IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1169/20

In the matter between:

PALESA CHUBISI **Applicant**

and

SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LTD **First Respondent**

MOJAKI MOSIA **Second Respondent**

MANNIE ALHO **Third Respondent**

MONTLENYANE DIPHOKO **Fourth Respondent**

Heard: **27 October 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 2 November 2020 at 18:00**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The appointment of the applicant into the vacant position of Producer/Presenter at the *'Morning Live Show'* of the first respondent (SABC) in March 2016, became the subject of an investigation by the Office of the Public Protector. This had followed upon an anonymous complaint laid in June 2017, in which it was alleged that the appointment was irregular for want of compliance with the SABC's own recruitment and selection policies, and further that the applicant

was unduly preferred and appointed ahead of other more suitably qualified, experienced and deserving candidates.

[2] The background to this application is largely common cause and may be summarised as follows;

2.1 The SABC is a public broadcaster established in terms of the Broadcasting Act,[1] . The applicant commenced her employment with one of the SABC's radio stations, *Lesedi FM* in April 2011 in terms of a fixed term contract as a Specialist Presenter.

2.2 In March 2016, she was transferred from *Lesedi FM* to temporarily fill a vacancy of Producer/Presenter on the *'Morning Live News'* programme on one of SABC's channels. On 8 June 2016, a written offer to occupy that position was made to her, with the appointment to be made retrospective to 1 April 2016. The applicant accepted the offer in writing on 9 June 2016.

2.3 Significant with this appointment is that it followed what is termed *'Deviation From Regulated Recruitment Process'*[2], which effectively meant that it was made without following the SABC's normal applicable recruitment and selection processes. As appears from this document, the SABC's leadership had directed that where there was a strategic and critical role that needed to be filled by '*an identified talent and scarce skill individual'*, a deviation from the recruitment process should be allowed.

2.4 The appointment of the applicant in the above manner was requested by senior individuals within SABC including the then or current Executive Producer: Morning Live, National TV News Editor, Human Resources Manager – SABC News and the Current Affairs, General Manager Finance. It was then approved by the Group Executive: SABC News & Current Affairs, and Group Executive: Human Resources.

[1] Act 4 of 1999
[2] Annexure 'PC 16' to the Founding Affidavit

2.5 On 23 July 2018, the applicant was re-assigned to another TV slot *'SA Today'* on SABC 2, which is broadcast live in the afternoons with effect from 1 August 2018. She had accepted the re-assignment on 24 July 2018.

2.6 On 9 December 2019, the applicant was served with a Notice in terms of Section 7(9)(a) of the Public Protector Act[3], wherein she was informed that the investigations into her appointment into the position were in the process of being finalised, as there were allegations that it was made without following the SABC's applicable recruitment and selection procedures and prescripts.

2.7 In the Notice, the applicant was afforded ten days within which to respond to the allegations. A similar but more detailed Notice in the form of an interim report had previously been served on the Group Chief Executive Officer of the SABC on 3 June 2019. The applicant had on 30 January 2020 through her attorneys of record, made written representation/responses to the Public Protector's Notice.

2.8 The Public Protector had produced her report on 13 March 2020[4]. The substance of that report and the findings made to the extent relevant to this case were that the SABC and its functionaries had failed to follow its own recruitment and selection procedures in appointing the applicant in April 2016, more particularly since the position was not advertised. Such conduct on the part of the SABC was deemed to be improper. The Public Protector recommended remedial steps to be taken by the SABC's Group CEO within 30 days of receipt of the report, which were;

a) to act in line with the SABC's recruitment prescripts to confirm the applicant's appointment in the position of Producer/Presented; or

b) place her in a position commensurate with her level within SABC; or

[3] Act 23 of 1994
[4] Titled:
'Report on an investigations 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'

c) migrate her back to the position of Producer/Presenter at Les*edi FM* Radio Station; or

d) to take any further steps as provided for in the LRA.

