter to wdrsa1@gmail.com which is an email address used by Tony Gupta.[57]

11.4 Mr Seleke's collusion with Mr Koko to provide improper assistance to the Gupta family in relation to Eskom matters was not confined to the Tegeta / Optimum Coal case. On 4 November 2015 Mr Koko forwarded to Mr Seleke a letter from Just Coal (Pty) Ltd complaining about Eskom's cancellation of their contract to provide coal for various Eskom Power Stations including Rotran, Matla and Arnot. The cancellation of the Just Coal's coal supply contract would provide an opening for the Guptas to profit by concluding a replacement coal supply contract with Eskom through Tegeta. In this context, Mr Koko's email stated "[p]lease give the Boss. The fight begins." Mr Seleke had no difficulty identifying who "the

[56] The email and the letter are attached as **SOE 7** & **SOE 8**
[57] The email and the opinion are attached as **SOE 9** & **SOE 10**

Boss" was. He immediately forwarded Mr Koko's email to Tony Gupta at his wdrsa1@gmail.com email address. [58]

11.5 Mr Seleke, in his "BusinessMan" infoportal1 guise, was also included on much of the internal Gupta Group correspondence relating to the creation of Denel Asia and attempts to set up Denel India.[59] He reciprocated by forwarding to Mr Chawla internal correspondence between the Minister of Public Enterprises, and Denel in relation to her tentative misgivings about the formation of Denel Asia.[60]

11.6 Mr Seleke appears to have been involved with the Gupta company Tequesta which benefited from the Transnet / CSR locomotive purchase discussed below. On 15 December 2015, he forwarded a blank Tequesta letterhead received from Mr Salim Essa to Mr Chawla.[61]

11.7 On 1 March 2016, Mr Seleke forwarded to Tony Gupta a spreadsheet analysing trends in the rand exchange rate, the balance of payments and the balance of payments over the periods of office of all Presidents and Ministers of Finance since democracy.[62] The most likely purpose behind the production of this spreadsheet was an attempt to influence public debate over merits of retaining Minister Gordhan in office as Finance Minister.

[58] The email and the letter are attached as **SOE 11** & **SOE 12**
[59] Copies of the emails and draft agreements or resolutions attached thereto are attached as Annexures **SOE 13 - SOE 26.**
[60] Copies of the email and the attached letter from the Minister are attached as Annexures **SOE 27** & **SOE 28**.
[61] Copies of the email and the attached letter from the Minister are attached as Annexures **SOE 29** & **SOE 30**.
[62] Copies of the email and the attached letter from the Minister are attached as Annexures **SOE 31** & **SOE 32**.

12 The Public Enterprises portfolio is one of particular importance for the Guptas because of their interest in contracts with state owned enterprises. Against the backdrop of Mr Seleke's sustained improper relationship with the Guptas, it is difficult to find an innocent explanation for the President's appointment of him to the position of Director General of Public Enterprises.

MINISTER GIGABA'S APPOINTMENTS

13 President Zuma announced his appointment of Malusi Gigaba as Minister of Public Enterprises on 31 October 2010.

14 Shortly after his appointment, Minister Gigaba appointed Gupta linked individuals to Transnet and Eskom's Boards, where they oversaw the R50 billion locomotives tender and other Gupta-linked contracts with Regiments, VR Laser Services (Pty) Ltd and companies in the Trillian group.

Transnet: December 2010 – December 2014

15 In December 2010, Minister Gigaba appointed Mr Iqbal Sharma to the Transnet Board. While Minister Gigaba sought to appoint Mr Sharma as chairperson of the Transnet Board, this appointment was vetoed by Cabinet because of Mr Sharma's known ties to the Gupta family.[63] Instead, in June 2011, Mr Sharma became the chairperson of the Transnet Board's new Acquisitions and Disposals Committee.

[63] amaBhungane, *'#GuptaLeaks: Guptas and associates score R5.3bn in locomotives kickbacks',* 1 June 2017, Available at: http://amabhungane.co.za/article/2017-06-01-guptaleaks-guptas-and-associates-score-r53bn-in-locomotives-kickbacks

16 In February 2011, Minister Gigaba appointed Mr Brian Molefe as CEO of Transnet, and in July 2012, Minister Gigaba appointed Mr Anoj Singh as CFO of Transnet.

Transnet's locomotives tender and the R5,3 billion kickback to Tequesta

17 Messrs Sharma, Molefe and Singh oversaw the issue, in July 2012, of a tender to purchase 1064 locomotives at a value of R50 billion tender.

18 The tender was awarded on 17 March 2014. The tender award was split between four suppliers (on the advice of Regiments Capital). These included China South Rail (Hong Kong) Co. Ltd, which was contracted to supply 359 locomotives – 60% of the electric locomotives procured; China North Rail, General Electric and Bombardier.

19 The leaked records from the Sahara computer server have revealed that a company registered in Hong-Kong, Tequesta (Pty) Ltd earned a 21% "advisory services fee" of the contract value of Transnet's procurement from China South Rail (dubbed CSR's "Project 359") – i.e., R3.8 billion of the R18.1 billion contract.

20 Tequesta is a Gupta front company set up with the knowledge and assistance of Mr Seleke for the purposes of channelling public funds to the Guptas. Its sole director is the Gupta's principal business associate, Mr Essa.

21 China South Rail ("CSR") and Tequesta concluded a "Business Services Development Agreement" on 18 May 2015.[64] In terms of the agreement,

[64] A copy of the agreement is attached as Annexure **SOE 33**.

Tequesta would provide "advisory and consultant services" to CSR in respect of Project 359.

21.1 Clause 6.1.1 provides that *"Tequesta shall be entitled to an Advisory Fee of 21% (Twenty one percent) of the Contract value of Project 359…",* payable when CSR receives payment from Transnet.

21.2 Extraordinarily, the final clause of the contract (in Annexure A) provides that:

> *"The company [CSR] will not require any proof of delivery of the above services since it is understood that the project would not have materialised without the active efforts of Tequesta to provide the services listed above".*

22 The most innocent interpretation of this clause is that it reflects that Tequesta was able to peddle the Gupta family's political connections within Transnet, in order to divert work to CSR in breach of all Constitutional and statutory requirements relating to the procurement of goods by organs of state.

23 Following the conclusion of the "Business Services Development Agreement", Transnet placed two further procurement orders with CSR for another 95 and 100 electric locomotives, at a cost of R2.7 billion and R4.4 billion, respectively. It appears that no competitive tender process was followed for these acquisitions. Tequesta claimed the same 21% service fee from CSR for these contracts – bringing its total earnings from Transnet's procurement from CSR to R5.3 billion.

24 Reconciling leaked records, *AmaBhungane* has exposed the particular role that Mr Iqbal Sharma played in ensuring that Transnet purchased its electric locomotives from CSR. *AmaBhungane* explains that, six months before the award of the R50 billion locomotives tender, Mr Sharma ensured that a competing offer for the provision of 100 electric locomotives from Japan's Mitsui & Co was thwarted.

24.1 *Amabhungane* reported as follows: [65]

> *"Six months earlier, in October 2013, Transnet's Sharma e-mailed Rajesh Gupta and senior Gupta employee Ashu Chawla. By this time, it should be noted, Sharma was about to be a business partner to Essa and the Guptas – he was negotiating his and their imminent joint acquisition of VR Laser, a steel cutting business. But these e-mails were not about VR Laser.*
>
> *To Chawla, Sharma sent a memorandum that had been submitted to the acquisitions and disposals committee, which he headed. It motivated for the urgent acquisition by 'confinement' – that is, without a tender – of 100 electric locomotives from Japan's Mitsui & Co pending the finalisation of the 1,064 tender, which had been delayed. If the Guptas were batting for CSR, the award to a competitor would have threatened their interests. Sharma provided the solution.*
>
> *To Rajesh Gupta, better known as Tony, Sharma e-mailed two letters: One from him to the department of public enterprises director-general, and the other a draft reply from the director-general.*

[65] Copies of this article and the emails that it cites are attached as Annexures **SOE 34 - SOE 37**

The letter to the director-general was in the form of Sharma seeking advice from the department, which represents government as Transnet's shareholder.

But in it Sharma expressed serious doubt about the acquisition, saying: 'My own view as chairman … is to decline the request for confinement and procure by way of an open and transparent tender process.'

He added that it 'could appear' that Transnet's freight rail division, which had motivated the acquisition, wanted to favour 'particular companies that have enjoyed similar treatment in the past'.

The director-general's draft reply – which, metadata shows, Sharma authored himself – concluded: 'We do not readily support the use of confinement as a method of procurement and in this instance we would urge the [acquisitions and disposals committee] to not grant approval for this procurement with a confinement.'

The record shows that Mitsui & Co did not get the contract for the extra 100 locomotives, but that CSR did. We could find no evidence that this followed an open tender. End result: By early 2014, CSR had contracts to supply Transnet with 95, 100 and 359 locomotives – 554 units in total."

Transnet – VR Laser Services

25 While the Guptas and their business associates gained directly from the Transnet procurement from CSR, they also stood to benefit indirectly through the local sub-contracting conditions. The winning bidders were required to source 60% of the locomotive components from South African subcontractors.

26 In February 2014, a few weeks prior to Transnet being awarded the locomotives tender (on 17 March 2014), Tony Gupta and Duduzane Zuma acquired shares in local steel-cutting and processing company, VR Laser Services (Pty) Ltd (through their company Westdawn Investments, and Craysure Investments which is a wholly-owned subsidiary of Westdawn Investments).

27 Each of the four winning bidders visited VR Laser Services to assess the possibility of subcontracting work to them. The Gupta family and Duduzane Zuma accordingly stood to benefit handsomely from the local subcontracting condition.

Transnet – Regiments/ Trillian advisory contracts

28 Gupta associates also benefitted from Transnet's procurement of advisory consultant services from Regiments Capital and later Trillian, both Gupta-linked companies.

29 The Regiments Group comprises *inter alia* Regiments Capital (Pty) Ltd which is a financial advisory business, and a range of other financial services companies. Mr Wood has a 32% shareholding in the Regiments Group through the Zara Family Trust. The other two directors and major shareholders in the Group are Mr Litha Nyhonyha and Mr Niven Pillay. Mr Wood had always been the director primarily responsible for Regiments Capital. In the course of 2015 and early 2016 Mr Wood fell out with Mr Nyhonyha and Mr Pillay. According to the latter, this was because of their misgivings about Mr Wood's close business relationships with the Guptas. The three partners attempted to reach an agreement in terms of which Mr Wood would leave the Regiments Group but

take with him the advisory business he had been conducting in the name of Regiments Capital (Pty) Ltd and would either pay Mr Nyhonyha and Mr Pillay or be paid by them, the amount necessary to ensure that what he took out of the Regiments Group accurately reflected his 32% interest in the Group. Mr Wood ultimately took his financial advisory business to Trillian Capital (Pty) Ltd on 1 March 2016.[66]

30 The extraordinary and convoluted manner in which Transnet's payments to Regiments for advisory services ballooned, and then how Trillian acquired the benefits of Regiments' contracts with Transnet, is detailed in the *Betrayal of the Promise* report.[67]

31 Transnet's employment of these companies and the escalation in Transnet's payment for their services appears to have been facilitated primarily by the newly-appointed Transnet CFO, Anoj Singh.

32 In summary:

32.1 Regiments Capital is a fund management and investment advisory company, specialising in public sector infrastructure projects. The company was initially subcontracted in 2012 by McKinsey & Company, after Transnet invoked unexplained conflicts of interest with McKinsey preferred subcontractors and proposed that Regiments be appointed as a substitute. Transnet's payment for financial advisory services for the

[66] Mr Wood's dispute with Mr Nyhonyha and Mr Pillay remains unresolved. It is being ventilated in the Gauteng High Court, Johannesburg in case number 35530/2016. The facts stated in this chapter relating to Mr Wood, Regiments and Trillian emerge from the papers in that case.
[67] *Supra at* pp 28-30.

locomotives deal was initially capped at R35.2 million, with Regiments given an estimated R10 million share.

32.2 Mr Singh proceeded to transfer the bulk of the work under the McKinsey contract to Regiments, to amend the contract scope, and – with Mr Molefe's approval – increase the contract value to an astonishing R265 million. As the *Betrayal of Promise Report* explains (drawing on *AmaBhungane's* investigative reports): [68]

> *"Singh, signing on behalf of Transnet, also increased the contract value by R6 million, bringing the total contract to R41.2 million, of which a R21 million 'fixed price' would go to Regiments, according to the amaBhungane investigation. Two months later, in April 2014, Singh sent a memo to Molefe in which he motivated for a post-facto revision in the fee allocation to Regiments, asking to add an additional R78.4 million. The additional fee was apparently based on Regiments' own calculation of 'the billions' its advice had supposedly saved Transnet. Singh's rationale was that Regiments had apparently demonstrated to Transnet that it could save money by splitting the locomotive order between four bidders (ultimately awarded), rather than choosing one or two. According to Singh, as summarised by amaBhungane, although this would make each locomotive more expensive, as bidders would have a smaller volume to dilute their overheads, the full complement of 1 064 could be delivered more quickly. Based on this reasoning, the amendment to the original contract value increased Regiment's*

[68] *Betrayal of the Promise: How South Africa is Being Stolen*, May 2017. Available online at: http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf at p 28.

payment from R21 million to R99.5 million. Molefe provided approval for this.

In early 2015, the then group treasurer of Transnet, Mathane Makgatho, resigned unexpectedly. The media reported that she told her staff: 'I arrived here with integrity, and I will leave with my integrity intact.' She was replaced by Phetolo Ramosebudi, the previous group treasurer of SAA, who weeks after his appointment on April 28 2015, compiled a proposal purporting to approve a 'contract extension' for Regiments' support to Transnet on the locomotive transaction, raising its fee from the previous R99.5 million by R166 million to total R265.5 million."

32.3 In 2015, the Guptas reportedly sought to buy a stake in Regiments Capital. After the directors of Regiments refused the purchase offer, the Guptas, apparently operating through Mr Essa, bought over a small investment firm, Trillian Asset Management. Mr Essa acquired a 60% stake in Trillian, and was registered as its sole director.[69]

32.4 In December 2015, Transnet (now acting under its new Board) paid Trillian R93.5 million for acting as *"the lead arranger"* for a R12 billion loan by a syndicate of banks to finance Transnet's locomotives purchase. It appears from the papers in Mr Wood's dispute with his former partners that he performed most of the work relating to the arrangement of the R12 billion loan while he was still employed by Regiments Capital, yet Transnet paid

[69] Sunday Times *'Transnet deals fall into Gupta man's lap'*, 22 May 2016.

the R93.5m to Trillian. Moreover, the *Betrayal of the Promise* report notes:[70]

> *"Usually in such a deal, the lead arranger would be one of the lenders – typically an experienced financial or advisory institution, lending at least as much money as each of the others. Trillian Asset Management was a small boutique asset manager, arguably without the capacity to lead a R12 billion bank syndicate. Furthermore, the SOE's own corporate treasury, one of the largest in the country, could arguably have arranged the loan itself. Trillian allegedly did at least R170 million worth of work for Transnet. It remains unclear what kind of work could justify such large pay-outs of state resources."*

32.5 In August 2016, *AmaBhungane* reported that, by the end of June 2016, Transnet had paid Trillian a further R74 million for invoices that appeared *"remarkably skimp on detail"* and did not indicate time or personnel allocated.[71]

The Neotel/ Homix scandal

33 In 2014, Neotel paid R66-million in apparent kickbacks to a Gupta-linked, letter box company, Homix (Pty) Ltd, to secure contracts from Transnet. A further R25-million was agreed but not yet paid. Neotel's CEO, Mr Sunil Joshi reportedly agreed to pay a 10% "commission" fee to Homix to secure Transnet's purchase of R300-million in telecommunication network equipment from Neotel and a 2%

[70] *Betrayal of the Promise: How South Africa is Being Stolen*, May 2017. Available online at: http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf at p 28. at p 29.

[71] amaBhungane , '*Gupta-linked firm's R167m Transnet Bonanza',* 28 August 2016.

"success fee" for Transnet's award of a five-year, R1.8-billion contract with Neotel for network services.

34 Neotel's board commissioned an investigation into the payments after the company's auditors blew the whistle to it in April 2015. Neotel had made two suspicious payments to Homix for no apparent services rendered: of R34.5 million in April 2014 (after Neotel was awarded the R300 million network equipment contract) and of R41million in February 2015 (after Neotel was awarded the network services contract).

35 In the course of Neotel's investigation, former managing director of the Guptas' Sahara Systems, Mr Ashok Narayan, identified himself as the CEO of Homix.

36 On investigating the sources of Homix's funds (which also included Regiments Capital, Cutting Edge Commerce, Sechaba Computer Systems and Burlington Strategy Advisors, a Regiments Group Company), AmaBhungane reported that the company was indeed no more than a front, with ties to the Gupta's primary business associate, Salim Essa:[72]

> *"The company through which at least R250-million owed was a hole in the wall led by a ghost. With millions in its account, Homix was no more than a room behind a plain blue door abutting a latrine in a run-down office block in Centurion. Neighbours said the door hardly ever opened.*
>
> *Its sole director, one Yakub Bhikhu, is untraceable and his credit history gives his most recent employment status – in 2013 – as 'unemployed'.*

[72] AmaBhungane, *'The Guptas and the R250 million "kickback laundry"',* 29 October 2016.

Homix's bank records show no sign that the company had staff. There were no salary payments, and only four months of payments to Vodacom for what appears to have been a single cell phone bill.

For the rest, the cash just flowed out again, mainly to Bapu Trading – a company even more obscure…

At the end of the six months in April last year, Homix's account had a balance of less than R200,000. But tens of millions more must have flowed in, as the outflows continued apace.

A report on an investigation by an official agency, submitted to former public protector Thuli Madonsela and leaked this week, records that Homix purchased 16 batches totalling over R65-million in foreign currency from Mercantile Bank, to be remitted to Hong Kong as payment for imports.

But Mercantile got suspicious and reported three of the purchases, totalling R14.4-million, to the Reserve Bank's financial surveillance department, which froze it after inquiries revealed that customs documentation for the supposed matching imports had been falsified.

The report states: 'Homix remitted exorbitant amounts of money offshore illegally.'

The R51-million that got through to Hong Kong, according to the report, went to two companies: YKA International Trading Company and Morningstar International Trade. AmaBhungane could not trace YKA's sole director, a Chinese resident.

Morningstar's registered director and owner is Mahashveran Govender, a South African. But amaBhungane could not trace him either, not least as the

residential address he gave Hong Kong's company registrar is a run-down at in central Johannesburg, where there was no sign of him.

Morningstar's Hong Kong registered address, however, gives a possible clue about where the money may have gone. It is a small, 15th floor office in Sheung Wan, the old part of Hong Kong.

The same flat is also the registered address of three Essa companies – Tequesta Group, Regiments Asia and VR Laser Asia."

37 Neotel's board subsequently reported its payments to Homix to the police as possible bribery.

38 The circumstances surrounding the Neotel-Homix agreement suggest the involvement in the scheme of Transnet's CFO, Mr Anoj Singh and CEO, Mr Brian Molefe, who approved the awards to Neotel. The background to these contracts were investigated by *AmaBhungane*, which reported: [73]

"At the end of 2013, Transnet put the master agreement out to tender. It was provisionally awarded to a competitor, T-Systems, but the latter withdrew by agreement some months later, an insider said, when it became apparent its solutions were inappropriate.

In April 2014, during this hiatus, Neotel paid its first R30-million to Homix. The Deloitte correspondence identifies the payment as relating to routers and other equipment that Neotel sold to Transnet.

[73] amaBhungane , *"'Kickback' scandal engulfs Transnet*", 31 July 2015.

Transnet is understood to have paid Neotel about R300-million for the equipment. Neotel's payment to Homix equals a 10% "commission".

In August 2014, Transnet notified Neotel that it was the new preferred bidder for the master agreement and that negotiations should be concluded before Christmas.

By early December, individuals close to the negotiations have claimed, Transnet became intransigent without clear reason. To protect sources, they cannot be identified.

A week later, they said, Neotel's chief executive, Sunil Joshi, met Transnet's chief financial officer, Anoj Singh, to whom the state-owned entity's procurement structures reported. After the meeting, Joshi allegedly asked his staff to approach Homix again.

A "success fee" was agreed with Homix – 2% of the R1.8-billion value of the master agreement with Transnet, equating to R36-million, plus R25-million in respect of a related agreement to sell assets to Transnet. Within hours, Transnet was ready to resume negotiations.

