Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no:J 1343/16

In the matter between:

SOLIDARITY	**First Applicant**
FOETA KRIGE	**Second Applicant**
SUNA VENTER	**Third Applicant**
KRIVANI PILLAY	**Fourth Applicant**
JACQUES STEENKAMP	**Fifth Applicant**

And

SOUTH AFRICAN BROADCASTING CORPORATION	**Respondent**

Heard: 22 July 2016
Delivered: 26 July 2016

Summary: (Urgent interdict – unlawful summary dismissal – dismissals in breach of contractual right to disciplinary procedure and in breach of right to freedom of expression - dismissals *void ab initio* – costs)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application which was brought on an urgent basis by a number of employees of the respondent, the South African Broadcasting Corporation ('the SABC'). The application was initially launched on 15 July and was set down for a hearing on the urgent roll on 21 July 2016.

[2] The individual applicants are: Mr F Krige ('Krige'), an executive producer of current affairs at Radio Sonder Grense ('RSG'); Ms S Venter ('Venter'), a producer and presenter in the current affairs team at RSG; Ms K Pillay ('Pillay') and executive producer of current affairs at SAfm, and Mr J Steenkamp ('Steenkamp'), a senior reporter at SABC news dealing with news and current affairs investigations, who also serves as acting assignment editor from time to time meaning that, he is responsible for day-to-day operations of the newsroom. The applicants have a varying lengths of service between three and 22 years.

[3] Initially, the applicants sought interim relief to the uplift their suspensions from work, suspend disciplinary proceedings against them and various other related relief pending the outcome of three other applications namely:

3.1 The final determination of the application by eight individual applicants ('the SABC 8') including the Second to Fifth Applicants' application for direct access to the Constitutional Court;

3.2 The final determination of the High Court review intended to be launched by the SABC in relation to the decision of (ICASA regarding its Protest Policy; and

3.3 The final determination of Parts A and B of the matter of Helen Suzman Foundation v South African Broadcasting Corporation, case no: 52160/16 in the Gauteng Local Division, Pretoria of the High Court.

[4] Apart from finalising the interim relief sought in the Labour Court, the Constitutional Court application aims to have the so-called protest Policy[1] adopted by the SABC in June 2016 declared unconstitutional, unlawful

[1] Described more fully at par [8] below

and invalid. The application before the Gauteng Local Division was in fact finalised on 20 July before this application was heard. In that matter, the parties agreed to an interim order, the gist of which was that, pending the final determination of that application the SABC and the Chief Operating Officer Mr H Motsoeneng ('the COO' or 'Motsoeneng') undertook to exercise editorial discretion in accordance with the Constitution, the Broadcasting Act, 4 of 1999, and various other legislation and are prohibited from suppressing coverage and reportage of protest action and events or actions which might reflect negatively on the President of the Republic of South Africa and any political party or politician.

[5] On Wednesday 20 July, the day before the urgent application had initially be set down, and before the SABC had filed any answering affidavit, the applicants filed a notice of amendment to include relief setting aside the dismissal of the individual applicants which had taken place on 18 July and ordering their reinstatement. As *Mr Skosana* , who appeared for the SABC assisted by *Mr Madlanga* correctly observed, unlike the remaining relief relating the interdicting of the disciplinary proceedings, which is retained in the amended notice of motion, the relief sought in the new prayer is final in nature. *Mr Budlender*, appearing for the applicants with *Mr Bruinders* concurred in this.

[6] On 21 July, the SABC sought a postponement to obtain more time to file an answering affidavit in view of the amended application. An interim order was made postponing the matter to 12H30, the following day and setting timetables for the filing of answering and replying affidavits. Costs of the postponement are to be costs in the cause. The matter was eventually heard after 14h15 on Friday 22 July.

Chronology of relevant events.

[7] The sequence of events is essentially undisputed as are most of the relevant facts. In the answering affidavit of the SABC deposed to by Mr M Tebele ('Tebele'), the SABC's Acting Group Executive: News and Current Affairs.

[8] It is now well known that on 26 May 2016, the SABC issued the following news editorial edict known as the Protest Policy which stated:

> "SABC WILL NO LONGER BROADCAST FOOTAGE OF
>
> DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS
>
> Johannesburg- Thursday, 26 May 2016-The South African Broadcasting Corporation (SABC) has noted with concern the recent turmoil arising from violent service delivery protests in various parts of the country. The SABC as a public service broadcaster would like to condemn the burning of public institutions and has made a decision that it will not show footage of people burning public institutions like schools in any of its news bulletins with immediate effect. We are not going to Qrovide publicity to such actions that are destructive and regressive,
>
> The SABC is cognisant of the fact that citizens have constitutional rights to protest and voice their concerns on various issues that they are not happy with but we also do not believe that destruction of property is the best way to voice those grievances. These actions are regrettable and viewed as regressive on the developments made after 22 years of South Africa's democracy. Continuing to promote them might encourage other communities to do the same. The SABC would like to stress that we will continue to cover news without fear or favour. We will not cover people who are destroying public property.
>
> The SABC's Chief Operations Officer, Mr Hlaudi Motsoeneng stated that "It is regrettable that these actions are disrupting many lives and as a responsible public institution we will not assist these individuals to push their agenda that seeks media attention. As a public service broadcaster we have a mandate to educate the citizens and we therefore have taken this bold decision to show that violent protests are not necessarv. We would like to encourage citizens to protest peacefully without destroying the very same institutions that are needed to restore their dignity".
>
> The SABC would like to make an appeal to other South African broadcasters and the print media to stand in solidaritv with the public broadcaster not to cover the violent protests that are on the rise and in turn destroying public institutions, " (emphasis added)"

[9] Journalists within the SABC were not consulted about this radical new policy, but were simply instructed to follow the Protest Policy by the Chief

Operations Officer, Mr Hlaudi Motsoeneng ('Motsoeneng') and the then acting Chief Executive Officer, Mr Jimi Matthews ('Matthews').

[10] The SABC was intent on preventing any internal or external debate about the Protest Policy. Even internal criticism of the Protest Policy by very senior journalists was therefore met with an immediate disciplinary response.

[11] On 31 May 2016, Motsoeneng summoned Krige and Pillay to a meeting to discuss a number of issues over which he was unhappy. These included the fact that on the previous two days, SABC radio shows had included comments from independent analysts which criticised the Protest Policy.

[12] During the meeting, it was made clear that the SABC wanted complete compliance with the Protest Policy and did not want any criticism of the Protest Policy aired, even if this was criticism by independent analysts.

[13] Mr Motsoeneng stated: "[I]f people do not adhere, get rid of them. We cannot have people who question management... This is the last time we have a meeting of this kind." Mr Matthews added: "It is cold outside. If you do not like it you can go. You've got two choices: the door or the window. ',

[14] Events escalated on 20 June 2016, when the Right2Know campaign protested against the adoption of the Protest Policy, outside the SABC offices in Johannesburg, Cape Town and Durban.

[15] On the morning of 20 June 2016, a news room diary meeting was held to discuss which events would receive coverage that week. The meeting was attended by various people, including Mr Krige and Ms Venter. At the meeting, Tebele announced that the three protest marches were to be scrapped as stories and afforded no coverage at all by the SABC.