2.9 The applicant takes various issues with the Public Protector's report which I do not deem necessary to deal with in this judgment, as that report is a subject of review proceedings launched in April 2020 before the Gauteng Provincial Division of the High Court under case number 21609/20. As at the hearing of this application, the SABC had not opposed that review application, even though it contends in its answering papers that it intends to do so.

[3] It is significant to point out that the appointment of the applicant is not the only one within the SABC which is alleged to have been improper or irregular. In fact, as can be gleaned from *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others*[5], irregular appointments of employees within the SABC, and systemic maladministration under the reign of the then COO (Mr Hlaudi Motsoeneng) became the subject of complaints investigated by the Public Protector as far back as late 2011 and early 2012.

[4] The engagement, promotions and transfers of about 27 other current and former employees of the SABC also became the subject of litigation in this Court before Moshoana J in *South African Broadcasting Corporation (Soc) Ltd v Keevy and Others*[6]. That application was brought by the SABC in terms of section 158(1)(h) of the Labour Relations Act (LRA)[7], seeking a declarator to the effect that those appointments, promotions and transfers were unlawful and/or irrational.

[5] The applicant in this case was the 19th respondent in the matter before Moshoana J. In a judgment delivered on 7 February 2020, Moshoana J dismissed the application, essentially informing the SABC that it was not for this

[5] (3104/2016; 18107/16) [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC)
[6] (J1652/19) [2020] ZALCJHB 31; [2020] 6 BLLR 607
[7] Act 66 of 1995, as amended

Court to dismiss its employees on its behalf, as the Court did not possess those powers[8].

[6] Notwithstanding the judgment of Moshoana J of 7 February 2020, and the Public Protector's Report of March 2020, the SABC had on 1 April 2020, presented the applicant with an addendum to her employment contract, requiring her to render additional duties and present another programme, *'Leihlo La Sechaba'* on SABC 2 on Mondays.

[7] On 30 June 2020, the second respondent sent correspondence to the applicant, requesting her to make written representations related to her alleged irregular and unlawful appointment effective from 1 April 2016 as Producer/Presenter, *'Morning Live News*'. In the correspondence, the applicant was *inter alia* advised that, there was no authority to deviate from the SABC's recruitment processes; that her appointment was irregular and unlawful; and that SABC intended not to recognize her purported Contract of Employment due to it being *void ab initio*.

[8] Significant with this correspondence was that it was indicated to the applicant that the position that she had previously held as Specialist Presenter at *Lesedi FM* was still available, and that in the event that she failed to persuade the SABC to recognize her purported contract of employment, it was its intention to return her to that position. The applicant had responded on 14 July 2020 with detailed written representations.

[9] On 19 October 2020, the applicant reported for duty for the *'SA Today'* slot that is broadcast between 15h00 and 18h00 on weekdays. The microphone was literally unplugged whilst the applicant was in the middle of a live show in that at about 15h51, she was served with an email by the second respondent with an attachment (titled *Re: Notification of the non-recognition of your purported contract of employment with the SAB*C). Effectively, she was notified that her contract of employment was no longer 'recognised', as her appointment was irregular and unlawful on the grounds set out therein. She was further informed that she was no longer considered an employee of SABC with immediate effect.

[8] At para 55

That email was followed shortly thereafter with a *WhatsApp* message from the Executive Producer, advising her that the show was cancelled.

[10] With this urgent application, the applicant seeks an order declaring the termination of her employment by SABC on 19 October 2020 to be unconstitutional, unlawful, invalid, and of no force and effect. She further seeks an order that the said decision be set aside with immediate effect, and that she be entitled to report for duty with immediate effect.

The submissions and evaluation:

[11] The SABC contends that this Court lacks jurisdiction to grant the relief sought, as it is for a declaration of unlawfulness in respect of the termination of her employment. It contends that the Court further lacks jurisdiction to entertain the applicant's claim in the light of the scope under section 157 of the LRA, and that this Court can only exercise jurisdiction on matters that are to be determined by it in terms of the LRA.