The next day, a Saturday, representatives from both sides met and resolved remaining issues – without any overt assistance from Homix. The master agreement was signed before Christmas."

39 Subsequently, it emerged that Transnet (under Mr Molefe) awarded two more large projects – for closed-circuit television (CCTV) systems worth R835-million – to Neotel without any tender and while Neotel was interacting with Homix.[74]

[74] AmaBhungane, *'Transnet 'kickback' scandal widens',* 7 August 2015.

Evidence of Gupta ties to Transnet's Executive Directors

40 There is clear evidence of improper relationships between the Guptas and Messrs Sharma, Singh and Molefe during their tenure at Transnet.

40.1 Mr Sharma was chair of Transnet's Acquisitions and Disposals committee from June 2010 to December 2014. Leaked email records over this period reveal that Sharma shared confidential Transnet Board documents with the Gupta family. These included documents pertaining to Japan's Mitsui & Co's proposed urgent sale of electric locomotives to Transnet; and the agenda of a crucial meeting of Transnet's Acquisitions and Disposals committee in May 2014. The committee then agreed to escalate the costs of the 1,064 locomotives tender from R39-billion to R52-billion (from which Essa's Tequesta stood to make billions in professional fees from bidders). About a week before this meeting, Sharma sent the agenda to Tony Gupta at his wdrsa1@gmail.com email address.[75]

40.2 Brian Molefe was Transnet's CEO from February 2011 to March 2015.

40.2.1 The Public Protector recorded in the *State of Capture* report that:[76]

> *"Mr Brian Molefe ("Mr Molefe") is friends with members of the Gupta family. Mr A. Gupta admitted during my interview with him on 4 October 2016 that Mr Molefe is his 'very good friend' and often visits his home in Saxonwold."*

[75] The email and the document are attached as Annexures **SOE 38** & **SOE 39**
[76] Public Protector, '*State of Capture report*', Report 6 of 2016 at para 5.95, p 122.

40.2.2 In conducting the *State of Capture* investigation, the Public Protector obtained and analysed the cell phone records of certain individuals, including that of Mr Molefe, to establish their relationships with the Gupta family and their business associates. As is detailed further below (in respect of Molefe's tenure as CEO of Eskom), the Public Protector found that (during the period August 2015 to April 2016) Mr Molefe regularly made and received calls to and from Ajay Gupta, and made frequent visits to the Saxonwold area (where the Gupta home is situated).[77]

40.3 Anoj Singh worked as Transnet's CFO from July 2012 to August 2015. During this period, he was treated to four suspiciously timed Gupta-funded trips to Dubai. Booking confirmations reveal that:

40.3.1 From 6 to 9 June 2014, Singh stayed at the Oberoi Hotel in Dubai with Tony Gupta. This was three months after Transnet's award of the locomotives tender. It was also the time during which bidding for the Neotel deal was open.[78]

40.3.2 From 7 to 12 August 2014, Singh again stayed at the Oberoi Hotel. Chawla forwarded Singh's reservation to an associate in Dubai, saying *"[p]lease swipe the card for all charges*". It was during that

[77] Public Protector, '*State of Capture report*,' Report 6 of 2016 paras 5.96-5.101, pp 122-124.

[78] See Annexure **SOE 40**

month, Transnet notified Neotel that it was the new preferred bidder. [79]

40.3.3 From 7 to 9 November 2014, Singh was allegedly accommodated in the Oberoi Hotel in Dubai at the Gupta's expense. Weeks later, Neotel was awarded the contract concerned, worth R 1.8 billion. It paid Homix, a letterbox company allegedly connected to the Guptas, R41m. [80]

40.3.4 Singh was again hosted in the Oberoi from 24 to 26 February 2015. The Guptas paid all expenses. [81]

40.3.5 AmaBhungane has identified further evidence that Singh has business ties to the Guptas. It reported that: [82]

> *"Company documents submitted to the Ras al-Khaimah Investment Authority indicate that on May 1, 2014, Indian national Vivek Sharma transferred ownership in a company, Venus Ltd, to Singh. We could not establish its purpose. Ras al-Khaimah is one of seven emirates making up the United Arab Emirates. The investment authority provides a highly secretive offshore company jurisdiction. Vivek Sharma and his father were Gupta associates, numerous e-mail exchanges show. This includes an invitation for Tony Gupta to attend Vivek's wedding in March 2014."*

[79] See Annexure **SOE 41**
[80] See Annexure **SOE 42**
[81] See Annexure **SOE 43**
[82] AmaBhungane, ''#GuptaLeaks: Guptas and associates score R5.3 billion in locomotives kickbacks', 1 June 2017.

Eskom: June 2011 – December 2014

41 Minister Gigaba appointed Colin Matjila to Eskom's Board in June 2011 and as Acting CEO on 1 April 2014. This was after Mr Essa sent Mr Matjila's CV to Tony Gupta on 22 March 2014 and Tony Gupta forwarded the CV to Duduzane Zuma on 23 March 2014.[83]

42 Mr Matjila has shared directorships with Mr Essa, in Inca Energy (Pty) Ltd - 2009/022231/07 and Nu Age Energy (Pty) Ltd - 2010/024567/07. Through his company Matlapeng Resources, Mr Matjila is a 59.4% shareholder in Newshelf 960 (Pty) Ltd where he is a co-director with the CEO of Oakbay Resources, Ms Ronica Ragavan.

On 30 April 2014, within a month of being appointed as CEO, Mr Matjila was responsible for irregularly approving Eskom's R43 million contract to sponsor the Gupta's New Age newspaper's *"business breakfasts".*

MINISTER BROWN'S APPOINTMENTS

43 President Zuma appointed Lynne Brown as Minister of Public Enterprises on 25 May 2014, and renewed her appointment on 30 March 2017.

Eskom: December 2014 to date

44 Shortly after her appointment as Minister in May 2014, Minister Brown recommended the appointment of a new Eskom Board to Cabinet. Cabinet confirmed the appointments in line with Brown's recommendation on 11

[83] The emails and CV are attached as Annexures **SOE 44** & **SOE 45**

December 2014. These appointments included numerous individuals who had personal or business relationships with the Gupta family and their close business associates:[84]

44.1 Dr Ben Ngubane, who Brown also appointed as chair of the Eskom Board in September 2015. Dr Ngubane served as a co-director (with Mr Essa) of the natural resources exploration company, Gade Oil and Gas (Pty) Ltd from May 2013 to November 2014.[85]

44.2 Mr Mark Pamensky, who sat on the Board of the Gupta's Oakbay company (Oakbay Resources and Energy (Pty) Ltd) until May 2017.[86] Mr Pamensky also served as a director on the boards of numerous other companies in which the Guptas hold a stake, including Shiva Uranium (Pty) Ltd, Yellow Star Trading 1099 (Pty) Ltd, and BIT Information Technology (Pty) Ltd. Mr Pamensky also has direct business interests in Oakbay and Shiva Uranium and is a known friend of Mr Essa;

44.3 Ms Viroshni Naidoo who is the wife of Mr Kuben Moodley and a friend and business associate of the Guptas and Mr Essa. Mr Moodley is a director of Albatime (Pty) Ltd, which contributed to Tegeta's purchase of Optimum Coal Mine. Mr Moodley also served as a co-director with Mr Pamensky of BIT Information Technology;

[84] Public Protector, *'State of Capture'*, Report 6 of 2016/2017 at pp 119-120 paras 5.74 – 5.80. Also see *amaBhungane ,The 'Gupta owned' state enterprises*, 24 March 2016.

[85] Ben Ngubane resigned from the Eskom Board in June 2017.

[86] Pamensky resigned as Eskom director in November 2016, after the release of the Public Protector's State of Capture report.

44.4 Mr Romeo Khumalo, who was a co-director with Mr Essa at Ujiri Mining Technologies (Pty) Ltd (until Mr Essa resigned in August 2015);

44.5 Ms Nazia Carrim, who is married to a first cousin of Mr Essa, Mr Muhammad Noor Hussains and;

44.6 Ms Mariam Cassim, a former employee of the Gupta's Sahara Computers company.

45 Minister Brown transferred both Brian Molefe and Anoj Singh from Transnet to Eskom.

45.1 In April 2015, Minister Brown appointed Mr Molefe as acting CEO of Eskom;

45.2 In August 2015, Minister Brown appointed Mr Singh as acting CFO at Eskom; and

45.3 Both appointments were made permanent in October 2015.

46 Under their management, Eskom abused its position to force Glencore's sale of Optimum Coal Mine ("OCM") to Tegeta and then allow Tegeta to profit from lucrative coal supply contracts with Eskom. It did so by, amongst others:[87]

46.1 Cancelling the Cooperation Agreement that Eskom's procurement officers and Tender Board Committee had negotiated with Glencore in respect of its coal supply to Hendrina power. The Board referred the matter to then

[87] Public Protector, *'State of Capture'*, Report 6 of 2016/2017 at pp 337-341, para 6.5.

Acting CEO, Molefe, who refused to approve the negotiated terms and cancelled the Agreement;

46.2 Levying a fine on Glencore of over R2 billion, referring the matter to arbitration and issuing a summons for the same penalty amount on the same day. As the Public Protector noted "*It is unclear as to why Eskom proceeded to refer a matter to arbitration and issue a summons on the same day. It can only be inferred that Eskom wished to exert pressure on OCH/OCM"*[88];

46.3 Refusing to re-negotiate terms with OCM and seeking to enforce the penalty levied against OCM, with the result OCM/OCH's Business Rescue Practitioners had no option but to look for possible entities to purchase OCM. To date, Mr Singh remains the CFO of Eskom;

46.4 Refusing to consent to the sale of OCM to another purchaser (Pembani), so that Tegeta emerged as the only remaining entity that wished to make the purchase;

46.5 Forcing the sale of all shares held by Optimum CH, as Eskom refused to consent to a standalone transaction with OCM being the only entity sold;

46.6 Concluding lucrative contracts to supply coal to Arnot Power Station with coal from OCM. This essentially increased the financial stability of OCM

[88] Public Protector, *'State of Capture'*, Report 6 of 2016/2017 at pp 339, para 6.9. (l).

and decreased Tegeta's obligations of post-commencement finance to OCM; and

46.7 Authorising an extraordinary pre-payment to Tegeta in the amount of R586 million, for the purchase of coal from Tegeta and delivery by OCM to Arnot Power Station. The Pre-Payment was approved by a committee of Eskom representatives at a meeting held at 21h00 on 11 April 2016. This was the very same day on which Tegeta's request for approximately R600 million of bridging finance for the purchase of all shares in OCH was made to, and rejected by, the Loan Consortium of Banks and the day before payment fell due.

47 To date, Eskom has concluded coal supply-contracts with Tegeta, at inflated prices, to the estimated value of R11,7 billion.[89]

48 Eskom's role in unlawfully assisting Tegeta to force the sale of OCM and all the shares in OCH, and its subsequent award of coal supply contracts to Tegeta for OCH's coal mines, is detailed in the Public Protector's "*State of Capture"* report.

49 In examining the role of the Board, the Public Protector disclosed evidence in the form of cell phone records of Mr Molefe's regular interactions with Ajay Gupta and his close business associates in Tegeta. The Public Protector found that:[90]

49.1 Between the period of 2 August 2015 and 22 March 2016 – being the period when Tegeta's forced purchase of OCM and OCH was being

[89] amaBhungane and Scorpio, *'#GuptaLeaks: How Eskom was captured',* 10 June 2017.

[90] Public Protector "*State of Capture"* Report 6 of 2016/2017 at p 300-303, para 6.1.

facilitated by Eskom – Mr Molefe had called Mr Ajay Gupta a total of 44 times and Mr Ajay Gupta had called Mr Molefe a total of 14 times;

49.2 Between 23 March 2016 and 30 April 2016, Ms Ronica Ragavan (a director of Tegeta) made 11 calls to Mr Molefe and sent 4 text messages to him. Of the calls made, 7 were made between 9 April 2016 and 12 April 2016. This includes one call made on 11 April 2016, when the prepayment was granted to Tegeta by Eskom; and

49.3 Mr Molefe was in the Saxonwold area, where the Gupta family resides, on 19 occasions between 5 August 2015 and 17 November 2015.

50 The Public Protector concluded that the evidence reveals *"a distinct line of communication between Mr Molefe of Eskom, the Gupta family and directors of their companies in the form of Ms Ragavan and Mr Howa. These links cannot be ignored as Mr Molefe did not declare his relationship with the Gupta family."*[91]

51 In addition to its unlawful facilitation of business to Tegeta, Eskom has paid Trillian Capital Partners (Pty) Ltd over R400 million for management consulting and advisory services.[92] Trillian Capital is 60% owned by Trillian Holdings (Pty) Ltd (a company in which Salim Essa has a majority stake and is the sole director) and 25% owned by Zara W (Pty) Ltd (a company owned and directed by Eric Wood); Eric Wood is one of the three directors of Trillian Capital; and Trillian

[91] Public Protector "*State of Capture"* Report 6 of 2016/2017 *at* p 303, para 6.1*(ee)*.
[92] amaBhungane and Scorpio, *'#GuptaLeaks: How Eskom was captured',* 10 June 2017.

Capital is one of the companies that contributed to Tegeta's price of Optimum Coal Mine.[93]

52 The leaked records provide further evidence of corrupt ties that have facilitated these deals. After he became Eskom CFO, Anoj Singh stayed in the Oberoi Hotel in Dubai from December 17 to 24, 2015. The bill was sent to the Gupta's Sahara Computers. This trip started two days after Tegeta obtained Optimum Coal Holdings.[94]

53 In the wake of Molefe's resignation (following the release of the Public Protector's *State of Capture* report), in November 2016, Minister Brown approved the Board's recommendation to appoint Mr Koko as acting CEO of Eskom.

53.1 As Group Executive of Generation (i.e., as the Eskom executive responsible for securing coal for power stations), Koko had approved Eskom's controversial pre-payment of R586 million to Tegeta, which facilitated Tegeta's purchase of Optimum Mine.

53.2 As has been pointed out above, Mr Koko repeatedly leaked confidential and privileged information from Eskom to the Guptas through Mr Seleke and referred to Tony Gupta as "the Boss".

53.3 In January 2016, Mr Koko and Mr Mantsha, the CEO of Denel were flown to Dubai and accommodated at the Oberoi hotel at the Gupta's expense. In advance of their stay, Mr Chawla wrote to the hotel stating: "*Sahara will*

[93] Public Protector "*State of Capture"* Report 6 of 2016/2017 at p 269 paras 5.304 – 5.306.

[94] See Annexure **SOE 46**

pay the entire bill, please do not ask any credit card guarantee from the guest at the time of check-in."[95]

Transnet: December 2014 to date

54 Minister Brown also oversaw the appointment of Gupta associates to the Transnet Board in December 2014. Which include:

54.1 Ms Linda Mabaso, who was appointed chairperson of Transnet.

54.1.1 In July 2014, the Guptas assisted Ms Mabaso to obtain a business visa to India for her son Sphilile Malcolm Mabaso. They also arranged his flights to India.[96]

54.1.2 Sphilile Malcolm Mabaso was also a business associate and co-director with Mr Essa in Premium Security and Cleaning Services (Pty) Ltd – 2013/127549/07. Malcolm Mabaso was appointed as a special adviser to Minister Zwane in October 2015.[97]

54.2 Minister Brown was also responsible for the appointment of Mr Seleke to the Board of Transnet.

Denel: July 2015 to date

55 On 24 July 2015, Minister Brown overhauled the Denel Board, leaving only one board member in place: the Gupta-beneficiary, Mr Nkopane "Sparks" Motseki.

[95] See Annexures **SOE 47** & **SOE 48**
[96] See Annexures **SOE 49, SOE 50** & **SOE 51**
[97] amaBhungane '*The Gupta-owned' state enterprises'*, 24 March 2016.

55.1 A company in which Mr Motseki is the sole director was allocated 1,3% in the Gupta-led consortium that bought Shiva Uranium in 2010.[98]

55.2 The Guptas had sponsored a trip by Mr Motseki to Mumbai and Delhi in 2010.[99]

55.3 In his capacity as Treasurer of the MK Military Veterans Association, Mr Motseki had assisted to procure a donation of R850 000 from the Guptas to fund the conference of the association in 2010.[100]

56 The list of new Denel Board members that Minister Brown recommended to Cabinet reportedly bore no resemblance to the one prepared by her department. As the State Capacity Research Project notes, the new Denel Board "*also lacked skills and experience: there was, for example, not a single engineer (Denel being a highly technical state-owned company) and most had never served on a corporate board before.*"[101]

57 Minister Brown again appointed known Gupta and Zuma associates to the Board. A key appointment was former advisor to Minister Faith Muthambi, Mr Lungisani Daniel Mantsha as chair of the new Denel Board.

58 Shortly after his appointment on 24 July 2015, Mr Mantsha suspended Denel's CEO, Mr Riaz Salojee, its CFO, Mr Fikile Mhlontlo and company secretary, Ms Elizabeth Africa. No formal reasons were given at the time. The suspensions were subsequently alleged to be for their roles in Denel's acquisition of Land

[98] *Betrayal of the Promise report* p 34.

[99] See Annexure **SOE 52**
[100] See Annexures **SOE 53, SOE 54, SOE 55, SOE 56.**
[101] *Betrayal of the Promise report* p 34.

Systems South Africa from BAE Systems, but questions were raised about the strength of the charges.[102] There were strong suspicions that the three company managers were suspended to make way for the Denel – VR Laser Asia deal.[103]

59 As the chair of the Denel Board, Mr Mantsha oversaw the conclusion of the Denel Asia joint venture between Denel and VR Laser Asia, a Gupta–aligned company.[104]

59.1 VR Laser Asia is wholly owned by Gupta business partner, Salim Essa, and is an associate company of VR Laser Services, a South African steel-cutting business in which the Guptas and Duduzane Zuma have an interest (through Westdawn Investments).[105]

59.2 Westdawn Investments (also known as JIC Minister Services) has a 25% stake in VR Laser Services, and Salim Essa has a 75% stake. Duduzane Zuma and Tony Gupta control Westdawn Investments.

59.3 VR Laser Services is registered to the same Sandton office park where other Gupta businesses are based.

59.4 VR Laser Services has only three directors: Salim Essa, Pushpaveni Govender (a director of other Gupta companies) and Kamal Singhala (a

[102] Mail & Guardian, '*VR Laser and the Guptas'*, 5 February 2016.

[103] Mail & Guardian, *'Guptas conquer state arms firm Denel',* 5 February 2016.

[104] amaBhungane, *'How Denel was highjacked'*, 30 May 2016.

[105] amaBhungane, *'Guptas conquer state arms firm Denel'*, 5 February 2016.

nephew of the Guptas in his mid-20s, who gives as his address the Gupta's Saxonwold compound).[106]

60 On 10 December 2015, the day after President Zuma appointed Des Van Rooyen as Minister of Finance, Mr Mantsha submitted Denel's application to National Treasury for approval of the Denel Asia joint venture.[107]

61 The Denel Asia joint venture was formally announced in January 2016. The joint venture was concluded by Denel without approval from the Minister of Finance or the Minister of Public Enterprises, as prescribed by the Public Finance Management Act.

62 The incentive for the deal was apparently a US $4 billion tender to deliver long-range artillery to the Indian army. However, the terms of the deal were weighted heavily in favour of the Guptas:

62.1 Drafts of the joint venture agreement forwarded to the Guptas and Mr Seleke show that Denel gave up its intellectual property to Denel Asia in return for little more than a promise of a R100 million marketing contribution from VR Laser Asia that was to be treated as an interest-bearing shareholder's loan to the Company by VR Laser Asia.[108]

62.2 Moreover, in relation to its Indian operations, Denel Asia proposed to enter into a joint venture with an Indian investment company controlled by Anil

[106] Mail & Guardian, *'VR Laser and the Guptas'*, 5 February 2016. The joint venture was dissolved and derregistered in May 2017.

[107] amaBhungane, *'GuptaLeaks: How the Guptas screwed Denel'*, 10 June 2017.

