REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1867 / 2013

In the matter between:

ROBERT M MADZONGA **Applicant**

and

MOBILE TELEPHONE NETWORKS (PTY) LTD **Respondent**

Heard: **27 August 2013**

Delivered: **30 August 2013**

Summary: **Interdict application – principles stated – application of principles to matter – issue of clear right and alternative remedy.**

Jurisdiction – Labour Court does have jurisdiction to consider urgent application to uplift suspension – issue is whether it is competent for the Labour Court to do so – exceptional and compelling reasons required

Unfair suspension – whether suspension unfair – basis of the right – right to fair suspension determined by LRA – cannot rely on implied term in contract or directly on Constitution

Unfair suspension – whether suspension unlawful – no general right to be heard or to be provided with reasons prior to suspension – provisions of disciplinary code as it stands determinative as to whether suspension unlawful

Alternative remedy – statutory prescribed dispute resolution process – this process must be followed – departure from process should only be entertained in exceptional circumstances

Practice and procedure – requirement to make out case in notice of motion founding affidavit – issue of determining factual disputes in applications

Interdict – no clear right shown and existence of proper alternative remedy – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me as an urgent application brought by the applicant in terms of which the applicant sought to challenge his suspension by the respondent. It is important to consider the basis on which the application has been brought and the relief that has been sought. The applicant is seeking final relief, in terms of which the applicant seeks an order declaring that his suspension by the respondent from his position as chief corporate service officer is invalid and/or unlawful and/or unfair. The applicant further seeks an order that his suspension be uplifted with immediate effect and he be allowed to resume his duties.

[2] As these are motion proceedings, in which final relief is sought, the principles as to the resolution of any factual disputes between the parties in such proceedings was enunciated in the now regularly quoted judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[1] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[2] this test was most aptly described, where the Court said: 'The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules …. are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[1] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) para 26

[2] 2009 (3) SA 187 (W) para 19

[3] When it comes to the disputed facts in this matter, the difficulty the applicant faces with regard to his version is that none of the disputes of fact or the version as raised by the respondent in its answering affidavit can be considered to be bald or fictitious or implausible or lacking in genuineness. The issues raised by the respondent in the answering affidavit are properly raised, and with all the requisite particularity. The answering affidavit commenced with a detailed background and summary of facts, which are entirely consistent with the supporting documents. There is accordingly no basis or reason for me to reject any of the facts or versions of the respondent raised in the answering affidavit. I thus intend to determine this matter on the basis of the admitted (common cause) facts as ascertained from the founding affidavit, the answering affidavit and the replying affidavit, and as far as the disputed facts are concerned, on what is stated in the first respondent's answering affidavit. On this basis, I will set out the background facts hereunder.

[4] As this matter also concerns the granting of final relief, the applicant must satisfy three essential requirements, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[3] These requirements must all be shown by the applicant to exist for the applicant to be entitled to relief, and will be determined hereunder in this judgment, applying the proper factual matrix arrived at by using the *Plascon Evans* test enunciated above.

Background facts

[5] The applicant is still currently employed by the respondent as its chief corporate services officer. In that capacity, the applicant is *inter alia* responsible for the

[3] *Setlogelo v Setlogelo* 1914 AD 221 at 227 ; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20 ; *Royalserve Cleaning*

respondent's legal department, which resorts directly under his portfolio. All of the issues giving rise to this matter arose in the legal department.

[6] In and during March / April 2011, the applicant was reported by one of his subordinates with regard to allegations of misconduct and irregular dealings relating to an attorneys' firm the applicant was dealing with, being Nozuko Nxusani Inc Attorneys. It was alleged that such attorneys firm was doing no work but was presenting certain invoices for payment which the applicant was authorizing for payment and which the respondent then paid. Nozuko Nxusani Inc Attorneys had been rendering legal services to the respondent since 2002.

[7] Price Waterhouse Coopers ("PWC") was the appointed by the respondent on 20 April 2011 to investigate the allegations made against the applicant relating to the invoices referred to. The conclusions of PWC relating to these invoices were that the invoices were irregular in that the invoices were addressed to the applicant although he was not involved in the day to day functions of the legal department, there was no reason to appoint attorneys to do the particular work, the invoices lacked the necessary particularity, the invoices were unrealistic in dates, time frames and the hours billed, and there was no evidence of the work being done. PWC concluded that the invoices should not have been authorized.

[8] The PWC report was issued on 22 August 2011, in the form of the first draft report. Of significance to the current matter, it was recorded that Nozuko Nxusani Inc Attorneys were introduced by the applicant to MTN.[4] It was also recorded that the applicant co-operated with PWC in the investigation.[5] It was however clear that the applicant was instrumental in the allocation of work to Nozuko Nxusani Inc Attorneys

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(Pty) Ltd v Democratic Union of Security Workers and Others (2012) 33 ILJ 448 (LC) para 2

[4] Bundle page 54 para 4.27

[5] Bundle page 54 para 4.24

in 2010, and that he approved their invoices. It was also clear from the report that Nozuko Nxusani Inc Attorneys were not entirely forthcoming in the PWC investigation and inter alia refused to provide PWC with file copies and copies of documents.[6] Nozuko Nxusani Inc Attorneys specifically stated that no record was kept of instructions from the applicant, time spent on agreements drafted, research notes or amendments made to contracts, and invoices were in essence prepared from memory.

[9] The PWC report involved 78 invoices submitted to the applicant by Nozuko Nxusani Inc Attorneys for the period between 13 January 2010 and 4 March 2011 totaling in excess of R12 million. In addition the difficulties already referred to above, some of these invoices were tendered to the applicant before the work had been done or were tendered for the drafting of agreements that had already been signed. The report suggested there were weaknesses in the procurement of legal service providers and the process of approval of the payment of invoices.

[10] It is common cause that the applicant was never suspended pending and pursuant to this PWC investigation and continued to render his normal services whilst it was ongoing.

[11] Pursuant to the above interim report of PWC, and on 7 October 2011, the applicant was presented with a written warning[7] for negligence in respect of (1) his failure to comply with necessary and proper governance procedures in instructing Nozuko Nxusani Inc Attorneys in the period between January 2010 and March 2011, (2) the lack of maintenance of proper records relating to work done in this period by Nozuko Nxusani Inc Attorneys, and also in respect of improper conduct in approving payment without adequate supporting documents. The applicant was further instructed to

[6] See Bundle page 60 – 61

implement systems and processes to prevent a reoccurrence of such events in the future. It is clear, in a nutshell, that the gravamen of the warning concerned the fact that the respondent considered the applicant to have behaved negligently and improperly in the management of the legal department. There was no issue or contention of impropriety or dishonest conduct on his part.