[16] Krige and Venter, together with another employee, Ms Gqubule ('Gqubele'), placed on record their disagreement with this decision not to cover the Right2Know protests. In any event, the Right2Know protests were not covered by the SABC. This was pursuant to the instruction given by Tebele.

[17] Three days later, on 23 June 2016, Krige, Venter and Gqubule were called into a meeting with management and informed that they had been

suspended. Disciplinary proceedings were instituted against all three employees and remain pending. The suspension notices of 23 June 2016 are identical in their terms and state:

> "RE NOTICE OF SUSPENSION
>
> It has come to management's attention that you have allegedly refused to comply with an instruction pertaining to the provisions of the SABC Editorial Policy as well as the directive not to broadcast visuals / audio of the destruction of property during protest action(s) and that you distance yourself from the instruction.
>
> The above alleged offence constitutes a refusal and/or failure to comply with a reasonable and lawful instruction and same impacting negatively on the day-to-day broadcasting operations.
>
> Please be advised that management regards the alleged offence as being of a serious nature and has furthermore resolved that the potential of your presence at the workplace may interfere with the investigation into the matter, therefore, a decision was taken to suspend your services with the SABC with immediate effect pending institution of disciplinary action. Your suspension is with full remuneration.
>
> Please hand in your SABC access card, office keys, laptop, iPad Tablet and 3G card to the Human Resources Manager: News & Current Affairs, Mr Mannie Alho, before leaving the premises of the SABC.
>
> Please keep the office of the Acting Group Executive: News & Current Affairs informed of your whereabouts should you need to leave the Johannesburg area for any reason, as the SABC might need to liaise with you in respect of the institution of disciplinary action, during your suspension,
>
> During the suspension period, you are not allowed to have any communication with any employee, without obtaining prior permission from the office of the Acting Group Executive: News & Current Affairs. You will be informed of the outcome of the investigation in due course.
>
> Yours faithfully
>
> SIMON TEBELE
>
> ACTING GROUP EXECUTIVE: NEWS & CURRENT AFFAIRS"

[18] Krige and Venter are alleged to have failed and/or refused to comply with a lawful instruction. In particular, that they failed and or refused to comply with a directive relating to the SABC's Protest Policy.

[19] One of the persons at the SABC most directly involved in driving these processes against the journalists was Matthews. However, a few days later on 27 June 2016, he resigned from the SABC. In his public resignation letter, Matthews stated:

> 'T]he prevailing, corrosive atmosphere has impacted negatively on my moral judgement and has made me complicit in many decisions which I am not proud of. I wish also to apologise to the many people who I've let down by remaining silent when my voice needed to be heard.
>
> What is happening at the SABC is wrong and I can no longer be a part of it."

On 26 June 2016, Pillay and Steenkamp (along with another employee, Ms Ntuli) sent an internal letter to the senior managers at the SABC, recording their concern about what was occurring at the SABC ,including the Protest Policy and the suspensions. The letter was then obtained by the media and published. On 29 June all three employees received letters notifying them of the institution of disciplinary proceedings in the following terms:

> "RE DISCIPLINARY HEARING
>
> You are hereby notified to attend a disciplinary hearing to be held on Friday 1 July 2016 at 09:00 in …. Johannesburg, in order to investigate the following alleged offences brought against you.
>
> 1. CHARGE 1
>
> NON-COMPLIANCE WITH THE DUTIES OF YOUR CONTRACT OF EMPLOYMENT
>
> alternatively
>
> CONTRAVENTION OF SABC RULES AND REGULATIONS
>
> In that
>
> You in Your Capacity As a Reporter, for Radio News in Johannesburg Allegedly Liaised with the media i.e. Star (28 June 2016), The Times (28

June 2016), ENCA (letter drafted and signed by you and provided to ENCA) and News 24 (letter drafted and signed by you and provided to ENCA) without having had permission to do so. In doing so it is alleged that you contravened regulation 2 (d) of the SABC's personnel regulations i.e.

"An employee:

…

(d) shall not, without prior consent of the group chief executive, make any comments in the media or ….."

Should these facts be proven it will constitute an act of non-compliance with the duties of your contract of employment on your part alternatively contravening SABC rules and regulations.

You will be entitled to the following:

- To be represented by a co employee of the corporation or a union representative, who is an employee of the Corporation should you be a member of a recognised trade union;
- To call witnesses to testify in support of your case;
- To cross-examine the employer's witnesses
- To have access to documentation that will be used by the initiator; and
- To request the services of an interpreter, should it be necessary.

The disciplinary panel will consist of:

….

Should you have any objection against any of the panel members or any other query in this regard, you are requested to contact the initiator on telephone number… without delay."

(Emphasis added, superfluous detailed excluded)

[20] A letter to Krige dated 30 June contained a slightly different charge. It read:

"You are herewith notified to attend a disciplinary hearing to be held on Friday 1 July 2016 at 09:00 in …of the SABC Offices in

Johannesburg, in order to investigate the following alleged offenses brought against you:

1. CHARGE 1

NON-COMPLIANCE WITH THE DUTIES OF YOUR CONTRACT OF EMPLOYMENT

alternatively INSUBORDINATION

alternatively

INSOLENCE

In that

You in your capacity as the Executive Producer: RSG News & Current Affairs, during a Radio News line talk meeting held on Monday 20 June 2016, you allegedly categorically distanced yourself from the instruction issued by the SABC management not to cover the Right-2„Know movement marches in Cape Town, Durban and Auckland Park, that Is campaigning against the SABC decision not to broadcast violent protests.

Should these facts be proven it will constitute an act of non-compliance with the duties of your contract of employment on your part alternatively insubordination alternatively insolence.

Should these facts be proven it will constitute an act of non-compliance with the duties of your contract of employment on your part alternatively insubordination alternatively insolence.

The panel will consist of:

….

You will be entitled to the following:

- To be represented by a co-employee of the Corporation or a union representative, who Is an employee of the Corporation, should you be a member of a recognised trade union;
- To call witnesses to testify in support of your case;
- To cross examine the employer's witnesses;
- To have access to documentation that will be used by the Initiator; and
- To request the services of an interpreters should it be necessary.

> Should you have an objection against any of the panel members or any other query in this regard, you are requested to contact the Initiator on … without any delay…"

(redundant detail excluded)

[21] The South African National Editors Forum recognised the extraordinary pressure that the eight journalists were being placed under to conform to the approach demanded by SABC management. On Saturday 9 July 2016, SANEF awarded the eight members of the SABC 8 the annual Nat Nakasa Award. The award recognises "a media practitioner who has shown integrity, commitment and has shown courage in the media". This was announced at a public ceremony on that evening. The award was accepted publicly by six of the eight. Only Pillay commented at the awards ceremony, which she did by reading out the terms of the SABC's mandate and then said "*Until this is achieved, #notinourname*".