[108] See the drafts of the Investment Company Agreement and the JV Agreement forwarded to the Guptas and Mr Seleke on 18 October 2015 which are attached as Annexures **SOE 21, SOE 22, SOE 23, SOE 24** and the files called Attachment.docx attached to both emails)

Gupta and Adani Enterprises in terms of which the Indian investment company would have a right of first refusal to manufacture any products that Denel SOC Ltd. had licenced Denel Asia to manufacture or sell. [109]

63 The email records on the Sahara company server evidence direct and improper ties between Mr Mantsha and the Guptas. The emails evidence that –

63.1 Mr Mantsha was flown to and accommodated in India and Dubai at the expense of the Guptas on several occasions.

63.1.1 In August 2015, Mr Mantsha was flown to India, in the Gupta's jet (ZS-OAK) and in the company of Mrs Angoori Gupta, Mr Rajesh Gupta, Mrs Arti Gupta, Mr Sashank Singhala, Mr Amankant Singhala, Mr Salim Essa and Mr Gysbert van den Berg. He was accommodated for a few nights with the Guptas at the ICT Maratha Hotel in Mumbai, in a room near the Guptas' presidential suite, at the Guptas' cost. [110]

63.1.2 In October 2015, Mr Mantsha travelled to and from Dubai, accompanied by Duduzane Zuma and his wife (Shanice Zuma). Flights were booked for all three by the Gupta's travel agents and were invoiced to the Gupta's Sahara company. A visa was arranged by Sahara (Mr Chawlu and Tony Gupta) for Mr Mantsha. [111]

[109] See Annexures **SOE 57** & **SOE 58**
[110] See Annexures **SOE 59** & **SOE 60**
[111] See Annexures **SOE 61** & **SOE 62**

63.1.3 On 3 January 2016, Sahara's CEO, Mr Chawla confirmed travel arrangements for Mr Mantsha. Mr Mantsha was booked into the Oberoi Hotel in Dubai and Chawla arranged a concierge service for Mantsha to an exclusive housing estate in Dubai, at the expense of the Gupta's Sahara company. [112]

63.2 Mr Mantsha sent the Guptas confidential information he received in his capacity as Chairperson of Denel, including information Minister of Public Enterprises.

63.2.1 On 23 November 2015, Mr Mantsha received an email from Keromamang Mhlongo, of the Department of Public Enterprises, whose Minister, Lynne Brown, has political oversight of Denel. The email was titled *"PFMA Section 54(2) Pre-Notification on the Proposed Formation of Denel Asia,"* the e-mail was Minister Brown's response to Denel's notification to her of the proposed tie up. The e-mail was marked "confidential" and was meant to advise both Denel executives and the government in their dealings with the Guptas. [113]

63.2.2 Five days later, on 28 November 2015, Mr Mantsha forwarded Minister Brown's e-mail, using his law firm's address, to Ashu Chawla, CEO of Sahara. [114]

[112] See Annexures **SOE 63** & **SOE 64**
[113] See Annexure **SOE 65**
[114] See Annexure **SOE 66**

63.3 Mr Mantsha also sent the Guptas his personal bills. On 3 August 2015, Mantsha sent his municipal rates bill of R14 238 for his Randburg home, dated 11 June 2015, to Sahara's CEO, Ashu Chawla, saying: *"Please find the attached document for your urgent attention."* [115]

[115] See Annexure **SOE 67**

CHAPTER 4: THE APPOINTMENT AND RETENTION OF MINISTER MOSEBENZI ZWANE

Overview: The key facts

1 President Zuma appointed Mosebenzi Joseph Zwane to Cabinet as Minister of Mineral Resources on 22 September 2015. In the Cabinet reshuffle on 30 March 2017, President Zuma retained Mr Zwane as Minister of Mineral Resources.

2 President Zuma's appointment and retention of Mr Zwane as Minister of Mineral Resources evidences his use of presidential powers to promote and protect the interests of the Guptas and their business associates, including the President's son, Duduzane Zuma. It evidences the unlawful use of the President's appointment powers for improper purposes, and is a strong indication that an improper relationship exists between President Zuma and the Gupta family.

3 The facts disclosed in official investigations, media investigations and the documents from Sahara's computer server indicate that:

3.1 Zwane was appointed as Minister of Mineral Resources by President Zuma after first being vetted by members of the Gupta family, and without the prior knowledge of the ANC National Executive Committee.

3.2 Prior to his appointment, in June 2012, as MEC for Agriculture in the Free State Province, Zwane promoted the establishment of a "mega" Vrede dairy project with Estina (Pty) Ltd, which has cost the province at least R184 million. The Guptas were intimately involved in the project and were beneficiaries of it.

3.3 Shortly after the launch of the Vrede dairy project, in October 2012, Zwane (and his local gospel choir) were gifted by the Guptas to an all-expenses paid trip to India.

3.4 In March 2013, as MEC for Agriculture and Rural Development in the Free State, Minister Zwane furnished invitees for the Gupta Sun City wedding with an official invitation from the MEC's office, which facilitated the landing of an aircraft with wedding guests at the Waterkloof Air Force Base.

3.5 Prior to his appointment to Cabinet, Mr Zwane attended numerous meetings with Tony Gupta. Minister Zwane was also flown to, and accommodated at, the luxury Oberoi Hotel in Dubai, in the company and at the expense of the Guptas on at least two further occasions in 2013. Zwane has attended Gupta family weddings in South Africa and India, at the Guptas' invitation and expense.

3.6 As Minister of Mineral Resources, Zwane utilised his public office to facilitate the sale of Optimum Coal Mine from Glencore to Tegeta Exploration & Resources (Pty) Ltd ("Tegeta"), a company that is owned by the Guptas, their close business associate, Mr Salim Essa and Duduzane Zuma. In December 2015, Zwane flew to Switzerland to meet with Glencore's CEO, in the company of Atul Gupta, Ajay Gupta and Mr Essa, to influence Glencore into selling its Optimum Coal Mine to Tegeta. This sale was followed shortly by the conclusion of coal-supply contracts between Tegeta and Eskom at escalated prices. The Public Protector

concluded, the contracts appeared only to benefit the shareholders of Tegeta.

3.7 While the dispute over Optimum Coal was taking place, and Eskom was supposed to be at arms length with the Gupta's and Tegeta, Mr Richard Seleke, who had been Mr Zwane's Director General in the Free State Department of Economic Development prior to Mr Zwane's appointment as Minister of Mineral Resources (and who had no legitimate role whatsoever in relation to the Optimum Coal dispute) was used as a conduit to leak confidential Eskom documents to Tony Gupta[116];

3.8 Minister Zwane's Department of Mineral Resources also authorised the release of Koornfontein Mine's R280 million rehabilitation trust fund and Optimum Coal Mine's R1.43 billion rehabilitation trust fund into Bank of Baroda accounts, without ensuring that these funds were properly ring-fenced and secure and would be utilised for its proper purpose. The fate of these funds is unknown.

3.9 As Minister of Mineral Resources, Zwane has appointed known Gupta associates as his special and personal advisors, namely Kuben Moodley and Malcolm Mabaso.

3.10 As Minister of Mineral Resources, Zwane has been instructed in his public and media statements by Gupta family members and known Gupta

[116] The facts in this regard are set out in Chapter 3.

associates, including Tony Gupta, former Oakbay CEO, Mr Nazeem Howa, Duduzane Zuma and the Gupta-hired PR firm, Bell Pottinger.

3.11 On 13 April 2016, President Zuma appointed Mr Zwane to chair an inter-ministerial committee to investigate the closure of the Guptas' South African bank accounts. Nedbank accused Mr Zwane of abusing this position by trying to influence them to keep their Gupta-held accounts open.

3.12 On 1 September 2016, Minister Zwane issued a public statement announcing that Cabinet had agreed on a recommendation of the Inter-Ministerial Committee that a judicial inquiry investigate why South Africa's banks had blacklisted Gupta-owned businesses. In fact, Cabinet had done nothing of the sort.

3.13 Despite the fact that Minister Zwane had publicly misrepresented what Cabinet had decided, he has been retained in the Cabinet by President Zuma and remains responsible for the Mineral Resources Portfolio that is of obvious importance to the Gupta family.

4 In the light of these facts, the following conclusions can be drawn with confidence:

4.1 Zwane has an improper relationship with the Gupta family, and has abused his public office to enrich the Gupta family and their business associates, including President Zuma's son, Duduzane Zuma.

4.2 President Zuma has abused his powers of appointment in appointing and retaining Zwane as Minister of Mineral Resources, to promote and protect the interests of the Gupta family and their business associates, including the President's son, Duduzane Zuma.

4.3 An improper relationship exists between President Zuma and the Gupta family.

5 The remainder of this chapter details the key facts and the supporting evidence.

The appointment of Mr Zwane as Minister of Mineral Resources

6 On Tuesday, 22 September 2015, President Zuma announced the appointment of Mr Zwane as Minister of Mineral Resources. Minister Zwane was sworn in the following afternoon, on 23 September 2015.

7 Mr Zwane was appointed Minister less than a month after being sworn in as a member of the National Assembly (on 2 September 2015).[117] Minister Zwane had no experience in mining or in national government and was not a member of the ANC's national executive committee. He had previously served as MEC for Agriculture and Rural Development (2014 – 2015) and MEC for Economic Development, Tourism and Environmental Affairs (2009 – 2013) in the Free State province, under Premier Ace Magashule. His academic qualifications are a secondary teacher's diploma from the South African Teachers' College in

[117] Staff, P. (2017). *New minister of mines tainted by Gupta family link*. [online] The M&G Online. Available at: https://mg.co.za/article/2015-09-23-new-minister-of-mines-tainted-by-gupta-family-link.

Pretoria and a certificate in Executive Leadership Municipal Development Programme from the University of Pretoria.[118]

8 President Zuma announced Minister Zwane's appointment to the surprise of the ANC National Executive Committee, which had met the previous weekend and had not been advised of the impeding appointment.[119]

9 Minister Zwane's appointment appears to have been vetted, if not orchestrated, by the Guptas, using Duduzane Zuma as a conduit to President Zuma.

9.1 On 1 August 2015, less than two months before President Zuma appointed Mr Zwane as Minister, Mr France Oupa Mokoena of Koena Consulting and Property Developers emailed Rajesh (Tony) Gupta to say "*Please find attached the CV of Mr Mosebenzi for your attention".* Tony Gupta forwarded Mokoena's email, with its attachment, directly to Duduzane Zuma.[120]

9.2 On the Sunday evening prior to President Zuma's announcement, on 20 September 2015, a presidential-level motorcade was reported to have paid a visit to the Gupta family compound in Saxonwold.[121]

10 As is discussed in Chapter 3, a similar process of Gupta vetting or orchestration was followed in President Zuma's appointment of Mr Seleke, Minister Zwane's

[118] Mosebenzi Zwane's profile on the Department of Mineral Resources website: http://www.dmr.gov.za/about-us/the-ministry/minister.html.

[119] ANC, 'Statement of the ANC following the NEC Meeting, 18-20 September 2015', at http://www.polity.org.za/article/anc-statement-of-the-anc-following-the-nec-meeting---18---20-september-2015-2015-09-21.

[120] These emails are attached marked **MJZ 1** and **MJZ 2**.

[121] AmaBhungane Reporters, M. (2017). *Gupta past haunts new mines minister*. [online] The M&G Online. Available at: https://mg.co.za/article/2015-09-23-gupta-past-haunts-new-mines-minister/.

former Director General in the Free State Department of Economic Development, Tourism and Environmental Affairs, to the position of Director General of Public Enterprises, another office of crucial importance for the Gupta family.

11 In May 2017, former Mineral Resources Minister Ngoako Ramatlhodi publicly stated that he was removed as minister and replaced by Minister Zwane after he resisted pressure from Eskom's CEO, Minister Brian Molefe and Eskom's chairperson, Minister Ben Ngubane, to suspend Glencore's mining licences.[122] As is pointed out in more detail in chapter 3 below, Mr Ngubane has an improper relationship with the Gupta family and has abused his position on the Transnet and Eskom boards to further their interests.[123] At the time that he pressurised Minister Ramatlhodi to suspend the Glencore mining licences, Glencore was then the owner of Optimum Coal Mine, which was subsequently purchased (with the assistance of the new Minister Zwane) by the Gupta-Zuma owned company, Tegeta. The Optimum Coal mine became the subject of lucrative coal-supply deals that Tegeta proceeded to conclude with Eskom on terms considerably more favourable to Tegeta than those to which Glencore had been subject prior to the purchase, and which, for no apparent reason, obliged Eskom to purchase the coal from Tegeta at a price of 19.69/GJ as opposed to the price of R18.68/GJ which was the Optimum Coal Mine price to Tegeta and the price for which Eskom could have contracted directly with the Optimum Coal Mine:[124]

[122] AmaBhungane, 'How Brian Molefe 'helped' Gupta Optimum heist', 16 May 2017.

[123] Reference to chapter on SOE's

[124] Public Protector 'State of Capture' report p 313 para z.

12 Minister Ramatlhodi's account of the circumstances surrounding his removal is published in an article by amaBhungane, 'How Brian Molefe 'helped' Gupta Optimum heist', dated 16 May 2017[125], and reads in relevant part:

> *"Former Mining Minister Ngoako Ramatlhodi has made damning new allegations that Eskom chief executive Brian Molefe and chair Ben Ngubane effectively pressed him to blackmail resources giant Glencore.*
>
> *When he did not comply, he says, President Jacob Zuma fired him within weeks. At the time the Gupta family were angling to buy Optimum, the coal mine that supplies Eskom's Hendrina power station.*
>
> *Glencore, which then owned Optimum, had placed it into business rescue in August after Molefe refused to renegotiate the price of a long-term supply contract and reinstated a disputed R2.17-billion penalty that Optimum supposedly owed for supplying substandard coal.*
>
> *Speaking from Limpopo on Friday, Ramatlhodi, then minister of mineral resources, said he met with Molefe and Ngubane at the latter's insistence. At the meeting, they allegedly demanded that he suspend all Glencore's mining licenses in South Africa, pending the payment of the R2.17-billion penalty.*
>
> *Eskom had tried to issue a legal summons for the penalty on 5 August 2015, but Optimum's business rescue practitioners, appointed only the*

[125] See Annexure **MJZ 3**.

day before, batted away the claim, citing legislation which restricts new claims once a company is in business rescue.

Glencore maintained the Hendrina contract was losing it R100-million a month and it could no longer support the losses. Business rescue, an alternative to liquidation, puts independent managers in charge in an attempt to save a company.

Ramatlhodi told amaBhungane: "They insisted that I must suspend all the Glencore mining licenses pending the payment of the R2-billion... You must remember that the country was undergoing load-shedding at that time. I said to them: how many mines do these people have supplying Eskom? How many more outages are we going to have?"

A suspension of all of Glencore's licenses would have brought Glencore's 14 coal operations to a standstill and risked the jobs of its 35 000 employees in South Africa. At the time Glencore supplied roughly 14% of Eskom's coal needs, including virtually all of the coal for the Hendrina power station.

Ramatlhodi said Ngubane was very insistent, but he refused: "I said I'm not going to shut the mines."

He said Ngubane then told him that he would have to report on their meeting to President Jacob Zuma straightaway as the president needed to be in the know before leaving on a foreign trip.

On 2 September 2015, Zuma arrived in China for a commemoration of victory over the Nazis in World War II. There he was due to meet Russian President Vladimir Putin.

Ramatlhodi said he was removed as mines minister shortly after Zuma's return. Zuma announced unexpectedly on 22 September that year that Mosebenzi Zwane, a Free State politician linked to the Guptas, would replace Ramatlhodi.

Zuma moved Ramatlhodi to public service and administration at the time, but fired him along with finance minister Pravin Gordhan and other members of his cabinet earlier this year."

Mr Zwane's involvement in the Estina dairy project

13 In and about mid-2011 to mid-2012, Mr Zwane (as MEC for Agriculture and Rural Development in the Free State Province) and Free State Premier, Ace Magashule, drove the conclusion of a mega-contract between the Department and Estina (Pty) Ltd for the "Vrede dairy project".

14 Despite repeated denials from the Gupta family and those involved in the project, as is shown below, it is now evident that the Gupta family and their associates were intimately involved in, and benefited from, the project.

15 Under the Vrede dairy project, MEC Zwane's Department of Agriculture awarded a Gupta-linked company, Estina (Pty) Ltd, a 99-year, rent-free lease on the 4400-hectare Krynaauwslust farm near Vrede (Zwane's home district). The Department also undertook to commit R114m-a-year for three years (R342

million in total) to set up the farming operation and dairy on the property. No tender processes were followed and no due diligence of Estina was conducted before the Department contracted with Estina.[126]

16 The project was mired in controversy. Investigative journalists, amaBhungane, reported that the company that was awarded the contract, Estina, had no apparent capacity to manage and implement the project. Estina's sole director was Kamal Vasram, who worked in information technology (as a retail sales manager for Toshiba's South African subsidiary) and had no farming background. In its proposal, Estina claimed that an Indian company, Paras Dairy was jointly involved in the project and would provide expertise. This claim was refuted by Paras Dairy, which claimed that it had no knowledge of the project.[127]

17 During or about October 2013, National Treasury investigated the Department's contracts with Estina. The results of this investigation were not published by Treasury, but some of the findings were disclosed by AmaBhungane after it obtained a transcript of an interview that the investigators had conducted with the Department's Chief Financial Officer, Mr Seipati Dlamini. (Notably, as Minister of Mineral Resources, Minister Zwane appointed Mr Dlamini as national Deputy Director-General: Mineral Regulation in November 2016, without following due process and without Cabinet approval).[128]

[126] AmaBhungane, 'Guptas' farm cash cows in Free State', 31 May 2013; AmaBhungane 'Gupta dairy project milks Free State coffers', 7 June 2013; AmaBhungane 'Gupta dairy flouts treasury rules', 14 June 2013.

[127] AmaBhungane, 'Guptas' farm cash cows in Free State', 31 May 2013; AmaBhungane 'Gupta dairy project milks Free State coffers', 7 June 2013; AmaBhungane 'Gupta dairy flouts treasury rules', 14 June 2013.

[128] Mineweb, 'Zwane appoints loyalist to key position at DMR, ignores due process', 2 November 2016; AmaBhungane, ' Zwane and his new appointment go way back', 3 November 2016; City Press, 'Mosebenzi Zwane in controversial DG appointment', 13 November 2016.

18 AmaBhungane reported in February 2014 that:

> *"[A] document obtained by amaBhungane shows that in October last year a forensic team was dispatched by the treasury to Bloemfontein to question officials about the bizarre contract to develop a large dairy and milk processing plant in the northeastern Free State town of Vrede.*
>
> *Investigators were shocked by what they heard, including:*
>
> - *The Free State agriculture department did not follow any supply-chain procedures when agreeing to fund the project through Estina, a private company;*
> - *The department did no due diligence on Estina or its claimed partnership with Paras, a major dairy company in India. Paras subsequently denied any involvement;*
> - *The Free State paid grants directly into Estina's bank account and the responsible official admitted she had no real evidence of how the money was being spent;*
> - *A "feasibility study" was done only after the contract was signed; It appears the "loosely drafted" contract – skewed in Estina's favour – was drawn up by Premier Ace Magashule's legal adviser. The contract commits the department to shelling out R342-million and Estina will be billed for the balance of the R570-million project cost "if necessary";*
> - *Small-scale farmers, who were supposed to be beneficiaries of a 51% share in the scheme, were only identified recently and the official could not explain how they were chosen; and*

- *Approval for the project was rushed through despite the fact there was no budget, no feasibility study and no urgency.*

One of the investigators remarked in apparent exasperation: "Estina is using government's money to establish a plant, putting cows on land that is given by government rent-free. Now they get to make a fortune off the infrastructure."

The disclosures are made in a confidential transcript, which records an extraordinary interview (http://cdn.mg.co.za/content/documents/2014/02/06/ensinterviewdlamini.pdf) with the Free State department of agriculture chief financial officer, Dipatle Dlamini."[129]

19 This article, titled "Free State dairy project damned in treasury investigation is attached.[130]

20 On 13 August 2014, following the National Treasury's investigation, the Department cancelled its contract with Estina (Pty) Ltd.[131] Management of the project was taken over by the Free State Development Corporation (FDC). The FDC indicated that the cow housing shed was inadequate, and that the processing plant that was built by Estina would require additional investment, if it was viable at all. The FDC also reportedly admitted (in a meeting of the Portfolio Committee for Economic Development in the Free State Legislature)

[129] As at 14 June 2017, the transcript is still available online at the published address.

[130] See Annexure **MJZ 4**.