[12] As stated, the PWC report on 22 August 2011 was an interim report. What remained outstanding was the handing over and investigation of the files of Nozuko Nxusani Inc Attorneys and the complete investigation of the actual services provided by Nozuko Nxusani Inc Attorneys to the respondent. The upshot of this was that by November 2012, the respondent has still not received a final report from PWC with regard to the dealings between Nozuko Nxusani Inc Attorneys and the respondent (and by necessary consequence the applicant), and in particular, no filed had been received from Nozuko Nxusani Inc Attorneys.

[13] The respondent then decided in November 2012 to engage the services of Knowles Husain Lindsay Inc Attorneys to pursue the investigation further and in particular, to compel Nozuko Nxusani Inc Attorneys to hand over the files relating to the invoices forming the subject matter of the PWC investigation. Pursuant to the efforts of Knowles Husain Lindsay Inc Attorneys, some files were procured on 23 January and 20 February 2013. Also, and on 7 December 2012, PWC delivered its final report in this matter.

[14] Knowles Husain Lindsay Inc Attorneys then investigated the files they has received. This investigation also involved a consideration of the final report of PWC in reviewing the files. All of this, according to the respondent, then started to reveal a "worrying picture". In fact, it appeared that the picture that started to emerge was one

[7] See Bundle page 95 – 96

of possible impropriety and unlawful conduct on the part of the applicant and Nozuko Nxusani Inc Attorneys. In particular, and contrary to earlier statements that no such records were kept, the files in fact contained records of hours spent on the files. Many of the hours noted were entirely unrealistic considering the file content, with some instances reflecting work done of more than 24 hours in one day. Some files duplicated the description of agreements worked on but contained different hours and dates. The hours recorded were vague, unsubstantiated and in most instances billable activities were noted without any recordal of hours spent on the activities.

[15] As far as it concerned the conduct of the applicant himself, a consideration of the files and the final PWC report, showed that the explanations offered by the applicant and as recorded in the initial PWC report were not sustainable. In particular, the following was apparent: (1) the files noted extensive consultations with the applicant contradicting his statements that this did not happen; (2) the constant description in the files of work done was drafting of agreements which is contrary to what the applicant has said he instructed the attorneys to do.

[16] The conclusion the respondent came to from all of the above is that there existed a very real possibility that the applicant's approval of the Nozuko Nxusani Inc Attorneys' invoices was not negligence, but possible collusion with such attorneys to secure payment of grossly inflated invoices. The misconduct in such a case would of course be one of dishonesty, which was never contemplated before. Considering the applicant's position, this was a very serious issue. This was clearly an issue entirely distinct and separate from, and could not have been contemplated by, the written warning of 7 October 2011.

[17] Pursuant to the investigation into the dealings between the applicant and Nozuko Nxusani Inc Attorneys referred to above, the respondent also came across dealings

between the applicant and other attorneys, being Mashiane Moodley and Monama Inc Attorneys. Similar to the Nozuko Nxusani Inc Attorneys invoices, these invoices involved exorbitant fees that do not appear to be justified by the work done as recorded in the invoices. One invoice reflects a fee of R10 million (excluding disbursements to counsel) for a matter regarding the dismissal of call centre employees. There were also 9 separate invoices for R22 800,00 each for what appears to be a single collective dismissal. Other invoices suggest possible double billing and vastly excessive fees. Added to the above, John Mashiane of Mashiane Moodley and Monama Inc Attorneys is a trustee of the applicant's Madzonga Family Trust. Again, the common denominator is the applicant, from whom the instructions appeared to emanate and the applicant having approved payment of the invoices.

[18] These developments as set out above gave rise to a meeting on 6 August 2013 of the respondent's senior management. In this meeting, it was determined that the picture that emerged as set out above required detailed investigation into the applicant's activities and the legal department to determine the scope and nature of the applicant's involvement in what was clearly, at least on a prima facie basis, unlawful and dishonest conduct. The discussions specifically concerned whether the applicant should be immediately suspended or not pending these investigations.

[19] The respondent, in deciding whether or not to suspend the applicant, considered the nature of the possible misconduct of the applicant, which involved acts of dishonesty if found to be substantiated in the investigation to come. The respondent considered that the applicant was in a very senior and influential position and in change of the legal department from which the issues emanate. The respondent considered that the applicant's subordinates would have to be involved in the investigation for the purposes of providing information and it would be unlikely that they would freely and voluntary participate whilst the applicant was still at work. The respondent also

referred to one incident where the applicant sought to amend an invoice in an unrelated investigation into the Carol Bouwer Productions issue.

[20] A further meeting with held with the respondent's CEOs on 7 August 2013 to finally decide on the issue of suspension of the applicant and it decided to issue the applicant with a notice calling on him to make submissions with regard to his suspension.

[21] On 8 August 2013, the applicant then filed a grievance. The grievance related to an incident arising from the ICT Indaba in February 2013, some six months prior. The grievance was brought against Lily Zondo ("Zondo"), the head of business risks and forensics, and the nub of the issues were that Zondo contended that the applicant's signature was on a cheque for the payment of R15 million, when that was not the case (which contention was later withdrawn), and an e-mail circulated by Zondo on 1 February 2013 in which she contended that a R6 million consulting fee in this whole ICT Indaba saga was shared with the applicant by a third party. The grievance was further brought against Pienaar, the applicant's immediate superior, and the HR Director Themby Nyathi, for failing to act against Zondo when the applicant complained about her conduct.

[22] On 13 August 2013, the applicant was provided with a notice of contemplated suspension. The notice called on the applicant to submit representations as to why he should not be suspended, by 14 August 2013. The notice recorded that further information in the Nozuko Nxusani Inc Attorneys investigation had come to light and that the respondent also now wanted to conduct investigations into the applicant's dealings with Mashiane Moodley and Monama Inc Attorneys. It was recorded that considering the position of the applicant in the respondent his continued presence at work would jeopardize the respondent's investigations and its interaction with the

applicant's subordinates in the investigation. The respondent recorded that it was also concerned with stability in the workplace.

[23] The applicant duly made representations on 14 August 2013. The applicant stated in his representations that his suspension related to and was motivated by his grievance against Zondo and legal proceedings he contemplated against her. The applicant contended that the matter of Nozuko Nxusani Inc Attorneys had been disposed of on 7 October 2011 when he was given the written warning. He denied any impropriety in his dealings with Mashiane Moodley and Monama Inc Attorneys. He recorded that he was not aware of any further information and as such could not make further representations. Significantly, and other than a bald denial, the applicant said nothing about the respondent's concerns as set out above and recorded in the notice of intention to suspend relating to the fact that his continued presence at work would jeopardize the investigation and cause instability in the workplace.