11 July 2016

[22] These plaudits cut no ice with the SABC and on the morning of Monday 11 July 2016, the SABC issued further disciplinary charges against seven members of the SABC 8. This included the Second to Fifth Applicants. The disciplinary proceedings against the journalists have not yet commenced. On 8 July 2016 the disciplinary proceedings were postponed indefinitely by the SABC. It seems from the letters that they were drafted on 8 July 2016 as that is the date which appears on the letters. The contents of the letters read:

> NOTICE IN TERMS OF SCHEDULE 8 OF THE LABOUR RELATIONS ACT NO. 66 OF 1995
>
> 1. You are hereby notified in terms of schedule 8 of the Labour Relations Act no. 66 of 1995 that allegations have been received that you are continuing to commit further acts of misconduct after receiving your letter informing you of your disciplinary hearing in the following respects:
>
> 1 .1 You wrote and signed a letter to the SABC COO raising concerns in relation to the instruction given by him and leaked it to the media platforms thereby displaying disrespect and persistence in your refusal to comply with an instruction pertaining to the editorial policy of the

SABC as well as the directive not to broadcast visuals/ audio of the destruction of property during protest actions.

1 .2 Since the Policies and Personnel Regulations are incorporated into your employment contract, your conduct as stated above constitutes a contravention of paragraph 2 (d) of the Regulations in that you made comments or published an article in the media on your terms and conditions of contract while you are in the service of the SABC without prior consent of the Group Chief Executive.

1 .3 it also contravenes regulation 2 (e) in that it constitutes a refusal to obey and carry out reasonable and lawful instructions including the Policies and Regulations of the SABC. It amounts to insubordination and contravenes clause 2.1 of the Disciplinary Code & Procedure.

1 .4 it undermines editorial responsibility and authority of the SABC as vested upon its Operating Officer in terms of paragraph 2 of the SABC Revised Policies, 2016.

2. Since receiving your disciplinary hearing notice, you continuously took part in media interviews with various daily newspapers resulting in the publication of articles wherein you criticized and displayed disrespect and persistence in your refusal to comply with an instruction pertaining to the editorial policy of the SA3C as well as the directive not to broadcast visuals/ audio of the destruction of property during protest actions. Your conduct constituted a contravention of the prescripts set out in paragraphs 1.2 to 1.4 above.

3. You are accordingly afforded an opportunity to state your case in response to these allegations. In that regard you are entitled to prepare that response with the assistance of a trade union representative, a fellow employee or lawyers of your own choice. Such response must be delivered to my office not later than 16h00 on Friday, 15 July 2013, failing which I will assume that you have no answer to the allegations leveled against you.

Your co-operation herein is appreciated.

Yours faithfully

Seboleto Ditlhakanane

General Manager: Radio News & Current Affairs”

[23] On the same day, a few hours after the additional charges had been served on the journalists, the Complaints and Compliance Committee ('CCC') of the Independent Communications Authority of South Africa ('ICASA') upheld a complaint lodged on 1 June 2016 against the SABC policy decision. The decision of the CCC is a carefully considered one. It takes into account the obligations of the SABC in terms of the Broadcasting Act, the provisions of its license and the special role the broadcaster plays as confirmed by the Constitutional Court ***SABC v National Director of Public Prosecutions & others*** in which it was held:

> "Ultimately, however, what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed and educated as is acknowledged in the Preamble to the Broadcasting Act which reads—
>
> 'Noting that the South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity .
>
> The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy."[2]

[24] In its conclusions, the CCC also found *inter alia* that:

> '[16] In Islamic unity Convention v Independent Broadcasting Authority and Others Langa DJC (as he then was) stated the following in a matter that concerned the validity of the then Broadcasting Code:
>
> 'South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as "one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members. As such it is protected in almost every international human rights instrument. In Handyside v The United Kingdom (1976) 1

[2] 2007 (1) SA 523 (CC) at paras 26-28.

EHRR 737 at 754 the European Court of Human Rights pointed out that this approach to the right to freedom of expression is —

> 'applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'

[17] Given the breadth of the right to freedom of expression and "what is central to the issue is not the responsibility and rights of the SABC as a broadcaster but the right of the public to be informed,' it is clear to the CCC that particular focus should be placed on ensuring that accurate information, with the scenes of service delivery protesters burning public property, is broadcast to the public and that, where a breach of these duties is clear, it should advise Council to compel the SABC to give effect to the citizen's fundamental right to receive even offending, shocking or disturbing information as long as it enjoys the protection of section 16 of the Constitution read with the Broadcasting Code of the BCCSA.

[18] Prior restraint. The present matter is similar to the case concerning blacklisting by the SABC — Freedom of Expression Institute v Chair, Complaints and Compliance Committee." Here, as in that case, the head of news of the SABC had — in advance — banned a category of coverage. Our courts have held that where forms of expression are cut off before reaching the public, this is known as a "prior restraint" and that such restraint would be permitted only in truly exceptional circumstances. In the present context, the SABC has categorically imposed an absolute restraint on its newsroom and there is nothing in the Broadcasting Act or the licences that permits this. Although it is true that the "prior restraint" was not imposed by an external body — as was the case in Print Media South Africa v Minister of the Interior and Another[33] - the effect on the newsroom is the same. In fact, at the core of the matter lies the categorical ban on such material - like the legislative ban which was imposed on quoting persons listed in terms of the security legislation in apartheid times. There was no choice granted to newspapers to publish statements by these persons, even if they were politically irrelevant. This amounted to nothing else than absolutism which was typical of a tyrannical regime. Such absolutism is totally foreign to our new democracy based on freedom of expression and especially, for this case, the right to receive information which is in the public interest - the latter test not amounting to that which is

> "interesting to the public" but that which serves to inform the public. When the duties under the Broadcasting Act and the licences of the SABC are judged as a whole, there is one basic message: inform when it is in the public interest. The CCC has no doubt that that includes the duty to inform the viewing and listening public when public buildings are set alight or otherwise destroyed as part of a service delivery protest. Why should the public not be informed of this action — illegal as it is — so that it may be part of an open society where good and bad is broadcast so that choices may be made? In fact, the right to freedom of expression is meaningless if there is not also a right, and thus a duty, to be informed as to matters of public interest— as, in fact, the Constitution of the Republic guarantees. In Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape) the Supreme Court of Appeal stated that "[m]ere conjecture or speculation that prejudice might occur will not be enough." It is our view that at the most the argument of the SABC in regard to the covering or showing of the burning of public property would fall in the category stated by Nugent J in the said judgment. The Court held that these principles apply, appropriately adapted, "wherever the exercise of press freedom is sought to be restricted in protection of another right".

(footnotes omitted)

[25] The CCC found that the Policy was in conflict with its duties as a public broadcaster and was invalid from its inception in terms of the Broadcasting Act 1999 read with the sections 16, 192 and 39(2) of the Constitution of the Republic of South Africa 1996, and in terms of its licenses. ICASA confirmed that the findings constituted a decision of ICASA

[26] After the decision of ICASA that, the Protest Policy was unlawful on 12 July 2016, the SABC 8, through the freedom of expression Institute ('the FXI'), wrote to the SABC. They asked for confirmation that, in light of the ICASA decision, the SABC would abandon the Protest Policy and reverse the suspensions and disciplinary proceedings. On 13 July 2016, the SABC replied. It queried the standing of the FXI to make representations on behalf of the applicants and pointing out that it was in the process of taking the ICASA decision on review.

[27] The same day, the applicant's attorneys of record wrote to the SABC asking for an undertaking that, unless and until the ICASA decision was

finally set aside by a competent court, the SABC would agree to reverse the suspensions and suspend in totality the disciplinary proceedings. No response was received to this letter.

