
PUBLIC PROTECTOR
SOUTH AFRICA

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Report on allegations of an irregularity in the filling of the position of Producer/Presenter, Morning Live Show

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPRIETY IN THE APPOINTMENT OF MS PALESA CHUBISI IN THE POSITION OF PRODUCER/PRESENTER, MORNING LIVE SHOW AT THE SOUTH AFRICAN BROADCASTING CORPORATION
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Executive Summary

(i) This is my report 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, 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of maladministration and impropriety in the appointment of Ms Palesa Chubisi (Ms Chubisi) in the position of Producer/Presenter, Morning Live Show by the South African Broadcasting Corporation functionaries (the SABC functionaries).

(iii) The complaint was lodged with my office on 02 June 2017 by an anonymous Complainant (the Complainant) alleging maladministration and impropriety in the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show by the SABC functionaries.

(iv) In the main, the Complainant alleged inter alia that:

(a) In April 2016, the SABC appointed Ms Chubisi permanently in the position of Producer/Presenter, Morning Live Show without following and adhering to recruitment procedures and prescripts that were applicable within the SABC at the time. She was preferred and appointed ahead of other candidates who were suitably qualified and experienced for the position.

(b) The conduct of the SABC functionaries in the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC amounted to maladministration and impropriety.
(v) On analysis of the complaint, the following issue was identified and investigated:

(a) Whether the SABC functionaries appointed Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC and if so, whether the conduct of the SABC functionaries was improper and amounted to maladministration?

(vi) The investigation was conducted by way of correspondence and analysis of relevant documentation as well as the consideration and application of relevant legislation, related prescripts and applicable jurisprudence.

(vii) Key legislation and prescripts taken into account to determine if there had been improper conduct and maladministration in the appointment of Ms Chubisi in the position of Producer/Presenter Morning Live Show were the following:

(a) The Constitution of the Republic of South Africa, 1996;

(b) The Public Protector Act of 1994;

(c) The Public Protector Rules of 2018;

(d) Public Finance Management Act of 1999;

(e) The Labour Relations Act 66 of 1995;

(f) The Broadcasting Act 4 of 1999; and

(g) The Transfer Policy No. HR049/02/A;

(h) The Acting in Higher Grade Policy No. HR002/98/A;
(i) The SABC Recruitment Policy No. HR038/02/A of November 1998.

(viii) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:

(a) Regarding whether the SABC functionaries appointed Ms Chubisi in the position of Producer/Presenter, Morning Live Show in April 2016 without following and adhering to the recruitment procedures and prescripts applicable within the SABC and if so, whether the conduct of the SABC functionaries was improper and constituted maladministration?

(aa) The allegation that the SABC functionaries appointed Ms Chubisi in the position of Producer/Presenter, Morning Live Show in April 2016 without following and adhering to the recruitment procedures and prescripts applicable within the SABC is substantiated in that:

(bb) The SABC failed to advertise the vacant position of Producer/Presenter, Morning Live Show as required by its Recruitment Policy of November 1998, which denied other similar placed employees and candidates within the SABC and/or the radio and television broadcasting environment to openly contest for the position.

(cc) The SABC Recruitment Policy of November 1998 does not make provision for recruitment through any other process except through adverting of a vacant position.

(dd) The conduct of the SABC functionaries of appointing Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to recruitment procedures and prescripts applicable within the SABC violated section 186(2) of the Labour Relations Act of 1995, and 26(1) of the Broadcasting Act and Part b and Part D1 of the SABC "Recruitment Policy of November 1998".
Accordingly, such a violation by the SABC functionaries amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(vi) The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The Group Chief Executive Officer of the SABC

(a) To take steps within thirty (30) days of receipt of this report, in line with the SABC recruitment process and applicable prescripts to confirm the appointment of Ms Chubitsi in the position of Producer/Presenter for SABC TV, or place her in a position commensurate with her level within the SABC, or migrate her to the position of Producer/Presenter that she previously held at Lesedi FM Radio Station, or take any other steps provided for in the Labour Relations Act 66 of 1995.

(b) Any irregular/fruitless and or wasteful expenditure incurred by the SABC, as a result of improper conduct by any person is dealt with in accordance with the process stipulated in the National Treasury updated guidelines on irregular expenditure.

(c) To take steps within sixty (60) days of receiving this report to train, workshop and/or educate the SABC employees on adherence and compliance with the SABC policies and prescripts including the values and principles stipulated in section 195 of the Constitution.