[24] The respondent then considered these representations, and decided to proceed with the suspension of the applicant. The applicant was suspended on full pay by way of a notice of suspension dated 14 August 2013 and issued on such date.[8] The reasons for the suspension were given as the seriousness of the allegations against the applicant, the need to conduct further investigation without possible hindrance or interference, and that the applicant's presence at work could hamper such investigations. The applicant was advised that in the event of disciplinary proceedings being instituted, he would be given proper notice of this.

[25] On 16 August 2013, the applicant's attorneys addressed a letter to the respondent stating that the applicant's suspension was unlawful and unfair and constituted an

[8] Bundle page 115 – 116

unfair labour practice.[9] The applicant's attorneys raised a number of reasons for this, which can be crystallized into contentions that the suspension was motivated by the grievance against Zondo, the Nozuko Nxusani Inc Attorneys issue having been concluded on 7 October 2011, and non compliance with the respondent's disciplinary code. It was also specifically raised that because the applicant was not suspended in the 2011 PWC investigation, there was no need to suspend him now in the current proposed investigations. It was demanded that the applicant's suspension be uplifted.

[26] The respondent did not adhere to this demand and the current application was then brought on 19 August 2013. Significantly, the applicant never referred an unfair suspension dispute to the CCMA.

Urgency and jurisdiction

[27] The respondent in its answering affidavit has raised the issue that the Labour Court does not have jurisdiction to determine this application. This contention is based on the premise that the true issue in dispute in this matter is that of an unfair labour practice which cannot be determined by the Labour Court and must be determined by the CCMA in arbitration proceedings.[10] Whilst it is course correct that the CCMA is the proper and prescribed forum to determine unfair labour practice cases by way of arbitration proceedings, this does not deprive the Labour Court of jurisdiction to intervene even in such proceedings on an urgent basis. The Court in *Gcaba v Minister for Safety and Security and Others*[11] said that jurisdiction means 'the power or competence of a court to hear and determine an issue between parties'. In the case of the

[9] Bundle page 117 – 118
[10] See Section 186(2) of the LRA as read with Section 191
[11] (2010) 31 ILJ 296 (CC) at paras 74 – 75

Labour Court, this competence and power is found in Section 158.[12] The Court in *Booysen v Minister of Safety and Security and Others*[13] specifically dealt with these powers and held that '…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.' In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[14] the Court confirmed the jurisdiction of the Labour Court to entertain an urgent application specifically relating to the uplifting of a suspension, but said that it should only be entertain in 'in extraordinary or compellingly urgent circumstances'.[15] The point therefore is that the Labour Court does have jurisdiction as a matter of principle to entertain these kinds of applications as brought by the applicant, but must only exercise such jurisdiction in compelling circumstances based on the facts of every case. The respondent's jurisdictional objection must thus be dismissed.

[28] Dealing then with urgency, I refer to *Jiba v Minister: Department of Justice and Constitutional Development and Others*[16] where the Court held: 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.' I accept that this matter is urgent. In any event, and in the argument submitted by both parties before me, the issue of urgency was not

[12] Section 158(1) reads: '*(1) The Labour Court may (a) make any appropriate order, including (i) the grant of urgent interim relief (ii) an interdict; (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order ….*'
[13] (2011) 32 ILJ 112 (LAC) at para 54
[14] (2012) 33 ILJ 2033 (LAC)
[15] Id at para 46

really placed in contention. For the sake of completeness, I mention that the applicant was suspended on 14 August 2013, then first engaged the respondent to uplift his suspension on 16 August 2013, and when this was not achieved, brought this application on 19 August 2013. I accept that this is prompt and immediate action. I further point out that both parties have had the opportunity to fully state their respective cases in the pleadings, and it is in the interest of justice that this issue now be finally determined. I thus conclude that there are proper grounds to determine this matter as one or urgency.[17]

The issue of a clear right

[29] On the merits of this matter, the applicant has the onus to show that he has a clear right to the relief sought. The applicant has based his case in this regard on three contentions, namely that his suspension was either unlawful, or invalid or unfair. I will immediately dispose of the contention of invalidity. No such case is made out in the founding affidavit. There is no allegation or contention or evidence that the decision to suspend the applicant was not authorized by the respondent or that the respondent acted outside the scope of its powers in suspending the applicant or that there some or other provision in a code or regulation that prohibits his suspension. An example of these kind of instances can be found in *Sephanda and Another v Provincial Commissioner, SA Police Service, Gauteng Province and Another*[18] which concerned a precautionary suspension implemented when the disciplinary hearing itself was already well underway, and there was thus no need for a precautionary suspension to be implemented at such a late stage. Another example is found in

[16] (2010) 31 ILJ 112 (LC) at para 18
[17] See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) ; *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (2007) 28 ILJ 2796 (LC) at para 12 ; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 – 24
[18] (2012) 33 ILJ 2110 (LC)

Mathabela v Dr J S Moroka Local Municipality[19] where a suspension was found to be invalid because a chairperson exceeded his powers by extending a suspension beyond a 60 day prescribed suspension period in the regulations. A final example to be referred to is that of *Mbatha v Ehlanzeni District Municipality and Others*[20] which concerned a delegation of the power to suspend to the mayor when this power was not capable of being so delegated. In the current matter, there is no such case, and accordingly, no basis for any conclusion that the applicant's suspension was invalid. The applicant therefore has not demonstrated or proven the existence of any clear right in this respect.

[30] The next issue to deal with is the contention that the applicant's suspension was unfair. In this regard, it is important to firstly determine where the right to a fair suspension emanates from. It has now authoritatively been determined that there is no implied right to fairness incorporated into the employment contract which can form the basis of such a right. In *SA Maritime Safety Authority v McKenzie*[21] the Court specifically dealt with this issue and I wish to refer several pertinent extracts from this judgment. The Court said the following:[22]

> ' …. If what is incorporated is simply a general right not to be subjected to unfair labour practices, without the incorporation of the accompanying statutory provisions, of which the definition is the most important, then the incorporation goes further than the statute from which it is derived. That is logically impermissible when we are dealing with incorporation by implication. If what is incorporated is limited to the statutory notion of an unfair labour practice, with all its limitations, then incorporation serves no purpose as the employee will gain no advantage from it. That is a powerful indication that no such incorporation is intended.'

[19] (2011) 32 ILJ 2000 (LC)
[20] (2008) 29 ILJ 1029 (LC)
[21] (2010) 31 ILJ 529 (SCA)

The Court went further and said the following:[23]

> '…. I would add to it that there is the further bar in South Africa that the legislation in question has been enacted in order to give effect to a constitutionally protected right and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment. I am also fortified in that conclusion by the fact that it reflects an approach adopted in a number of other jurisdictions. In addition the Constitutional Court has already highlighted the fact that there is no need to imply such provisions into contracts of employment because the LRA already includes the protection that is necessary.'