[28] Although the answering affidavit on behalf of the SABC was deposed to by Mr M Tebele, the acting Group Executive: News and Current Affairs, and despite the fact that the events set out in paragraphs [8] to [27] were contained in the founding affidavit served on the SABC on 15 July, the response of Tebele, who was also personally involved in some of the events related was perfunctory, viz:

> "As these paragraphs relate to the factual background and this was the events in this case, and in view of the limited time for dealing with this affidavit, the contents thereof are denied in so far as they are in conflict with the allegations and contentions already stated herein..."

In truth, very little of the contents of those paragraphs were disputed elsewhere in Tebele's affidavit and his excuse that there was insufficient time is unacceptable given that nearly six days had passed since receipt of the founding affidavit in which all these averments were made and given the relative simplicity of the averments made. Effectively, the applicants' version set out above is undisputed.

15 July 2016

[29] As mentioned above, in the letters issued to them on 11 July, the applicants had been called upon to answer the charges contained therein by 15 July. As the applicants were that stage in the process of preparing this urgent application, the attorneys sent the following letter to the SABC:

> "2. We refer to the notices served on our clients on Monday, 11 July 2016, which contained the additional charges raised against our clients and which required a response by today.
>
> 3. As you will be aware, our clients-along with four other SABC employees-today launched an application for direct access in the constitutional court seeking to have the decisions to Institute disciplinary proceedings against them declared unconstitutional, unlawful and invalid.

4. Our clients will also, this afternoon launched urgent proceedings in the labour court seeking to interdict the disciplinary proceedings on an interim basis, pending the outcome of into alia the constitutional court application.

5. In the circumstances, our clients consider it would be inappropriate the stage to respond to the charge sheets. Suffice it to say that our clients deny all of the additional charges against them.

6. We point out also that, as you are no doubt aware, our courts have made clear that parties including especially organs of state, are not permitted to conduct themselves in a manner that impedes or undermines the ability of courts to grant relief to litigants for them. We refer for example to the matter of Gauteng Gambling Board and another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA).

7. We are of the view that any attempt by the SABC to proceed with the disciplinary proceedings against our clients in the face of the pending Constitutional Court and Labour Court proceedings, would be unlawful and would amount to constructive contempt of court. We trust that the SABC will not do so."

The Constitutional Court application had already been served by this stage and it was obvious from the letter that an interim application in this Court was imminent. That Labour Court application was served later that afternoon.

18 July 2016

[30] The SABC displayed reckless disregard for the pending applications. Instead of pausing, it pressed ahead with the dismissal of the applicants, which it did through correspondence in the form of letters signed by Mr Ditlhakanane, the General Manager: Radio News & Current Affairs. The letters stated:

"NOTICE OF TERMINATION OF EMPLOYMENT

I referred to the notice in terms of schedule eight of the labour relations act served on you on the 08th of July 2016.

Further, I confirm receipt of a letter from your attorneys... Dated 13th of July 2016. It is SABC's see's considered view that the said letter from your

attorneys does not amount to adequate response to the issues/concerns raised by the SABC against you.

It is common cause that you have made it known to the SABC that you will continue to this respect the SABC, your employer. It has now become clear to the SABC that you have no intention to refrain from your conduct of undermining the SABC and the authority of its management.

In the premise your continued acts of misconduct become intolerable. Your employment with the SABC is thus terminated with immediate effect, being 18 July 2016.

You have a right to refer a dispute the CCMA in the event that you are not satisfied with this decision."

[31] It was this action which necessitated the applicants filing an amended notice of relief to set aside the dismissals and reinstate them and to hold the relevant SABC officials personally liable for the costs concerned. They claim that by dismissing them, the SABC deliberately sought to prevent them having the lawfulness of their suspensions and the pending disciplinary enquiries determined by a court, which flouted their right of access to a court.

[32] The applicants also argue that their dismissals are in breach of their contracts of employment for the following reasons. Clause 20 of their contracts of employment states:

> ""If the employee breaches this agreement, violate[s] the SABC policies or acts inappropriately, acts illegally or in breach of labour legislation, the SABC shall be permitted to take the necessary disciplinary actions as allowed and detailed in the relevant labour legislation and SABC Disciplinary Procedures and Code of Conduct. Such action may result in dismissal of the employee and termination of this agreement."

(emphasis added)

[33] Clause 1.5 of the SABC's Disciplinary Procedure states:

> "The Disciplinary Procedure and Code of Conduct supplements the SABC's Personnel Regulations, and together with the said Regulations, they form part of all employees' contracts of employment."

Clauses 4.5 and 4.6 of the same Procedure provides:

> "4.5 For misconduct or offences which, in the opinion of management warrant a stronger disciplinary measure than a verbal warning… a formal disciplinary hearing must be held
>
> 4.6 The disciplinary hearing will be presided over by a disciplinary panel, chaired by the employees line manager for another manager (if the line manager is involved in the evidence against the employee where he is not available). The chairperson can appoint additional members of management to serve on the disciplinary panel. The chairperson must be seen to be as independent and objective as possible... ".

(emphasis added)

[34] Clause 4.8 goes on to detail the procedures for conducting a hearing providing for both parties to call witnesses in support of their versions after which the chairperson will consider the evidence and determine the question of guilt. In the event an employee is found guilty, the chairperson is required to allow an opportunity for mitigation to be presented and after considering both mitigating and aggravating factors to make a decision on the appropriate disciplinary measure.

[35] Lastly, the applicants argued that the SABC by admitting in its answering statement that the reason for the dismissals is that the "*employees were criticizing the 'editorial decision' their suspension and SABC management*" with that, this was an impermissible ground of dismissal. They contend that in the circumstances, to dismiss SABC journalists for criticising the Protest Policy, the suspensions and SABC management were actions based on the application of an invalid policy and is a breach of section 16(1) of the Constitution.

Evaluation

[36] The applicants claim that their suspensions and the pending disciplinary action prior to their dismissal were unlawful because they both arose from and are directly related to their dissent over the protest Policy. Given that they alleged that the protest Policy was invalid, a fact which was confirmed by ICASA on or about 11 July 2016, the suspensions and disciplinary action could not lawfully be pursued because any instruction to comply

with the policy would be an unreasonable and unlawful one, as would any suspension based on an alleged breach of that policy.

[37] In relation to their claim that their dismissals are unlawful and invalid, the applicants' claim rests on two distinct and independent grounds. Firstly, they contend that it was unlawful to terminate their services without complying with their contractual rights to a disciplinary hearing before they were dismissed. Secondly, they contend that their dismissal is in breach of their constitutional right to freedom of expression and cannot be lawful for that reason either.

[38] The SABC contends that the Labour Court has no jurisdiction to hear their claim. The jurisdictional objection also has two independent legs. Firstly, the SABC argues that the applicants are essentially relying on a claim under the LRA and in keeping with the recent judgement of the Constitutional Court ***in Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)***[3] they are confined to remedies for unfair dismissal and, presumably, for unfair suspension. The second leg of the argument is that, in seeking to interdict the disciplinary proceedings which were initiated before the applicant's dismissal and in asking for an order that the officials responsible for dismissing them should be called upon to show cause why they should not be held personally liable for the costs of the application, the applicants are seeking incompetent relief.