Monitoring

(d) The Group Chief Executive Officer of the SABC must submit to my office, within twenty-one (21) days from date of receiving this report an Implementation Plan stipulating how the above remedial actions would be implemented.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPRIETY IN THE APPOINTMENT OF MS PALESA CHUBISI TO THE POSITION OF PRODUCER/PRESENTER, MORNING LIVE SHOW AT THE SOUTH AFRICAN BROADCASTING CORPORATION

1. INTRODUCTION

1.1. This is my report 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, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note and act on the outcome of my investigation:

1.2.1. The Group Chief Executive Officer of the SABC;

1.2.2. Ms Palesa Chubisi to inform her about the outcome of the investigation; and

1.2.3. A copy of the report is also provided to the Complainant to inform him about the outcome of the investigation.

2. THE COMPLAINT

2.1. The complaint was lodged with my office on 02 June 2017, by an anonymous Complainant (the Complainant).

2.2. The Complainant alleged *inter alia* that:

2.2.1. In April 2016, the SABC functionaries namely, the then Acting Group Executive: SABC News & Current Affairs, Mr Simon Tebele (Mr Tebele) and the Group Executive: Human Resources, Mr Jabulani Mabaso (Mr Mabaso)
approved the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment, procedures and prescripts applicable within the SABC.

2.2.2. It is the Complainant’s contention that the conduct of the SABC functionaries of approving the appointment of Ms Chubisi without following and adhering to the recruitment procedures and prescripts applicable within the SABC amounted to maladministration and impropriety.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent state institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through amongst others, the investigating and redressing of improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that:

"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."

3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.
3.4. 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. The Public Protector is also given the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. The Public Protector’s powers are further regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.

3.6. In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

3.7. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at paragraph [76].
3.8. An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.9. Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68).

3.10. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69).

3.11. Every complaint requires a practical or effective remedy that is in *sync* with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70).

3.12. The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71).

3.13. Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure, and “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has
to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (para 71).

3.14. She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71).

3.15. “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71).

3.16. The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences” (para 73).

3.17. The SABC is a state entity in terms of the Public Finance Management Act and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.

3.18. The jurisdiction of the Public Protector was not disputed by SABC in this matter.

3.19. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s);
whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.20. In terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints after two years of the date of an incident unless special circumstances exist. It is trite that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge public interest in the public administration or governing of public affairs. Appointment of public officials to positions would ordinarily generate huge public interest. The community, other applicants and public servants themselves would be keen to know or enquire into the fairness of the processes followed in filling of such key and strategic positions within public bodies

3.20.1. In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP), the court held as follows, when confirming the powers of the Public Protector:

3.20.1.1. The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him/her under the Constitution if that is required to remedy the harm in question;\(^2\)

3.20.1.2. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers;\(^3\):

(a) Conduct an investigation;

\(^2\) Para 82.
\(^3\) Para 100 – 102.
(b) Report on that conduct; and

(c) Take remedial action.

3.20.1.3. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings;\(^4\)

3.20.1.4. The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the courts' roles and functions;\(^5\)

3.20.1.5. The fact that there is no firm findings on the wrong doing does not prohibit the Public Protector form taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct;\(^6\)

3.20.1.6. *Prima facie* evidence which point to serious misconduct is sufficient and appropriate basis for the Public Protector to take remedial action;\(^7\)

3.20.1.7. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.20.1.8. 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. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.21. The investigation of the complaint was conducted in terms of section 182 of the Constitution which gives the Public Protector the power to investigate any

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\(^4\) Para 104.
\(^6\) Para 10 – 108.
\(^7\) Para 112.
alleged, suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through alternative dispute resolution measures such as conciliation, mediation and negotiation.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, this investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of impropriety or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been had the impropriety or maladministration not occurred or prevented from occurring?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

4.2.3 In the Public Protector v Mail and Guardian the Supreme Court of Appeal\(^8\) (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all the evidence as judicial officers do.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice.

4.2.5 In this particular case, the factual enquiry primarily focused on whether or not the SABC functionaries approved the appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show in April 2016 without following and adhering to its recruitment procedures and prescripts applicable within the SABC.

\(^8\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA).
4.2.6 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the SABC functionaries to prevent improper conduct and/or maladministration.