The Court then concluded:[24]

> ' …. insofar as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices. Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer.'

[31] Not only am I bound by the above reasoning in *McKenzie*, but I respectfully agree with the same.[25] I therefore conclude that the applicant's right not to be unfairly suspended is fully and only determined by the provisions of the LRA, and is subject

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[22] Id at para 27
[23] Id at para 33
[24] Id at para 56

[25] See also *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC) at para 21

to all the limitations in the LRA, and cannot be implied into his contract of employment. The applicant's contract of employment thus cannot give raise to a general right that his suspension must be fair.

[32] The applicant also cannot base his right not to be unfairly suspended on the general right to a fair labour practice as found in Section 23(1) of the Constitution.[26] Direct reliance on the fundamental rights as contained in the Constitution is impermissible when the right in issue is regulated by legislation, as is actually the case with the LRA, which directly regulates the right to fair labour practices (which includes suspension). In *SANDU v Minister of Defence and Others*[27] the Court held that '…. where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. This was equally confirmed in similar circumstances to the current matter in the judgment of *Gradwell*.[28] The applicant has sought to do exactly what the above reasoning prohibits, in that the applicant seeks to rely, in his founding affidavit, directly on the provisions of Section 23(1) of the Constitution to establish his right to relief.[29] The applicant is prohibited in law from doing so, and thus cannot directly rely on the fundamental right to a fair labour practice in the Constitution to establish his right not to be unfairly suspended.

[33] This then leaves only the provisions of the LRA itself. The issue of suspension is specifically provided for in the LRA in Section 186(2)(b) where it is recorded that an unfair labour practice means 'any unfair act or omission that arises between an employer and an employee involving- ....(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.' The LRA then prescribes

[26] Act 108 0f 1996. Section 23(1) reads '*Everyone has the right to fair labour practices*'
[27] (2007) 28 ILJ 1909 at para 51
[28] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (*supra*) footnote 14 at para 34 ; See also *Booysen v SA Police Service and Another* (2009) 30 ILJ 301 (LC) at para 37 – 38
[29] Bundle page 14 para 5.3

the manner in which such disputes must be resolved, being firstly by way of a referral to the CCMA (or bargaining council) for conciliation, and if the dispute remains unresolved, the matter is then referred to the CCMA (or bargaining council) for arbitration.[30] What is clear is that the Labour Court is not tasked with the determination as to whether or not a suspension of an employee is fair or unfair, and this task is specifically and only designated to the CCMA. In this regard, the Court in *Gradwell*[31] said:

> 'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)*(a)*(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.'

[34] Applying the reasoning in *Gradwell*, I point out that the applicant has made no attempt to pursue his remedies under the LRA, despite contending that his suspension was unfair, and in the initial letter of demand from his attorneys that his suspension was an unfair labour practice. The applicant has not even referred that

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[30] See Section 191(1)(a) and (b), Section 191(5)(a) of the LRA
[31] Id at para 46

dispute to the CCMA as a step of first instance. Instead, the applicant has directly approached the Labour Court and sought a final determination of the fairness of his suspension in motion proceedings, causing the very mischief the Court in *Gradwell* warned against. As a matter of principle, this kind of conduct should not be entertained, with the only exception being that the applicant must convince the Labour Court to entertain this matter by showing extraordinary or compellingly urgent circumstances, which I will address hereunder.

[35] To make matters worse, the applicant did not even seek interim relief pending proceedings in the CCMA. When I alerted Mr Roode who represented the applicant, to this issue, he then belatedly sought to suggest that what the Court should do was to grant interim relief pending a CCMA dispute. The problem with this is of course that the applicant is bound by the case it brought to Court. In *Betlane v Shelly Court CC*[32] the Court said: 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit….' The applicant is thus bound by the case presented and made out in the notice of motion and founding affidavit. The applicant has never asked for interim relief in the notice of motion, and in any event, interim relief pending what, as there is no referral of a dispute to the CCMA. There is accordingly no issue of urgent interim relief as justification for hearing this matter, which leaves the applicant the one and only avenue of having to show extraordinary or compellingly urgent circumstances for this Court to intervene.

[36] Mr Roode submitted that there are such circumstances in this case which justifies intervention, and this is set out in the founding affidavit. In a nutshell, these

[32] 2011 (1) SA 388 (CC) para 29 ; See also *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA) ; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A – B ; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC)

considerations are the following: (1) the existence of an ulterior motive and mala fides for the suspension; (2) the fact that in the previous PWC investigation the applicant was not suspended; (3) prima facie proof of alleged misconduct is not provided; (4) the applicant had the right to be heard before his suspension which was contravened; (5) No proper particulars for the reasons for suspension are not provided; (6) the matter had already been disposed of by the written warning of 7 October 2011; (7) the suspension has professional and reputational implications for the applicant and prejudices his job advancement; and (8) the respondent had acted contrary to its own disciplinary code which has been incorporated into the applicant's contract of employment.

[37] Firstly, and immediately, there is nothing extraordinary and compellingly urgent in respect of the considerations set out in points (2), (3), (4), (5) and (8) above. These are the kinds of contentions that would apply to virtually each and every unfair suspension case. There is simply nothing unique and special in this. There is no need for this Court to pronounce on the merit of any of these issues at this juncture,[33] save only for the issues of the right to be heard before suspension and the respondent allegedly acting contrary to its own disciplinary code, which in this case are really issues concerning the suspension being lawful or not and which will be addressed hereunder.

[38] I will next deal with the issue of the allegations of ulterior motives and mala fides. These allegations are principally founded on the issue of the grievance brought against Zondo on 8 August 2013 by the applicant. The applicant has contended that the suspension came about because he lodged this grievance and was a mala fide tactic to apply retribution for him doing so. These are the kinds of issues that are best ventilated by way of oral evidence in arbitration proceedings. The problem the

[33] These issues must be properly ventilated in the CCMA by leading of evidence

applicant has is that since these are motion proceedings, and in terms of the application of the *Plascon Evans* test referred to, I have to accept the respondent's denial that this was ever the case. The respondent has clearly and unequivocally, and with proper motivation, disputed that the suspension had anything to do with the grievance and in fact has gone so far as to contend that the grievance was nothing more than an attempt by the applicant to escape his suspension which he in some or other way had been alerted to was on the horizon. There is no reason for me not to accept this version of the respondent. In fact, and on the probabilities, I tend to agree with what the respondent is saying. The fact is that the issues giving rise to the applicant's suspension were investigated since November 2012. The issue of the applicant's suspension was fully discussed by management before the applicant even made the grievance. The applicant's grievance also related to an issue that arose six months before, and if it was such a pressing issue to the applicant, why does he wait so long to lay the grievance. In my view, and on the papers in this matter, there is no nexus between the suspension and the grievance.