[12] The SABC further contends that to the extent that the applicant's case is located squarely on a claim of unlawfulness, the Court lacks jurisdiction based on what was stated by the Constitutional Court in *Steenkamp and Others v Edcon Limited*[9]. Further reference in this regard was made to this Court's decision in

[9] (CCT46/15, CCT47/15) [2016] ZACC 1; (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) where it was held;

> "[106] Section 189A falls within Chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE. Under the heading appears an indication of which sections fall under the chapter. The sections are reflected as "ss 185-197B". The chapter starts off with section 185. Section 185 reads:
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> "Every *employee* has the right not to be—
> (a) unfairly dismissed; and
> (b) subjected to unfair labour practice."
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> Conspicuous by its absence here is a paragraph (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in section 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA.
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> [107] This indication is reinforced when one has regard to the definition of "dismissal" in section 186(1). It starts with what would ordinarily be understood as a dismissal, namely, a termination of employment with or without notice. That encompasses the ordinary situation of

Lieutenant General Phahlane & another v South African Police Service and others (Phahlane)[10], where Van Niekerk J held that the net effect of what was said in *Steenkamp* was that where an applicant alleged that a dismissal was unlawful (as opposed to unfair), there was no remedy under the LRA and that this Court had no jurisdiction to make any determination of unlawfulness. Van Niekerk J had further held that if a remedy was sought under the LRA, the applicant must categorize the alleged unlawfulness as unfairness, and that by extension, the same principle applied to other forms of employer conduct which are alleged to be unlawful.

[13] Further submissions made on behalf of the SABC in the light of the above authorities was that since this Court was a creature of statute, it only had exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law, were to be determined by it. To this end, it was submitted that the applicant was required to point to a provisions in the LRA or some other law that empowered this Court with the jurisdiction to determine this dispute, but that no such provision existed.

[14] To the extent that the applicant placed reliance on the constitution, it was further submitted on behalf of the SABC that the principle of subsidiary ought to apply and the applicant could not allege a violation of a constitutional right thereby circumventing the application of the LRA and the dispute resolutions mechanisms provided for therein[11]

[15] In response to the issue of jurisdiction, the applicant contends that what she seeks is a declaratory order in reliance on the provisions of section 158 of the LRA. She contends that this Court has jurisdiction, in view of the termination of her contract of employment being illegal, unlawful, an infringement on her constitutional rights, and having taken place without due process. She further

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the employer giving notice under the contract of employment and a summary dismissal. But then in five further paragraphs it extends the concept of dismissal far beyond its ordinary meaning. Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if a dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA."

[10] Case number J736/20 Delivered on 11 August 2020 at para 5

[11] In reference to *Chirwa v Transnet and others* [2008] 29 ILJ (CC) at para 124; *Kapari v Office of the Chief Justice and others* (Unreported, Case Number J530/2020)

contends that the termination was in bad faith and with malice, intended to humiliate her and infringe her rights to dignity and good reputation.

[16] The applicant contends that the SABC's basis for the jurisdictional challenge is premised on a misinterpretation and misconstruing of the decision in *Steenkamp* as in that case, the Constitutional Court was confronted with a dispute concerning a declaration of invalidity of dismissal based on non-compliance with the provisions of the LRA, and that the apex Court was not dealing with the Court's exercise of its powers to determine contractual disputes under the provisions of section 77(3) of the BCEA[12], nor was it concerned with the exercise of the Court's powers to review any decision taken or any act performed by the State as an employer, on grounds as are permissible in law provided in section 158(1)(h) of the LRA.

[17] The applicant contends that her employment contract was terminated summarily in contravention of the labour laws as the termination was under the pretext that she was not an employee when in fact she was until the unlawful termination, and that therefore, only this Court has jurisdiction to adjudicate employer-employee relationships.