[39] In respect of the merits of the applicants claim, the SABC maintains that because the applicants were not dismissed for the original charges brought against them but for the new misconduct they allegedly committed afterwards, which was set out in the so-called schedule 8 of the notices, the SABC was entitled to adopt the procedure sanctioned by Schedule 8, item 4 of the LRA. Consequently, they cannot allege that the procedure adopted was unlawful.

[40] Secondly, it was perfectly lawful of the SABC to dismiss them for acting in violation of their contracts in terms of which they were forbidden to comment in the media in respect of their conditions of employment. They

[3] (2016) 37 *ILJ* 564 (CC)

had no permission to do so, which is a precondition of regulation 2(d) and they had not denied making such comments.

[41] Thirdly, the SABC disciplinary code provided for summary dismissal in a number of instances as set out in clause 1.8 thereof, and clauses 1.2.3 and 1.2.7 of part two of the code authorised summary dismissal when an employee deliberately caused negative publicity of SABC affairs in the media and/or for non-compliance with duties of the applicant's service contract. The specific clauses referred to read as follows:

> "1.8 notwithstanding anything contained herein, any employee who allegedly breaches his conditions of employment by participating unprocedural collective industrial action such as strikes, boycotts, go slows overtime bands, or who incites other employees to participate in such unprocedural collective industrial action need not be dealt with in terms of this disciplinary procedure and may be summarily dismissed. Management may at its own discretion in exercising any right to tested discipline or dismiss an employee arising out of the employee's participation in unprocedural collective industrial action without the necessity of first convening a disciplinary hearing. The provisions pertaining to unprocedural industrial action contained in procedural and recognition agreement is will, in so far as they clash with the provisions of this clause take precedence.
>
> ....
>
> **Part 2**
>
> **CODE OF CONDUCT**
>
> 1. The following are examples of misconduct or offences and do not include all possible forms of misconduct or offences. These offences can be committed against the management of the SABC, fellow employees and outsiders, where the image of the SABC is concerned.
>
> 1.1 ...
>
> 1.2 Misconduct and Offences Warranting Summary Dismissal
>
> ....
>
> 1.2.3 Deliberately causing negative reporting of SABC fares in the media
>
> ...

1.2.7 non-compliance with duties of the service contract, indicating a breach of contract."

Jurisdictional Issues

[42] Before turning to the merits, it is necessary to address the preliminary objections raised by the SABC. In the *Steenkamp* case, the Constitutional Court was seized with the question of the kind of relief that can be obtained by employees if an employer gives shorter notice of termination in a large-scale retrenchment than the 60 day period stipulated in section 189A of the LRA. In brief, the majority decision of Constitutional Court found that a dismissal in breach of that provision did not make the dismissal invalid because the invalidation of a dismissal is not a remedy contemplated by the LRA. Employees who are not given the requisite notice are confined to their remedies under the unfair dismissal regime of the LRA. The SABC cited extracts from some of the following passages of the majority judgement (passages numbered in bold are those cited by the SABC, others have been included for the sake of completeness) in support of its contention that, the applicants in this matter are likewise precluded from pursuing a claim based on the invalidity of their dismissal:

> "**[130]** The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right. A well-known example is every employee's right not to be unfairly dismissed which is provided for in section 185. In section 186 there is a definition of what dismissal means. In section 187 there is a special category of dismissals, namely, automatically unfair dismissals. In section 188 other categories of dismissals are created, namely, dismissals that lack a fair reason and procedurally unfair dismissals.
>
> ...
>
> [131] In section 189 the LRA sets out the process or procedure that an employer must follow when contemplating the dismissal of any employee

for operational requirements. In section 189A the LRA creates rights and obligations for a certain category of employers and their employees in regard to dismissals for operational requirements which did not form part of the LRA before 2002. It also creates the processes or procedures to be complied with. Section 189A also specifies the process for the adjudication of disputes. In this regard it makes provision for the referral to the Labour Court for adjudication of a dispute about whether there is a fair reason for dismissal. It makes provision for the route of a strike and lock-out for the resolution of a dispute. It is particularly significant that section 189A(9) expressly contemplates the very eventuality that arises in this case. That is the eventuality of an employer giving notice of dismissals prematurely. It provides the remedy of an immediate strike for a breach of the section's provisions. In section 189A(13) the LRA specifies special remedies for non-compliance with a fair procedure. All of that – including subsection (8) – is about the right not to be unfairly dismissed which the LRA creates in section 185. In section 191 the LRA sets out the dispute procedure that must be used to resolve disputes concerning alleged infringements of the right not to be unfairly dismissed. No provision is made anywhere for a dispute procedure that must be used for a dispute about the validity or lawfulness or otherwise of a dismissal.

[132] One can take other rights provided for in the LRA and do the same exercise. These include organisational rights, collective bargaining rights, the right to strike and others. There is even a special dispute resolution chapter in the LRA but it says nothing about a right not to be dismissed unlawfully or about disputes concerning invalid dismissals. There is no reference to a right not to be unlawfully dismissed.

There are no processes or procedures for the enforcement of such a right. There are no fora provided for in the LRA for the enforcement of such a right. Nowhere in the entire LRA is there mention of the words "dismissal" and "unlawful" or "invalid" in the same sentence. Yet there are many sentences in the LRA in which the words

"dismissal" and "unfair" appear. The LRA makes no provision for dispute procedures to be followed in the case of a dispute arising out of the infringement of such a right. The only sensible explanation for these omissions in the LRA is that the LRA does not contemplate a right not to be

unlawfully dismissed nor does it contemplate invalid dismissals or orders declaring dismissals invalid and of no force and effect.

[133] The absence in the LRA of any provision for a right not to be dismissed unlawfully and of any dispute procedures or processes for the enforcement of that right explain why the applicants have been forced to go to another statute i.e. the BCEA to enforce a right that is not provided for in the BCEA which they say is provided for in the LRA. The explanation is simply that the LRA does not contemplate the right and the invalid dismissals on which they base their case. If the LRA contemplated such a right in regard to dismissals, it would have made provision for it and for a dispute procedure to be followed in disputes concerning its infringement.

[137] The second basis for my conclusion that the applicants' appeal should be dismissed is a principle that, for convenience, I call "LRA remedy for an LRA breach". The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.

...

[143] Ngcobo J also said:

> "The question therefore is whether a dispute about a failure to comply with the mandatory provisions of item 8 and 9 of Schedule 8 to the LRA is a dispute which falls to be resolved under the dispute resolution provisions of the LRA. In the light of the principles to which I have referred, the answer is clear; a dispute concerning the alleged non-compliance with the provisions of the LRA is a matter which under the LRA, must be determined by the Labour Court. This result cannot be avoided by alleging, as the applicant does, that the conduct of Transnet violates the provisions of the LRA in question and violates a constitutional right to just administrative action in section 33 of the Constitution and is therefore reviewable under PAJA."

[144] Applying this passage to the present case, the dispute concerns the breach by Edcon of the procedural requirements of section 189A(8). Accordingly, the dispute "falls to be resolved under the dispute resolution provisions of the LRA". The applicants cannot avoid this result by alleging that the dismissal is invalid and of no force and effect. What this passage means in part is also that, if a litigant's case is based on a breach of an LRA obligation, the dispute resolution mechanism used must be that of the LRA and the remedy must also be a remedy provided for in the LRA.

Accordingly, on this ground, too, the appeal falls to be dismissed."