4.2.7 In this case, key laws and policies taken into account to determine if there had been maladministration by the SABC functionaries were principally those imposing administrative standards that should have been complied with by the SABC functionaries in approving the appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC.

4.2.8 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the state entity complied with the regulatory framework setting the applicable standards for good administration.

4.2.9 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.10 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

4.3 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

4.3.1 Whether the SABC functionaries approved the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to recruitment procedures and prescripts
applicable within the SABC and if so, whether the conduct of the SABC functionaries was improper and amounted to maladministration?

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 A copy of “Transfer Policy No. HR049/02/A” (the Transfer Policy of August 2015) stipulating the procedure of transferring an employee within the SABC;

4.4.1.2 A copy of “Policy of Acting in Higher Grade No: HR002/98/A” (Acting Policy of April 2014) stipulating the procedures to be followed when appointing an employee to act in a higher or another position;

4.4.1.3 A copy of the “Recruitment Policy No. HR038/02/A” (the Recruitment Policy of 1998) of November 1998, stipulating the procedures to be followed and adhered to during the recruitment and selection process;

4.4.1.4 A copy of “Delegation of Authority Framework 2016-2017” (the Delegations of April 2016), of April 2016 stipulating the delegations of authority relating to appointment of different categories/ranks of employees;

4.4.1.5 A copy of a document titled: “Deviation From Regulated Recruitment Process For Appointment Of Ms Chubisi” (the Deviation Document) of 2 June 2016 providing a motivation to approve the appointment of Ms Chubisi in the position of Producer/Presenter Morning Live Show without following and adhering to the applicable recruitment procedures and prescripts applicable within the SABC;

4.4.1.6 A copy of “Specialist Producer/Presenter News Channel” (the Specialist post requirements), stipulating the inherent job requirements for the position of Producer/Presenter, Morning Live Show;
4.4.1.7 A copy of “Appointment Offer Letter” (the Appointment Letter) dated 8 June 2016 confirming the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show;

4.4.1.8 A copy of “Curriculum Vitae” (the CV) of Ms Chubisi stipulating her qualifications, employment history and experience;

4.4.1.9 A copy of “Grade 12 Certificate” (the Grade 12 Certificate) for Ms Chubisi;

4.4.1.10 A copy of “National Diploma in Public Relations Management” (the National Diploma) for Ms Chubisi;

4.4.1.11 A copy of “B-Tech Degree in Public Relations Management” (B-Tech Degree) for Ms Chubisi; and

4.4.2 The below correspondence was exchanged between the Public Protector, the SABC functionaries and Ms Chubisi including her attorneys:

4.4.2.1 A copy of letter dated 20 November 2017 and co-signed by Mr Sello Xama (Mr Xama) the SABC General Manager and Mr Zak Yunus (Mr Yunus) the SABC Acting Group Executive, Human Resources responding to the allegations;

4.4.1.1 A copy of letter dated 21 December 2017 co-signed by Mr Sello Xama (Mr Xama) the SABC General Manager and Mr Zak Yunus (Mr Yunus) the SABC Acting Group Executive, Human Resources responding to additional request for information;

4.4.1.2 A copy of letter dated 23 December 2019 from Moroka Attorneys acting on behalf of Ms Chubisi requesting an extension to respond to the section 7(9) notice;
4.1.1.3 A copy of letter dated 22 January 2020 from MT Raselo Incorporated acting on behalf of Ms Chubisi requesting extension to respond to the section 7(9) notice; and

4.1.1.4 A copy of letter dated 30 January 2020 from MT Raselo Incorporated acting on behalf of Ms Chubisi, responding to the section 7(9) notice, including copies of Ms Chubisi’s Diploma in Public Relations Management, B Tech degree in Public Relations Management and contract of employment dated 29 April 2011.