[131] Among the recommendations of National Treasury's investigation was that the Head of the Department and Chief Finance Officer face disciplinary hearings. The MEC for Agriculture and Rural Development has however indicated in the reply that no disciplinary action will be instituted. National Treasury's investigation was carried out at a cost of R868 447.33 and has subsequently been ignored. See: Politicsweb, 'Vrede Dairy Project controversy deepens - MEC's reply creates more questions than answers', 3 August 2015.

that none of the 80 beneficiaries purportedly identified for the project are currently involved in it.[132]

21 As disclosed in the MEC's replies to parliamentary questions[133], by 28 April 2015, the Free State Department of Agriculture had invested R183,950,000.00 (R183 million) in the Vrede Dairy Project.

22 The provincial government, Estina, the Gupta family and Vasram all denied any Gupta-involvement in the project, save for the conclusion of a consulting subcontract of R138,000 between Estina and a Gupta-owned company, Linkway Trading.[134] However, emails from the Sahara computer server evidence that the Guptas were intimately involved in the project. They evidence further that the Guptas have been the beneficiaries of tens of millions of rands that the provincial Government paid to Estina, through payments made by Estina to an offshore Gupta-front company called Gateway Ltd (registered in the United Arab Emirates).

23 The evidence of the Gupta family and associates' involvement in the scheme, and how they extracted public funds from it, is detailed in an amaBhungane/ Scorpio exposé of 5 June 2017.[135] The report explains:

> *"By the time Estina was kicked off the project in 2014 following a national Treasury probe and amaBhungane's exposure of dead cows being*

[132] Politicsweb, 'Vrede Dairy Project controversy deepens - MEC's reply creates more questions than answers', 3 August 2015.

[133] See Annexure marked **MJZ 5**.

[134] AmaBhungane, 'Guptas' farm cash cows in Free State', 31 May 2013; AmaBhungane 'Gupta dairy project milks Free State coffers', 7 June 2013; AmaBhungane 'Gupta dairy flouts treasury rules', 14 June 2013.

[135] See Annexure **MJZ 6.**

dumped in a ditch, the provincial government had paid Estina about R184-million in taxpayers' money.

The #GuptaLeaks open a window on what happened to a large chunk of that money, supporting the impression that the Guptas not only controlled Estina, but were the primary beneficiaries.

Zwane's successor as agriculture MEC, Mamiki Qabathe, answered questions in the provincial legislature in November 2013, saying that by then a total of R114-million – tranche R30-million and R84-million – had been transferred to Estina.

Spreadsheets in the #GuptaLeaks show a total of $8.35-million – equal to the R84-million second tranche at the exchange rate then – hitting the account of a company called Gateway Ltd in August and September 2013.

Gateway is registered in Ras al-Khaima, one of seven emirates making up the UAE and a highly secretive offshore company jurisdiction. Gateway appears to be little more than a Gupta front; it is among a number of UAE companies administered by a man who, the #GuptaLeaks show, is a Gupta subordinate.

Part of the R84-million appears to have gone to an engineering firm in Saharanpur, the Guptas' home town in India. It went like this: Star Engineering, based in Saharanpur, sent a letter to Ajay Gupta in 2012, thanking him for meeting and "taking interest in our line of production of super quality dairy equipment".

In September 2013, Gateway, the Gupta UAE company, invoiced Estina for a milk pasteurising plant at US$3.45-million (about R34-million then). A little over a week later a similar amount from Estina hit Gateway's account.

Further correspondence shows that Gateway ordered the plant from Star Engineering in Saharanpur. A representative from the firm asked for questions to be emailed, but had not replied by the time of publication.

And so, it appears that of the R84-million remitted to the UAE, R34-million was for actual dairy equipment – although how much was paid to Star Engineering and how much Gateway kept as a mark-up remains to be seen.

What happened to the remaining R50-million Estina remitted to Gateway is not clear.

Although there was some construction at the farm and some cows were bought, the full use of the remaining R100-million from the total R184-million that the province paid Estina also remains unclear. On visits to Vrede at the time, amaBhungane did not encounter development suggested by that level of expenditure."

24 There is compelling evidence to support these allegations, which have not been meaningfully disputed. The repeated denials by the Guptas, Vasram and the Department over the Gupta's association with the project have also never been explained.

25 The evidence obtained from the Sahara computer server includes the following documents:[136]

25.1 Emails exchanged between the Gupta brothers and senior Gupta employees on the recruitment of Estina staff from India; obtaining work permits for Estina employees; and approving their contract salaries.

25.2 Emails exchanged between Ravindra Nath and B. Rajendra CEO of The Bank of India: Johannesburg that indicate that Gupta group and personnel applied for a bank loan for Estina;

25.3 Spreadsheets on the Sahara computer indicate that Sahara hosted Estina's accounting software, and oversaw the flow of monies in and out of its account.

25.4 Invoices from Gateway to Estina dated 15 September 2013.

26 Quite apart from the contents of these documents, the mere fact that they were found on the Sahara Computer is clear evidence of involvement of the Guptas in Estina.

27 The AmaBhungane/Scorpio report cites further evidence of the Guptas' involvement in the scheme, through their companies' association with Vasram (the sole director of Estina). The report notes that:

> *"During the Estina saga, there were ongoing large orders from the Guptas' Sahara Computers for IT equipment from Toshiba, represented by*

[136] Annexures attached include **MJZ 7, MJZ 8A, MJZ 8B, MJZ 8C, MJZ 9, MJZ 10, MJZ 11, MJZ 12, MJZ 13, MJZ 14, MJZ 15** and **MJZ 16**.

Vasram. E-mails also listed apparent transfers totaling millions of rand from Gupta companies to Vasram.

Separately Vasram, using his Estina e-mail address, invoiced Gupta company Linkway Trading monthly for "services rendered". Linkway is the company the Guptas acknowledge had done "consulting" on the dairy project in its early stages.

Vasram's invoices, initially at R11,000 a month, started in May 2011, when Estina was negotiating the project with Zwane's Free State agriculture department, and continued until least August 2012.

In early 2013 there were two more invoices from Vasram to Linkway, for amounts of around R50,000 each.

These invoices suggest that the Gupta consulting company paid Vasram fees for the Estina work – again upending his and the Guptas' insistence that Estina was his business a theirs."

28 The invoices from Vasram to Gupta companies (dated May 2011 to August 2012 and early 2013).[137]

29 Of particular concern is the evidence of a "kickback" from the Guptas to Mr Zwane and other officials in the Department, for facilitating the Estina scheme. In October 2012, shortly after the launch of the Estina project, Mr Zwane, officials from his department and a local gospel choir (the Umsingizane gospel choir) that

[137] Refer to attachments **MJZ 17A. MJZ 17B, MJZ 17C, MJZ 17D, MJZ 17E, MJZ 17F, MJZ 17G, MJZ 17H and MJZ 17I**.

Zwane promotes were hosted on an all-expenses paid tour of India by the Guptas.

30 Details of this trip are evidenced in emails and records from the Sahara computer server. These include:

30.1 The flight and accommodation bookings for 24 or more travellers, including Mr Zwane, at Oberoi hotels in different parts of India;

30.2 An email from Mr Zwane ("M Zwane <zwanemail@gmail.com>"), in which he personally sends a list detailing which members of the party should share rooms and who should get their own.

30.3 The tour programme which included visits to the Taj Mahal and the "Kingdom of Dreams", as well as "Mr Gupta house for dinner".

31 These emails and records are attached. [138]

Mr Zwane's close association with the Guptas

32 Following his trip to India in October 2012, Mr Zwane enjoyed subsequent trips to India and Dubai, which were arranged and paid for by the Gupta family. These include:

32.1 A trip to India in December 2013, to attend a wedding with Ashok Narayan (an executive of the Gupta company, Sahara Systems), members of the

[138] Refer to attachments **MJZ 18, MJZ 19** and **MJZ 20**.

Gupta family and Chandrama Prasad ("CP") Yadav, the farm-manager of the Vrede dairy project.[139]

32.2 A trip to Dubai and Delhi in September 2014, which Gupta employees (at Sahara) arranged, and which the Gupta family paid for. The flight tickets evidence that Mr Zwane flew to Dubai, and then Delhi, in the company of Rajesh (Tony) Gupta and Salim Essa and Suraya Singhala. The purpose of this trip is unknown.

33 The emails records from the Sahara computer server, which evidence these trips and the Gupta family's payment of Mr Zwane's expenses (upfront or by refund), are attached[140]

34 The Sahara computer server indicates that numerous meetings were scheduled between Mr Zwane, Tony Gupta and a certain Peter at Sahara and a place designated as "No. 5". Electronic meeting invitations and acceptances[141] record that the following meetings were held between Zwane and Tony Gupta:

– on 31 January 2013, at 11 am between Mr Zwane and Tony Gupta at No. 5;

– on 1 February 2013, at 4pm, between Mr Zwane, DG and Tony Gupta at No. 5;

– on 15 March 2013, at 4pm between Mr Zwane and Tony Gupta at No. 5;

[139] amaBhungane 'Gupta past haunts new mines minister', 4 September 2015.

[140] Refer to attachments **MJZ 21** and **MJZ 22**.
[141] Refer to attachments **MJZ 23**, **MJZ 24, MJZ 25**, **MJZ 26** and **MJZ 27**.

– on 6 April 2013, at 5pm between Mr Zwane and Tony Gupta at No. 5;

and

– on 27 August 2013, at 1pm, between Mr Zwane, Tony Gupta and Peter at Sahara;

35 On 30 April to 2 May 2013, Mr Zwane attended the Gupta family wedding (of Vega Gupta and Aakash Jahajgarhia) at Sun City, where he stayed for three nights. The confirmation of Mr Zwane's attendance and stay is attached.[142]

36 Further, on 22 July 2013, Mr Ashok Narayan requested Sahara's CEO, Ashu Chawla, to use the Gupta's helicopter to fly from Grand Central to Harrismith, with Mr Zwane and Duduzane Zuma named as two of the passengers.[143]

37 This history evidences that Minister Zwane has a close association to the Gupta family and their associates – in particular, Tony Gupta and Ashok Narayan. Minister Zwane met with Tony Gupta regularly throughout 2013 (when the Estina project was underway) and they continued to meet in 2014. Minister Zwane travelled with the Guptas – using their aircraft and at their expense. Between October 2012 and September 2014, Minister Zwane travelled to Dubai and India on at least three occasions, at the Gupta's expense. Zwane also attended Gupta family weddings in South Africa and India, at their invitation and expense.

[142] Refer to attachment **MJZ 28**.
[143] Refer to attachment **MJZ 29**.

Mr Zwane used his position as MEC to facilitate the landing of the Guptas' wedding guests at the Waterkloof Air Force Base

38 Minister Zwane is implicated in the Gupta's use of the Waterkloof Airforce Base for landing wedding guests from India on 30 April 2013. In March 2013, an official letter signed and sent on behalf of Minister Zwane (as MEC for Agriculture and Rural Development in the Free State) extended an open invitation to Shivpal Yadav, a minister in the Indian state of Uttar Pradesh, to visit the province. The letter of invitation was copied to the Indian High Commissioner to South Africa, Virendra Gupta. This invitation helped secure the aircraft of wedding guests landing access at the Waterkloof Air Force Base. Yadav was one of about 200 guests from India who attended the wedding after arriving in the Jetways Airbus at the Waterkloof Air Force Base.[144]

39 The flight for the Gupta wedding, a private civilian affair, was cleared to land at Waterkloof by the South African National Defence Force. Permission was granted on application from the Indian High Commission, on the basis that the Airbus 330 was a "VIP" flight carrying a delegation from India.

40 The timing of Minister Zwane's letter of invitation is suggestive of an ulterior and improper purpose. In February 2013, the Minister of Defence, Nosiviwe Mapisa-Nqakula, had refused a request by a Gupta family envoy – a representative of the Gupta family's Sahara company – for approval to land at the Waterkloof Air Force Base. The Indian High Commissioner to South Africa, Virendra Gupta, then became instrumental in securing permission for the use of Waterkloof. On

[144] Mail & Guardian 'Free State government gave Gupta guests an 'alibi', 10 May 2013.

the strength of the open letter of invitation to an official "delegation" from Minister Zwane, the Indian High Commission obtained clearance for the landing from then-chief of state protocol, Mr Vusi Bruce Koloane. This timing, together with the fact that the Free State government's official meeting was not publicised at all, is (at the very least), suggestive of an abuse of powers on the part of Minister Zwane as MEC.[145]

41 What is more, a chain of emails from the Sahara computer server evidences that the letter of invitation was, in fact, prepared by Ashok Narayan and forwarded to Ashu Chawla. Chawla then forwarded the letter to Minister Zwane to be copied on an official letterhead.[146]

42 Mr Koloane, was suspended as chief of state protocol by the Department of International Relations and Cooperation, in the wake of the Waterkloof affair and it emerged that he had persuaded other government officials to make the Waterkloof airbase available for the Gupta landing by saying that he "was under pressure from Number 1 [i.e. President Zuma]" to do so.[147]

43 The Gupta's and President Zuma have never acknowledged that any improper pressure was put on Mr Koloane (or any other person) to make the Waterkloof airbase available for the Gupta wedding. If that were the case, one would have expected them both to have viewed the conduct of Mr Koloane in a dim light, and to have had no further contact with him. However, they have both continued to

[145] Mail & Guardian 'Zuma fury over the Gupta's wedding scandal', 3 May 2013; Mail & Guardian **'**Free State government gave Gupta guests an 'alibi', 10 May 2013; Mail & Guardian, 'Gupta wedding: What is the plane truth?' 10 June 2013.

[146] Refer to attachment **MJZ 30, MJZ 31** and **MJZ 32**.

[147] JCPS Cluster Report -Landing of a chartered commercial aircraft at air force base Waterkloof: *http://www.justice.gov.za/reportfiles/other/20130517-jcps-waterkloof-report.pdf*

extend patronage to Mr Koloane in a manner inconsistent with their version that they had nothing to do with his unlawful acts in relation to the Waterkloof fiasco:

43.1 President Zuma appointed Mr Koloane as Ambassador to the Netherlands in August 2014.

43.2 Mr Koloane has retained strong ties to the Guptas, including facilitating new business relations in the Netherlands. These continued ties are detailed in an *amaBhungane/ Scorpio* exposé published on 11 June 2017.[148]

Further emails evidence how Mr Koloane approached the Guptas in 2016 to sponsor a golf tournament he was hosting in Pietermaritzburg in December 2016 to mark his 20th wedding anniversary. Mr Koloane made the request in an email addressed to Sahara's CEO, Ashu Chawla, who forwarded the request to Tony Gupta. The response from Tony Gupta is revealing: "*Support whatever he wants.*"[149]

Mr Zwane has used his position as Minister to benefit the Guptas and Duduzane Zuma

44 As Minister of Mineral Resources, Mr Zwane used his public office to facilitate the sale of Optimum Coal Mine from Glencore (Pty) Ltd to Tegeta (Pty) Ltd, a subsidiary of the Gupta-family holding company, Oakbay Investments (Pty) Ltd

[148] Refer to attachment **MJZ 33**.
[149] Refer to attachment **MJZ 34**.

(with a 29.05% shareholding) and in which Duduzane Zuma's Mabengela Investments (Pty) Ltd held a 28.53% shareholding.[150]

45 Following its purchase of Optimum Coal Mine, Tegeta secured lucrative coal supply contracts with Eskom from Optimum Coal Mine. These include a R564 million contract awarded in April 2016 to supply Arnot power station with 1.2 million tons of coal over six months (excluding the transport costs also payable by Eskom). As the City Press reported in June 2016:

> "*At R470 a ton, Tegeta's Arnot contract is one of Eskom's most expensive. In May, last year, Public Enterprises Minister Lynne Brown told Parliament that Eskom paid an average price of R230.90 a ton for coal, and that the average price of Eskom's five most expensive contracts was a "delivered price" of R428.84 a ton.*
>
> *… City Press has established that, with transport, Tegeta is paid roughly R580 a ton, pushing the total value of the six-month contract up to just under R700 million*."[151]

46 Tegeta also inherited an estimated R1.5 billion rehabilitation trust fund, set aside under the Mineral and Petroleum Resources Development Act and the National Environmental Management Act to finance the rehabilitation of the mine upon its closure.

47 Investigative journalists at *AmaBhungane* and *Scorpio* calculate that, altogether:

[150] On the shareholdings and directorships of these companies, see Public Protector's *State of Capture Report* at pp 111-112.

[151] City Press, "How Eskom bailed out the Guptas", 12 June 2016.

> *"the Guptas have received contracts worth R11.7-billion from Eskom for coal alone. None of these contracts was awarded as the outcome of a competitive bidding process, and the R11.7-billion does not include the contracts that Tegeta inherited when it bought Optimum Coal, nor does it include invoices totalling R419-million for management consulting and advisory services delivered to Eskom by Trillian Capital Partners, a company majority owned by Salim Essa."*[152]

48 The *City Press* and *AmaBhungane/ Scorpio* articles are attached. [153]

49 In the "*State of Capture"* report,[154] the Public Protector analysed Minister Zwane's flight records to confirm that Minister Zwane flew from Johannesburg to Zurich, via Dubai, on 29 and 30 November 2015. The Public Protector reports that she received information *"from an independent source"* that "*Minister Zwane did in fact meet with Mr Glazenberg in Switzerland at the Dolder Hotel around 30 November 2015 to 5 December 2015, and that the other individuals present during said meeting(s) [were] Mr Rajesh (Tony) Gupta and Mr Essa"*.[155]

50 The Public Protector was unable to explain how Minister Zwane got from Zurich to Dubai, since his official flights (booked on Emirates Airlines (i) from Zurich to Dubai on 2 December 2015; (ii) from Dubai to Delhi on 3 December 2015; and (iii) from Delhi to Dubai on 5 December 2015) were never used. However,

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[152] AmaBhungane and Scorpio, '#GuptaLeaks: How Eskom was captured', 10 June 2017.

[153] Refer to attachment **MJZ 35**.

[154] Public Protector, '*State of Capture': Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Minister and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses* (Report 6 of 2016/17), 14 October 2016 ("State of Capture Report").

[155] Public Protector, 'State of Capture', Report 6 of 2016/2017 at p 126, paras 5.110.

Minister Zwane did catch his official flight booked from Dubai to Johannesburg on 7 December 2015.[156]

51 The flight and accommodation bookings extracted from the Sahara computer server confirm that, on 2 December 2015, when Minister Zwane failed to board his official flight from Zurich to Dubai, he was on board the Guptas' private Bombardier jet, ZS-OAK, along with Tony Gupta and Salim Essa. Further, the records evidence that Minister Zwane spent the next two days in India with the Guptas before flying back to Dubai and catching his official flight back to Johannesburg.[157] Whilst in Dubai, Minister Zwane was booked into the five-star Oberoi hotel paid for by the Guptas' company, Sahara Computers, and was chauffeured around in a BMW 7 Series motor vehicle, at the expense of Sahara Computers.[158]

52 In the context of the Optimum Coal dispute, Eskom as an organ of state had to decide whether to terminate its contract with Glencore, and if so, how to procure the coal that it had previously obtained from Glencore, it would plainly have been improper for Minister Zwane to travel with, and at the expense of the Tegeta delegation that was hoping to obtain the Eskom contract after forcing Glencore to sell the Optimum mine. Minister Zwane, the Guptas and former Tegeta CEO, Nazeem Howa, have thus persistently lied to the public by denying that this took place.[159] These denials include repeated lies by Minister Zwane to Parliament:

[156] Public Protector, 'State of Capture', Report 6 of 2016/2017 at p 125, para 5.105-5.108.

[157] AmaBhungane and Scorpio, '#Guptaleaks: How Eskom was captured', 9 June 2017.

[158] Refert to attachment **MJZ 36.**

[159] Cape Times 'Zwane denies Swiss trip with Guptas to facilitate Optimum mine sale', 8 June 2017; Herald Live 'Ajay Gupta denies Tegeta travelled with Zwane to Switzerland in a February interview', 22 November 2016; City

52.1 In a written reply to a parliamentary question from Democratic Alliance MP, Mr TJ Brauteseth on 8 April 2016, Zwane denied ever meeting with any of the Guptas, Gupta employees or close associates since taking office as Minister of Mineral Resources. The answer furnished was: "*The Minister has not met with any member, nor close associate of the Guptas. He has also not attended a meeting with a specified person at the Gupta's Saxonworld Estate in Johannesburg."*

52.2 In a written reply to parliamentary questions from the EFF leader, Mr Julius Malema, in May 2016, Zwane denied travelling with the Guptas on their trip to Switzerland in January to persuade Glencore to sell Optimum coal mine to their companies Oakbay and Tegeta; and

52.3 In a written reply to parliamentary questions from Freedom Front Plus MP, Mr Anton Alberts on 8 June 2017, Minister Zwane repeated this denial, saying he had gone on the trip accompanied by an official of his department "*to promote mining and [to] address company issues relating to the investment climate in the country in general, and to mitigate imminent retrenchment"*. Minister Zwane also denied that he had any direct or indirect interests in Oakbay or Optimum mine.