[39] In *Kroukam v SA Airlink (Pty) Ltd*[34] it was held that: 'In my view a court should be slow to infer that the reason why an employer has brought disciplinary charges against an employee or the reason why an employer has dismissed an employee is or are illegitimate reason(s) …. unless there is sufficient evidence to justify such a conclusion. A court should be even slower to come to that conclusion in a case where it does seem that the employer may have had a basis to bring disciplinary charges against an employee even if the court would not have done the same had it been in the employer's shoes. ….' In my view, and considering the circumspection urged by the Court in *Kroukam*, there is insufficient evidence to justify a conclusion that the applicant's suspension was motivated or caused by the grievance.[35] I conclude that on the evidence, the opposite is true, being that the

[34] (2005) 26 *ILJ* 2153 (LAC) at para 86
[35] See also the similar approach of the Court in *SA Municipal Workers Union & another v Nelson Mandela Metropolitan Municipality and Others* (2007) 28 ILJ 2804 (LC) at para 14

grievance was brought by the applicant in an attempt to provide justification for his attempts to avoid his suspension. I have little hesitation in concluding, on the evidence, that there was proper cause for the respondent to have suspended the applicant, considering the nature of the allegations made against him. It is clear from the evidence to be accepted that it was these serious allegations and the need to properly and without any undue interference fully investigate the same that was the motivation for the applicant's suspension. This is surely a proper and justified motivation for the course of action embarked upon by the respondent.

[40] I will next deal with the contention that in the previous PWC investigation the applicant was not suspended. This was one of Mr Roode's principal contentions on behalf of the applicant. Again, this is a matter best suited to oral evidence. The founding affidavit provides no detailed motivation as to why the applicant was not suspended in the previous investigation, other than a contention (which is disputed) that he cooperated in the investigation. Again, and with the applicant choosing motion proceedings, *Plascon Evans* works against him. The respondent has stated in its answering affidavit that in hindsight, the fact that the applicant was not suspended in the previous investigation was a mistake and it was a mistake it did not want to repeat. This, in my view, is a proper explanation on the part of the respondent. It is not really known exactly why the applicant was not suspended in the previous investigation. What does however appear is that there has been a change in focus, so to speak, from the previous investigation to the current one. The previous investigation was premised on the issue that the applicant was negligent in his management and control of the legal department, which is evidenced by the written warning issued on 7 October 2011. The current investigation is premised on allegations of dishonest conduct on the part of the applicant and alleged collusion by him with service providers to artificially inflate or generate invoices for the respondent to pay, and then, presumably, to share the spoils from such endevours with the

service provider concerned. This change in focus, which case was specifically made out in the respondent's answering affidavit, in itself justified a change in approach as to the suspension of the applicant. The fact that the applicant may not have been previously suspended in the earlier PWC investigation is thus of no assistance to him in this matter. The respondent was entitled to change its mind on the future course of action, which it did.

[41] The next consideration is the issue of the possible reputational and professional prejudice, together with possible prejudice in job advancement, caused by the suspension of the applicant. I must immediately point out that surely this is the case with each and very suspended employee. This would always be the possible result of any suspension. If this would be a basis for the Labour Court to intervene in suspension proceedings, then virtually all suspension cases would be urgent and directly end up in the Labour Court. This would fly in the face of the clear intentions of the legislature found in specific provisions in the LRA dispute resolution process, and undermine the effective and orderly resolution of employment disputes in the manner prescribed by law.[36] In *Mosiane v Tlokwe City Council*[37] the Court said: 'The reasons advanced by the applicant why urgent relief is sought relate to his reputation. This can hardly be a basis to approach this court for relief on an urgent basis. All employees who get dismissed or suspended and believe that they are innocent, have their reputations tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the employer should justify the charges against them. Should they fail to do so, such employees will be reinstated with no loss of benefits. I accept that some damage to their reputations would have been done. This court however is not in the business of ensuring that an

[37] See also Section 1(d)(iv) of the LRA which provides that one of the primary objects of the LRA is '*the effective resolution of labour disputes*.'

employee's reputation should not be tarnished. If so, it will open the flood gates and this court will be inundated with many such applications.' I fully agree with this reasoning. I conclude on this issue with the following reference to what the Court said in *Dladla v Council of Mbombela Local Municipality and Another (2)*:[38] 'In my view, the applicant's image and reputation cannot be the basis upon which this court can overturn the suspension.'

[42] The final issue to consider in this regard is the issue that in this case, there exists "double jeopardy",[39] as the applicant calls it, on the basis that the issue has already been disposed of by the written warning of 7 October 2011. There is no merit whatsoever in this contention. The respondent, in its answering affidavit, has fully and properly explained this issue, and I have already touched on this above. The fact is that the written warning was premised on the applicant negligently managing and controlling the legal department, whilst the current investigation (and resulting suspension) is premised on dishonest conduct and collusion between the applicant and service providers in respect of unlawful invoices. Also, the 7 October 2011 warning only concerned the Nozuko Nxusani Inc Attorneys invoices, whilst the current matter also concerns invoices by Mashiane Moodley and Monama Inc Attorneys. In the current matter, the respondent now has access to further information it did not have access to before which information appears to now support allegations of dishonesty on the part of the applicant. There is therefore a material difference between the current proceedings and the 2011 proceedings. In *Score Supermarket Kwathema v Commission for Conciliation, Mediation and Arbitration and Others*[40] it was held that 'It is an established rule of our law that for the plea of res judicata to succeed it is necessary to establish that a final judgment has been made involving- (a) the same subject-matter; (b) based on the same facts; and (c) between the same parties.' In the current matter, the fact is that the issues giving rise to the applicant's

[37] (2009) 30 ILJ 2766 (LC) at para 17
[38] (2008) 29 ILJ 1902 (LC) at para 43

[39] Or as legally defined the res judicata principle

current suspension are not premised on the same facts as the 2011 proceedings. There are some of the facts that are the same but there are crucial additional facts that only came apparent when the files were received from Nozuko Nxusani Inc Attorneys and arose from the invoices of Mashiane Moodley and Monama Inc Attorneys which are also now being investigated. In addition, the cause of action (subject matter), so to speak, is different, as the 2011 proceedings did not contemplate the issue of dishonest conduct and collusion with service providers by the applicant.[41] In *Makhanya v University of Zululand*[42] the Court said that: 'The existence of a right might nonetheless be relevant to a claim asserting another right arising from the same facts but in an altogether different context. ….' In my view, and as a matter of fact and law, the events in 2011 and the warning given then, did not stand in the way of the proceedings giving rise to the suspension of the applicant. The fact, context and subject matter of the 2011 proceedings and the current proceedings are not the same. Accordingly, the applicant has not made out a case for intervention on this basis.

