THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J802/2022

In the matter between:

DENNIS NHLANHLA NKOSI	**Applicant**
and	
MINISTER OF WATER AND SANITATION	**First Respondent**
DEPARTMENT OF WATER AND SANITATION	**Second Respondent**

Heard: 12 June 2024

Delivered: 25 April 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is an application in terms of section 158(1)(a)(iv) read with section 158(1)(h) of the Labour Relations Act[1] (LRA) and section 77(2) and (3) of the Basic Conditions of Employment Act[2] (BCEA). The applicant is Dennis Nhlanhla Nkosi. The first respondent is the, Minister of Water and Sanitation, an executive authority of the second respondent and the second respondent, is the Department of Water and Sanitation (Department). The applicant seeks a declaratory order that the termination of his contract of employment was unlawful and invalid.

[2] The applicant was employed by the Department as a Deputy Director-General. The applicant's employment was as a result of settlement agreement entered into between the applicant and the Department. The applicant's employment was terminated by the Director-General (Dr Phillips) of the Department on 18 March 2022 based on the fact that the settlement agreement concluded with the applicant was unlawful and irregular and the applicant's employment was irregular as it exceeded the 12-month period as required by regulation 57 of the Public Service Regulations.

[3] The applicant received the termination letter on 24 March 2022. Aggrieved with the termination of employment, the applicant launched this application.

<u>The relevant facts</u>

[4] The applicant was previously employed on a fixed term contract by Trans Caledon Tunnel Authority (TCTA), a state- owned entity, as a Senior Programme Manager. The applicant's fixed term contract expired on 28 February 2017. When the applicant's fixed term contract was not renewed by TCTA, he referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The applicant was unsuccessful at the CCMA. The CCMA arbitration award still stands and is binding on the applicant and TCTA. TCTA was established to implement, operate and maintain water/dam related and/ or relevant treaty projects as well as to perform

[1] No. 66 of 1995 as amended.

[2] No. 75 of 1997 as amended.

other applicable functions set out in its Notice of Establishment and/or role required by the Minister, in terms of Government Notice No 2631 of 12 December 1986.

[5] At the time of the dispute between the applicant and TCTA, the applicant sought the assistance of the Minister of Water and Sanitation, in his dispute with TCTA. The Minister refused to intervene as the Department was not a party to the dispute.

[6] On 22 August 2019, the acting Director-General of the Department with the approval of the Minister, appointed the applicant as Deputy-Director General (SL-15) for a period of twelve months additional to the establishment in the Office of the Acting Director-General. This was a secondment to the Department. The applicant's appointment into the Department was a separate process to the dispute between the applicant and TCTA.

[7] The applicant's period of employment with the Department was from 9 September 2019 to 30 September 2020. Despite his employment with the Department, the applicant dispatched a letter of demand to the Department in respect of his dispute with TCTA, a dispute which at that stage was arbitrated and resolved by the CCMA and the arbitration award was not challenged on review. The letter of demand alleged that a legitimate expectation was created that the applicant's contract of employment that he had with TCTA would be extended/renewed, which expectation was created by the Department.

[8] The applicant alleged that the expectation was created following a meeting with the former Director- General, Mr Mashitisho, on 9 March 2017. The allegation was that the Director-General entered into an agreement that the applicant's employment would continue for a further five years from 1 March 2017 to 30 March 2022. These are the same allegations raised at the CCMA which the applicant was unsuccessful with. The CCMA arbitrator ruled that the Department was not a party to the proceedings as the applicant's claim was against the TCTA and that the

Department could not have created a reasonable expectation for the extension of the contract by the TCTA.[3]

[9] The applicant in his letter of demand to the Department, demanded payment of R4 423 936.20, on the basis that he had not received payment for 30 months. The legal services of the Department were of the view that there are no prospects of success on the part of the applicant and that there is no reason why the letter of demand can be conceded to especially in light of the arbitration award. The legal services were further of the view that the amount of R4 423.936.20 was also exorbitant and not justified.