52.4 The parliamentary questions and Minister Zwane's replies are attached.[160]

Press 'Guptas: Avoid them, IDC's urged; Zwane denies Switzerland trip', 25 May 2016; Business Day, 'Mining: Minister's Gupta trip', 25 January 2016.

[160] Is attached marked **MJZ 37A, MJZ 37B** and **MJZ 38.**

53 The travel and accommodation records for Minister Zwane between 2 and 7 December 2015 indicate that these denials are false.

54 Under Minister Zwane, the Department of Mineral Resources has also approved the release of billions of rands in mine rehabilitation funds to Tegeta in apparently unlawful circumstances. The Public Protector investigated the transfer to Bank of Baroda accounts of –

54.1 R280 million from the Koornfontein Rehabilitation Trust Fund on 23 May 2016; and

54.2 R1,469 billion from the Optimum Mine Rehabilitation Trust Fund on 21 June 2016.

55 The Public Protector reported on the apparent illegalities in the Department's release of these mine rehabilitation funds in the State of Capture report. The Public Protector found that, in respect of both Trust Funds –

> *"It is clear and apparent that the funds were not ring-fenced for the purposes of investment and capital growth. The interest payment on all the investment accounts were not reinvested and recapitalised but were transferred to the Baroda Main account and utilised."*[161]

56 In an affidavit filed by former Finance Minister Pravin Gordhan in litigation between the Minister of Finance and Oakbay Investments,[162] Minister Gordhan

[161] Public Protector, '*State of Capture',* Report 6 of 2016/2017 *at* pp 280-291, paras 5.348 and 5.355. See also at pp 333-337, para 6.4*(oo) – (ccc)*

[162] In Minister of Finance v Oakbay Investments (Pty) Ltd and Others, High Court Gauteng Division, Pretoria, case no. 80978/ 2016.

also expressed alarm at the Department of Mineral Resources' written approval of the release of funds from the Optimum Mine Rehabilitation Trust Fund's Standard Bank account to the Bank of Baroda – particularly in circumstances where the Standard Bank account was closed because of suspicious and unusual transactions on the account. Mr Gordhan's affidavit and the FIC's report is attached.[163]

57 The fate of the mine rehabilitation funds is unknown.

Mr Zwane appoints Gupta associates as his advisors, despite conflicts of interest

58 As Minister of Mineral Resources, Zwane has appointed known Gupta associates as his advisors, most notably Mr Kubentheran ("Kuben") Moodley and Mr Malcolm Mabaso.

59 Minister Zwane appointed Mr Moodley as his special advisor. The Public Protector's report records that Mr Moodley served as his advisor in 2016, during the Tegeta purchase of Optimum Coal Mine.[164]

59.1 Mr Moodley is a known friend of the Gupta family and Mr Essa, the Gupta's close business associate and sole director, inter alia, of Elgasolve (which holds a 21.5% stake in Mabengela Investments) and VR Laser Services,

[163] Refer to attachment **MJZ 39** and **MJZ 40**.
[164] Public Protector, '*State of Capture',* Report 6 of 2016/2017 at p 124 para 5.102

a company in which the Gupta family's investment vehicle and Duduzane Zuma holds shares.[165]

59.2 Mr Moodley is the sole director of Albatime (Pty) Ltd, a company that made a R10 million payment for the benefit of Tegeta towards the acquisition of Optimum Coal Mine.[166]

59.3 Mr Moodley is married to Devapushpum Viroshini Naidoo, who served on the Eskom Board as a Non-Executive Director from 11 December 2014 to 2016, which includes at the time of the sale of Optimum Coal Mine and the conclusion of Eskom's coal-supply contracts with new mine-owner Tegeta.[167]

59.4 As the Public Protector found, Minister Zwane's appointment of Mr Moodley as his special advisor in these circumstances, presented a conflict of interest – as *"Minister Zwane is responsible for ensuring policymaking and policy implementation of service delivery for Eskom. He also oversees the regulation of the MPRDA [Mineral and Petroleum Resources Development Act]. In the execution of his functions the Minister relies on advisors".*[168]

59.5 Mr Moodley also has business ties to Mr Mark Vivian Pamensky, another close business associate of the Gupta family. Mr Pamensky has served

[165] Public Protector, '*State of Capture',* Report 6 of 2016/2017 at p 112 para 5.42.

[166] Public Protector, '*State of Capture',* Report 6 of 2016/2017 at p 124 paras 5.102 – 5.103 and p 275 para 5.332 – 5.333..

[167] Public Protector, '*State of Capture',* Report 6 of 2016/2017 at p 118 para 5.71.

[168] Public Protector, '*State of Capture',* Report 6 of 2016/2017 at p 124 para 5.102.

as a director of the Guptas' company Oakbay Resources and Energy (Pty) Ltd from 25 September 2014 to 10 June 2017, and as a Non-Executive Director of Eskom from 11 December 2014 to November 2016). Pamensky is also a director of Shiva Uranium, in which Oakbay Resources has a 74% stake and Tegeta a 19.6% stake;[169] Yellow Star Trading 1099, of which Mr Essa is a director; and ORE, which is 64% owned by Atul Gupta.[170] Mr Moodley served with Mr Pamensky as directors of BIT Information Technology (Pty) Ltd from 4 March 2004 to 16 March 2005, and is said to be a friend of Pamensky.[171]

60 Minister Zwane also appointed Mr Malcolm Mabaso as his personal advisor in 2016.

60.1 Mr Mabaso is a former business associate of Mr Essa, having served with Mr Essa as a director of Premium Security and Cleaning Services (Pty) Ltd from July 2013 to October 2015.

60.2 Mr Mabaso was reportedly brought to National Treasury by Minister Des van Rooyen, on the first day of his fleeting spell in office as Minister of Finance in December 2016. Minister Van Rooyen appointed Mr Ian Whitley and Mr Mohamed Bobat – both business associates of the Gupta family and Mr Eric Wood – as his advisors. However, on his arrival at Treasury, Minister Van Rooyen also sought to ensure that Mr Mabaso was

[169] The Herald 'Joining the dots between Eskom and the Guptas', 3 November 2016.

[170] Business Day, 'Links in the Gupta chain', 9 March 2017.

[171] AmaBhungane, The 'Gupta-owned' State enterprises, 24 March 2016; Sunday Times, 'How to hijack a coal mine 1, 2, 3', 6 November 2016.

given a desk, despite Mr Mabaso not being a Treasury or Department employee.[172]

Minster Zwane takes instruction from Gupta associates on official public statement

61 Emails recovered from the Sahara computer server evidence that the Guptas and their known associates (including Duduzane Zuma and Nazeem Howa, the former CEO of the Gupta-owned company, Oakbay), have directed and influenced Minister Zwane in the public and media statements he makes as Minister of Mineral Resources.

62 In an email from Mr Howa to Duduzane Zuma and Tony Gupta on 2 February 2016[173], Mr Howa listed fourteen questions he anticipated Minister Zwane could expect from the journalists at a forthcoming Mining Indaba. Mr Howa drafted comprehensive answers for Minister Zwane on matters sensitive to the Guptas (including Minister Zwane's alleged closeness to the Gupta family, the sale of the Optimum mine and his inexperience as a mining minister). Mr Howa requested Tony Gupta's and Duduzane Zuma's further input, stating:

> *"I need some help on some of the answers. I think we should also prepare for a question of his role around the Waterkloof landing. Perhaps I can sit with someone this side to help me polish and add to the answers. Let's chat when you have a chance to review."*

[172] F Haffajee, City Press, '4 days in December', 8 December 2016.

[173] Refer to attachments **MJZ 41** and **MJZ 42.**

63 In February and March 2016, Mr Howa also exchanged a series of emails with employees of Bell Pottinger (the UK-based, Public Relations firm hired by the Guptas) over public statements concerning Minister Zwane's engagement with the Guptas, particularly during Minister Zwane's trip to Switzerland. These emails evidence the Gupta's sustained efforts to direct public statements from and concerning Minister Zwane, as Minister of Mineral Resources, and their concern to conceal their relationship with the Minister.[174]

64 That Minister Zwane was discussing Cabinet business with the Guptas, and taking instructions from them, is further supported by the fact that, in July 2016, Bell Pottinger told *Fin24* reporters that it was in possession of the findings of the inter-ministerial committee set up by Cabinet on 13 April 2016 (with Minister Zwane as its chairperson) to investigate the closure of the Guptas' South African bank accounts.[175] Bell Pottinger advised Fin24 that the Inter-Ministerial Committee was recommending a commission of inquiry into the country's banks, and that Minister Zwane, should be directly contacted. This was two months before Minister Zwane made these findings public on 2 September 2016.[176] The *Fin24* report on the incident is attached.[177]

65 Minister Zwane issued a public statement on 1 September 2016, announcing that Cabinet had agreed on the recommendation of the Inter-Ministerial Committee that a judicial inquiry investigate why South Africa's banks had blacklisted Gupta-

[174] Refer to attachments **MJZ 43** and **MJZ 44**.
[175] Fin24, 'Exclusive: Gupta PR firm knew about bank probe weeks before Zwane dropped the bomb', 22 September 2016.
[176] Business Day, 'Gupta PR firm knew about Zwane's banks inquiry before it was announced', 22 September 2016.
[177] Refer to attachment **MJZ 45**.

owned businesses. The recommendation included that the inquiry look into the current mandates of the Banking Tribunal and the Banking Ombudsman; consider the current Financial Intelligence Centre Act and the Prevention of Combating of Corrupt Activities Act in relation to the banks' conduct; reconsider South Africa's clearing bank provisions to allow for new banking licences to be issued; and investigate the establishment of a state bank of South Africa with the possible corporatisation of the Post Bank to be considered as an option. A report of the statement issued by Minister Zwane is attached.[178]

66 Minister Zwane was severely rebuked by the ANC and the Presidency, who distanced themselves from Minister Zwane's statement about a judicial inquiry into the banking sector and denied that the recommendation had Cabinet backing.[179] Media reports of the statements issued by the ANC and the Presidency are attached.[180] Minister Zwane refused to apologise for the misleading statement or to explain what drove him to mislead the public about what the Cabinet had decided.[181]

Minister Zwane abused his position on the Inter-Ministerial Committee

67 In addition to misrepresenting Cabinet's response to the recommendations of the Inter-Ministerial Committee, Minister Zwane is also alleged to have abused his

[178] Refer to attachments **MJZ 46.**
[179] SABC News, 'Presidency distances itself from Zwane's inquiry into banks', 2 September 2016; News24 'Zwane statement reckless – ANC', 3 September 2016; City Press, 'Gordhan contradicts Zwane on call for banking inquiry, 8 September 2016.

[180] Refer to attachment **MJZ 47 and MJZ 48**.
[181] Cape Times, 'Zwane unfazed amid banks backlash', 7 September 2016; City Press, 'Zwane stands by his controversial statement on banks', 28 September 2016.

powers as chair of the committee by improperly trying to influence banks to keep their Gupta-held accounts open.[182]

In an affidavit filed on behalf of Nedbank in *Minister of Finance v Oakbay Resources and Others* (litigation concerning the Minister of Finance's powers to interfere in bank-client relations), Nedbank's CEO, Mark Brown attests to having attended a meeting with Minister Zwane in May 2016, as chairperson of the Inter- Ministerial Committee. Minister Zwane was accompanied by Minister Faith Muthambi and her advisor, Mr Mzwanele Manyi (who are not appointed as members of the committee), and not the Minister of Finance and Minister of Labour who were its appointed members. Mark Brown states that, at this meeting, Zwane attempted to persuade Nedbank to keep Gupta companies as clients and to become their primary banker. The relevant portion of the affidavit is attached.[183]

[182] Fin24, 'Nedbank says mines minister urged them to keep Guptas as clients', 13 December 2016.

[183] Attached marked **MJZ 49**and **MJZ 50**.

CHAPTER 5: THE APPOINTMENT AND RETENTION OF MINISTER FAITH MUTHAMBI

Overview: The key facts

1 The Ministry of Communications has been of particular importance for the Gupta family by virtue of their broadcasting interests in Infinity Media (Pty) Ltd which owns the television station, ANN7 and which has attempted to procure a free-to-air television broadcasting licence for ANN7.

2 President Zuma appointed Faith Muthambi to Cabinet as Minister of Communications on 25 May 2014. In the Cabinet reshuffle of 30 March 2017, President Zuma retained Muthambi as a member of Cabinet, appointing her as Minister of the Public Service and Administration.

3 On 24 February 2017, the National Assembly's ad hoc Committee on the SABC Board Inquiry (headed by the Hon. Mr Vincent Smith MP) found that Minister Muthambi *"displayed incompetence in carrying out* her *responsibilities as Shareholder Representative* [of the SABC]". The Committee noted that the evidence suggested *"major shortcomings"* in Minister Muthambi's conduct, particularly in relation to the amendment of the SABC's Memorandum of Incorporation (MOI) and her role in Hlaudi Motsoeneng's permanent appointment as Chief Operating Officer (COO). It concluded that *"the Minister interfered in some of the Board's decision-making and processes and had irregularly amended the MOI to further centralise power in the minister,"* and condemned all political interference in the SABC Board's operations.

4 The Committee recommended that: *"The President should seriously reconsider the desirability of this particular Minister retaining the Communications portfolio".*[184]

5 In November 2015, the High Court found that Minister Muthambi acted irrationally and unlawfully in appointing Hlaudi Motsoeneng as Chief Operations Officer of the SABC in the face of the Public Protector's damning findings against him of abuses of power, fraud and maladministration. The court held that "*the [Minister's] decision to appoint Mr Motsoeneng, when there was a manifest need for a transparent and accountable public institution such as the SABC to exhaustively examine all of the disputes raised about his integrity and qualifications, cannot be considered as a rational decision"*.[185]

6 The Supreme Court of Appeal made the same (albeit *prima facie*) findings against the Minister.[186] It also criticised Minister Muthambi for "treat[ing] with disdain" the allegation that Mr Motsoeneng's appointment was irrational and unlawful, and for raising technical objections rather than furnishing the court with an explanation of her actions. The Court advised both the Minister and the SABC that *"the overriding public interest obliged them to make full and frank disclosure rather than shield themselves from scrutiny by resorting to technical points in opposition."*[187]

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[184] *Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the Fitness of the SABC Board,* 24 February 2017, paras 39.1.1 and 39.1.2.

[185] Democratic Alliance v South African Broadcasting Corporation Soc Ltd and Others (12497/2014) [2015] ZAWCHC 182; [2016] 1 All SA 504 (WCC); 2016 (3) SA 468 (WCC) para 49.

[186] South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) at para 48.

[187] Above at para 51.

7 Despite this admonition, Minister Muthambi continued to exercise her powers behind a veil of secrecy, and with evident disdain for public accountability.

8 In June 2017, in ruling on eTV's challenge to the Minister's set-top box policy, the Constitutional Court expressed its concern at Minister Muthambi's "*evasive and 'suspicious' responses or lack thereof to pertinent questions raised by e.tv,*" as regards consultations that she had with undisclosed parties. Chief Justice Mogoeng stated:

> *"We live in a constitutional democracy, whose foundational values include openness and accountability. It is thus inappropriate for the Minister to not have volunteered the identities of those she consulted with and what the consultation was about, as if she was not entitled to solicit enlightenment or did so in pursuit of an illegitimate agenda. This conduct must be frowned upon and discouraged…"*[188]

9 In his most recent cabinet reshuffle President Zuma has retained Minister Muthambi in Cabinet regardless of the most serious criticism of her conduct as Minister of Communications – from Parliament and the courts alike.

10 What is more, President Zuma has appointed Minister Muthambi to lead the very portfolio that most urgently requires leadership that is committed to the principles of good governance, accountability, responsiveness and transparency, namely the Ministery of Public Service and Administration. The appointment of Minister Muthambi as Minister of this national portfolio makes a mockery of the

[188] Above at para 61. See also para 157 (of the minority judgment).

Constitutional principles of public administration that are enshrined in section 195 of the Constitution.

11 President Zuma's retention of Minister Muthambi in Cabinet is another strong indication that an improper relationship exists between President Zuma and the Gupta family.

12 Media reports and the records leaked from the Gupta's Sahara Company's computer server reveal the following –

12.1 During the course of July and August 2014 (shortly following her appointment as Minister of Communications), Minister Muthambi personally sent emails to Tony Gupta on confidential matters of national government policy and on the powers she would assume as Minister.

12.2 On 8 July 2014, Minister Muthambi appointed Hlaudi Motsoeneng as permanent COO of the SABC, in defiance of the Public Protector's findings against him of abuses of power, fraud and maladministration at the SABC. Mr Motsoeneng facilitated the SABC's effective sponsorship of the Gupta's media outlet, The New Age.

12.3 In December 2015, Minister Muthambi reportedly offered to appoint Ms Vuyo Batyi as the Chairperson of the ICASA on condition that she grant the Gupta's ANN7 media company, Infinity Media (Pty) Ltd a free-to-air television licence. President Zuma's son, Duduzane Zuma also has a stake in Infinity Media. When Batyi refused to comply with this condition for appointment, Muthambi declined to gazette her appointment.

12.4 In May 2016, Minister Muthambi attended meetings that the interministerial committee held with banks on the closure of Guptas' bank accounts, despite her not having been appointed by Cabinet to this committee.

12.5 Minister Muthambi appointed Lugisani Daniel Mantsha and Mzwanele Manyi as her legal and special advisors. Both have close ties to the Guptas, and have done the Guptas' bidding in government circles.

13 In the light of these facts, it is indisputable that Minister Muthambi has an improper relationship with the Gupta family, and has abused her public office to benefit the Gupta family and their business associates, including Duduzane Zuma.

14 President Zuma appointed Minister Muthambi to a Cabinet portfolio that was of particular importance to the Gupta family and then retained her in the Cabinet in the face of clear maladministration of her portfolio and notwithstanding repeated criticisms of her conduct from Parliament and the Courts. In the context of President Zuma's broader relationship with the Gupta family, the most likely conclusions to be drawn are that:

14.1 his initial appointment of Minister Muthambi as Minister of Communications was designed improperly to promote the interests of the Gupta family and their business associates, including the President's son, Duduzane Zuma, and

14.2 his retention of Minister Muthambi in the Cabinet has been to protect her for her promotion of the interests of the Gupta family and their business associates.

15 The remainder of this chapter details the key facts in relation to these processes, and substantiates the preceding allegations as set out above.

Minister Muthambi's emails to Tony Gupta

16 The email records obtained from the Sahara computer server show that, between July and August 2014 – shortly after President Zuma appointed her to Cabinet as Minister of Communications – Minister Muthambi sent a series of emails to Tony Gupta on confidential matters of executive policy and on the scope of her ministerial powers. The correspondence suggests either -

16.1 that the transfer of powers to her national portfolio in 2014 was influenced and vetted by the Guptas, or

16.2 that Minister Muthambi used her relationship with the Guptas to influence the manner in which the President transferred powers into her portfolio.

17 These emails were either sent directly from Minister Muthambi to Tony Gupta or indirectly, from Minister Muthambi to the Sahara company's CEO, Mr Ashu Chawla. Mr Chawla, in turn, forwarded Minister Muthambi's correspondence to Tony Gupta and Duduzane Zuma. The latter appears to have acted as a conduit between the Guptas and President Zuma.

17.1 On 18 July 2014, Minister Muthambi emailed a copy of the President's Proclamation on the transfer of administration and powers to certain

Cabinet members (published as Proclamation 47 of 2014 in Government Gazette No. 37839 of 15 July 2014) to Ashu Chawla who, in turn, forwarded the email to Tony Gupta. [189]

17.2 Proclamation 47 of 2014 defined the legislation henceforth to be administered by the Minister of Communication and the Minister of Telecommunications and Postal Services respectively. It provided *inter alia* that all powers under the Electronic Communications Act 36 of 2005 and the Sentech Act 63 of 1996 were to be assigned from the Minister of Communications to the Minister of Telecommunication and Postal Services, Minister Cwele.