[43] I also need to make reference to the seniority and influence of the position of the applicant. This was an important issue to the respondent when it considered whether or not to suspend the applicant. The fact is that the investigation the respondent has stated it would pursue would encompass a detailed investigation in the legal department, and as a necessary consequence, interviewing of the employees employed there. Considering that this investigation process is directly aimed at the applicant, it is a matter of simple logic that his continued presence at work would be, at the very least, extremely uncomfortable for the subordinates of the applicant in the legal department. The applicant's seniority also creates a risk that he could be in a

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[40] (2009) 30 ILJ 215 (LC) at para 30

[41] See for example *Ditsamai v Gauteng Shared Services Centre* (2009) 30 ILJ 2072 (LC) ; *Dial Tech CC v Hudson and Another* (2007) 28 *ILJ* 1237 (LC) where the same set of facts were found to have supported different causes of action and thus res judicata did not apply.

[42] (2009) 30 ILJ 1539 (SCA) at para 46

position to possibly tamper with evidence or influence subordinates, being a case pertinently made out by the respondent. As a matter of principle, the more senior the position where it comes to instances of possible dishonest conduct, the more justified suspension would be. In the case of the applicant, and on this basis as well, suspension was justified. In *Phutiyagae v Tswaing Local Municipality*[43] it was held as follows, which is of particular application to the current matter:

> 'The applicant is the head of the department the respondent intends investigating. During the course of the investigation there is a possibility that the applicant's subordinates may have to be interviewed, that documents may have to be accessed. The continued presence of the applicant might possibly hinder the investigations.
>
> The rationale underpinning the applicant's suspension appears to be reasonable and it is prima facie informed by the suspicion that the applicant has committed serious misconduct.'

[44] In *Koka v Director General: Provincial Administration North West Government*[44], Landman J (as he then was) referred with approval to the following remarks made by Denning MR in *Lewis v Heffer and others* [1978] 3 All ER 354 (CA) at 364*c-e*: 'Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and he is suspended until he is cleared of it. No one, as far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply....'' I agree with these remarks, which

[43] (2006) 27 ILJ 1921 (LC) at para 27 – 28
[44] (1997) 18 ILJ 1018 (LC)

in my view properly expresses the very purpose of what can be called precautionary suspension. This purpose is surely an important consideration in determining the issue of the existence of a fair suspension.

[45] Based on all of the above, there are simply no extraordinary or compellingly urgent or unique circumstances in this matter that would justify the Court in this matter entertaining a departure from the prescribed statutory dispute resolution process as set out above. The applicant has made out no proper case in this regard. Accordingly, the applicant has not established a clear right to the relief sought in this matter based on the right not to be unfairly suspended in terms of the LRA. The applicant is compelled, in order to enforce this right, to follow the prescribed dispute resolution process in terms of the LRA.

[46] This then leaves the last issue remaining, being whether or not the applicant's suspension was lawful. If the applicant's suspension was unlawful, then the applicant has established a clear right. In determining what is lawful, the application of principles of fairness is irrelevant. An issue is either lawful, or not. Whether or not the applicant's suspension is lawful is entirely founded on the provisions relating to the regulation of disciplinary action in the respondent. The lawfulness of the conduct of the respondent is founded on the principle that the respondent, as employer, must comply with its own rules. In the current matter, the conduct of discipline in the respondent is regulated by the disciplinary code and procedure. For the purposes of the determination of this matter, I will accept that the provisions of the respondent's disciplinary code as it exists from time to time has been incorporated into the applicant's contract of employment, as contended for by the applicant.

[47] Something however needs to be said about the conduct of the applicant relating to the discovery of this disciplinary code in the pleadings. The applicant attached to the

founding affidavit what he contended was the disciplinary code of the respondent and sought to rely on several provisions contained therein which supported contentions made by him that he was entitled to proper reasons for his suspension and a right to be heard before suspension. From the disciplinary code attached to the respondent's answering affidavit, it was clear that what the applicant did was to seek to rely on a previous version of the disciplinary code. The current version of the disciplinary code is version 4 and was promulgated on 18 June 2013.[45] I find it surprising that someone such as the applicant, and considering his position, would not know this to be the case. I am left with a lingering feeling that the applicant has tried to mislead the Court in order to make out a case, especially considering the applicant's simple answer in his replying affidavit, without proper explanation, that this amended code was not circulated to him and he was not aware of it,[46] which I consider unlikely in any event.

[48] The above being said, this then brings me to the actual provisions of the disciplinary code insofar as it relates to issues of suspension.[47] It records that suspension is the responsibility of line management following a preliminary investigation. The applicant's suspension, on the above evidence, is clearly fully in line with this provision. The code further records that employees would only be suspended if the presence of the employee in the workplace would interfere with ongoing investigations or cause workplace instability. The code concludes by providing that suspensions are on full pay and the suspension period should be reasonable.

[49] In the current matter, the respondent has submitted that it believed that the applicant's continued presence in the workplace would interfere with the investigation and cause instability. The respondent has made out a case in the answering affidavit

[45] See Bundle page 186
[46] See Bundle page 315

in support of this belief. It is clear that there is an actual ongoing investigation into the alleged misconduct of the applicant and this investigation concerns very serious allegations involving dishonesty. The investigation would directly involve the legal department. I am quite satisfied that to suspend the applicant under such circumstances is necessary for the purposes of a proper investigation. The fact is that all the respondent has to have, as contemplated by the provisions of the code itself, is a reasonable belief that the applicant's presence at work would interfere with the investigation or cause disharmony (instability). In my view, the respondent's belief is indeed reasonable, for all the reasons already given.

[50] There are no provisions in the code requiring the applicant to be heard before suspension, or that proper reasons need to be provided for such suspension. Mr Roode submitted that despite this, and as a matter of law, it should be accepted that the right to be heard is an imperative to a suspension being lawful even if the code did not specifically provide for it. The submissions of Mr Roode are founded on the judgment in *Mogothle v Premier of the North West Province and Another*[48] where the Court held as follows: 'In summary: each case of preventative suspension must be considered on its own merits. At a minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing [obligation] of fairness on employers when they make decisions affecting their employees, requires first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy; and thirdly, that the employee is given the opportunity to state a case before the employer makes any final decision to suspend the employee.'