[18] She further submitted that in addition to the powers under section 158(1) of the LRA, the Court's jurisdiction is located in the provisions of section 77(3) of the BCEA, which provides that this Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constituted a term of that contract

[19] In determining whether this Court has jurisdiction to grant the applicant the relief that she seeks, the starting point is to reiterate the trite principle that jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case. This principle was reaffirmed in *Gcaba* as follows;

> "Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were

[12] Basic Conditions of Employment Act 75 of 1997

heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction..."[13]

[20] It has further been restated that section 157(1) of the LRA provides that subject to the Constitution[14] and section 173, and except where the LRA provides otherwise, the Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by this Court. What this requires is that a party referring a dispute to this Court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this Court to adjudicate the dispute. It is thus incumbent on an applicant referring a matter to this Court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this Court to entertain the claim. What is required is a determination of the legal basis for the claim, and then an assessment of whether the Court has jurisdiction over it[15].

[21] In *PSA obo Members v Minister of Health and Others*[16], Van Niekerk J had occasion to examine the provisions of sections 157 and 158 of the LRA, and held that the distinction between jurisdiction and powers as they are drawn by both provisions is not necessarily cast in Manichean terms, and that it remains

[13] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 75
[14] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)
[15] See *Shezi v SAPS and Others* (Unreported. Case Number J852/20 Delivered on 15 September 2020 at para 9)
[16] (J3106/18) [2018] ZALCJHB 345; [2019] 1 BLLR 71 (LC); (2019) 40 ILJ 193 (LC)

for the court to determine whether the statutory provision on which an applicant relies to found jurisdiction is indeed one that confers jurisdiction, or whether it is no more than the expression of a power that may be exercised once jurisdiction has been established[17]. In similar vein, it was held in *Merafong City Municipality v SAMWU*[18] that the distinction between jurisdiction and powers as they are drawn by sections 157 and 158 is not necessarily cast in conflicting or contradictory terms.

[22] In this case, the applicant seeks a declarator that the termination of her contract of employment was unconstitutional, unlawful, invalid and of no force and effect. This Court is empowered under the provisions of section 158 of the LRA[19] to grant declaratory orders amongst other forms of relief.

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[17] At para 13

[18] [2016] 8 BLLR 758 (LAC)

[19] 158. Powers of Labour Court.

(1) The Labour Court may-

(a) make any appropriate order, including
  (i) the grant of urgent interim relief;
  (ii) an interdict;
  (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
  (iv) a declaratory order;
  (v) an award of compensation in any circumstances contemplated in this Act;
  (vi) an award of damages in any circumstances contemplated in this Act; and
  (vii) an order for costs;

(b) order compliance with any provision of this Act or any other employment law.

(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with –
  (i) the constitution of that trade union or employers' organisation (as the case may be); or
  (ii) section 26(5)(b);

(f) subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law; (i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and

(j) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.

[23] Arising from the majority decision of the Constitutional Court in *Steenkamp* it is settled that this Court cannot ordinarily determine claims based on the invalidity or unlawfulness of a dismissal[20]. One can also not quarrel with the conclusions reached by Van Niekerk J in *Phahlane*[21] to the effect that from *Steenkamp*, it should be accepted that an applicant alleging that a dismissal was unlawful (as opposed to unfair), has no remedies under the LRA, and that this Court had no jurisdiction to make any determination of unlawfulness, of the learned Judges' conclusions that if a remedy was sought under the LRA, the applicant must categorize the alleged unlawfulness as unfairness. In my view this would be even more appropriate where the pleadings clearly point to what is being alleged as being unlawful, being merely unfairness in disguise.

[24] Having had regard to the cases as pleaded in *Steenkamp* in both the matters before the Constitutional Court and the Labour Appeal Court (LAC), and further

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[20]See also *Edcon v Steenkamp and Others* [2015] ZALAC 2; 2015 (4) SA 247 (LAC); [2015] 6 BLLR 549 (LAC); (2015) 36 ILJ 1469 (LAC), where it was held;