17.3 A few minutes after emailing Proclamation 47 of 2014 to Mr Chawla, Minister Muthambi sent him a second email attaching a document describing the effect of the proclamation. The document contained the following statement:

> *"The ability to make broadcasting policy and issue broadcasting policy directions are set out in section 3 of this Act. These powers have been transferred from the Minister of Communications to the Minister of Telecommunications and Postal Services. It is therefore the Minister of Telecommunications and Postal Service*

[189] Copies of the email of Mr Chawla forwarding the email of Minister Muthambi to Tony Gupta and the attached proclamation are Annexed as **COM 1; COM 2 & COM 3**.

who will make policy and issue policy directives to ICASA for broadcasting, including public service broadcasting."[190]

17.4 On 25 July 2014, Minister Muthambi sent two emails to Mr Chawla:

17.4.1 In the first e-mail, with the subject line "*Proclamation New July 18"*, she wrote: *"These sections must be transferred to the Minister of Communications*." A document describing the statutory provisions to which she referred was attached to the e-mail under the file name "proclamtion (sic) new 18 July 2014 (clean).docx".[191]

17.4.2 The document named "proclamtion (sic) new 18 July 2014 (clean).docx" proposed the retransfer of certain powers under the Electronic Communications Act 36 of 2005 from the Minister of Telecommunications and Postal Services to the Minister of Communications.

17.4.3 In a second e-mail sent minutes later, with the subject line *"Responsibility for InfraCo and Sentech"*, Muthambi wrote: *"Sentech's signal distribution must rest with the Ministry of Communications"*. The attached document motivates for the transfer of powers and functions over Sentech (which is responsible for broadcasting signal distribution to the SABC and commercial broadcasters) from the Minister of

[190] Copies of the email of Minister Muthambi and the attached document are Annexed marked **COM 4 & COM 5**.

[191] Copies of this email and the attached document are Annexed marked **COM 6 & COM 7**.

Telecommunications and Postal Services to the Minister of Communications (under the Sentech Act No. 63 of 1996).[192]

17.4.4 Both e-mails of 25 July 2014 were subsequently forwarded by Ashu Chawla to Tony Gupta and Duduzane Zuma, in separate emails.[193]

17.4.5 The use by Minister Muthambi of the word "must" in both of her emails is particularly disturbing. It suggests one of two possibilities:

(a) Either she was conveying to Tony Gupta that these changes had to take place if the interests of the Gupta family were to be protected, or

(b) She was instructing Tony Gupta to use his influence with President Zuma (the only person who could reassign the functions in question) to ensure that the proposed changes did take place.

17.5 Included in the powers which *"proclamation new 18 July 2014 (clean).docx*" proposed to have retransferred to Minister Muthambi was the power under section 3 of the Electronic Communications Act to make national policy for the information, communications and technology sector *"to the extent that it deals in any way with a broadcasting service*

[192] Copies of the emails and the attached document are attached as **COM 8 & COM 9**.

[193] Copies of the emails of Ashu Chawla to Tony Gupta and Duduzane Zuma are attached as **COM 10A; COM 10B; COM 11A ; COM 11B**; **COM 12A; COM 12B; COM 13A & COM 13B**.

or an electronic communications network service used for or in the provision of broadcasting service."

17.6 On 6 December 2013, Minister Muthambi's predecessor as Minister of Communications, Minister Carrim had started the process of exercising his power under section 3 of the Electronic Communications Act 36 of 2005, by issuing for public comment draft amendments to the broadcast digital migration technology under Government Notice 954 of 2013.[194] For present purposes, we emphasize two features of the amendments proposed by Minister Carrim:

17.6.1 The first is that it proposed fixed dates for certain stages in the digital migration process;

17.6.2 The second is that it proposed that the Government would subsidise set top boxes capable of receiving encrypted signals. This proposal was in accordance with ANC policy on the issue.

17.7 As pointed out in the document that Minister Muthambi had forwarded to Mr Chawla on 18 July 2014, in terms of the assignment of functions in Proclamation 47 of 2014, responsibility for broadcast digital migration policy now lay not with Minister Muthambi, but with Minister Cwele. On 29 July 2014, Minister Muthambi sent an e-mail to Chawla, with the following message: *"Despite my request, the cde is determined to table the matter in cabinet tomorrow ... He called me that he was coming to*

[194] The draft policy amendments was gazetted by Minister Carrim .

Cape Town this morning ... I hope he still on his way." Minister Muthambi attached a memorandum that she had sent, as Minister of Communications, to the Minister of Telecommunications and Postal Services, Mr Cwele. In the memorandum, Minister Muthambi noted that Minister Cwele proposed to table final amendments to the Broadcasting Digital Migration Policy in Cabinet and expressed concerns about the proposed amendments. The forwarding of this document to Mr Chawla was a gross violation of Cabinet confidentiality. Mr Chawla forwarded the e-mail and the document to Tony Gupta later that day.[195]

17.8 Minister Cwele did not obtain Cabinet approval for his proposed final amendments to the Broadcasting Digital Migration Policy, either at the cabinet meeting of 30 July 2014 or at any time thereafter.

17.9 On 1 August 2014, Muthambi sent an email to Mr Chawla, to which she attached a draft of a proclamation in the name of the President for the transfer of administration, powers and functions under the Electronic Communications Act from the Minister of Telecommunications and Postal Services to the Minister of Communications. The emailed message was: *"See attached Proclamation that President must sign".*[196] Again, the use of the word "must" in the email from Minister Muthambi relating to the proposed exercise of a presidential power is disturbing.

[195] Copies of the emails of Minister Muthambi and Mr Chawla, and the letter of Minister Muthambi to Minister Cwele are attached as Annexure **COM 14 & COM 15**.

[196] Copies of the email and the proposed proclamation are attached as **COM 16; COM 17 & COM 18**.

17.10 On 8 August 2014, *"Ellen"* of Fortune Holdings emailed Muthambi in reply, thanking her for the proposed proclamation that the President *"must"* sign. The email was signed by *"Zandile",* presumably Zandile Ellen Tshabalala, the Chairperson of the SABC at the time. *"Zandile"* copied Mr Chawla and a certain Khumalo at the SABC on this correspondence.[197]

17.11 The draft Presidential proclamation was never promulgated in the self-contained form attached to the emails between Minister Muthambi, Mr Chawla and Tony Gupta. However, on 2 December 2014 the President Promulgated Proclamation 79 of 2014 which transferred to the Minister of Communications a range of powers including the power to make national policy on information, communications and technology under section 3 of the Electronic Communications Act insofar as it relates to broadcasting.

17.12 With policy on Broadcast Digital Migration safely now under her control, Minister Muthambi published her amendments to the policy on 18 March 2015 under Government Notice 232 of 2015.[198] The final policy included neither of the two features mentioned above in relation to Minister Carrim's published draft of December 2013.

17.12.1 The policy no longer tied the Government to any dates for the digital migration process, and

[197] The email of "Ellen" is attached as **COM 19**.

[198] A copy of the promulgated amendments to the policy is attached as **COM 20A**.

17.12.2 The policy provided that Government subsidised set top boxes would not be capable of receiving encrypted signals. It thus reversed Minister Carrim's proposal which had been in accordance with ANC policy, and replaced it with a decision that was contrary to ANC policy. In changing the policy in this manner, Minister Muthambi provoked criticism in a public statement issued by the Tri-Partite Alliance in February 2015.[199]

17.13 As pointed out above, when Minister Muthambi was taken to Court by e-TV in relation to her failure to consult publicly in relation to the changed provisions relating to encryption, the Constitutional Court commented on her *"evasive and suspicious"* responses relating to the identity of the persons with whom she had consulted in relation to the changes that she made. In the light of the emails described above, the reasons for this evasiveness are obvious.

17.14 We are unaware of what particular interests the Gupta family may or may not have had in delaying the digital migration process or in resisting the subsidisation of set top boxes that were capable of being used for encrypted signals. The communications described above between Minister Muthambi, Mr Chawla and Tony Gupta amount to an abuse of her office. There is no reasonable explanation for communications of this nature between the Minister of Communications and members of the

[199] See the *Business Day* Article of 18 February 2015 'Muthambi defies ANC on digital TV boxes' Annexure **COM 20B**.

Gupta group who control a television station subject to her regulatory jurisdiction.

The Minister's appointment of Hlaudi Motsoeneng as COO of the SABC

18 On 8 July 2014, Minister Muthambi appointed Hlaudi Motsoeneng as permanent COO of the SABC, in spite of the Public Protector's findings and remedial action. The High Court and Supreme Court of Appeal found that the Minister's decision was, on the face of it, irrational and unlawful.

19 The explanation for Minister Muthambi's protection and promotion of Mr Motsoeneng – notwithstanding his abuses of power at the SABC – appears to lie, at least in part, in the Minister and Mr Motsoeneng's shared improper relationship with the Guptas.

20 As Group Chief Executive of Stakeholder Relations at the SABC (April 2011-November 2011), and later as acting COO (November 2011-July 2014) and permanent COO (July 2014 – November 2015) of the SABC, Mr Motsoeneng promoted the SABC's so-called *"business relationship*" with the Gupta's media company, TNA Media Group (Pty) Ltd.

21 Under Mr Motsoeneng, the SABC concluded agreements with TNA Media in terms of which the SABC would broadcast the New Age "*Business Breakfasts*" at a loss to the SABC, while TNA Media amassed considerable profits and media exposure from the broadcasts.

22 Parliament's ad hoc Committee on the SABC noted in its report that –

22.1 SABC producer, Mr Vuyo Mvoko gave evidence that SABC resources were diverted to fund ANN7, the Gupta-owned news channel. He indicated that the SABC's *Morning Live* resources were diverted to pay for the production costs associated with the TNA Business Breakfasts. The SABC did not generate any revenue from the briefings.[200]

22.2 The former acting Group CEO of the SABC (between July 2011 to January 2012), Mr Phil Molefe *"corroborated evidence that the SABC bore costs associated with the Business Breakfasts. In his submission he indicates that the shows came at a huge cost to the SABC. Technical equipment for one production could cost R1 million or more. In addition, the SABC had to cover the flights, accommodation and subsistence of its production staff when the briefings took place outside of Johannesburg. Mr Molefe confirms that while the SABC carried the production costs, the TNA Media Group earned the revenue exclusively."*[201]

23 In addition, the SABC paid huge subscriptions to the Gupta-owned New Age newspaper. This escalated from R238,356 in 2011 to close to a R1 million in 2015/2016.[202]

24 During Parliament's inquiry into the SABC, Mr Molefe made a serious allegation that, in November 2011, he was pressured by Mr Motsoeneng and then

[200] Ad hoc Committee report para 17.1.3. See also para 8.2.4.

[201] Ad hoc Committee report para 17.1.3. See also para 18.1.1 on the corroborating evidence of Mr Mvoko and Ms Gqubule-Mbeki.

[202] Polity, '*DA: Phumzile van Damme says Muthambi refuses to disclose Gupta meetings*', 30 November 2016. See also Ad hoc Committee report para 8.2.2.

chairperson of the SABC, Dr Ben Ngubane to increase Mr Motsoeneng's salary by R500,000. When he refused, Mr Motsoeneng allegedly said to Ngubane: "*Chair, I told you that this is not our man. So I'm going to Pretoria tonight".*[203] This reported conversation suggests that Mr Motsoeneng was protected not only by Minister Muthambi, but also by President Zuma.

25 Mr Motsoeneng's gross abuses of power at the SABC – which included diverting public resources vested in the SABC to benefit the Gupta's rival media company – appear to have been sanctioned by both Minister Muthambi and President Zuma.

Muthambi proposed to appoint an ICASA chair to favour the Gupta-Zuma media company, Infinity Media

26 In December 2015, Minister Muthambi reportedly offered to appoint Ms Vuyo Batyi as the chairperson of the Independent Communications Authority of South Africa (ICASA) on condition that she grant the Gupta's media company, Infinity Media (Pty) Ltd a free-to-air television licence for its ANN7 channel. President Zuma's son, Duduzane Zuma also has a stake in Infinity Media, through Mabengela Investments which reportedly has a shareholding of 21%.[204] When Ms Batyi refused to comply with this condition for appointment, Minister Muthambi declined to gazette her appointment.

[203] News24, '*Hlaudi's R500k demand, 'Pretoria', Guptas take centre stage in SABC inquiry'*, 9 December 2016.

[204] News24, '*Gupta bid cost Icasa chair her job – report'*. 31 July 2016.

27 The incident was reported by the *Sunday Times* in July 2016, after Ms Batyi resolved to take legal action against the Minister.[205] It was reported that:

> *"The Sunday Times has established that on December 4 last year Muthambi sent Batyi a letter appointing her as chairwoman for one year, even though the Icasa Act stipulates a five-year term.*
>
> *Two independent sources, one with direct knowledge of the offer, said that on December 6 Batyi was summoned to a meeting with Muthambi and told her appointment was conditional on her approving Infinity Media's application for a licence.*
>
> *Muthambi told Batyi her job came 'with conditions' and she had been appointed only for a year to "prove herself", sources said.*
>
> *Batyi refused to approve the application, the sources said. The next day Batyi received a second letter from Muthambi saying she could only commence her duties as chairwoman once her appointment had been gazetted. But in April, when Muthambi gazetted a list of four new councillors, Batyi's name was not included."*[206]

Muthambi interfered in the Inter-Ministerial Committee's investigation into the closure of the Guptas' bank accounts

28 In May 2016, Minister Muthambi and her advisor, Mr Mzwanele Manyi, attended meetings that the Inter-Ministerial Committee held with banks, when it

[205] Sunday Times, *'Minister attached Gupta strings to Icasa's top job'*, 31 July 2016.

[206] This article is attached marked **COM 21**.

investigated the closure of the Guptas bank accounts. Extraordinarily, Minister Muthambi intervened despite not having been appointed by Cabinet to this committee.

29 Minister Muthambi attended a meeting that Mr Zwane held with Nedbank, in which Nedbank accused Mr Zwane of improperly seeking to influence it to reopen its Gupta-held accounts. Minister Muthambi failed to give any explanation for why she saw fit to attend this meeting.[207]

Muthambi's advisors are known Gupta promoters

30 Minister Muthambi had appointed Lungisani Daniel Mantsha and Mr Manyi as her legal and special advisors. Both are reported to have close ties to the Guptas, and to have done the Guptas' bidding.

31 Mr Mantsha acted as Minister Muthambi's legal advisor during the course of 2015 and 2016, despite having been struck from the roll of attorneys in 2007 after the High Court found that he was guilty of a range of counts of serious misconduct and had been untruthful to his clients, the Law Society and the Court.[208]

32 Shortly after being appointed by Minister Brown as Chair of Denel (on 24 July 2015), Mr Mantsha oversaw the conclusion of the Denel Asia joint venture between Denel and VR Laser Asia, a Gupta–aligned company.[209] VR Laser Asia is wholly owned by Gupta business partner, Salim Essa and is an associate company of VR Laser Services, a South African steel-cutting business in which

[207] Business Day, '*Nedbank CEO reveals details of Gupta intervention'*, 13 December 2016.

[208] Law Society of the Northern Provinces v Mantsha [2007] ZAGPHC 132 (25 July 2007)

[209] AmaBhungane, '*How Denel was highjacked*'. 30 May 2016.

the Guptas and Duduzane Zuma have an interest (through Westdawn Investments).[210]

33 The email records on the Sahara company server evidence direct and improper ties between Mr Mantsha and the Guptas. The emails evidence that –

33.1 Mr Mantsha was flown to India and Dubai at the expense of the Guptas on several occasions.

33.1.1 During August 2015, Mr Mantsha was flown to India, in the Gupta's jet (ZS-OAK) and in the company of Mrs Angoori Gupta, Mr Rajesh Gupta, Mrs Arti Gupta, Mr Sashank Singhala, Mr Amankant Singhala, Mr Salim Essa and Mr Gysbert van den Berg. He was accommodated for a few nights with the Guptas at the ICT Maratha Hotel in Mumbai, in a room near the Guptas' presidential suite, at the Guptas' cost.[211]

33.1.2 In October 2015, Mr Mantsha travelled to and from Dubai, in the company of Duduzane Zuma and Duduzane's wife (Ms Shanice Zuma). Flights were booked for all three by the Gupta's travel agents and were invoiced to the Gupta's Sahara company. Visas were arranged by Sahara (Mr Chawlu and Tony Gupta) for Mr Mantsha and Ms Shanice Zuma.[212]

[210] AmaBhungane, '*Guptas conquer state arms firm Denel',* 5 February 2016.

[211] The emails evidencing these facts are attached marked **COM 22 & 23**.

[212] The emails evidencing these facts and attached records are attached marked **COM 24; COM 25**; **COM 26; COM 27; COM 28; COM 29 & COM 30**

33.1.3 On 3 January 2016, Sahara's CEO, Mr Chawla confirmed travel arrangements for Mr Mantsha. Mr Mantsha was booked into the Oberoi Hotel in Dubai and Mr Chawla arranged a concierge service for Mr Mantsha to an exclusive housing estate in Dubai, at the expense of the Gupta's Sahara company.[213]

33.2 Mr Mantsha sent the Guptas confidential information he received in his capacity as Chairperson of Denel, including from the Minister of Public Enterprises.

33.2.1 On 23 November 2015, Mr Mantsha received an email from Keromamang Mhlongo, of the Department of Public Enterprises, whose minister, Lynne Brown, has political oversight of Denel. Titled *"PFMA Section 54(2) Pre-Notification on the Proposed Formation of Denel Asia,"* the e-mail was Minister Brown's response to Denel's notification to her of the proposed tie-up. The e-mail was marked "confidential" and was meant to advise both Denel executives and the government in their dealings with the Guptas.[214]

33.2.2 Five days later, on 28 November 2015, Mr Mantsha forwarded Brown's e-mail to Mr Chawla, CEO of Sahara.[215]

[213] The emails evidencing these facts are attached marked **COM 31; COM 32 & COM 33**.

[214] The email is attached marked **COM 34 & COM 35**.

[215] See **COM 34**.

33.3 Mr Mantsha also sent the Guptas his personal bills. On 3 August 2015, Mr Mantsha sent his municipal rates bill of R14 238 for his Randburg home, dated 11 June 2015, to Sahara's CEO, Mr Chawla, saying: *"Please find the attached document for your urgent attention."* [216]

34 Minister Muthambi appointed Mr Manyi as her special advisor in 2016. He resigned later in the same year.

35 Mr Manyi is widely known to be a promoter of Gupta-interests. Email records from the Sahara computer server evidence Mr Manyi's close association to the Guptas. In particular, they reveal that Mr Manyi scouted for Guptas, sending them the CVs of high profile persons, including his own, for vetted appointments to the boards of state-owned enterprises.

35.1 In May 2014, Mr Manyi sent two emails to Sahara CEO Ashu Chawla. He attached his own CV and that of Attorney Xoliswa Mpongoshe under cover of the note: "*as discussed with Tony*".[217]

35.2 In 2013, Mr Manyi was reportedly head-hunted by the Guptas to present a weekly talk-show on the Gupta-owned television channel, ANN7, *"Straight Talk".*[218]

35.3 As President of the Progressive Professionals Forum (PPF), Mr Manyi has led the PPF in vociferously opposing the promulgation into law of the

[216] This email is attached as **COM 36 & COM 37**.

[217] These emails are attached marked **COM 38; COM 39; COM 40 & COM 41**. Mpongoshe's response was published in *Sunday Times*, 'Manyi implicated in parastatal jobs bid, leaked "Gupta email" shows', 28 May 2017.

[218] Mail & Guardian, 'Jimmy Manyi: Gupta TV's oprah', 23 August 2013.

Financial Intelligence Centre (FIC) Amendment Act – a law that would strengthen the FIC's powers to stamp out money-laundering and the illicit flow of funds. Notably, the FIC identified 72 "suspicious" transactions in the Gupta family's various personal and business accounts, valued at R6.8 billion. The FIC's list of red-flagged transactions in the Gupta accounts was disclosed in the former Minister of Finance, Pravin Gordhan's court application against Oakbay Investments.[219]

35.4 In December 2016, the *Sunday Times* reported how the Black Business Council rebutted executive member Mr Manyi's alleged attempt to have Gupta company Oakbay become a corporate member (after the closure of their bank accounts in April 2016).[220]

The appointment of Minister Ayanda Dlodlo in March 2017

36 In the Cabinet reshuffle of 30 March 2017, President Zuma appointed Ms Ayanda Dlodlo as the new Minister of Communications. This appointment evidences Zuma's continued concern to appoint to this national portfolio persons who are friendly with the Guptas and their associates, including Duduzane Zuma.