(emphasis added)

[43] The Constitutional Court in *Steenkamp* further held *inter alia* that:

"[108] Another indication that the LRA does not contemplate an invalid dismissal is this. In section 187 the LRA created a new category of dismissals. It called them "automatically unfair dismissals". This is a special category of dismissals. What makes this category of dismissals special is that the dismissals in this category are all based on reasons that we, as society, regard as especially egregious. They include cases where an employee is dismissed for his or her race, gender, sex, ethnic origin, religion, marital status, political opinion, membership of a trade union, participation in a protected strike, exercise of rights provided for in the LRA and other such arbitrary reasons. Another factor that makes this category of dismissals special is that for those cases where an employee's dismissal has been found to be automatically unfair, the LRA provides the Labour Court with power to order the employer to pay double the maximum compensation that the Labour Court would have had the power to order if the dismissal had not been found to be automatically unfair but was found to simply lack a fair reason or was found to have been effected without compliance with a fair procedure.

[109] Most, if not all, of the reasons for dismissal that render a dismissal automatically unfair as contemplated in section 187 are reasons that would ordinarily render a dismissal unlawful and invalid. If the Legislature had intended that under the LRA there would be a category of invalid dismissals, it would have been the automatically unfair dismissals. The Legislature must have deliberately decided that the LRA would not provide

> for invalid dismissals but rather for automatically unfair dismissals instead. Put differently, the Legislature deliberately provided in the LRA for unfair dismissals and automatically unfair dismissals to be outlawed and to attract a remedy but did not make any provision for unlawful or invalid dismissals...."

(emphasis added)

[44] A consequence of the Constitutional Court's interpretation of the LRA is that the LRA does not provide remedies for unlawful or invalid dismissals. The issue which arises from this for present purposes is whether the judgment means that the Labour Court has no jurisdiction to provide such remedies. It does not follow as a matter of logic that because the LRA does not provide such remedies that such remedies do not exist or that this Court cannot grant them if they do exist. The point made by the applicants is that they are not relying on any remedy provided by the LRA, but essentially assert that they are entitled to reject what they claim is the unlawful termination of their contracts of employment which they say the SABC committed when it dismissed them without a disciplinary hearing and also in breach of their constitutional right to freedom of expression. They maintain that they are entitled to enforce their contracts of employment and set aside their dismissals.

[45] In support of this contention they cite examples of judgements in which the Labour Court has made orders of specific performance compelling an employer to honour contractual obligations to hold a disciplinary hearing and setting aside dismissals in breach of such obligations, namely ***Ngubeni v National Youth Development Agency & another***[4] and the unreported decision in ***Dyakala v City of Tshwane Metropolitan Municipality***.[5] In *Ngubeni*'s case, the court noted:

> "[19] Insofar as it may be contended that the remedy of specific performance is either unavailable or inappropriate, the starting point is to note that s 77A*(e)* of the BCEA specifically empowers this court to make such orders. In *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 (5) SA 73 (C); (2002) 23 *ILJ* 2001 (C), the court noted that

[4] **(2014) 35 *ILJ* 1356 (LC)**

[5] (J 572 / 15) [2015] ZALCHB 104 (23 March 2015)

courts in general should be 'slow and cautious' in not enforcing contracts, and that performance should be refused only where a recognized hardship to the defaulting party is proved."

[46] In *Ngubeni's* case the court held both that clause 10.1 of his contract of employment[6] and a further written undertaking by the employer offering him "a procedure that would have made any criminal court proud", both constituted binding obligations on the employer which he could enforce by way of specific performance. The court found that his dismissal in breach of clause 10.1 was unlawful and set the termination aside. In *Dyakala's* case the court held *inter alia* :

> "In regard is had to the applicant's contract of employment it is clear from clause 18.2 of the contract that, where the reason for terminating the employment contract include being guilty of any serious misconduct, the employer is entitled to terminate the contract after due compliance with its disciplinary code and procedures. The applicant therefore has, in my view, established that he has a contractual entitlement to a disciplinary hearing. Insofar as there clearly has been no compliance with this contractual obligation to hold a disciplinary hearing before terminating the contract, the termination of the contract was unlawful."[7]

[47] The SABC advanced no authority why either of these judgements were wrong either with respect to the power of the Labour Court to hear and determine contractual disputes or to make orders pronouncing on the lawfulness of a breach of contract or granting relief in the form of specific performance in the exercise of jurisdiction under s 77(3) of the Basic Conditions of Employment Act ('the BCEA')[8]. I am satisfied that the

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[6] The clause read:

"10.1 *Misconduct*

The employment of the employee may be terminated at any time, either summarily or on notice by the agency after a fair disciplinary procedure establishes that the employee is guilty of any misconduct or the employee has committed a breach of material obligation under this agreement which is incompatible with a continued employment relationship, or if the employee is found guilty of any act which would, at common law or in terms of any applicable statute, entitle the agency to terminate the employee's employment."

[7] At para [20].

[8] Section 77(3) of the BCEA states:

"The Labour Court has concurrent jurisdiction with the civil courts to hear and

determine any matter concerning a contract of employment, irrespective of whether any

decision of the Constitutional Court does nothing to disturb the legal premises of either of these and similar judgements. Consequently, the Labour Court is entitled to entertain the applicants' claims based on any alleged invalid termination of their contracts of employment and to make orders which are competent in claims based on breach of contract.

[48] Quite apart from its contractual jurisdiction, under s 157(2) of the LRA, the Labour Court also has concurrent jurisdiction with the High Court "...in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from - (a) employment and from labour relations; (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;.." (emphasis added). Plainly, the LRA did envisage and provide for this court granting relief for the violation of constitutional rights within the ambit of its sphere of operation in labour matters.

Substantive merits

Breach of contractual right to a hearing before dismissal

[49] As in *Ngubeni*'s and *Dyakana*'s cases above it is plainly also the case in this instance that in terms of clause 20 of applicants' contracts of employment and clause 1.5 of the SABC Disciplinary Code And Procedure, the disciplinary code and procedure is incorporated in the provisions of their contracts. Further, on a plain reading of the disciplinary code and procedure, it is clear that before an employee may be dismissed they should be subjected to an oral disciplinary hearing presided over by a chairperson, or a panel which will hear evidence and representations, reach a verdict on the question of guilt and consider further

basic condition of employment constitutes a term of that contract."

representations, if necessary on the issue of an appropriate sanction before imposing one.

[50] It is also clear that until the SABC issued the schedule 8 notices, the more comprehensive hearing contemplated in its disciplinary code was precisely the kind of disciplinary proceeding it envisaged. When it issued the schedule 8 notices, the content of those notices merely called on the applicants to respond to charges stated in the vaguest form, without offering any form of hearing of the kind previously envisaged. The SABC argued that it was entitled to do this because clause 20 of the contract of employment effectively gave it an option of either following its disciplinary code and procedures for the more attenuated form of enquiry required by schedule 8 of the LRA. A plain reading of that provision does not support the SABC's interpretation that it provides it with an election between different procedures. The most plausible interpretation of the provision is that, an employee is entitled to a disciplinary procedure that conforms both with the SABC code and procedure and with schedule 8. The express incorporation of the disciplinary code and procedure in the employee's contracts contained in clause 1.5 of the procedure leaves little scope for the interpretation advanced by the SABC.