> "[40] The implicit acceptance by the Appellate Division in *Schierhout v Minister of Justice* that a wrongful or "invalid" termination can in effect bring a contract of employment to an end has however persisted in our labour law. The notion is comprehended in the definition of "dismissal" in section 186 of the LRA which defines a dismissal to mean *inter alia* "an employer has terminated a contract of employment with or without notice". The statutory concept of a "dismissal" is not the equivalent of a lawful cancellation of a contract of employment. It encompasses much more. Besides the termination of a contract of employment with or without notice, it includes the failure to renew a fixed term contract in certain circumstances, the refusal to allow an employee to resume work after taking maternity leave, selective non re-employment and a resignation by an employee where the continuation of the relationship has been rendered intolerable by the employer. The statutory concept of dismissal is therefore not restricted to the contractual notion of lawful cancellation and recognises that contract law is an insufficient instrument to regulate the modern employment relationship. The purpose of the wide definition of "dismissal" is to extend the LRA's scope to cover the effective dismissal of employees, whether or not by due termination of their contracts of employment. A wrongful termination without notice which does not constitute a lawful cancellation or rescission of the contract may therefore still constitute a dismissal in terms of the LRA.
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> [41] The definition of dismissal is thus wide enough to include a wrongful or "invalid" termination in violation of contractual or statutory notice periods within its ambit. The word "terminated" in section 186(1)(a) of the LRA should be given its ordinary meaning of "bringing to an end". The ordinary meaning is not coloured by the lawfulness, fairness or otherwise of the action. The fact that a remedy may exist to redress any wrongfulness or unfairness does not *per se* alter the consequence of an ending brought about by the employer's action. As a rule, a wrongful or unfair termination will only be reversed (and the contractual rights and obligations restored) by the grant of the remedy of specific performance or an award of retrospective reinstatement at the discretion of the court. The resultant legal position is not unlike that prevailing in administrative law where a declaration of illegality will not have the inevitable consequence that wrongful action will be declared invalid and set aside."

[21] See fn 10 above

having regard to other cases relied upon by the SABC in its jurisdictional challenge, (viz *Phahlane*), and the applicant's case in this matter, I agree with the views expressed by this Court in *Tshivhandekano v Minister of Mineral Resources and Others*[22] and *Solidarity and Others v South African Broadcasting Corporation*[23] that the decisions in *Steenkamp* (and *Phalane)* ought to be understood within the context of what the Constitutional Court (and this Court in *Phahlane*) was called upon to determine in the light of the pleadings before it.

[25] In *Steenkamp,* the issues before the Constitutional Court and the LAC concerned the declarations of invalidity of dismissals based on non-compliance with the provisions of section 189A of the LRA. As La Grange J in *Tshivhandekano*[24] correctly observed, *Steenkamp* was not concerned with the court's exercise of its powers to determine contractual disputes under section 77(3) of the BCEA, nor was it concerned with the exercise of the court's powers to "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law" as provided for in section 158(1)(h).The Constitutional Court had found that a dismissal in breach of those provisions did not make the dismissal invalid because the invalidation of a dismissal is not a remedy contemplated by the LRA.

[26] In a nutshell, a dismissal based on operational requirements which is not compliant with the provisions of section 189 of the LRA is a matter to be determined under the unfair dismissal regime of the LRA. This is so in that concepts of 'invalidity', or 'unlawfulness' or 'wrongfulness' are foreign to the entire scheme of unfairness contemplated in the overall scheme of the LRA.

[27] In similar fashion, to the extent that a dismissal (that is not automatically unfair) under section 188 of the LRA in order to be fair ought ordinarily be on account of the employees' conduct or capacity, and also be in compliance with a fair procedures, it follows that dismissals on those grounds cannot attract invalidity or unlawfulness where they are challenged. This approach ought equally be

[22] (J580/18) [2018] ZALCJHB 70; [2018] 6 BLLR 628 (LC); (2018) 39 ILJ 1847 (LC) at para 11
[23] (J1343/16) [2016] ZALCJHB 273; 2016 (6) SA 73 (LC); (2016) 37 ILJ 2888 (LC); [2017] 1 BLLR 60 (LC) at para 22
[24] At para [11]

applicable to any instances were at the core of the claim is any alleged unfair labour practice as contemplated in section 186(2) of the LRA.