4.3 Case Law

4.3.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.3.2 President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP);

4.3.3 Public Protector vs Mail and Guardian, 2011(4) SA 420 (SCA);

4.4 Legislation and other prescripts

4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

4.4.2 The Public Protector Act, 23 of 1994 (the PPA);

4.4.3 The Public Protector Rules of 2018;

4.4.4 The Public Finance Management Act 01 of 1999 (PFMA);

4.4.5 Labour Relations Act 66 of 1995;
4.4.6 The Broadcasting Act 4 of 1999;

4.4.7 Copy of Transfer Policy No. HR049/02/A of August 2015;

4.4.8 Copy of "Policy of Acting in Higher Grade No: HR002/98/A of April 2014;

4.4.9 Copy of Recruitment Policy No: HR038/02/A of November 1998;

4.4.10 Mr Mxakwe's responses to the section 7(9) notice dated 19 June 2019; and

4.4.11 Mr Ms Chubisi's response to the section 7(9) notice dated 30 January 2020.

5 THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO APPLICABLE LAW AND PRESCRIPTS

5.1 Whether the SABC functionaries approved the appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC and if so, whether the conduct of the SABC functionaries was improper and amounted to maladministration?

Common cause

5.1.1 Ms Chubisi was transferred from Lesedi FM Radio Station in the Free State Province in March 2016, to temporarily fill the vacant position of Producer/Presenter, Morning Live Show in Johannesburg, following the resignation of Ms Ayanda Payne (Ms Payne) in February 2016; and

5.1.2 She was subsequently permanently appointed in the position of Producer/Presenter, Morning Live Show with effect from 1 April 2016.
5.1.3 It is the Complainant's version that Ms Chubisi was irregularly appointed in the position of Producer/Presenter, Morning Live Show in that, relevant procedures applicable to recruitment and selection of staff were not adhered to by those who were responsible to facilitate her appointment.

5.1.4 It is the Complainant's contention that the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show did not comply with the relevant recruitment legislation and prescripts applicable within the SABC.

5.1.5 In its first response letter to the Public Protector dated 20 November 2017 co-signed by Mr Sello Xama, the SABC General Manager and Mr Zak Yunus, the SABC Acting Group Executive Human Resources, the SABC denied the alleged appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC contending that:

5.1.5.1 Upon the resignation of Ms Payne from the position of Producer/Presenter, Morning Live Show in February 2016, a critical skills gap was created. Ms Chubisi was then transferred from Lesedi FM Radio Station in the Free State Province to temporarily act in the position from March 2016 owing to her qualifications and radio presentation experience. She was the right candidate at that point in time, to urgently fill the skills gap created by the resignation of Ms Payne;

5.1.5.2 A "Deviation Document" was prepared requesting approval for the appointment of Ms Chubisi in the vacant strategic and critical position of Producer/Presenter, Morning Live Show without following and adhering to the normal recruitment procedures and prescripts applicable within the SABC;
5.1.5.3 The "Deviation Document" included the request for approval to review Ms Chubisi’s remuneration outside the "current" SABC’s remuneration directive of paying at midpoint;

5.1.5.4 The request to deviate from the normal recruitment procedures and prescripts to allow for the appointment of Ms Chubisi was co-approved by the then Acting Group Executive: SABC News and Current Affairs, Simon Tebele (Mr Tebele) on 3 June 2016 and the then Group Executive: Human Resource, Jabulani Mabaso (Mr Mabaso) on 6 June 2016 respectively; and

5.1.5.5 The appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show was approved with effect from 1 April 2016.

5.1.6 According to the "Deviation Document", the reasons for the appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC were amongst others that:

5.1.6.1 Ms Chubisi was identified from Lesedi FM Radio Station in the Free State province, where she was Radio Producer/Presenter of a popular current affairs show to come and temporarily stand in the vacant position of Producer/Presenter, Morning Live Show created by the resignation of Ms Payne in February 2016;

5.1.6.2 She had been an employee of the SABC since 1 March 2007 and her presenting experience coupled with qualifications made her the right candidate to fill the vacant position of Producer/Presenter, Morning Live Show;

5.1.6.3 She was brought in to fill a position that required a high calibre individual and despite "her little experience of working on television", she fitted well with highly experienced Producers/Presenters on the show and some audiences had written to the show expressing appreciation of her high performance standard;
5.1.6.4 It was management’s view that she was performing well and should therefore be permanently appointed in the Producer/Presenter, Morning Live Show without going through the recruitment procedures and prescripts applicable within the SABC;

5.1.6.5 The “SABC Leadership has directed that where there is a strategic and critical role that needs to be filled by an identified talent and scarce skill individual, deviation from the recruitment process must be allowed”. Further that once talent has been identified, the individual must be appointed quickly without following the relevant stages of the SABC Recruitment Policy to avoid loss of the talent to other competitors;