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[47] See Bundle page 196 para 6

[48] (2009) 30 ILJ 605 (LC) at para 39

[51] Before specifically dealing with the judgment in *Mogothle,* I point out that the law reports are permeated with judgments relating to urgent applications by applicants to uplift suspensions on the basis that such suspensions are unlawful. Save for individual exceptions, the vast majority of these judgments are brought by senior employees in the public sector. It must be pointed out that the public sector is a highly regulated employment environment, with detailed regulation and prescription of the issue of the conduct of discipline, done by way of regulation, or collective agreement or codes. The fact is that most of the judgments determine the issue of the lawfulness of the suspension based on the provisions of the regulatory provisions themselves. Most of these judgments thus concern the interpretation and application of the actual regulatory provisions, and it is based on this interpretation that the Courts then decided the issue, and held a suspension to be unlawful, without reliance on a general contractual right of fairness.[49] Most of the authorities thus are not of much use in determining the issue I am now called on to decide.

[52] Dealing then with the issue of a general right to be heard and reasons being provided prior to suspension, it is my respectful view, that the difficulty with reliance on the judgment in *Mogothle* is that it was decided before the judgment of the SCA in *McKenzie*.[50] As has been set out above, the Court in *McKenzie* has made it clear that the right of employees to fairness in the employment relationship is fully determined by the provisions of the LRA, and is subject to all the limitations in the LRA, and cannot be implied into the contract of employment. With respect, this must contradict the judgment in *Mogothle*, and as such, I do not consider myself bound by the judgment in *Mogothle* insofar as this judgment seeks to rely on this general right of

[49] For the most recent cases see *Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC) ; *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC) ; *Lebu v Maquassi Hills Local Municipality and Others (2)* (2012) 33 ILJ 653 (LC)
[50] *SA Maritime Safety Authority v McKenzie* (*supra*) footnote 21

fairness implied into the employment contract as a basis for a conclusion that an employee is entitled to be heard before suspension. In the recent judgment of *Lebu v Maquassi Hills Local Municipality (1)*[51] which was decided after *McKenzie*, the Labour Court distanced itself from the judgment in *Mogothle* and said that 'I must accept for present purposes that the latest pronouncement of the SCA on the non-existence of a contractual duty of fairness must prevail. Consequently, insofar as the applicant relies on a contractual obligation of fair dealing, he cannot succeed.'

[53] In any event, the Labour Court itself, when dealing with this issue of the right of an employee to be heard before suspension, has not been consistent. Some judgments held that the employee has the right to be heard before suspension, whilst other judgments have held this was not the case. This was recognized by the LAC in *Gradwell*.[52] In my view, the issue has now finally been disposed of in *Gradwell* where the Court said the following:[53]

> '…. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration. …. And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will

[51] (2012) 33 ILJ 642 (LC) at para 12
[52] Id at para 41 – 42
[53] Id at para 44 – 45

ordinarily be acceptable and adequate compliance with the requirements of procedural fairness.

The right to a hearing prior to a precautionary suspension arises therefore not from the Constitution, PAJA or as an implied term of the contract of employment, but is a right located within the provisions of the LRA, the correlative of the duty on employers not to subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights.'

[54] In the current matter, it is clear that the respondent, despite there being no obligation on the respondent to do this in terms of the disciplinary code, still afforded the applicant the right to make representations as to why he should not be suspended. In terms of the judgment in *Gradwell*, this is sufficient. Also, the facts of this case, in the light of the above ratio in *Gradwell*, fully support any attenuation of any requirement of procedural fairness, insofar as it may exist. Certainly, the balance of convenience must favour the respondent, also on the facts of this matter.

[55] Therefore, the right to be heard and other rights of procedural fairness cannot be implied into the respondent's disciplinary code insofar as it concerns the issue of suspension. It has to be the provisions of the respondent's disciplinary code, as specifically recorded in the code itself as it stands, that must determine whether the suspension of the applicant was lawful or not. In considering this question, I find guidance in the only related judgment I could find post the judgment in *McKenzie* and *Gradwell*, being that of *Ntuli v SA Police Service and Others*[54] where the Court dealt with regulation 13 of the SAPS Discipline Regulations which read: 'Precautionary suspension' - The employer may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner.' The Court

concluded that the employee was not entitled to make representations before suspension because the regulation did not provide for such a procedure. For another earlier example of where the Court simply applied the provisions of the regulation as it stood I refer to *Mapulane v Madibeng Local Municipality and Another*.[55] In the current matter, the disciplinary code makes no provision for the right to be heard or reasons or prima facie evidence to be provided prior to or relating to the suspension. The disciplinary code itself thus cannot substantiate the right the applicant seeks to assert, if applied as it stands. There has been compliance by the respondent with the disciplinary code, as it stands, and thus its conduct cannot be unlawful in terms thereof.

[56] The final issue to refer to in this regard is that in effect all that the disciplinary code required is that the respondent must have the belief that the presence of the applicant at work would prejudice the investigation or cause disharmony. I accept that this belief must be reasonable in the light of the actual facts of the particular matter, but this does not mean that this belief must be able to be objectively substantiated at that point in time. What this entails is a reasonable apprehension of risk, in the light of the purpose and scope of the investigation to follow as considered with the nature of the allegations against the employee. The respondent is entitled to its own belief in this respect, as basis for the suspension, even if at this stage it may be a subjective belief based on as yet unsubstantiated allegations.[56] In *Dladla v Council of Mbombela Local Municipality and Another (2)*[57] the Court, in considering the provisions of similar disciplinary provisions as in the current matter relating to a belief of interference by an employer as basis for suspension, said the following:

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[54] (2013) 34 ILJ 1239 (LC)
[55] (2010) 31 ILJ 1917 (LC) ; See also *Lekabe v Minister: Department of Justice and Constitutional Development* (2009) 30 ILJ 2444 (LC)

[56] I however wish to state that on the evidence before the Court in this application, there is certainly, at least on a prima facie basis, proper factual substantiation for the belief of the respondent.
[57] (*supra*) footnote 38 at para 19 and 21

> 'The wording is clear. Once an allegation exists that serious misconduct has been committed that is sufficient to trigger the coming into operation of clause 9.1 in particular. The belief that the municipal manager may jeopardize any investigation is in the absolute discretion of the municipality. Therefore the test is subjective. Such belief need not be communicated to the applicant before suspension.
>
> Since the belief in my view is subjective, it only takes the municipality to form that believe. It matters not that the applicant would say that as a matter of fact he is not interfering with the investigation. That may be so factually, but the issue is the belief of the second respondent. I take this view, even if I were to accept the applicant's version that he is not interfering with the investigation.' (sic)

[57] Therefore, and based on all of the above, the applicant has equally failed to make out a case that his suspension was unlawful. The applicant is not entitled to reasons for his suspension and a right to be heard before his suspension. The applicant was afforded the opportunity to make written submissions prior to being suspended which is more than sufficient in the circumstances. The respondent is entitled to form the belief that it did in terms of the disciplinary code, and fully complied with the provisions thereof.