[28] In *Phahlane*, the issues for determination before Van Niekerk J were whether the applicant could interdict the confirmation or ratification of a decision to *dismiss* him, and whether the disciplinary proceedings against him could be declared unlawful and be set aside. In that case, the applicant had been suspended, notified of the disciplinary proceedings against him, and those proceedings had taken their course, resulting in a recommendation of a sanction of *dismissal* . The only issue was whether the National Commissioner of Police could be interdicted from ratifying and confirming the decision to *dismiss*. Other than the obvious fact that the facts in that case pointed to the horse having bolted to the finishing line since all that was left was for the confirmation of the sanction, Van Niekerk J had found that the pleadings did not disclose a cause of action over which the Court had jurisdiction[25]. Again, the facts of that case pointed to the claim being located squarely within an alleged unfair dismissal, other than anything resembling unlawfulness.

[29] This Court has overtime raised its concerns surrounding a deluge of matters that habitually burden the urgent roll, with contrived and unsustainable claims that a dismissal, or disciplinary enquiry or even suspensions are unlawful, void, or illegal. On a proper consideration of the pleadings in most of those cases however, the issues complained about turn out to be mostly about fairness of these events, without any basis being laid for those claims. In most of those cases, this Court has repeatedly stated that it lacks jurisdiction, and that they should be dealt with in accordance with the overall dispute resolution scheme as set out in the LRA. This is correctly in line with the Constitutional Court's decision in *Steenkamp*.

[30] The facts of this case are somewhat peculiar and clearly distinguishable from the above cases as referred to. The first distinguishable feature is the basis upon which the so-called 'non-recognition' of the applicant's contract of employment was effected, and how the applicant had pleaded her case.

[25] At para [10]

Reference in this regard is made to the *'Notification of non-recognition of your purported contract of employment with the SABC'*[26], in terms of which the applicant was notified that her appointment was irregular and unlawful, and as also duly established by the Public Protector. In essence, she was informed that the SABC does not 'recognise' her contract of employment, and therefore she is not considered an employee. Conspicuous with this notice of non-recognition is that nowhere is the applicant informed that her services are *terminated*, or that she is *dismissed*.

[31] The concept of *'non-recognition of a contract of employmen*t' is unknown, unheard of, and foreign within the context of the LRA, or any other legislative provisions one can think of. In my view, it is a meaningless if not a vague concept. Even if the definition of dismissal under section 186(1) of the LRA was extended as pointed out by the LAC in *Steenkamp*[27], so that the word "terminated" in those provisions is given its ordinary meaning of "bringing to an end", it is doubted that from the concept of *'non-recognition of contracts'*, one can readily infer 'terminated' or 'dismissed', for the purposes of a claim under section 186(1) of the LRA. It is indeed easy for an employer to decide that it no recognises an employee's contract of employment. It will however be an even more onerous burden on an employee at the CCMA or Bargaining Council, to discharge the onus under section 192(1) of the LRA, that he or she was dismissed, when all that she was told that a contract of employment was no longer recognised.

[32] In this case, and contrary to the submissions made on behalf of the SABC, the applicant is not relying on any alleged 'unfair dismissal' or 'unfair labour practice', nor can from a proper analysis of her pleadings, it be inferred that her case is grounded in unfairness. In any event, she could not have done so in that from the *'non-recognition of her contract of employment'*, it is not clear what the SABC meant, and the fact that she was told to pack her belongings cannot mean anything.

[26] Annexure 'PC1' to the Founding Affidavit
[27] See fn 14

[33] The applicant has disavowed reliance on any provisions of the LRA pertaining to unfairness as contemplated in Chapter VIII of the LRA. It is trite that in labour law jurisprudence, lawfulness cannot be equated with fairness[28]. To the extent that from *Steenkamp* it can be extrapolated that the LRA does not provide remedies for unlawfulness, it does not imply as correctly pointed by La Grange J in *Solidarity*[29], that such remedies do not exist, or that this Court cannot grant them if they do exist, especially if a case for such relief has been made out. This approach is further fortified by the provisions of section 34 of the Constitution, in terms of which everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or independent and impartial tribunal/forum.