[51] It follows therefore that the applicants were entitled to a proper disciplinary enquiry in conformity with the SABC Disciplinary code and procedure and that their dismissal in breach thereof was invalid. By parity of reasoning with *Ngubeni* and *Dyakana,* there is no reason not to declare their dismissals invalid for this reason alone.

[52] Before passing on to the question of whether the applicants' constitutional right to freedom of expression was also infringed, another argument advanced *albeit* faintly should be dealt with. It was suggested that if one has regard to the fact that the alleged misconduct committed by the applicants could have led to their summary dismissal, in that instance, they were not entitled to a disciplinary enquiry as a matter of right. Reference was also made to clause 1.8 of the disciplinary code in terms of which employees engaging in unprotected industrial action are not entitled to a hearing in terms of the code but may be "summarily" dismissed. The

suggestion was made that the applicants and unprotected strikers, as a result fell into the same category of employees who might forfeit the right to a formal enquiry.

[53]

[54] The first point to make is that the procedural rights of unprotected strikers in the code effectively mimic the attenuated requirements of procedural fairness which the courts have recognised as sufficient in the case of unprotected strikes. These limited rights are different from the requirements of procedural fairness in the case of dismissals for individual misconduct.[9] Secondly, the term 'summary dismissal' is derived from the law of the employment contract and arises when an employer terminates an employee's contract of employment without paying the employee notice pay, on account of the fact that the employee is guilty of a fundamental breach of the employment relationship.[10] In *Steenkamp*, the Constitutional Court expressed the difference between fairness and lawfulness in dismissal thus:

> "[191] The distinction between an invalid dismissal and an unfair dismissal highlights the distinction in our law between lawfulness and fairness in general and, in particular, the distinction between an unlawful and invalid dismissal and an unfair dismissal or, under the 1956 LRA a dismissal that constituted an unfair labour practice. At common law the termination of a contract of employment on notice is lawful but that termination may be unfair under the LRA if there is no fair reason for it or if there was no compliance with a fair procedure before it was effected. This distinction has been highlighted in both our case law and in academic writings."

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[9] See ***Modise & others v Steve's Spar Blackheath*** **(2000) 21** ***ILJ*** **519 (LAC)** at 556, para [91].

[10] See e.g ***Moonian v Balmoral Hotel*** **(1925) 46 NPD 215** and ***Mine Workers' Union v Brodrick*** **1948 (4) SA 959 (A)** as examples of cases in which the contractual dispute concerned whether the employee had been wrongfully dismissed without notice, entitling him to damages in the form of notice pay or payment for the unexpired period of a fixed term contract.

[55] In the context of the SABC disciplinary code, the classification of misconduct as warranting summary dismissal is really an echo of the common-law characterisation of certain conduct as constituting a repudiatory breach of the employment contract which warrants the employer terminating it without notice. However, it would be in absurd on this basis to interpret that provision to mean that all serious misconduct set out in clause 1.2 of the code disentitled employees accused of such misconduct to a disciplinary enquiry before their dismissal.

Dismissals as violation of constitutional right to freedom of expression

[56] Section 16(1) of the Constitution provides

> "Everyone has the right to freedom of expression, which includes:
>
> a. freedom of the press and other media;
>
> b. freedom to receive or impart information or ideas;
>
> c. freedom of artistic creativity; and
>
> . academic freedom and freedom of scientific research."

[57] If one has regard to the sequence of escalating actions taken by the SABC against the applicants, they were firstly suspended on the basis that they had disobeyed the policy which ICASA declared invalid and unlawful *ab initio.* The thrust of the charges proffered against some of the applicants at the end of June was that they contravened regulation 2 (d) of the SABC's personnel regulations by making comments in the media without prior consent of the Group Chief Executive by releasing a letter to various media agencies. Krige was charged with misconduct relating to his unwillingness to align himself with the policy.

[58] Coming to the reason given for their dismissals, which stemmed from the schedule 8 notices, the SABC stated in its answering affidavit that the reason for the dismissals is that the employees were dismissed "for criticizing the 'editorial decision', their suspension and SABC management which was committed through the media." It also stated that "It must be noted that the charges and the schedule eight notices issued against the employee's do not relate to the employer's refusal to comply with the policy but to them making comments in the media relating to their

conditions of employment contrary to their contracts of employment." Thus, the emphasis in the complaint against the employee's shifted as the public clamour over the suppressive policy grew. The complaint no longer concerned expressions of dissent over the policy or a supposed reluctance to comply with it, but focused on the alleged dissemination of the internal dissent to external media.

[59] The applicants claim that it was only in the SABC's answering affidavit that it set out in the alleged factual basis for the charge on which they had been dismissed. In their replying affidavit they denied the charges were true. Be that as it may, the claim they make in relation to the alleged violation of their constitutional right is that the SABC by relying on that reason, even if the allegation was true, is relying on a reason in breach of their constitutional right to freedom of expression which includes making information about the internal dissent over the policy more widely known. As such, the reason for the dismissal could not be a lawful one, quite apart from the fact that their dismissal was in breach of their contractual right to a disciplinary enquiry.

[60] In argument, *Mr Budlender* acknowledged that employees cannot rely on the constitutional right to freedom of expression to disseminate any form of information which might put place their employer in a bad light. However he argued that there were certain exceptional features about the SABC and the issue it objected to being publicised. The issues which make the dissemination of such information distinct from ordinary disclosures about the internal affairs of an employer may be summarised as follows.

[61] The SABC is a public institution and the public has an interest in how it is run. It is also an institution bound by certain constitutional values. The public also had a right to know if the SABC is implementing important constitutional principles which apply to it. In the case of **National Union Of Public Service And Allied Workers obo Mani and Others v National Lotteries Board** [11] the Constitutional Court held that these factors warranted the union and workers, who were involved in a dispute with the Lotteries Board, in publicising a letter, which amongst other things

[11] **2014 (3) SA 544 (CC)** at 596-7, paras [186]-[190].

questioned whether the head of the organisation was committed to ensuring that the lotteries Board was broadly representative of the population.:

[62] The applicants argue that for all the more reason, that approach is applicable in this instance. In this regard, apart from the special nature of the SABC, they rely on two other reasons which relate to the recognised role played by journalists:

[63] Firstly, all journalists have ethical and constitutional obligations which they must at least aspire to which are found in the ICASA Code of Conduct for Free To Air Licensees (the ICASA Code); the Broadcasting Complaints Commission of South Africa Free-to-Air Code of Conduct for Broadcasting Service Licensees (the BCCSA Code); and the Press Council Code of Ethics and Conduct for South African Print and Online Media (the Press Council Code). The ICASA Code and BCCSA Code state that news must be reported truthfully, accurately and fairly. They further provide that the news must be "presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by: distortion, exaggeration, or misrepresentation; material omissions; or summarization." Section 1 of the Press Council Code commits journalists to apply exactly the same considerations in their coverage of the news as does the BCCSA Code above.

[64] Moreover, these sentiments are echoed in the preamble of the Press Council Code, viz: "As journalists we commit ourselves to the highest standards, to maintain credibility and keep the trust of the public. This means always striving for truth…reflecting a multiplicity of voices in our coverage of events… and acting independently." Lastly, section 2 of the Press Council Code provides, inter alia, that journalists *"shall not allow commercial, political, personal and other non-professional considerations to influence or slant reporting."*

[65] These duties have also been ascribed to journalists in the Constitutional Court's judgment in ***Khumalo and Others v Holomisa*** [12]

[12] **2002 (5) SA 401 (CC)**

“[22] The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. The ability of each citizen to be an effective and responsible member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia,

'. . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media'.