[10] The legal services stated that if the Department pays any amount and disregard the arbitration award against the applicant, the payment will amount to irregular expenditure. The applicant then issued summons against the Department claiming an amount of R7 035 287.72.

[11] On 1 April 2020, the Deputy–Director General: Corporate Services: Corporate Support Services submitted a request for Mandate and Approval to finalize the settlement proposal with the applicant, to the Minister of Human Settlements, Water and Sanitation. A meeting took place between the Minister's Special Advisor (Adv

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[3] In the arbitration award, the commissioner stated:

'19.76 *A further problem I have with Mr Nkosi's case is the fact that he on 14 September 2017 or as per paragraph 7.23 above alleged that the DWA created the expectation (i.e. not the TCTA). This seriously contradicts the case now being made out against the TCTA.*

19.7.5. Another contradiction is buried in the fact that Mr Nkosi had in an attempt to achieve condonation (twice) submitted that TCTA gave him an expectation in October 2016. I say contradiction above based on the fact that Mr Nkosi during arbitration testified that the expectation was made in June 2016.Mr Nkosi then changed this date to March 2017 and later back to June 2016. Mr Nkosi's expectation in other words changed shape- from practice, to June 2016 to March 2017, and so on- and did not help his case.

24. Having regard to the complete record, I have come to the sum total that the material placed before me does not establish that Mr Nkosi had a section 186(1)(b) expectation. In other words, Mr Nkosi has failed to prove that he was dismissed as contemplated by section 186(1)(a) of the LRA. His fixed term contract of employment had expired at the end of its term and his employment consequently had automatically come to an end- on Mr Nkosi's own case.'

Simelane), Chief Director: Legal Services and Chief Director: Human Resources and the applicant and his legal representatives, in an attempt to resolve the matter.

[12] The agreement reached arising out of that meeting was payment of 29 months of salary to the applicant at the TCTA remuneration rates totaling R4 996 177.54, payment of the difference between the first package and maximum package for salary level 15 for the 12 month contract , amounting to R128 322.00, with the remuneration for the balance of the contract to be made at maximum salary package; the extended employment contract for 24 months in the amount of R1 714 074.00 per annum and the legal costs submitted by the applicant's legal representative. This would constitute a full and final settlement agreement between the parties.

[13] The acting Director-General, Mr. Tshangana, commented on the request to the Minister, that it was unfair for the Department to pay for TCTA where TCTA was successful in the arbitration against the applicant. However, the acting DG supported the settlement proposal.

[14] Minister Sisulu approved the settlement proposal on 3 April 2020. The settlement agreement was signed on or about 21 April 2020. The applicant was paid an amount of R4 996 177.54 on 11 May 2020. The applicant signed a fixed term contract of employment for 24 months on 13 May 2020.

[15] On 14 January 2022, the Deputy–Director General: Corporate Services compiled a report on the number of employees appointed additional to the establishment, those employed in terms of fixed term contracts as well as employees who were retained beyond the age of 65 years within the Department, to the Minister.

[16] The purpose of the report was amongst others that the Minister to note the number of employees appointed additional to the establishment, as one of the points of discussion, to request the Minister to note that the accounting officer is obliged to terminate the irregular contracts, Department had 1 111 persons appointed

additional to the establishment and that some officials receive payment without executing any functions in the Department which was not in its best interest.

[17] The applicant was one of the four senior management services members appointed additional to the establishment identified in the report. The applicant's appointment was regarded as being irregular as he was employed for 24 months additional to the establishment, whereas the regulatory framework provides for a maximum period of 12 months. Furthermore, the Department entered into a settlement agreement with the applicant who was not an employee of the Department at the time of his dispute with the TCTA.

[18] On 21 February 2022, the Director-General of the Department, Dr Sean Phillips addressed a letter to the applicant advising that the Department is in a process to review organizational structure which included assessment of appointments made in the Department and that the applicant's appointment was found to be unlawful and irregular.