[34] The applicant asserts that she rejects the unlawfulness related to the non-recognition of her contract of employment. Inasmuch as I appreciate that the contractual claim under the provisions of section 77 of the BCEA was belatedly made in the replying affidavit, it is my view that given the nature of her overall claim, this Court under the provisions of section 158 of the LRA, nonetheless still has jurisdiction to consider whether a declaratory order should be granted, and this is so in that her claim as pleaded, cannot be said to be a dispute that is quintessentially based on the right to fair labour practices, or an unfair dismissal, nor can she categorize the alleged unlawfulness as unfairness.

[35] It has been said that a declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction[30]. However, in circumstances where the basis of a termination of services cannot be classified as a dismissal or where the employer's impugned conduct cannot be classified as falling within the definition of unfair labour practice, it is hard to fathom what the employee's remedies under those circumstances would be, other than to seek a declarator.

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[28] *South African Post Office Ltd v Mampuele* (JA29/09) [2010] ZALAC 15; (2010) 31 ILJ 2051 (LAC) ; [2010] 10 BLLR 1052 (LAC) at para 21
[29] At para 44
[30] *MEC for Education, North West Provincial Government v Gradw*ell (JA58/10) [2012] ZALAC 8; [2012] 8 BLLR 747 (LAC); (2012) 33 ILJ 2033 (LAC) at para 46

[36] Having concluded that this Court has jurisdiction, the next issue to be determined is whether the applicant should be granted the relief that she seeks. The facts leading to the *'non-recognition'* of the applicant's contract of employment' are largely undisputed. The decision not to recognise the applicant's contract of employment clearly emanated from the report and findings of the Public Protector dated 13 March 2020. It is now settled that the remedial actions of the Public Protector have a binding effect, unless of course reviewed and set aside[31]. The SABC, particularly being a public body established in terms of an Act of Parliament, was clearly obliged to implement the Public Protector's remedial actions. The SABC claims that it did so. Clearly it did not.

[37] The starting point is that nowhere in her report did the Public Protector speak of *'non-recognition of the employment contract'*. In fact, four alternative remedial actions were recommended by the Public Protector and the SABC, despite alleging that it had implemented them, chose an easier option, from which the question of unlawfulness and invalidity comes up.

[38] In fact, there is merit in the applicant's contentions that the SABC's decision was in bad faith, malicious and intended to humiliate and tarnish her reputation. If not, how does the SABC explain its conduct of conveying its decision to the applicant when she was in the middle of a live show? No explanation was proffered as to the reason the decision could not have been conveyed to her before or after the show. Without making any findings or conclusions on this issue, one cannot think of a more humiliating and embarrassing experience as a TV personality, other than being informed of a non-recognition of one's employment contract during a live show on national television.

[39] Second, how does the SABC explain the easy option it took, when the Public Protector had guided it on how to deal with the applicant's appointment. There is no reasonable explanation why the SABC could not have invoked the provisions of the LRA as suggested by the Public Protector to terminate the contract of employment, or why it did not look at its own policies as to how best

[31] *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and others* 2016 (3) SA 580 (CC)

to deal with the matter. Even more worrisome, is an issue which the Court had raised with SABC's counsel, pertaining to the fact that in the letter requesting the applicant to make representations, it was indicated that her previous position as Specialist Presenter at *'Lesedi FM'* still existed, and yet this was not even considered. Counsel for the SABC however changed channels so to speak, contending that his instructions were that the position did not in fact exist. The question that arises is why then was the misrepresentation made in the letter requesting the applicant to make representations, if the position did not exist in the first place?

[40] It nonetheless gets worse for the SABC in that it never occurred to it that the applicant's initial appointment at *'Lesedi FM'* was above board. Nothing was said about that contract having been terminated. The 'non-recognition of the employment contract' which was based on the appointment from April 2016, nonetheless appeared to be for a clean sweep, with no regard to the legitimacy of her previous position. Clearly this leads to the invalidity of the decision, which in essence implies that there was never a dismissal within the confines of section 186(1) of the LRA in the first place[32].