5.1.6.6 Ms Chubisi was on salary scale 300 which was the same level of the vacant position of Producer/Presenter, Morning Live Show with a basic salary of R506, 706 per annum (midpoint) and it was proposed that management give her 8% more on her basic salary which became R547,242 per annum;

5.1.6.7 The vacant position of Producer/Presenter, Morning Live Show was a strategic and critical position for the SABC business and was budgeted for in the 2016/17 financial year;

5.1.6.8 Should the request to appoint Ms Chubisi in the position of Producer/Presenter, Morning Live Show not be approved, the Morning Live Show would suffer as following the normal recruiting process to fill the position would take time due to the scarcity of the skills required for the position; and

5.1.6.9 Consultations with the then Chief Operations Officer, Mr Hlaudi Motsoeneng pertaining to the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC had been undertaken.
5.2 Upon analysis and evaluation of the response above, against the SABC’s Transfer Policy of August 2015, Acting in Higher Grade Policy of May 2014, Recruitment Policy of November 1998, the CV of Ms Chubisi as well as her qualifications and experience, the following material discrepancies were identified:

5.2.1 The “Transfer Policy of August 2015” provides that the purpose of the policy is amongst others:

1.1 To ensure that the transfer of employees across the SABC Provincial Offices benefits both employees and employer;

1.2 To comply with all relevant SABC policies and procedures as well as applicable legislation.

5.2.2 Clause 5.1 of the policy further provides as follows with regard to the reasons for effecting a transfer:

5.1 Members of staff may be transferred from one division/business unit/province/department to another if

5.1.1.1 they are promoted/appointed;

5.1.1.2 they request a transfer;

5.1.1.3 it is in the interest of the SABC (such as a secondment); or

5.1.1.4 in the case of restructuring/re-organisation etc.

5.1.2 The “Acting in higher Grade Policy of May 2014” provides amongst others that:

The purpose of the policy is to regulate the appointment and compensation of employees who are appointed to act in higher or equivalent positions.
5.1.3 Clause 2.3 of the policy provides that:

*Acting in a higher grade also serves as an excellent training opportunity, as it provides exposure to higher levels of authority and decision making;*

5.1.4 Clause 3.1 of the policy provides as follows:

*Acting in a higher graded position will not create a legitimate expectation to be permanently appointed to, or be entitled to any benefits associated with the position in question. After the defined period of acting in a higher grade, the individual concerned returns to his/her designated/substantive role/position.*

5.1.5 Clause 3.4 of the policy provides as follows:

*An uninterrupted period of acting on a higher grade should not exceed three (3) months in cases where circumstances necessitate this, for which the necessary approvals must be acquired as per the Delegation of Authority. The employee concerned must be consulted in these cases.*

5.1.6 In terms of the SABC "Recruitment Policy of November 1998" it had been established that the policy have no provision allowing for recruitment to take place through a deviation process, rather all vacant positions are required to be filled by following and adhering to the SABC’s applicable recruitment procedures and prescripts;

5.1.7 The "Deviation Document" motivating for the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC, did not explain the process and criteria used to identify the suitability of Ms Chubisi from Lesedi FM Radio Station in the Free State province amongst
other employees of the SABC’s Radio and TV Stations countrywide to act in the position in the vacant position of Producer/Presenter, Morning Live Show;

5.1.8 The SABC could not provide compelling explanation as to why it failed to follow a normal recruitment process in filling the vacant position of Producer/Presenter, Morning Live Show during the period when Ms Chubisi was acting in the position and/or during the period when Ms Payne was serving her resignation notice;

5.1.9 The SABC did not substantiate its contention that the “SABC Leadership had previously directed that where there is a strategic and critical role that needed to be filled by an identified talent and scarce skill individual, deviation from the recruitment process must be allowed” with any evidence; and

5.1.10 In view of the above material discrepancies in the response received from the SABC, a follow up letter dated 18 December 2017, was submitted to Ms Philiso the former SABC Acting Group Chief Executive Officer seeking clarity and further evidence.

5.2 The SABC submitted another response dated 21 December 2017, co-signed by Mr Xaba and Mr Yunus conceding amongst others that:

5.2.1 At the time of Ms Chubisi’s appointment to the position of Producer/Presenter, Morning Live Show, the new policy and procedures which included allowing for recruitment through a motivated deviation were not yet approved;

5.2.2 There was no record of the directive by the SABC Leadership that sought to allow filling of a vacant position without following and adhering to the recruitment procedures and prescripts on the basis that the position was of a strategic and critical in nature; and

5.2.3 The “Deviation Document” motivating for the appointment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show without following and adhering to recruitment procedures and prescripts applicable within the SABC,
was not the best legal process it should have followed" to recruit the candidate as the SABC could have reasonably extended her acting capacity for the duration to allow for a proper and fair recruitment and selection process to be undertaken.