[19] The applicant was given 14 days to provide reasons why his employment contract should not be terminated. The applicant provided a response as to why his contract of employment should not be terminated by 10 March 2022.

[20] At the same time, the applicant was offered a contract of employment for a period of 12 months. The applicant was offered a position of Chief Director at salary level- 14. This position was offered to the applicant by the Director-General, Dr Phillips.

[21] On 18 March 2022 the Director-General terminated the applicant's contract of employment based on the following reasons: the applicant's appointment was as a result of the settlement agreement whose basis remains contested due to the dispute between TCTA and the applicant, the arbitration award absolved the Department and yet the letter of demand of the applicant to the Department referred to the issue of legitimate expectation which was already addressed in the arbitration

award, regulation 57 requires employment period should not exceed 12 months and therefore the settlement agreement was unlawful and irregular.

Grounds for seeking declarator

[22] The applicant submitted that his fixed term contract of employment expiring on 8 September 2022, provided grounds upon which the contract of employment could terminate. This included amongst others: expiry of the fixed term period, dismissal, resignation after serving notice period and death. What transpired on 18 March 2022, with the termination letter issued by the Director-General was unlawful and invalid as it was a termination not recognized by the terms of the contract of employment.

[23] The Director-General did not have authority to terminate the applicant's contract of employment. Only the Minister has the power as the executive authority to terminate the applicant's contract of employment. The Minister has not delegated his authority to terminate the agreements and the applicant's contract of employment.

[24] The Director-General and the second respondent failed to provide any lawful reasons justifying the termination of the applicant's employment. The settlement agreement which gave rise to the applicant's 24 months fixed term contract of employment was properly concluded and it has not been declared either irregular or unlawful. The respondents have not challenged the validity of the settlement agreement.

Submissions by the parties

[25] Mr Sikhakhane on behalf of the applicant submitted that the decision to terminate the applicant's fixed term contract was made by the Director-General of the second respondent and he was not empowered to make such a decision. The conduct of the Director-General in terminating the applicant's fixed term contract amounts to a repudiation of the applicant's contract of employment. The applicant

does not accept the repudiation and therefore seeks damages for the payment of the remainder of the fixed term contract which is about five months.

[26] The offer made by the Director-General to offer the applicant a position of a Chief Director, amounted to a demotion. With the demotion offer, the writing was on the wall irrespective of the representations made by the applicant as to why his fixed term contract should not be terminated. If the settlement agreement was unlawful, why offer the applicant the position of the Chief Director. This Court has jurisdiction to adjudicate the dispute and the respondent's interpretation of section 158(1)(h) of the LRA was incorrect. This related to the respondent's contention that this Court has no jurisdiction.

[27] Mr Sikhakhane further submitted that it is irrelevant how the applicant was employed. There was a settlement agreement reached. There is no counter application to set aside the settlement agreement. The settlement agreement was reached with the blessing of the Minister. The Minister was aware of the settlement agreement. There was no Ministerial delegation when the applicant was terminated by the Director-General on 18 March 2022.

[28] The applicant's employment was approved by all the relevant stakeholders. The respondent wants the Court to pronounce on the CCMA arbitration award and the settlement agreement. This Court should not make a pronouncement on the settlement agreement.

[29] Neither regulation 57 of the Public Service Regulations and section 38 of the Public Finance Management Act[4] (PFMA) permitted the Director-General to terminate the applicant's contract of employment.

[30] Mr Sekhakhane submitted in respect of the memorandum (report on the number of employees appointed additional to the establishment, those employed in terms of fixed term contracts as well as employees who were retained beyond the age of 65 years within the department of water and sanitation) submitted to the

[4] No. 1 of 1999.

Minister, the PFMA did not give the Director-General the power to terminate the fixed term contract of the applicant. In any event, there was no approval from the Minister as the memorandum only sought the Minister to note the report. Consequently, the report to the Minister cannot empower the Director-General to do what he cannot do in law.