37 The records from the Sahara company server evidence that from 16 to 19 December 2015, Ms Dlodlo stayed at the luxury Oberoi Hotel in Dubai. While Ms Dlodlo's account was settled by Mr Fana Hlongwane, the Oberoi liaised with Mr Chawla (who in turn liaised with Duduzane Zuma) in respect of Ms Dlodlo's

[219] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others*, High Court (North Gauteng, Pretoria) case no. 80978/2016. See also News24: 'Here it is: The full list of 72 'dodgy' Gupta transactions', 15 October 2016.

[220] Sunday Times, *'Black Business Council snubs Guptas'*, 30 December 2016.

reservation. Further, the Oberoi sent Mr Chawla the invoice that had been paid by Mr Hlongwane, which invoice Mr Chawla forwarded to Tony Gupta.[221]

38 At the time, Ms Dlodlo was serving as Deputy Minister of Public Service and Administration. Mr Hlongwane is known to be a close associate of Mr Duduzane Zuma and is (at least) a known *"acquaintance"* of the Guptas.[222]

39 Minister Dlodlo has admitted to having a scheduled trip to Jordan diverted for her stay in Dubai. It has since been established by the Democratic Alliance that Minister Dlodlo failed to declare her sponsored stay in Dubai in the National Assembly's Register of Members' Interests.[223]

40 Given their investment in news media and television broadcasting in South Africa, the Guptas and their associates in Infinity Media (Pty) Ltd – which include Duduzane Zuma – clearly have a vested interest in the appointment of the Minister of Communications. President Zuma appears intent on promoting and supporting these vested interests through his appointment of the Minister of Communications.

[221] These records are attached marked **COM 42; COM 43; COM 44 & COM 45**.

[222] Mr Hlongwane is mentioned in the Public Protector's report, *State of Capture*, Report 6 of 2016/2017, 14 October 2016. The report records in para 5.27, p 107 that Mr Hlongwane considers himself to be an "uncle" to Duduzane Zuma, and is "a casual acquaintance" of members of the Gupta family.

[223] Sunday Times ' Communications Minister Ayanda Dlodlo failed to declare her trip to Dubai', 7 June 2017.

CHAPTER 6: THE PRESIDENT'S REMOVAL OF FINANCE MINISTERS

Overview: The key facts

1 The Ministry of Finance exercises ultimate control over government finances, including those of State Owned Enterprises. It is also responsible for regulating the banking industry and enforcing money laundering legislation. As we have seen above, the Guptas have received billions of rands in contracts linked to State Owned Enterprises. They have also been denied banking facilities by South African banks as a result of suspicions that their bank accounts are being used for money laundering. The Guptas accordingly have an obvious interest in influencing the Minister of Finance and in removing from that position anyone who is not willing to exercise power for their benefit.

2 President Zuma has changed Finance Ministers four times during his terms in office. This is the most number of changes to the post under one President since 1994. The last three changes to the post require scrutiny.

3 During October 2015 the Deputy Finance Minister, Mcebisi Jonas was invited to a meeting by Duduzane Zuma and Fana Hlongwane. The meeting was ultimately held on 23 October 2015 at the Rosebank Hyatt. An hour into the meeting, Duduzane Zuma requested the meeting to be moved to a quieter venue. Duduzane Zuma drove Mr Jonas to the Gupta household in Saxonwold,

where Jonas met with one of the Gupta brothers, whose name he does not recall.[224]

4 At this meeting, the Gupta brother offered Mr Jonas the position of Minister of Finance in exchange for R600 000.00 immediately and the promise of more money later. Mr Jonas declined the offer and left the meeting. After this meeting, he warned the incumbent Finance Minister, Mr Nhlanhla Nene, that his position was in danger.

5 On 9 December 2015, the President removed Mr Nene from the office of Minister of Finance and replaced him with David van Rooyen. Mr Van Rooyen had no experience in finance, and had served as a parliamentary backbencher. Mr Van Rooyen was, however, closely connected to the Gupta Family. The true extent of his connection was revealed in the Public Protector's report entitled "*State of Capture*". The Public Protector's investigation included records of Mr Van Rooyen's mobile phone activity. This investigation revealed that –

5.1 in the period preceding Mr Nene's dismissal, Mr Van Rooyen frequented the Gupta Household in Saxonwold. This in circumstances when he should have been in Cape Town as Parliament was in session; and

5.2 the night before Nene's dismissal, Mr Van Rooyen made several telephone calls from the Gupta Household.

[224] Jonas Answering Affidavit in Minister of Finance v Oakbay and Others, Case no. 80978/2016, pp6-8, paras 12-16 - Annexure **NAT 1**

6 On Mr Van Rooyen's first day he arrived with two advisors, Mr Mohamad Bobat and Mr Ian Whitley. Both of these men were closely connected to Gupta family businesses. A few hours into his appointment, Mr Whitley sent an email attaching strategic Treasury documents to a series of close Gupta business associates. Mr Whitley's covering email, comprised only two words: "*Gents, finally*".

7 Mr Van Rooyen's appointment was an economic disaster. The President was forced to replace Mr Van Rooyen with Mr Gordhan on 13 December 2015.

8 Mr Gordhan was an effective Finance Minister. However, his second tenure as Finance Minister was characterised by conflict with President Zuma. On 27 March 2017, President Zuma dismissed Mr Gordhan and Mr Jonas. This occurred in circumstances where Mr Gordhan acted against Gupta interests.

9 Mr Gordhan was replaced as Minister of Finance by Mr Malusi Gigaba, someone perceived to be close to the Guptas.

10 The sequence of events relating to the President's repeated replacement of the Minister of Finance leads unavoidably to the conclusion that his decisions in this regard have been influenced by the interests of the Gupta family and his son whose fortune is inextricably linked to theirs.

11 In this section we describe, in chronological order, President Zuma's actions regarding the position of Minister of Finance.

The removal of Nhlanhla Nene

12 The President's removal of Nene as Minister of Finance is a matter of public record. This episode presents the starkest example of the abuse of the President's relationship with the Gupta family.

13 The starting point is the Guptas' offer of the post to Mr Jonas. Mr Jonas has described these events on three separate occasions and his version of events has remained consistent.[225] It can be summarised as follows:

13.1 During 2015, Mr Jonas was approached by Mr Fana Hlongwane, who proposed a meeting with Duduzane Zuma. Although he had never met Duduzane Zuma, Mr Jonas was already aware of his close ties with the Gupta family. In any event, Mr Jonas agreed to meet Duduzane Zuma. In the build-up to this meeting, Duduzane Zuma and Mr Jonas exchanged text messages, which were recorded in the *State of Capture* report.[226]

13.2 On 23 October 2015, Mr Jonas met Duduzane Zuma at the Hyatt Regency Hotel in Rosebank, as they had agreed. After a short while, Duduzane Zuma asked to move the meeting to a more private location for a discussion with a third party. Mr Jonas agreed. Mr Jonas and Duduzane Zuma left Rosebank in Duduzane Zuma's vehicle. Using Duduzane

[225] Jonas first released a public statement, a copy of which can be found on the following website: http://www.treasury.gov.za/comm_media/press/2016/2016031601%20-%20Statement%20by%20Deputy%20Minister%20Jonas.pdf. Jonas also gave evidence to the Public Protector in her State of Capture Report, which version is recorded in that report at pp 91-94, para 5.17. Finally, Jonas defended his version in an affidavit filed in the North Gauteng High Court in *Minister of Finance v Oakbay and Others*, Case no: 80978/16.

[226] State of Capture report, pp100-103, para 5.23

Zuma's vehicle, the pair drove to the Gupta family residence in Saxonwold. Mr Jonas had never been there before.

13.3 When they arrived, they were met by Ajay Gupta along with Mr Hlongwane. There was no exchange of pleasantries. Ajay Gupta informed Mr Jonas that they had conducted several investigations into Mr Jonas and his associates. Pursuant to those investigations they had discovered that Mr Jonas was part of a faction that sought to undermine President Zuma.

13.4 Despite this, Ajay Gupta advised Jonas that they were going to make him Minister of Finance.

13.5 Mr Jonas reacted with shock and irritation. He declined the offer, informing Ajay Gupta that only the President of the Republic was empowered to make such decisions. Mr Jonas stood up and left the meeting. As he was leaving, Ajay Gupta offered him payment of R600 million rand in an account of his choosing and whatever amount of cash he could carry with him.

13.6 Ajay Gupta also mentioned the names of persons with whom they were working. He informed Mr Jonas that they (the Gupta family) made lots of money from the State. They wanted to make more money, but Treasury was an impediment to their efforts.

13.7 Duduzane Zuma and Mr Hlongwane remained silent during this meeting.

13.8 Shortly after this incident, Mr Jonas informed both Minister Nene and Mr Gordhan about the meeting. Both Minister Nene and Mr Gordhan confirmed this fact.

14 On 9 December 2015, the President removed Mr Nene as Minister of Finance. According to Mr Nene, the President verbally informed him of his dismissal. When informing Mr Nene of the decision to remove him as Minister of Finance, the President stated that he would be deployed to the African Regional Centre of the BRICS Bank as Director General.[227]

15 Later that evening, the President announced his decision in a media statement. The primary reason the President cited for Mr Nene's dismissal, was that Nene was due for "…*deployment to another strategic position*".[228]

16 This reason appears not to have been genuine.

16.1 Mr Nene never was appointed to the post of Director General of the BRICS Bank Africa Centre.

16.2 There is no evidence to suggest that any decision by BRICS partners had been taken to offer the post of Director General of the BRICS Bank Africa Centre.

[227] State of Capture Report, p95, para 5.18(e)

[228] http://www.thepresidency.gov.za/content/statement-president-jacob-zuma-appointment-new-finance-minister Annexure **NAT 2**.

16.3 The suggested appointment had not been canvassed with Mr Nene. So there was no basis upon which to assume that he would take the appointment, even if it was available.

16.4 On the President's own version, Minister Nene had "*...done well since his appointment as Minister of Finance during a difficult economic climate.*" In those circumstances, it would have been strange to remove him from office with a view to deploying him at the BRICS Bank without first establishing that he was amenable to taking up the position at the BRICS Bank.

16.5 The sudden removal of Mr Nene was calculated to be controversial and to be damaging to the economy. In the circumstances, if the purpose of the decision was to free up Mr Nene to take a position at the BRICS Bank, it is most unlikely that this would not have been canvassed fully with Mr Nene in advance.

17 It is much more likely that Minister Nene was removed because he had taken decisions against the Guptas and other friends of the President.

17.1 Minister Nene opposed the Nuclear Build Programme on the basis that it was fiscally irresponsible. During the cabinet meeting that preceded his dismissal, on 9 December 2015, Minister Nene

> "*…delivered a presentation laying out the unaffordability of Nuclear; and the Energy Dept., at the same meeting, submits a*

memo to cabinet recommending that nuclear procurement go ahead. Cabinet approves this and hours later Nene is fired."[229]

Given their interests in Shiva Uranium, the Guptas had an obvious interest in the Nuclear Build Programme. Gupta companies hold the entire issued shareholding of Shiva Uranium and the three Gupta brothers are all directors of the company.[230]

17.2 Minister Nene had also clashed with Ms Dudu Myeni, the Chairperson of SAA's board, when he declined to give SAA a guarantee or to approve its aircraft leasing deal. Ms Myeni is the Chairperson of the Jacob Zuma Foundation and is the President's close *confidante*.

18 The decision to remove Minister Nene was ill-considered. The impact on South Africa's economy was devastating. The JSE All-Share index lost R169 Billion in the wake of the President's announcement. The currency fell to an all-time low of R16.054 to the US dollar.[231]

Mr Van Rooyen's brief stint as Minister of Finance

19 Mr Van Rooyen's cellular phone records place him in the vicinity of the Gupta's home in Saxonwold before and after his appointment as Minister of Finance on 9 December 2015.[232] On 8 December 2015, Minister Van Rooyen's cellular

[229] Betrayal of Promise Report, p18

[230] These facts are recorded on a spreadsheet of Gupta family companies that is one of the Sahara documents. It is attached as Annexure **NAT 3**

[231] https://www.newsclip.co.za/Uploads/Files/The_Finance_Minister_Shuffle.pdf

[232] State of Capture Report, p105

phone records place him in Saxonwold.[233] In the absence of any contrary explanation from Minister van Rooyen, it has to be assumed that he was meeting with the Guptas.

20 Mr Van Rooyen seems to have shared news of his impending appointment to Minister of Finance more than a month before it was announced. This is so because his friend, Mr Gaddafi Rabotapi, claimed to have known about this decision. So too did Van Rooyen's brother, as was pointed out by Mr Trevor Manuel in an open letter to Minister Lindiwe Zulu.[234] Despite this, the President remained silent about his plans to Cabinet. Cabinet's lack of knowledge is apparent from the Cabinet Statement from that same day, which did not mention this development.[235]

21 On 9 December 2015, Van Rooyen arrived at Treasury to occupy his position. On the first day, he arrived with two advisors, Messrs Ian Whitley and Mohamed Bobat.

22 The Guptas business associate Mr Eric Wood knew as early as 26 October 2015 that Mr Nene was going to be fired and that Mr Bobat would be appointed advisor to his successor. This fact is confirmed in an affidavit given to the Public Protector by a whistle-blower, who indicated that on 26 October 2015, she was informed by Mr Wood, to whom she then reported at Regiments Capital, that the

[233] State of Capture Report, p104, para 5.24(d)

[234] Obtainable from: https://www.scribd.com/doc/293763515/Trevor-Manuel-s-letter-to-Lindiwe-Zulu#fullscreen&from_embed.

[235] Refer to : http://www.gov.za/speeches/statement-cabinet-meeting-9-december-2015-11-dec-2015-0000. Also See attached as annexure **NAT 4**

President would replace Minister Nene and that Mr Bobat would be appointed as an advisor to the new Minister. Mr Bobat was then expected to channel tenders from National Treasury to a team of experts, including persons employed by Trillian Capital.[236]

23 Mr Whitley is Jessie Duarte's son in law. Shortly after he arrived, Mr Whitley obtained a Treasury document addressing the Economic Outlook for South Africa in the wake of the dismissal of Minister Nene.[237] As appears from the email chain under which it was forwarded,[238] the document was produced in response to a request for all Directors General to address six topics in advance of a Ministerial meeting to address ways of turning around the economy. Points 2 and 3 were issues of particular significance to the Guptas: the state of SoEs and corruption and perceptions. Points 4 and 6 would also be of special interest to the Guptas: beneficiation and mining and 9 point plan and each department's contribution.

24 Immediately upon receiving this document Mr Whitley shared it with Mr Bobat and Mr Malcolm Mabaso, Minister Zwane's advisor who, as we point out in Chapter 4 above, had inexplicably taken up residence at the Treasury when Minister Van Rooyen was appointed. Mr Whitley's covering email comprised only two words, the now notorious "Gents, finally…"

25 Within three minutes of receiving the document from Mr Whitley, Mr Bobat had forwarded it to two close associates of the Guptas, Mr Wood and Mr Seleke. Mr

[236] http://www.fin24.com/Economy/gupta-linked-firm-knew-of-nenegate-months-in-advance-report-20161023

[237] Annexure **NAT 5** (The presentation)

[238] Annexure **NAT 6** (The email chain)

Bobat's email to Mr Seleke was sent to his anonymous infoportal1@zoho.com address. As we point out in Chapter 3, this address has repeatedly been used by Mr Seleke for forwarding confidential government documents to the Guptas.

26 Minister Van Rooyen remained in the post for approximately four days. On 13 December 2015, the President replaced Minister Van Rooyen with Gordhan as Minister of Finance. In a media statement announcing the decision, the President said he had taken representations, which led him to change his mind.[239]

27 Following Minister Van Rooyen's removal from the Ministry of Finance, the Gupta family appear to have treated him to a consolation trip to Dubai. Emails obtained from the Sahara company server show that, on 20 December 2015, the Guptas booked and paid for Minister van Rooyen's stay at the luxury Oberoi Hotel and for a chauffeur for him while he was in Dubai.[240]

The dismissal of Minister Gordhan

28 President Zuma appointed Minister Gordhan to take the place of Minister van Rooyen, when the response to Minister van Rooyen's appointment made clear that it was necessary to replace him with someone who could be trusted to stabilise the economy.

29 Minister Gordhan's attempts to stabilise the economy brought him into regular conflict with the Guptas as government officials under the authority of Minister

[239] http://www.thepresidency.gov.za/content/announcement-new-ministers-finance-and-cogta

[240] See annexure **NAT 7**.

Gordhan took responsible decisions which conflicted with the interests of the Guptas. By way of illustration we refer to the following:

29.1 His refusal to sanction the Denel / VR Laser joint venture which is discussed in Chapter 3 above;[241]

29.2 The Treasury's robust investigation of the Eskom / Tegeta coal contracts discussed in Chapter 3 above, in the face of apparent obstruction from Eskom.[242]

29.3 Treasury's refusal to authorise excess payments by Eskom to Tegeta worth almost R4billion.[243] For example:

29.3.1 During August 2015, Treasury declined Eskom's request to increase the value of Eskom's Agreement with Tegeta's Brakfontein Colliery by another R2.94 billion.

29.3.2 Later that month, Treasury declined Eskom's request to extend Optimum Colliery's supply agreement with Arnot Colliery by a further six months without going on open tender.

29.3.3 Treasury had noted that Tegeta constantly overcharged Eskom for its coal supply and underperforms in the quality of coal it delivers to Eskom.

[241] See for example Annexure **NAT 8** (IOL article of 13 April 2016 attached "Gordhan lashes Denel over Gupta linked firm")

[242] See Annexure **NAT 9** (Treasury statement attached "2016082901 - Statement on Eskom Contracts")

[243] http://www.news24.com/SouthAfrica/News/treasury-blocks-r4bn-gupta-deals-20170423-3

29.4 The failure of the Minister and the Registrar of Banks to fast-track the application by the Gupta-linked company Vardospan Limited to purchase the shares in Habib Overseas Bank Limited and thus to enable the Guptas to obtain a South African Bank. One of the primary concerns in relation to this application was the failure of Vardospan Limited to prove that it had the financial resources necessary to underwrite a Bank. In its application, it relied on no liquid capital and based its claim to financial resources on the interests of its ultimate controlling shareholder, Mr Salim Essa, in three companies that we discuss in Chapter 3 above, Tegeta Exploration and Resources (Pty) Ltd, Trillian Capital Partners (Pty) Ltd and VR Laser Services (Pty) Ltd. The Minister was understandably reticent to give Vardospan control over a banking licence on the basis of these assets;[244]

29.5 The Financial Intelligence Centre Investigation into suspicious transactions concluded by the Guptas:

29.5.1 On 4 August 2016, the Minister received a letter along with a certificate from the Director of the Financial Intelligence Centre (FIC). It made for disturbing reading:

29.5.2 The FIC certificate identified 72 suspicious transactions from various members of the Gupta family and entities within their stable of companies. The total value of these transactions was R6.8 billion rand.

[244] The facts in this regard were set out in the Answering Affidavit of the Minister in the urgent application that Vardospan Limited unsuccessfully brought against the Registrar Minister Gordhan and others in the North Gauteng High Court under case number 21622/2017. A copy of that affidavit is Annexure **NAT 10**.

29.5.3 The largest suspicious transaction was a transaction of R1.3 billion in respect of the Optimum Mine Rehabilitation Trust. The Department of Mineral Resources under Minister Zwane had approved this transaction. The amount was to be transferred from a closed Standard Bank account to an account held with the Bank of Baroda.[245]

29.5.4 This transaction presented the real risk that the R1.3 billion, which was meant to be used to rehabilitate the mine, was transferred out of the country and used for other purposes.

30 The issue of sharpest conflict between Minister Gordhan and the Gupta family concerned the closure of Gupta linked accounts by various South African banks. This episode also illustrates the extent to which the Gupta family was able to enlist the support of President Zuma, Minister Zwane and Minister Muthambi to pursue its interests.

31 During April 2016, Oakbay announced that its bank accounts had been closed by the South African banks with which it held bank accounts and which were concerned about the possibility of money laundering transactions passing through their accounts.[246]

32 On 8 April 2016, Oakbay approached Minister Gordhan demanding his intervention to reverse this decision. In this letter, Oakbay's CEO stated that the banks' decision to close their accounts was **"***…the result of an anti-competitive*

[245] Gordhan FA in *Minister of Finance v Oakbay and Others*, Case no.: 80978/2016, paras 27-28.