5.2.4 The SABC also submitted a copy of the job profile of the “Specialist Producer/Presenter” position stipulating the minimum requirements for the position as follows:

5.2.4.2 Degree/Diploma in Journalism or related qualification;

5.2.4.3 At least 4-5 years' experience in radio broadcast production;

5.2.4.4 An above-average general and news knowledge; and

5.2.4.5 A clear broadcast voice.

5.2.5 In addition to the above minimum requirements, the following were also listed as unique requirements for the position namely:

5.2.5.2 Project management and event organization, staff supervision and people skills;

5.2.5.3 Excellent computer skills;

5.2.5.4 Effective business/broadcast report writing skills;

5.2.5.5 Client/stakeholder relationship management;

5.2.5.6 Self-initiator, attention to detail; and

5.2.5.7 Presentation and organizational skills.
5.2.5.8 In addition to the submission of the copy of the job profile for the position of Specialist Producer/Presenter, the SABC also submitted copies of Ms Chubisi’s qualifications and CV reflecting amongst others that:

5.2.6 She was in possession of a grade 12 certificate, Diploma in Public Relations Management as well as a B Tech degree in Public Relations Management;

5.2.7 She joined Setsoto Community Radio Station as a volunteer at the time when she was in grades 10 and 11. She joined the SABC, News Department as a Producer for Radio Current Affairs in June 2005 and later became Presenter/Producer for the same show; and

5.2.8 She was appointed Specialist Presenter, Current Affairs in 2013; and in April 2016 she was appointed Presenter/Producer, Morning Live Show.

5.3 In another response from the SABC dated 18 July 2019 and signed by Mr Madoda Mxakwe, it was stated that:

5.3.1 The SABC functionaries who approved the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show namely, Mr Simon Tebele retired on 31 July 2017, while Mr Jabulani Mabaso left the SABC on 30 June 2016; and

5.3.2 Consultations were held with Mr Chubisi on 13 July 2018 and she was informed that she will no longer be Presenter/Producer, Morning Live Show with effect from 1 August 2018. She was moved to Co-Anchor the television news slot, “SA Today” on Channel 404 and she was also hosting/anchoring the weekly TV news current affairs programme, “Leihlo La Sechaba” on SABC 2.
Application of relevant legal framework

5.3.3 Section 195(1) of the Constitution provides that: "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 developmental-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(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 maximize 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".

5.3.4 The failure by the SABC functionaries to follow and adhere to the recruitment procedures and prescripts applicable with the SABC when filing the position of Producer/Presenter, Morning Live Show was contrary to the promotion of the values and principles governing public administration as stated above.

5.3.5 The deviation process utilized to appoint Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the applicable recruitment procedures and prescripts, did not "promote good human resource management to maximise human potential and did not promote
employment and personnel management practices that are based on ability, objectivity and fairness”.

5.3.6 Section 186(2) of the Labour Relations Act, provides the following:

“(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-

(a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee”.

5.3.7 The conduct by the SABC functionaries of appointing Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following and adhering to the recruitment procedures and prescripts applicable within the SABC amounted to unfair labour practice by the employer with regard to the promotion of an employee and/or with regard to the provision of benefits to an employee. Similarly placed employees should also have been considered through a competitive process as prescribed by the SABC “Recruitment Policy of November 1998”.

5.3.8 Section 2 of the Broadcasting Act provides that:

The object of this Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose to-

(a) ...;

(f) encourage the development of human resources and training, and capacity building within the broadcasting sector especially amongst historically disadvantaged groups;

5.3.9 Section 26(1) provides as follows with regards to staff of the SABC:
(1) The Corporation may engage such officers and other employees as it may deem necessary for the attainment of its objects, and may determine their duties and salaries, wages, allowances or other remuneration and their other conditions of service in general.

5.3.10 The SABC “Recruitment Policy of November 1998”, which was in operation at the time of Ms Chubisi’s appointment in the position of Producer/Presenter, Morning Live Show states amongst others in its Preamble that:

“The SABC, as the national public broadcaster and an equal opportunity organisation, recognises that men and women are equal and therefore entitled to equitable employment practices.

