REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1886 / 2013

In the matter between:

MANAMELA NNANA IDA **Applicant**

and

DEPARTMENT OF CO-OPERATIVE GOVERNANCE

HUMAN SETTLEMENTS & TRADITIONAL AFFAIRS

LIMPOPO PROVINCE **First Respondent**

MATHABATHA C S (PREMIER: LIMPOPO PROVINCE) **Second Respondent**

Heard: **29 August 2013**

Delivered: **05 September 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 SMS handbook 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

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 her suspension by the respondents. The applicant is seeking final relief, in terms of which the applicant seeks an order declaring that her suspension by the respondents is invalid and unlawful. The applicant further seeks an order that his suspension be uplifted with immediate effect and she be reinstated into her normal duties. Critically, and from the outset, Mr Scholtz, who represented the applicant, stated that the applicant places no reliance at all on an unfair labour practice and does not seek relief on the basis of any unfair labour practice.

[2] These are motion proceedings in which final relief is sought. I shall thus apply the principles as to the resolution of any factual disputes between the parties in such proceedings was enunciated in *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 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.'

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[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) at paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) at para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 26

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

[3] When it comes to the disputed facts in this matter, the applicant's founding affidavit contains very little factual particularity and a lot of legal submissions. As opposed to this, nothing the respondents have said in their answering affidavit can be considered to be bald or fictitious or implausible or lacking in genuineness. The issues raised by the respondents in the answering affidavit are properly raised, with the necessary particularity. There is no basis or reason for me to reject any of the facts or versions of the respondents 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 respondents' answering affidavit. On this basis, I will set out the background facts hereunder.

[4] As this matter concerns the granting of final relief, the applicant must satisfy three essential requirements which must all be shown to exist, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[3] Whether these requirements exist is determined, on the facts, by 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 first respondent as its head of department and accounting officer. The conditions of employment of the applicant are subject to specific regulatory provisions, known as the SMS Handbook. I will accept that the provisions of the SMS Handbook form part and parcel of 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) at para 20 ; *Royalserve*

applicant's employment conditions for the purposes of the determination of this matter.

[6] The applicant was suspended by the second respondent on 19 August 2013 by way of written notice.[4] The suspension was implemented as a precautionary measure pending disciplinary proceedings. The suspension was on full pay.

[7] The applicant was also notified to attend a disciplinary enquiry to be held on 14 October 2013 on six charges of misconduct.[5] These charges, in terms of the notice to attend a disciplinary hearing, were very serious. The charges in essence entail what can generally be termed as tender manipulation or irregularity, in that the applicant irregularly and/or unlawfully approved tenders as listed in the disciplinary notice. The misconduct complained of clearly constitute offences with an element of dishonesty, if true.

[8] On 22 August 2013, the applicant's attorneys wrote to the second respondent, contending that her suspension was in breach of the SMS Handbook and unlawful for four reasons, being a lack of compliance with clause 2.7(2) of chapter 7 of the SMS Handbook, the failure to adhere to the *audi alteram partem* principle, the purpose of the suspension having become academic and the suspension having been effected for ulterior purposes.[6] It was demanded that the suspension be uplifted by 23 August 2013 failing which the applicant would approach the Labour Court for urgent relief.

[9] The respondents did not adhere to this demand and the current application was then brought on 23 August 2013. The grounds upon which the applicant's suspension is challenged in this application are in essence those articulated in the letter of demand

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

[4] Bundle page 39 – 40

[5] Bundle page 44 – 45

of 22 August 2013 referred to above. Significantly, the applicant never referred an unfair suspension dispute to the bargaining council.

[10] The respondents have stated that the applicant was suspended because of the seriousness of the charges she was facing and the possibility that witnesses could be interfered with or intimidated. The respondent was adamant that the suspension of the applicant was not disciplinary action but a precautionary measure pending the disciplinary hearing where the applicant would then face the allegations against her. The respondents have also stated that the premier had satisfied himself that all the requirements in clause 2.7(2) of the SMS Handbook had been complied with before the applicant was suspended and it was not needed to record this together with reasons for her suspension in her suspension letter.