The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

[23] Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in *Government of the Republic of South Africa v 'Sunday Times'*

Newspaper and Another†1995 (2) SA 221 (T) at 227I - 228A:

'It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . .

It must advance communication between the governed and those who govern.'…

[24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If

> they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16."[13]

[66] Secondly, the applicants argue that journalists at the SABC are under a particular duty to advance the public interest because the SABC is a public broadcaster with a special mandate. In this regard, the Constitutional Court has held, "*the SABC, as the public broadcaster provided for and regulated in terms of the Broadcasting Act, has a special function to perform".*[14] When the SABC is involved, what is at stake is "*the right of the public to be informed and educated*".[15] Having regard to the role the SABC is expected to fulfil in terms of its mandate and licensing provisions, it is clear that that the dissent over the extraordinary censorship measure is a matter which concerns the core functions of the SABC as a public broadcaster. Whatever concerns might apply to the Lottery Board that might warrant a more cautious approach to the public dissemination of information about that institution's management do not apply to the issue at hand for which the applicants were disciplined.

[67] Consequently, the applicants contend that to dismiss SABC journalists for criticising the Protest Policy and in suspending them, amounts to conduct by SABC management which is plainly in breach of section 16(1) of the Constitution, and it is conduct in respect of which the Labour Court, in the exercise of its concurrent jurisdiction with the High Court under s157(2) of the LRA, can make an appropriate order in terms of s 158(1).

Urgency

[68] The mere fact that the applicants have been dismissed in breach of their contracts of employment might not in and of itself warrant urgent relief. What makes the application urgent is related to a number of factors. Firstly, despite having accepted at least for the foreseeable future the

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[13] At 416-418.

[14] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 26

[15] At para 27

invalidity of the Policy and therefore in principle being logically committed to complying with the order agreed in the *Suzman Foundation* matter, the SABC has been unrelenting in opposing the relief sought by the applicants whose dismissal, suspensions and early disciplinary steps would never have come about but for the unlawful policy. One might have thought that the sincerity of the SABC in agreeing to accept the invalidity of the policy would have been followed up by an offer at least to allow the applicants to return to work in the interim, pending a final decision on that application. It cannot be reassuring for journalists who are currently working at the SABC to know that those who questioned an unlawful policy remain dismissed despite the SABC supposedly agreeing not to enforce that policy in the meantime.

[69] Secondly, it is important at a time when the role of the SABC will be in the spotlight in the course of the imminent local elections that its will and ability to fulfil its mandate as an instrument of a constitutional democracy will not be questioned on account of it adopting an inconsistent stance towards the applicants and the ICASA ruling.

[70] Thirdly, the importance of the applicants returning to work without delay is also because of the importance of them actually being able to perform their work as journalists in the light of all the considerations mentioned above. This is not a case where damages for wrongful dismissal would be an appropriate alternative remedy in due course.

Relief

[71] The appropriate relief in this instance given that the claim rests on unlawfulness is that the dismissals should be nullified. As the court stated in *Steenkamp*

> "[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...
>
> ...

> [192] It is an employee whose dismissal is unfair that requires an order of reinstatement. An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purposes of performing his or her duties. However, it cannot order the reinstatement of the employee."

[72] Consequently, an order declaring the applicants' dismissals invalid, will have the legal effect that their dismissals never took place and can be accompanied by an order that the SABCC must allow them into their workplaces for the purpose of performing their duties.

[73] There is also the question of the suspensions and the incomplete enquiries which were initiated prior to the applicants' dismissals. It was argued by the SABC that those would fall away as the fact of the applicants' dismissal would have that effect. However, if the legal consequence of the final relief is that the dismissals did not happen, it does not seem to follow in my view that everything preceding them has no application. As those enquiries were essentially initiated for the same reason as the dismissal or because of the applicants' disagreement over adopting the policy, it would follow from the analysis above that those instructions and steps were unlawful because they were premised on the enforcement of an unlawful policy.

[74] Paradoxically, the applicants did not amend their prayer only for interim relief in respect of the suspensions and pending disciplinary proceedings, linked to the final outcome of the other proceedings. However, if final relief is competent on the papers in respect of the dismissals and because the continuation of those other measures would be unlawful, it is appropriate to make an order for final relief in respect of those too.

Costs

[75] In the amended papers, the applicants also sought an order compelling the SABC to reveal the identity of officials involved in taking the decisions

to terminate the applicants' employment. The object of this was to put them on terms to show cause why they should not be held personally liable for the costs of the application.

[76] The reason for this unusual prayer is that even if it cannot be shown that the SABC proceeded with the dismissals in a wilful attempt to avert the possible consequence of the Constitutional Court application and this one which were launched on 15 July, whoever took the decision to dismiss the applicants did so with reckless regard for the pending applications and arguably if a more considered, reflective and financially accountable approach had been taken, the SABC would not have proceeded with the dismissals or persisted in opposing this application after agreeing to the order in the Suzman Foundation application.

[77] In ***Gauteng Gambling Board And Another v MEC for Economic Development, Gauteng***[16] the SCA made the following observation:

> [54] In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed.

[78] I am satisfied that there is no question that the applicants should not bear the costs of bringing this application including the costs of two counsel. I am also concerned that the dismissals were authorised with reckless disregard for the pending applications and with little regard for the relative costs and benefits to the SABC of doing so. That, this should occur during

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a time of financial crisis makes it more worrying. The only question is whether these costs should be levied on those who took the decision or on the SABC as an entity. Accordingly, I think it is appropriate that the person who appears to have authorised the dismissals when signing the dismissal letters should be given an opportunity to explain why he should not be held liable, at least in part, for the costs. The same applies to Tebele who seems to have played an active role in the events.

Order

[79] In light of the above it is ordered that,

79.1 The forms and rules of this Court are dispensed with and this matter is dealt with as a matter of urgency.

79.2 The respondent's dismissals of the second to fifth applicants are unlawful and void *ab initio*.

79.3 The second to fifth applicants are entitled to return to work at the SABC and to continue with their respective duties and responsibilities in accordance with their job descriptions.

79.4 The respondent is interdicted from proceeding with the disciplinary proceedings initiated against the second to fifth applicants prior to their dismissal.

79.5 Within five days of this order, Seboleto Ditlhakanane, the respondent's General Manager: Radio News & Current Affairs and Mololo S Tebele, Acting Group Executive: News and Current Affairs, must file affidavits showing cause why they should not personally be held liable for all or part of the costs of this application, such costs to be paid on the attorney-own client scale and including the costs of two counsel.

79.6 The determination of the final apportionment of liability for payment of the applicants' costs of the application including the costs of two counsel, as between the respondent and any of its officials or employees is postponed *sine die*, and may be enrolled by any party

for determination once 20 days have elapsed from the date of this order.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCE:

For the Applicants:	**S Budlender assisted by V Bruinders instructed by Serfontein, Viljoen & Swart Attorneys**
For the Respondent:	**D T Skosana SC assisted by Z Madlanga instructed by Ningiza Horner Inc.**