This policy shall be observed by all employees of the SABC, decision makers at every level, and entities such as employment agencies/executive search consultants that do business with the SABC”.

5.3.11 Part B2 of the Policy provides that the following methods could be used for recruiting candidates as cost effectively as possible with regard to vacant posts:

“Vacant posts shall be advertised internally i.e. internal staff magazine, intercom (except in case of strategic positions). If no suitable candidate is found within the SABC according to the criteria mentioned in A2, the position could be advertised externally. The SABC reserve the right to advertise posts simultaneously internally and externally. However, preference shall be given to internal applicants, i.e. permanent employees of the SABC”.

5.3.12 Part D of the Policy provides as follows with regard to the selection of candidates:

“D1. Inherent Requirements of the job;
5.3.13 The selection of candidates shall be based mainly on the inherent requirements of the job;

D2. Short-listing of Candidates

5.3.14 Human Resources shall present a shortlist of both internal and external candidates to line management for consideration. A list of other candidates who have applied for the post shall be made available to line management on request*.

5.3.15 Considering that the Preamble of the SABC “Recruitment Policy of November 1998” state that the, “The Policy shall be observed by all employees of the SABC, decision makers at every level, and entities such as employment agencies/executive search consultants that do business with the SABC”, it is my considered view that adherence to the “Recruitment Policy of November 1998” was neither an option nor a choice, rather an obligation that had to be complied with by all those responsible for the recruitment and selection processes at the SABC.

5.3.16 A further analysis of the “Recruitment Policy of November 1998” revealed that it does not make provision or exception for deviation from following the prescribed recruitment processes when filling any vacant position within the SABC.

Response to the notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.3.17 On 3 June 2019, and 9 December 2019 I signed off and subsequently served Mr Mxakwe and Ms Chubisi respectively, with notices in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond
to the allegations made in the complaint. Section 7(9)(a) of the Public Protector Act 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 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."

5.3.18 I now turn to consider the responses submitted regarding the section 7(9) notices. I have however, not dealt with each and every aspect raised in the responses but that should not be misconstrued as an admission of any kind of the averments contained therein.

5.3.19 In his response dated 19 June 2019 to the section 7(9) notice Mr Mxakwe:

5.3.19.2 Provided an explanation with regard to the discrepancy identified during the period of employment of Ms Chubisi to the position of Producer/Presenter, Morning Live Show by the South African Broadcasting Corporation functionaries. Mr Mxakwe submitted that Ms Chubisi joined the SABC in 2005 as an Independent Contractor (Freelancer) and was appointed permanently on 1 April 2006. The "Deviation Document" contained an error in respect of the date of her appointment in the SABC.

5.3.19.3 Conceded that the SABC could have indeed retained Ms Chubisi in an acting capacity while following the recruitment process in terms of the SABC Recruitment Policy. He indicated that at the time of approving the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show its 2016 Recruitment and Selection Policy was not yet operational.
5.3.19.4 Accepted the provisional findings of the Public Protector as rational and reasonable and further advised that the SABC was readying itself to approach the Labour Court to have all the identified irregular appointments and promotions including that of Ms Chubisi declared unlawful and invalid. He also indicated that the outcome of the application to the Labour Court relating to the irregular appointments and promotions at the SABC will be communicated to the Public Protector.

5.3.19.5 Did not adduce any new evidence contrary to my provisional report and nor did he dispute my provisional findings with regards to the failure by the SABC functionaries to follow their recruitment process and procedures in approving the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show. In essence he accepted my provisional findings and committed to remedy the anomaly through the Labour Court and undertook to furnish my office with the outcome of the Labour Court in this matter.

5.3.19.5.1 I do accept the explanation by Mxakwe in his response to the section 7(9) notice as the most probable response under the circumstances.