[31] Ms Rambachan-Naidoo on behalf of the respondents submitted that the applicant was employed by TCTA. The applicant was seconded to the Department as the Deputy Director- General (DDG) on salary level 15, the position was additional to establishment in the office of the Director-General. The secondment of the applicant to the Department was a separate process from the dispute which the applicant had with TCTA. The secondment was for a period of 12 months. There was a CCMA arbitration award issued against the applicant. The applicant initially attempted to review the arbitration award but such attempts were abandoned.

[32] Subsequent to the arbitration award, the applicant sends a letter of demand to the Department. The applicant alleged that the Department created a legitimate expectation that his TCTA fixed term contract will be renewed. The CCMA at that stage had already ruled that the Department was not a party to the CCMA proceedings. The arbitration award remains binding and unchallenged.

[33] The memorandum to the Minister in respect of the number of employees appointed additional to establishment, the Minister did not say that the Director-General has no authority to terminate the applicant's fixed term contract of employment. The Director-General is empowered in terms of section 38(g) of the PFMA to terminate the applicant's fixed term contract.

[34] The applicant failed to respond to the offer of employment as a Chief Director. Had he accepted the offer, the applicant would have been employed until February 2023. The salary that the applicant would have earned had he accepted the offer, is significantly higher than the damages that he is currently seeking i.e. five months.

<u>Evaluation</u>

[35] The respondents' contention that this Court has no jurisdiction is without merits. This relates to the submission made by the respondents that the true dispute of the applicant is the payment of six months of salary which remained on the irregular 24-month contract that would have ended by effluxion of time in September 2022. The applicant's true relief is a declaratory order.

[36] The jurisdiction of this Court is found in section 158(1)(a)(iv) of the LRA. This Court has the power to grant a declaratory order.

[37] The applicant seeks a declarator that the termination of his fixed term contract of employment on 18 March 2022 by the Director-General of the second respondent was unlawful and invalid. This is the main relief that he is seeking. In the alternative reference is made to section 158(1)h) of the LRA and section 77(2) and (3) of the BCEA. Nothing came out during the hearing of the matter in respect of the review as contemplated in terms of section 158(1)(h) of the LRA and section 77(2) and (3) of the BCEA.

[38] From the oral submissions made by Mr Sekhakhane and his heads of arguments, the applicant's case was based on the main relief, which is seeking a declarator in terms of section 158(1)(a)(iv) of the LRA that the termination of the applicant's fixed term contract of employment was unlawful and invalid. This is the pleaded case of the applicant.

[39] The applicant must stand and fall with how he pleaded his case. From the pleadings, this case is not about a review.

[40] Consequently, this Court approaches the matter on the basis as to whether the applicant is entitled to a declaratory relief or not.

[41] In *Cordiant Trading CC v Daimler Chrysler Financial Services*[5], the Supreme Court of Appeal (SCA) held that:

[5] 2005 (6) SA 205 (SCA) at paragraphs 16 - 18

'[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the Court that he/she is a person interested in an ' existing, future or contingent right or obligation' and nothing more is required (Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others 1995 (4) SA 1 (A) at 14F, In Durban City Council v Association of Building Societies 1942 AD 27 Watermeyer JA, with reference to a section worded in identical terms said at 32:

'The question whether or not an order should be made under this section has to be examined in two stages, First, the Court must be satisfied that the applicant is a person interested in an' existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.

[17] It seems to me that once the applicant has satisfied the Court that he/she is interested in an 'existing future or contingent right or obligation', the Court is obliged by the subsection to exercise its discretion. This does not, however mean that the Court is bound to grant a declarator, but it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that, once satisfied that the applicant is an interested person,' the Court must decide whether the case is a proper one for the exercise of the discretion' should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the Court, the prerequisite factors for the exercise of the discretion, the Court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something

> which would constitute the exercise of a discretion as envisaged in the subsection (cf Reinecke v Incorporated General Insurances Ltd 1974 (2) SA 84 (A) at 93A-E)'.
>
> [18] Put differently, the two-stage approach under subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an' existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.'