[41] Furthermore, I agree with what was stated in *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others*[33] to the effect that;

> "[144] If a person is a permanent employee in position X and is promoted to position Y, I do not accept that with the setting aside of his appointment to position Y he ceases to be an employee. In such a case the only act

[32] See Steenkamp (Constitutional Court's decision), where Zondo J (as he then was) held:

> "[189] An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer. In this Court's unanimous judgment in Equity Aviation, Nkabinde J articulated the meaning of the word "reinstate" in the context of an employee who has been dismissed. She said, quite correctly, it means to restore the employee to the position in which he or she was before he or she was dismissed. With that meaning in mind, the question that arises in the context of an employee whose dismissal has been found to be invalid and of no force and effect is: how do you restore an employee to the position from which he or she has never been moved? That a dismissal is invalid and of no force and effect means that it is not recognised as having happened. It is different from a dismissal that is found to be unfair because that dismissal is recognised in law as having occurred."

[33] *Supra*

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

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

[42] To reiterate, and further to the extent that part of the Public Protector's remedial actions included the applicant being reverted back to her position, the net effect of the SABC's non-recognition of her contract of employment could not have been extended to her position in *'Lesedi FM'*, nor caused her to cease to be an employee for all intents and purposes at SABC. It therefore follows that the applicant should be entitled to the relief that she seeks. Whether the SABC upon the applicant's return to service elects to exercise any of the options as recommended by the Public Protector or to take any other lawful measures it deems fit is obviously entirely within its discretion.

[43] In the light of the conclusions reached, it is not even necessary to dwell much into the issue of whether this application deserves the urgent attention of this Court or not. Even if it is necessary, having had regard to the provisions of Rule 8 of the Rules of this Court, I am satisfied that the applicant has set out in the founding affidavit, the reasons why this matter should be accorded urgency. She had also acted with alacrity and had approached this Court for relief within three days of the SABC's impugned decision. There are thus no grounds for

any conclusions to be reached that the urgency claimed is self-created. Furthermore, it has already been indicated in this judgment that she does not have alternative remedies to attain substantive relief in due course. In the end, the SABC cannot speak of any prejudice to it should urgent relief be granted, as various options are available to it in regard to how best to deal with what it considers to be the irregular appointment of the applicant from 1 April 2016.

[44] Furthermore, having had regard to costs, I am satisfied that upon a consideration of the requirements of law and fairness, the applicant should not be burdened with the costs of this application. The SABC as already indicated, knew what it was supposed to do where there were concerns with the applicant's appointment as with effect from April 2016. Even if the SABC can claim to have been in a quandary, the remedial actions of the Public Protector were clear, as well as the sound advice of Moshoana J in *South African Broadcasting Corporation (Soc) Ltd v Keevy and Others*[34]. The SABC however made incorrect choices, and acted unlawfully and callously towards the applicant, thus necessitating that she approach this Court for urgent relief. In my view, the applicant should be entitled to her costs, inclusive of those consequent upon the employment of two counsel.

[45] Accordingly, the following order is made;

Order:

1. The forms prescribed by the Rules of this Court are dispensed, and this matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court.

2. The termination of the Applicant's contract of employment by the First Respondent (SABC) on 19 October 2020 is declared to be unlawful, invalid and of no force and effect.

[34] At paragraphs 52 - 56

3. The decision of the First Respondent (SABC) of 19 October 2020 to terminate the Applicant's contract of employment is set aside, and the Applicant should be permitted to report for duty with immediate effect.

4. The First Respondent (SABC), is ordered to pay the costs of this application, inclusive of costs consequent upon the employment of two counsel.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	W Mokhari SC with M Makgato and C Lithole, instructed MT Raselo Incorporated
For the First - Fourth Respondents:	M Mhambi with S Bismilla, instructed by R Masilo Attorneys