5.3.20 In her response dated 30 January Ms Chubisi contended that:

5.3.20.2 She was qualified and experienced for the position of Producer/Presenter, Morning Live Show and that the SABC functionaries followed and adhered to applicable recruitment procedures and prescripts when approving her appointment in the position;

5.3.20.3 She could not be expected to know the internal processes which needed to be followed and adhered to by the SABC functionaries during the process of approving her appointment in the position, but has learnt that the SABC’s 2016 Recruitment and Selection Policy allowed for deviation from normal recruitment procedures.
5.3.20.4 She performed her work successfully after being introduced to Morning Live Show dispelling the myth that she was not experienced at the time of her appointment and as a result of her appointment, the programme saw an increase in viewership;

5.3.20.5 She started to work for SABC TV voluntarily by being engaged with live TV crossings and was assigned to do special projects covering important national events such as Women’s Day and Heritage Day celebrations. She was also invited to the SABC TV Studios in Auckland Park upon the launch of the SABC Channel 404 to observe how TV studio broadcasting was put together to gain more experience and exposure of working on TV. She stated her educational qualifications and work experience relenting to Radio and TV broadcast presenting.

5.3.20.5.1 I view the contention by Ms Chubisi that the SABC functionaries followed proper recruitment processes when approving her appointment in the position of Producer/Presenter, Morning Live Show as manifestly misplaced. The SABC has already conceded that it did not follow and adhere to its own Recruitment Policy that was applicable during her appointment in the position.

5.3.20.5.2 Further thereto, the “Recruitment Policy of November 1998” which was applicable during Ms Chubisi’s appointment to the position of Producer/Presenter, Morning Live Show did not make provision for appointment through a motivated deviation but rather through advertising of vacant posts;

5.3.20.5.3 Ms Chubisi’s qualifications and experience in whatever content and value cannot supersede or justify non-adherence to the applicable recruitment procedures and prescripts in the filling of a vacant position by the SABC functionaries.
6 FINDINGS

Having careful examination of the evidence obtained during the investigation, and the application of regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the SABC:

6.1 Regarding whether the SABC functionaries approved the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show without following the applicable recruitment procedures and prescripts and if so, whether the conduct of the SABC functionaries was improper and amounted to maladministration?

6.1.1 The allegation that the SABC functionaries approved the appointment of Ms Chubisi in the position of Producer/Presenter, Morning Live Show in April 2016 without following and adhering to the recruitment procedures and prescripts applicable within the SABC is substantiated in that:

6.1.1.1 The SABC failed to advertise the vacant position of Producer/Presenter, Morning Live Show as required by its "Recruitment Policy of November 1998", which denied similarly placed employees within the Radio and TV broadcasting environment to openly contest for the position;

6.1.1.2 The SABC "Recruitment Policy of November 1998" does not make provision for recruitment through any other process except through adverting of a vacant position.

6.1.2 The conduct of the SABC functionaries of approving the appointment Ms Chubisi in the position of Producer/Presenter, Morning Live without following and adhering to recruitment procedures and prescripts applicable within the SABC violated

6.1.3 Accordingly, such a violation by SABC functionaries amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7 Remedial Action

7.1 The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The Group Chief Executive Officer of the SABC

7.1.1 To take steps within thirty (30) days of receipt of this report, in line with the SABC recruitment process and applicable prescripts to confirm the appointment of Ms Chubisi in the position of Producer/Presenter for SABC TV, or place her in a position commensurate with her level within the SABC, or migrate her to the position of Producer/Presenter that she previously held at Lesedi FM Radio Station, or take any other steps provided for in the Labour Relations Act 66 of 1995.

7.1.2 Any irregular/fruitless and or wasteful expenditure incurred by the SABC, as a result of improper conduct by any person is dealt with in accordance with the process stipulated in the National Treasury updated guidelines on irregular expenditure.

7.1.3 To take steps within sixty (60) days of receiving this report to train, workshop and or educate SABC employees on adherence and compliance with the SABC policies and prescripts including the values and principles stipulated in section 195 of the Constitution.
8 Monitoring

8.1 The Group Chief Executive Office of the SABC must submit to my office, within twenty-one (21) days from the date of receiving this report an Implementation Plan stipulating how the above remedial actions would be implemented.

8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of Economic Freedom Fighters v Speaker of the National Assembly and other; Democratic Alliance v Speaker of the national Assembly and others[2016]ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the SABC and its functionaries, unless an Interim Interdict or Court Order directing otherwise is obtained in line with the Constitutional Court decision in Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016] ZACC 11, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the SABC, unless a court order directs otherwise.

[Signature]

ADV BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 10/03/2020

Assisted by:

MR MULAO LAMULA
SENIOR INVESTIGATOR
GOOD GOVERNANCE AND INTERGRITY UNIT