[42] Does the applicant have an interest in an *'existing, future or contingent right or obligation*'. This is the first leg of the enquiry. Without a doubt, the applicant has an interest in the matter. It was his fixed term contract of employment which was terminated by the Director-General on 18 March 2022. A dispute therefore exists between the parties as to the unlawfulness of the termination of the applicant's fixed term contract. This is a live dispute between the parties. This Court is therefore satisfied that the existence of the necessary conditions precedent for the exercise of the discretion exists.

[43] In exercising the discretion whether or not to grant the declaratory order, this Court must consider all the relevant factors.

[44] Despite Mr. Sikhakhane's contention that it is irrelevant how the applicant was employed, this Court must consider the circumstances that gave rise to the employment of the applicant in determining whether or not to grant the declaratory order. Furthermore, how the applicant was employed by the Department, forms part of the evidence placed before this Court by the respondents. This Court cannot simply turn a blind eye to such evidence merely because the Court is not called upon to pronounce on the validity of the settlement agreement reached between the applicant and the Department.

[45] The applicant was previously employed by TCTA. TCTA is a state-owned entity falling under the Department. The applicant was employed by TCTA on a fixed term contract which expired on 28 February 2017. The applicant's contract of employment was not renewed by TCTA and the applicant referred a dispute in terms of section 186(1)(b) of the LRA to the CCMA.

[46] The applicant was unsuccessful with his claim. Part of the applicant's contention which was rejected by the CCMA was that the Department created a legitimate expectation to the applicant that TCTA will renew his fixed term contract. The Department was not a party to the CCMA proceedings. This is so because at that stage of the dispute between the applicant and TCTA, the Department was not an employer of the applicant. The applicant did not challenge the CCMA arbitration award. The arbitration award is binding and still stands. CCMA arbitration awards must be respected and obeyed by everyone. This Court in its supervisory role, must ensure that there is compliance with CCMA arbitration awards unless the award is set aside on review.

[47] The applicant was then seconded for employment within the Department. This was a separate process from the dispute between the applicant and TCTA. It was indeed a separate process as the Department had nothing to do with the dispute between TCTA and the applicant. The applicant was seconded to be employed within the Department as a Deputy-Director General, additional to the establishment in the Office of the Acting Director-General. The fixed term contract was from 9 September 2019 to 30 September 2020.

[48] Whilst employed by the Department, the applicant dispatched a letter of demand to the Department claiming that the Department created a legitimate expectation that his fixed term contract of employment with TCTA was going to be renewed. The applicant was claiming an amount of R4 423 936.20. It is not clear from the papers when the letter of demand was issued.

[49] Without a doubt, the so-called legitimate expectation argument that the applicant raised in his letter of demand is the same issue that was rejected by the CCMA arbitration award.

[50] It is mind blogging that the applicant, without challenging the CCMA arbitration award, decided to issue a letter of demand against the Department alleging legitimate expectation created by the Department that his fixed term contract with TCTA will be renewed, despite the fact that there is a binding CCMA arbitration award which rejected this narrative.

[51] What is more concerning is that initially the legal services of the Department correctly, took a view that the amount claimed by the applicant was exorbitant and unjustified and applicant has no prospects of success given the binding CCMA arbitration award.

[52] It is important to quote from the memorandum addressed to the Minister of Human Settlements, Water and Sanitation. The memorandum is headed 'Letter *of demand from Mr Nhlanhla Nkosi// Department of Human Settlement Water and Sanitation/ Director- General Mr M Tshangana*, the memorandum states the following:

> '[2.5] It is worthy to note that the aforesaid allegations were tested by Mr Nkosi at the Commission for Conciliation, Mediation and Arbitration ('CCMA') against the TCTA and he was not successful. In other words, notwithstanding that the Department was not a party to the proceedings as Mr Nkosi chose to pursue the TCTA, the arbitrator ruled that the Department could not have created a reasonable expectation for the extension of the contract by TCTA.
>
> [2.6] Mr Nkosi has now decided to send a letter of demand to the Department as he intends to sue for the same issue that has been decided by the arbitrator as aforesaid. The arbitration award remains binding to the extent that for as long as it is unchallenged through review processes, it constrains both TCTA and the Department from either settling or conceding to legitimate expectation allegations.