[11] The respondents, in their answering affidavit, provided detailed reasons as to why the applicant was suspended.[7] The first was the seriousness of the charges which negatively impacted on the department's finances and was a contravention of the Public Finance Management Act. The applicant was the HOD, and thus occupied the highest post in the department, and all the employees in this department were her subordinates. She had unfettered access to documents which could jeopardize any investigation. With the applicant present at the workplace her subordinates would not be free to volunteer information or participate in an investigation. The respondents state that if the applicant is not suspended, then vital information and documents could disappear. The respondents would need all of the mentioned information and documents to prove its case in the disciplinary hearing. It was in the public interest that this investigation be conducted unhindered and in an environment that was free and devoid of intimidation.

[6] Bundle page 41 – 42

[12] According to the respondents, the fact that the disciplinary hearing has already been convened does not mean that the suspension falls away. The same precautionary requirements will apply until the hearing is concluded. The hearing was scheduled within the 60 day period allowed by the SMS Handbook. Information and documents must still be gathered for the disciplinary hearing and this process will be prejudiced with the applicant at work. The witnesses must also be protected by the applicant not being at work. The point the respondent makes is that the "investigation" does not stop with the convening of the disciplinary hearing, but is still part of the disciplinary process until completion of the hearing.

[13] The above factual matrix forms the basis for the determination of this matter. It is clear that no exceptional circumstances or compelling considerations of urgency have been advanced by the applicant, other than the four contentions relied on.

Urgency and jurisdiction

[14] The Court in *Gcaba v Minister for Safety and Security and Others*[8] said that jurisdiction means 'the power or competence of a court to hear and determine an issue between parties'. In the case of applications such as the current application, in which urgent intervention in the suspension of an employee is sought, the Labour Court has the competence and power in terms of Section 158 to do so.[9] The Court in *Booysen v Minister of Safety and Security and Others*[10] 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

[7] See page 14 – 16 para 46.2 of the answering affidavit
[8] (2010) 31 ILJ 296 (CC) at paras 74 – 75
[9] 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 ….*'
[10] (2011) 32 ILJ 112 (LAC) at para 54

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*[11] 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 entertained in 'in extraordinary or compellingly urgent circumstances'.[12]

[15] As to the issue of urgency in general, and in the case of an application relating to a challenge of suspension, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[13] 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 really placed in contention. For the sake of completeness, I mention that the applicant was suspended on 19 August 2013, then first engaged the respondents to uplift her suspension on 22 August 2013, and when this was not achieved, brought this application on 23 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 in argument, and it is in the interest of justice that this issue now be finally determined. I thus conclude that there are proper grounds to finally determine this matter as one or urgency.[14]

[11] (2012) 33 ILJ 2033 (LAC)
[12] Id at para 46
[13] (2010) 31 ILJ 112 (LC) at para 18
[14] 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*

The issue of a clear right

[16] Where an employee is suspended, an employee is not disciplined. The only instance where suspension is discipline of an employee is where the suspension is imposed as a disciplinary sanction following disciplinary proceedings. Where suspension is imposed as a precautionary measure, this is a prelude to disciplinary action and not disciplinary action itself. This kind of suspension is known as precautionary suspension. These proceedings thus concern the concept of precautionary suspension and where suspension is dealt with in this judgment, it only relates to the concept of precautionary suspension.

[17] Where an employee is subjected to discipline, the disciplinary action itself is commenced when the employee is called to answer allegations of misconduct. This is done by way of a notification of disciplinary proceedings which identifies the allegations the employee must answer. Any suspension of the employee preceding this commencement is not the actual conduct of discipline itself, as the purpose of this suspension is to mitigate further risks to the employer because such discipline is contemplated but has not yet happened. As to the purpose of suspension, in *Koka v Director General: Provincial Administration North West Government*[15], 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

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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

[15] (1997) 18 ILJ 1018 (LC)

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 in my view properly expresses the very purpose of what can be called precautionary suspension. This has to mean that at level of general principle, precautionary suspension is a unilateral act by the employer which need not be preceded by the application of the principle of *audi alteram partem*.