[246] Para 7, Gordhan FA, Minister of Finance v Oakbay and Others

and politically-motivated campaign designed to marginalise our businesses. We have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank … decided to close our business accounts. ... As the CEO I now hope to draw a line under the corporate bullying and anti-competitive practices we have faced from the banks."[247]

33 On 13 April 2016, at a meeting convened and chaired by President Zuma, Cabinet decided to intervene in the dispute between the banks and the Guptas. It announced its decision in the following media statement:

> *"Cabinet noted the actions by the four banks that gave notice to close the bank account of a company. Whilst Cabinet appreciate the terms and conditions of the banks, the acts may deter future potential investors who may want to do business in South Africa. Cabinet has endorsed that the Ministers of Finance, Labour and Mineral Resources should open a constructive engagement with the banks to find a lasting solution to this matter."*[248]

34 Instead of Constructive engagement, Cabinet established an inter-ministerial committee ("IMC") to investigate allegations that the closure of the Gupta family accounts was done "*unilaterally and in collusion*." This IMC was led by Minister Zwane, whose improper relationship with the Guptas is addressed in Chapter 4 above.

[247] Gordhan FA in Minister of Finance v Oakbay and Others, Case no.: 80978/2016, para 9

[248] Statement on Cabinet Meeting on 13 April 2016, para 5.2. Obtainable from http://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-13-april-2016

35 Over the coming months, the IMC conducted meetings with the heads of the major banks. Some banks declined to take part in the IMC, as it was not properly constituted. The CEO of Nedbank, Mr Brown, engaged the IMC. He reported that he left the meeting with the distinct impression that the purpose of cabinet's intervention was (i) to determine whether there was collusion; and (ii) to ask Nedbank to be Oakbay's primary banking partner.[249]

36 As has been pointed out in chapters 4 and 5 above

36.1 For no apparent reason, Minister Muthambi, a close ally of the Guptas, took part in interviews conducted by the IMC, and

36.2 On 1 September 2016, Minister Zwane issued a public statement falsely stating that Cabinet had agreed on the recommendation of the Inter-Ministerial Committee that a judicial inquiry investigate why South Africa's banks had blacklisted Gupta-owned businesses.

37 While the IMC had been pursuing its business, the Guptas continued to deal directly with Minister Gordhan.

38 On 17 April 2016, Oakbay wrote a further letter to Minister Gordhan requesting his assistance.[250]

38.1 On 25 April 2016, Minister Gordhan sought a legal opinion on whether he could intervene. Minister Gordhan was advised that neither he, nor any

[249] See the affidavit of Mr Brown which is attached as Annexure **NAT 11**.

[250] Gordhan FA in *Minister of Finance v Oakbay and Others*, Case no.: 80978/2016, para 11

member of the National Executive could intervene. Minister Gordhan summarized the basis of the opinion as follows:[251]

> "*The National Executive (comprising Cabinet and such individual Ministers as may be appointed by the President) are governed by the Constitution and national legislation. They are accordingly entirely 'creatures of statute' with only such powers as the law itself confers on them.*
>
> *Nothing in law, the opinion advised, authorised governmental intervention with the banker-client relationship arising by contract. The opinion also emphasised the obligations imposed by the Basel Committee on Banking Supervision at the Bank of International Settlements on South African banks. The Committee had imposed an international duty regarding know-your-customer (KYC) standards. I was further advised that required KYC policies and practices "not only contribute to a bank's overall safety and soundness", but also "protect the integrity of the banking system by reducing the likelihood of banks becoming vehicles for money-laundering, terrorist financing and other unlawful activities.*
>
> *These principles, I was further advised, are given effect to in domestic law by the FICA. In addition, the Banks Act imposes reporting duties, requires the Registrar of Banks under certain circumstances to disclose information reported to him to third parties, and contemplates*

[251] Gordhan FA in *Minister of Finance v Oakbay and Others*, Case no.: 80978/2016, para 13

that any concerns regarding the banking sector be communicated by the Registrar to inter alios the Minister of Finance."

39 On 24 May 2016, Minister Gordhan and other members of Treasury held a meeting with Mr Howa and other representatives of Oakbay. They communicated the contents of the opinion with them. Minister Gordhan went so far as to share a copy of the opinion with Oakbay's representatives.

40 On the same day, Oakbay sent a letter to Minister Gordhan indicating that its own legal advice was that any legal approach by it to challenge the closure of its accounts "*…may indeed be still-born.*"[252]

41 Despite this, Oakbay and Sahara continued to insist both publicly and to the Minister, that the Minister was indeed endowed with the power to intervene in such matters. In this context, Minister Gordhan applied to the North Gauteng High Court in November 2016 seeking a declaration, that he could not intervene in the dispute.

42 Minister Gordhan's application was heard in the week of 27 March 2017. In the same week, the application of Vardospan Limited to compel the Minister to allow it to take over Habib Overseas Bank Limited was heard in the High Court. While both applications were being argued in court, Minister Gordhan was recalled from investor roadshow in the United Kingdom by President Zuma.

[252] Gordhan FA in Minister of Finance v Oakbay and Others, Case no.: 80978/2016, para 16

President Zuma's appointment of Minister Gigaba

43 President Zuma replaced Minister Gordhan with Minister Gigaba on the night of 31 March / 1 April 2017. In order to inform him of his removal, President Zuma recalled Minister Gordhan from an international roadshow where Minister Gordhan was attempting to reassure investors that the South African economy was an appropriate destination for their money. Within days of the recall of Minister Gordhan, the sovereign credit rating of South Africa had predictably been reduced to junk status.

44 Minister Gigaba is not in the same category as Ministers Zwane and Muthambi when it comes to the Guptas. Nevertheless, he has a track record of exercising his powers in a manner that is advantageous to the Guptas.

44.1 As we have shown in Chapter 3 above, Mr Gigaba appointed Gupta family allies to the Board of Transnet where they presided over transactions that diverted billions of rands in public funds to Gupta companies.

44.2 He also fast tracked the naturalisation process of Gupta family members.[253]

45 President Zuma claims to have removed Minister Gordhan as Finance Minister because of a breakdown in trust between himself and Minister Gordhan. However, having regard to:

[253] See Annexure **NAT 12**. Statement of Treasury 13 June 2017.

45.1 the clear influence that the Gupta family exercised in relation to the previous appointments of Mr van Rooyen as Finance Minister,

45.2 the sustained conflict between Minister Gordhan and the Gupta family,

45.3 the timing of the removal of Minister Gordhan,

45.4 the inevitable damage that the removal of Minister Gordhan would do to the South African economy, and

45.5 the appearance that his successor Minister Gigaba is a more Gupta friendly Minister,

the inference is inescapable that the interests of the Gupta family influenced the decision of President Zuma to replace Minister Gordhan.

CHAPTER 7: CONCLUSION

1 As the Head of State and the Head of the national Executive, the President occupies *"a position indispensable for the effective governance of our democratic country"*.[254] The Constitutional Court has explained that -

> *"Only upon him has the Constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our Constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a Constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's Constitutional project*."[255]

[254] *Nkandla* judgment at para 20.

[255] *Nkandla* judgment para 20, citing sections 83(b) and (c) of the Constitution, read with the affirmation or oath of office in Schedule 2 of the Constitution, and sections 84-85 of the Constitution.

2 Special obligations are attendant on being entrusted with the highest office in the country and with the public power and resources associated with the President's Office. With public power comes commensurate responsibilities.

3 Thus, on assuming Office, the President is required to solemnly and sincerely promise to be faithful to the Republic of South Africa, to obey, observe, uphold and maintain the Constitution and all other law of the Republic; to promote all that will advance the Republic, and oppose all that may harm it; to protect and promote the rights of all South Africans; to do justice to all and to devote himself to the well-being of the Republic and all of its people. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities and true to the dictates of his conscience.[256]

4 The President and his Cabinet and Deputy Ministers are responsible for the proper exercise of the powers and carrying out of the functions that Parliament assigns to the Executive and must act in line with the Constitution.[257] They must perform their Constitutional obligations "*diligently and without delay*".[258] They are required to act in accordance with a code of ethics prescribed by national legislation. They are expressly enjoined under section 96 of the Constitution not to –

> *"(a) undertake any other paid work;*

[256] Section 87 of the Constitution, read with the oath or affirmation of office in Schedule 2 of the Constitution.

[257] Sections 92(2), 92(3) and 93(2) of the Constitution.

[258] Section 237 of the Constitution.

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."[259]

5 South Africans, through their elected representatives in the National Assembly, are entitled to hold the President to his oath of office and the obligations imposed on him and his Cabinet by the Constitution. In its recent *"Secret Ballot"* judgement, the Constitutional Court considered the role of Parliament in holding the Executive accountable. Section 42(3) of the Constitution places a duty on Parliament "*to represent the people and to ensure government by the people under the Constitution*".[260] This means:

> "*It thus falls on Parliament to oversee the performance of the President and the rest of Cabinet and hold them accountable for the use of State power and the resources entrusted to them. And sight must never be lost that 'all constitutional obligations must be performed diligently and without delay'. When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms. Those measures range from being voted out of office by the electorate to removal by*

[259] Section 96 of the Constitution.

[260] Section 42(3) of the Constitution.

> *Parliament through a motion of no confidence or impeachment. These are crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests*."[261]

6 The motion of no confidence is a crucial mechanism of accountability and good-governance. It is a check against the abuse of the public power and resources that are vested in the highest office-holder in the land, the President. It is, as the Constitutional Court has said: "*about ensuring that our Constitutional project is well managed; is not imperilled; the best interests of the nation enjoy priority in whatever important step is taken; and our nation is governed only by those deserving of governance responsibilities*". It is also, fundamentally, about ensuring that the needs of the people of South Africa are not neglected by the President and his Cabinet with impunity.[262]

7 It falls to the National Assembly to restore public trust and confidence in the government of the Republic of South Africa and its Constitution. It falls to each member of the National Assembly to vote according to his or her conscience, and to enforce accountability effectively and properly, as the members are Constitutionally obliged to do.[263]

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[261] *United Democratic Movement v The Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21 (22 June 2017) ("*UDM v The Speaker")* at para 10, with reference to sections 89, 102 and 237 of the Constitution.

[262] *UDM v The Speaker* at para 47.

[263] Section 48 of the Constitution, read with the oath or affirmation of office in Schedule 2 of the Constitution. See also *UDM v The Speaker* at para 79.

8 In voting with their conscience, the members must reaffirm the principles that drove the struggle of the oppressed majority of South Africans for so long: "*Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina"* (power belongs to us) and "*mayibuye iAfrika"* (restore Africa and its wealth).[264]

9 The facts detailed in this report evidence the serious and flagrant breach by the President of his Constitutional obligations and his oath of office.

9.1 The President has paralysed the Criminal Justice System to protect himself from prosecution;

9.2 In relation to Nkandla, he has enriched himself at the expense of the public and violated the Constitution by defying the Findings of the Public Protector to remedy this situation;

9.3 He has repeatedly lied to Parliament about his conduct that has been investigated by the Public Protector;

9.4 He has turned a blind eye to the gross violation of the fundamental rights of millions of poverty stricken South Africans to social assistance;

9.5 After being involved in a generally corrupt relationship with Schabir Shaik, he has moved to conducting a similar relationship with the Gupta family over the entire period of his Presidency; and

9.6 Now it emerges that he has colluded in the plundering of the South African

[264] *UDM v The Speaker* at para 7.

State for the benefit of the Gupta family and their business associates, including the President's son, Duduzane Zuma.

10 As the President's political position becomes less secure he reverts to unconstitutional fight or flight instincts. While his son and the Guptas explore the possibility of flight to Dubai, at home he is giving signals that he will fight unconstitutionally to hold onto power by using MK Veterans to conduct security functions which the Constitution reserves for the SAPS and the SANDF.[265]

11 The forthcoming vote of no confidence affords the National Assembly and its members the opportunity to reassert the supremacy of the Constitution in the face of a President who has repeatedly violated the Constitution. Prior to the "Gupta emails", the case for removing President Zuma was overwhelming. Since the emergence of the "Gupta emails", it is unanswerable. The National Assembly and its members would be failing in their Constitutional obligation if they did not vote to remove President Zuma from Office in the vote of no confidence.

[265] Section 199 and section 205 of the Constitution of the Republic of South Africa, 1996.

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

SUMMONS TO:

APPEAR AS A WITNESS

This summons is issued in terms of section 3(2) of the Commissions Act 8 of 1947, read with:

- **Proclamation 3 published in Government Gazette No. 41403 on 25 January 2018**
- **Government Notice No. 105 published in Government Gazette No. 41436 on 9 February 2018 (as amended)**
- **Rules of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State published in Government Gazette No. 41774 on 16 July 2018**

Tracking reference:	**SPS09/0315/CB**

To the sheriff or his/her deputy of Thohoyandou

INFORM: MS AZWIHANGWISI FAITH MUTHAMBI

OF

1633 BLOCK J
EXTENSION 1
THOHOYANDOU
0950

that she is hereby summoned to:

appear before the Commission personally at the Civic Centre, 158 Civic Boulevard, Braamfontein, Johannesburg on **21 May 2021** at **16:00 onwards**, for the purpose of giving evidence before the Commission and being questioned regarding:

a) the affidavit of Stefanie Fick (together with the annexures thereto) dated 17 July 2017 ("Ms Fick's affidavit");
b) her undated statement submitted to the Commission on 25 March 2021 in response to Ms Fick's affidavit;
c) the report by the Organisation Undoing Tax Abuse (OUTA) titled "*No Room to Hide – A President caught in the act*" attached hereto, insofar as it relates to her; and
d) matters connected therewith.

Your failure to attend before the Commission at the time and place specified in this summons without sufficient cause (the onus of proof whereof shall rest upon you) or to remain in attendance until the conclusion of the enquiry or until you are excused by the chairman of the Commission from further attendance, or having attended, refuse to be sworn or to make affirmation as a witness after you have been required by the chairman of the Commission to do so or, having been sworn or having made affirmation, fail to answer fully and satisfactorily any question lawfully put to you, or fail to produce any book, document or object in your possession or custody or under his control, which you have been summoned to produce, constitutes an offence and under section 6(1) of the Commissions Act 8 of 1947, as amended.

DATED at Parktown on this 12th day of May 2021.

Prof. Itumeleng Mosala
SECRETARY:
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

IN THE COMMISSION OF INQUIRY INTO ALLEGATION OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION")

STATEMENT

I, the undersigned,

AZWIHANGWISI FAITH MUTHAMBI

do hereby make oath and state that:

1. I am an adult female South African Citizen and the former Minister of Department of Communications.

2. The facts contained herein, unless the context otherwise indicates fall within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. On or around 08 March 2021 my legal representative received a directive and the Affidavit of Ms Stefanie Fick from the Commission stating that I am required to admit or deny the averments made against myself in the affidavit of Ms Fick.

4. On 12 March 2021, my legal representative addressed a letter to the Commission requesting them to advise on the basis upon which the directive has been issued

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since I was not in receipt of the Notice in terms of Rule 3.3 in respect of Ms Fick and that I do not have any recollection of Ms Fick ever testifying before the Commission.

5. On or around the 17 March 2021, the Commission stated further that if I am issued with a Reg 10(6) directive, it does not matter whether the witness in respect of whose affidavit I am required to deliver a response affidavit to, and whether they have testified or not. Therefore, the Commission advised that as long as I have been issued with a Reg 10 (6) directive, I am required to comply with it as long as it has not been set aside

6. On or around 17 March 2021, my legal representative addressed a letter to the Commission in response to the directive dated 8 March 2021 stating, that the affidavit upon which the Commission had required me to comment on Ms Fick's affidavit which deposed in 2017 for the purpose of instituting disciplinary proceedings by Parliament against myself.

7. The letter further states that the disciplinary proceedings were instituted against me as a result of Ms Fick's affidavit which the Commission is now in sought of me to provide comments on the said Affidavit.

8. I submit that the disciplinary proceedings as a result of this matter, is pending before parliament.

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9. It is submitted further that the pending review application brought forward in the High Court of the Western Cape Division where I am, amongst other things, reviewing the findings of the SABC parliamentary inquiry as far as it relates to myself.

10. In response to Ms Fick's Affidavit, I would like to state the following: -

11. On or around 30 March 2017 I brought forward an application for review against the Speaker of the National Assembly and Others under case no: 5839/17:

    11.1. On or around 3 November 2016, the National Assembly resolved to establish the Committee to inquire into the fitness of the SABC Board to continue to perform its fiduciary duties.

    11.2. The Committee was established to conduct an inquiry as contemplate in section 15A of the Broadcasting Act. Section 15A of the Broadcasting Act provides for the removal of members of the SABC Board, the dissolutions of the SABC Board and upon such dissolution, the appointment of the SABC Board and upon such dissolution, the appointment of an interim board.

    11.3. In so far as the fitness of the SABC Board is concerned, the inquiry provided for in section 15A of the Broadcasting Act can only relate to the following: -

        11.3.1. the performance of fiduciary duties,

        11.3.2. the adherence to the SABC Charter; and

        11.3.3. the carrying out of the SABC Board's duties as contemplated in

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section 13(11) of the Broadcasting Act.

12. Section 15A of the Broadcasting Act make provision for the National Assembly to inquire into the three issues I have listed above – and the National Assembly does not have powers to inquire into matters other than those provided for in section 15A.

13. section 15A of the Broadcasting Act does not make provision for the Committee or the National Assembly for that matter, to enquire into the desirability of myself as the then Minister of Communications '*retaining the Communications Portfolio*'.

14. The Committee says that its terms of reference were as follows:

2.1. *Terms of Reference*

2.1.1. The inquiry was instituted on 3 November 2016 per a resolution of the NA.

2.1.2. In line with section 15A(1)(b) of the Broadcasting Act the Committee was charged with inquiring into the ability of the SABC Board to discharge its duties as prescribed in that Act. Its terms of reference were limited to considering the:

- *SABC's financial status and sustainability;*
- *SABC's response to Public Protector Report No. 23 of 2013/14: when Government and Ethics fall;*
- *SABC's response to recent court judgments affecting it;*

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- *SABC's response to ICASA"s June 2016 ruling against the decision of the broadcaster to ban coverage of violent protests;*
- *Current board's ability to take legally-binding decisions following the resignation of a member of its non-executive board members.*
- *Board's adherence to the Broadcasting Charter;*
- *Board's ability to carry out its duties as contemplated in section 13(11) of the Broadcasting Act (No. 4 of 1999);*
- *Human resource-related matters such as governance structures, appointments of executive; and the termination of services of the affected executives; and*
- *Decision-making processes of the board*."

15. On its own version set out in the Report, the Committee did not have powers to inquire into any other matters than those set out in its terms of reference – in paragraph 2.1.2 of its Report.

16. According to the Terms of Reference the Committee did not have powers to inquire into the desirability of myself as the then Minister of Communications '*retaining the Communications Portfolio'* due to the fact that this issue does not fall within the Terms of Reference and is not contemplated in section 15A.

17. The Committee could only require into and make recommendations in relation to those issues which the National Assembly authorised it to enquire into and make

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recommendations on. These issues listed in its terms of reference, in paragraph 2.1.2 of its Report which I have quoted above.

18. The Committee only had powers to make recommendations in relations to matters which are set out in its terms of reference and nothing more. By way of an example, the Committee had no powers to make recommendations in relation to matters into which it was not empowered to inquire.

19. The Committee was not empowered to inquire into or make recommendations to the then President on whether it is desirable for the then Minister of Communications to retain the Communications Portfolio. The Committee was also not empowered to make any recommendations to the then President. The Committee was empowered to inquire into matters relating to the fitness of the SABC Board to continue to perform its fiduciary duties and make recommendations therein to the National Assembly.

20. In the circumstances, the recommendation is constitutionally invalid, unlawful and ought to be set aside, however this is for the review court to decide since this matter is sub-judice, for this reason I do not wish to dwell in detail with this matter.

21. As indicated above Ms Fick affidavit is the basis of the disciplinary proceeding that I am currently facing in Parliament, and the Commission should allow the Parliamentary process to run its course since such process has been initiated well before this Commission had received Ms Fick affidavit, it is my respectful

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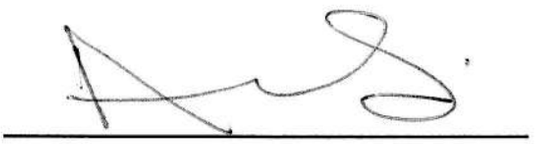
submission that the Commission should not allow Ms Fick to abuse its time and resources by bringing a matter pending before Parliament.



AZWIHANGWISI FAITH MUTHAMBI