[58] I conclude on the issue of the applicant having to establish a clear right by the following reference, as a comparison to the current matter, from the judgment in *Gradwell*, pursuant to which the Court concluded that the employee party in that matter was not entitled to the relief sought in the Labour Court:[58]

> '…. in the final analysis I am satisfied that the suspension was both fair and lawful in that there was compliance with the audi rule. In the circumstances of this case, taking account of the respondent's position, the serious nature of the allegations

[58] Id at para 47

> against him, the possibility that he could adversely influence the investigation, the public interest in ensuring that allegations of corruption and mismanagement at the highest levels of the public service are acted against swiftly and efficiently, and the limited prejudice to the respondent by reason of the suspension being on full pay and for a limited duration, the respondent had a reasonable and fair opportunity to make representations in response to the allegations made against him, which were clearly set out by the MEC in the relevant correspondence.'

[59] The applicant has thus failed to establish a clear right in support of the relief sought by him. The fact is that the applicant's suspension was not invalid, nor was it unlawful. In the light of what is set out above, and in these proceedings, the suspension of the applicant was also not unfair. As the applicant could not establish a clear right, this should be the end of the matter.

Alternative remedy

[60] I however wish to deal with the issue of the absence of the alternative remedy as requirement for the relief sought by the applicant to be granted, as well. I do so because of the plethora of cases that come before the Labour Court brought by senior employees or employees in the public sector to challenge their suspensions on an urgent basis in the Labour Court, which in essence amounts to bypassing the prescribed dispute resolution processes in the LRA for such kind of disputes. I fully align myself with the following statements made by the Court in *Mosiane v Tlokwe City Council*:[59]

> 'A worrying trend is developing in this court in the last year or so where this court's roll is clogged with urgent applications. Some applicants approach this court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such

[59] (2009) 30 ILJ 2766 (LC) at para 15 – 16

> applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this court with fanciful arguments about why this court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this court will grant them relief on an urgent basis.
>
> All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant bargaining councils and then approach this court for the necessary relief.'

[61] In *Gradwell*, the Court in fact expressed its doubts whether the Labour Court would be competent to grant final declaratory relief in declaring a suspension unfair, where the Court said:[60] 'I am therefore of the view that the judge a quo ought not to have exercised his discretion to grant the declarator. I doubt also whether he had the legal competence to do so. Without the benefit of legal argument, however, I hesitate to pronounce on the jurisdictional question whether the existence of the arbitration remedy precludes relief in the form of a declarator in all cases.' In the current matter, I fortunately have had the benefit of competent and proper legal argument on this issue and am thus in the position to pronounce on the same.

[62] The issue is not one of jurisdiction. It is one of competence. As I have set out above, the Labour Court will by virtue of the provisions of Section 158(1) of the LRA always have jurisdiction to interdict any form of disciplinary proceedings or grant interim relief. The question is whether such jurisdiction should be competently exercised. In

[60] Id at para 47

Ntuli v SA Police Service and others[61] the Court held that: 'In the current case, the applicant has not referred an unfair labour practice dispute in terms of s 186(2)(b) of the LRA to the bargaining council. He has an alternative remedy but has elected not to make use of it. In the light of the binding authority in Gradwell, this is another reason why he has not satisfied the requirements for urgent interim relief.' Similarly and in *SA Municipal Workers Union and another v Nelson Mandela Metropolitan Municipality and Others*[62] the Court said; 'As far as an alternative remedy is concerned, it is clear that the second applicant has an alternative remedy available to him in the form of a referral of a dispute concerning his suspension as an alleged unfair labour practice to the relevant bargaining council. The second applicant does not offer any explanation for such failure. There is also ample authority for the argument that this is the correct procedure to follow.' A final reference is made to *Phutiyagae v Tswaing Local Municipality*[63] where it was held: 'The question whether the suspension of the applicant is unfair and consequently an unfair labour practice must be adjudicated upon and decided by the appropriate forum; in this case, the bargaining council.'

[63] The above authorities make it clear that the issue of the alternative remedy of the referral of the dispute to the CCMA or bargaining council, and this remedy is actually prescribed by law, is an important consideration mitigating against not granting relief in urgent applications concerning the uplifting of suspensions. In my view the issue is actually more than just the existence of an alternative remedy. The simple reason for this is that the alternative remedy is not just an available alternative remedy but a statutory prescribed alternative remedy. This is where the issue of competence comes in. The primary consideration must always be that proper effect be given to the clear terms of the statute, and for the Labour Court to entertain this issue would be contrary to the dispute resolution process clearly prescribed by such statute which should only be done with great circumspection and reluctance. In my view, and as a matter of principle, the Labour Court should only entertain urgent applications to

[61] (*supra*) footnote 54 para 22
[62] (2007) 28 ILJ 2804 (LC) at para 15
[63] (2006) 27 ILJ 1921 (LC) at para 45

declare suspensions unfair or unlawful or invalid on the basis of interim relief pending the final determination of the issue in the proper prescribed forum, and even then compelling considerations of urgency and exceptional circumstances have to be shown by an applicant for such relief. Whether or not compelling considerations of urgency and exceptional circumstances exist is a call the Court has to make on a case by case basis on the facts of the matter.

[64] In the light of the above, the applicant's application in the current matter must fail as well. The applicant has not referred a suspension dispute to the CCMA. The applicant does not seek interim relief from this Court but final relief. The applicant has not make any attempt to follow the dispute resolution process prescribed by law, and has not offered any proper explanation for not doing so. There is nothing compelling or unique in the applicant's suspension that would justify intervention outside the normal course of the statutory prescribed dispute resolution process.

[65] I therefore conclude that the applicant has failed to demonstrate a clear right to the relief sought and has failed to provide any compelling considerations of urgency or exceptional circumstances to justify a departure from the statutory prescribed alternative remedy. The applicant never sought interim relief. As the applicant must prove all the requirements for final relief as set out at the beginning of this judgment, it is not necessary to determine the issue of prejudice, and for the purposes of a final determination in this matter I shall consider the issue of prejudice as neutral factor. For all these reasons the applicant's application must fail.

[66] This then only leaves the issue of costs. The applicant has elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. The applicant was legally assisted from the outset, and clearly knew he could and should pursue his dispute to the CCMA. There is simply no reason why

costs should not follow the result in this matter. Mr Redding asked for the costs of two counsel and considering the seniority and position of the applicant and the complexity of the issues raised I accept this is justified.

Order

[67] I accordingly make the following order:

> The applicant's application is dismissed with costs, which costs shall include the costs of two counsel.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

APPLICANT:	Adv B Roode Instructed by Deon De Bruyn Attorneys
RESPONDENT:	Adv A I S Redding SC Instructed by Knowles Husain Lindsay Inc Attorneys

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