> [2.8.] Our view is that a dispute can either be settled where there are no prospects of success if the matter were be defended or in circumstances where it will be economically for the Department to settle than to defend the matter. In this case, there are no prospects of success on the part of Mr Nkosi and there is no reason why the letter of demand can be conceded to, especially in light of the arbitration award referred to above.
>
> [2.9] Albeit the discussion above, the amount claimed is also exorbitant and not justified.

[53] The acting Director- General on 19 November 2019, wrote the following in the above- mentioned memorandum: *[1] Please note that Nhlanhla is currently working as DDG additional to the establishment,[2] Legal services to respond to the letter of demand.*

[54] Below the comments of the acting Director-General, there is name of the Minister of Human Settlements, Water and Sanitation, Ms LN Sisulu, MP. Just below her name, the following comments appears:

> 'DG: my interpretation of this matter is different. You should meet with my legal advisor to find solution to this. Referring this to legal department is merely deferring the matter- it does not solve it. We have to solve this matter.'

[55] From the above it is clear that there were differences of opinion between the acting Director- General and the Minister in terms of how to deal with the applicant's letter of demand.

[56] The written comments purportedly from the Minister, completely ignored the advice from the legal services of the Department. The views expressed by the legal services were correct and had the best interest of the Department. The comments by the Minister were patently wrong and opened a pandora's box to a settlement agreement and fixed term contract of 24 months given to the applicant which are shrouded in controversy and *prima facie* downright unlawful under the circumstances

wherein the applicant unduly benefited based on a letter of demand, which raised the same issues which were rejected by the CCMA arbitration award.

[57] There was absolutely no basis to settle with the applicant. The applicant had zero prospects of success with his claim.

[58] The acting Director-General (M. Tshangana) wrote a letter to the Minister of Human Settlements, Water and Sanitation, Ms L.N Sisulu, MP dated 22 November 2019[6]. In this letter regarding the applicant's demand of R4 423 936.20, the acting Director- General stated that:

> 'I have been advised that there is no legal basis for the Department to settle the matter on behalf of TCTA as that would result in an irregular expenditure. I am further advised that the basis for such a conclusion is that Mr Nkosi took TCTA to the Commission for Conciliation Mediation and Arbitration (' CCMA') and the arbitrator, rightfully or wrongfully ruled against him. This arbitration award is not challenged and remains binding between TCTA and Mr Nkosi. Therefore, the Department is constrained in settling the matter which it was not a party to especially in light of the outcome thereto.'

[59] Despite the above letter from the acting DG to the Minister, there was a meeting between legal services, the Minister's special advisor, the applicant and his legal representatives. The meeting appears to have reached a settlement proposal. The Minister eventually approved the settlement proposal on 3 April 2022 and later a settlement agreement was concluded.

[60] In the memorandum requesting a mandate and approval to finalise the settlement proposals with Mr Nkosi, Deputy Director-General: Special Projects, Department of Water and Sanitation, the acting Director-General, M Tshangana, made the following comments: '*It is unfair for the Dept to pay a TCTA… when TCTA won the arbitration against Mr Nkosi.'* The acting Director-General, despite his written comments, supported the settlement proposal and the Minister approved it.

[6] Index p 138-139.

[61] As per the settlement proposal and eventually the settlement agreement the applicant was paid an amount of R4 996 177.64 and payment was for 29 months salary at TCTA remuneration and the applicant was offered 24 months fixed term contract, and that legal costs as per the statement of account are to be taxed.

[62] The payment to the applicant of an amount of R4 996 177.64 was unjustified and makes a mockery of the CCMA arbitration award which rejected the claims of the applicant that the Department created a legitimate expectation that his fixed term contract with TCTA will be renewed. There was no legal basis whatsoever to pay the applicant this amount of money. The payment to the applicant was an affront to the Rule of law. A binding CCMA arbitration award was simply ignored to satisfy the applicant's wishes contained in his letter of demand and summons.

[63] What this payment shows is that the applicant was rewarded for having lost his CCMA arbitration award and was rewarded by the Department under the circumstances wherein the Department had nothing to do with the CCMA dispute between the applicant and TCTA.

[64] This was an absolute tragedy and squandering of the public purse. This Court cannot ignore such conduct when it exercises its discretion whether or not to grant the declaratory order.

[65] It absolutely baffles the mind that senior officials of the Department and a Minister, can consider to pay the applicant an exorbitant amount of money based on the same issues which were rejected by the CCMA arbitration award under the circumstances wherein the Department was not a party to the CCMA dispute and wherein the applicant was not an employee of the Department at the time when he had a dispute with TCTA at the CCMA. What happened with this settlement agreement, was not in the best interest of the Department.

[66] The conclusion of the settlement agreement between the Department and the applicant wherein the applicant unduly benefited financially and in terms of his fixed

term contract for 24 months, was nothing but a sham and a disgrace and it should not have been allowed by those entrusted to protect the public purse. The scarce public funds were not used wisely when payment to the applicant was approved.

[67] As previously stated, arising out of a *prima facie* unlawful settlement agreement, it was agreed that the applicant would be offered a fixed term contract of 24 months from 9 September 2020 to 8 September 2022.

[68] The applicant signed the 24 months fixed term contract on 13 May 2020. This was long before the expiry of his first fixed term contract which was valid for 12 months and which would have expired on 8 September 2020. This begs the question, what was so urgent about the applicant's case that he was given a new fixed term contract for 24 months long before the expiry of his existing contract and was offered 24 months contract instead of the 12 months contract as per regulation 57 of the public service regulations.

[69] Given the totality of the evidence before this Court and the unjustified and *prima facie* unlawful settlement agreement reached between the applicant and the Department, which on the face of it, as correctly, stated by the acting Director General to the Minister, that payment to the applicant would constitute irregular expenditure, this Court declines to exercise its discretion to grant the applicant a declaratory order under these circumstances.

[70] The applicant unduly benefited when the Department concluded a *prima facie* unlawful settlement agreement with him and paid him unjustified huge sums of money at the expense of the public purse. The applicant now approaches this Court to continue to benefit from the same *prima facie* unlawful settlement agreement which gave rise to his fixed term contract of employment which was terminated by the Director-General of the Department, this with respect is untenable and this Court cannot exercise its discretion to grant the declaratory order.

[71] Even if I could exercise the discretion to grant the declaratory order, this Court has no power in terms of the LRA to declare a termination of contract of employment

unlawful and invalid. In *Chubisi v SA Broadcasting Corporation SOC Ltd and others*[7], the Labour Court through Tlhotlhalemaje J, held that:

> '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. One can also not quarrel with the conclusion reached by Van Niekerk J in Phalane 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' conclusion that if a remedy was sought under the LRA, the applicant must categorise 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 unlawful, being merely unfairness in disguise.'

[72] In as far as the applicant seeks an order to declare the termination of his employment unlawful and invalid, on the strength of the binding judgement of the Constitutional Court in *Steenkamp and others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[8], this Court has no jurisdiction under the LRA to grant such an order. What is classically a dispute of unfair dismissal under the LRA, the applicant turns it into a different dispute and sought a declaratory order that the termination is unlawful and invalid. This practice should be discouraged.

[73] In the premises the following order is made:

<u>Order</u>

1. The applicant's application is dismissed.

2. There is no order as to costs.

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[7] 2021 42 ILJ 395 (LC) at para 23.

[8] (2016) 3 ILJ 564 (CC).

H. Molotsi
Acting Judge of the Labour Court of South Africa.

<u>Appearances:</u>

For the Applicant:	Mr M Sikhakhane
Instructed by:	Ndebele Attorneys
For the Respondent:	Ms N. Rambachan- Naidoo
Instructed by:	State Attorney, Pretoria