[18] The above being said, and just like most unilateral acts by an employer, suspension would always be susceptible to legal challenge. This challenge can be based on three grounds, being that the suspension is unfair, or invalid, or unlawful. The applicant has the onus to show that she has a clear right to the relief sought in this application, and this can thus only be done by showing that her suspension was either unlawful, or invalid or unfair.

[19] A suspension would be invalid if the suspension for example is *ultra vires* the powers of the functionary effecting the suspension or the regulatory provisions of the employer do not permit the act of suspension in the first instance or may even prohibit it. In such instances, the suspension is *ultra vires*, and accordingly invalid. An example of these kind of instances can be found in *Sephanda and Another v Provincial Commissioner, SA Police Service, Gauteng Province and Another*[16] which concerned a precautionary suspension implemented when the disciplinary hearing itself was already well underway, and precautionary suspension was thus no longer contemplated or permitted. Another example is found in *Mbatha v Ehlanzeni District Municipality and Others*[17] which concerned a delegation of the power to suspend to the mayor when this power was not capable of being so delegated.

[16] (2012) 33 ILJ 2110 (LC)
[17] (2008) 29 ILJ 1029 (LC)

[20] A suspension would be unlawful in instances where the right or power of an employer to effect a suspension is prescribed by specific regulation and these regulations are not complied with by the employer. The unlawfulness is founded in the employer not complying with its own rules. This regulation (rules) can be done in the form of a disciplinary code and procedure, collective agreement, statutory provisions, or other regulatory provisions. This kind of regulation is prolific in the public service as evidenced by the fact that the law reports are permeated with judgments relating to urgent applications by senior employees in the public sector to uplift suspensions on the basis that such suspensions are unlawful. As will be further and specifically addressed hereunder, the issue of the lawfulness of the suspension must be based solely on the provisions of the regulatory provisions themselves, as defined therein, and thus only concern the interpretation and application of the actual regulatory provisions in order to assess and determine compliance by the employer.[18]

[21] As to the third ground, a suspension would be unfair if it is found to be unfair in terms of the unfair labour practice provisions of the LRA and pursuant to the dispute resolution provisions prescribed in that statute. In Section 186(2)(b), 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 prescription in the LRA as to the manner in which such disputes must be resolved is firstly that of a referral of such dispute 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.[19] In this respect, all the provisions of the general

[18] 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)

[19] See Section 191(1)(a) and (b), Section 191(5)(a) of the LRA

right to fairness, which would include the application of the provisions of the *audi alteram partem* principle, would find application in such forum deciding this issue in terms of this process. This issue will also be specifically addressed hereunder, considering certain submissions made by Mr Scholtz, who represented the applicant, in trying to substantiate the applicant's clear right in this matter.

[22] The above then being the three grounds upon which the applicant can challenge her suspension, what is then the case of the applicant? The applicant does not rely on invalidity, and has made out no case nor contention that her suspension was unauthorized or *ultra vires*. The applicant has also specifically disavowed any reliance on an unfair suspension as establishing a clear right to the relief sought, and Mr Scholtz confirmed in argument that the applicant placed no reliance at all on an unfair labour practice or Section 186(2)(b) of the LRA. This means that the only basis on which the applicant can establish a clear right to the relief sought is to show that her suspension is unlawful.

[23] As I have already said above, the question as to whether suspension is unlawful is based solely on what the regulatory provisions actually provide, and a literal interpretation and application thereof. In the current matter, these regulatory provisions would be found in the terms of the SMS Handbook. Precautionary suspension in dealt with in chapter 7 of the SMS Handbook, in particular clause 2.7(2), which provides as follows:

> '(2) *Precautionary suspension or transfer*
> *(a)* The employer may suspend or transfer a member on full pay if -
> • the member is alleged to have committed a serious offence; and
> • the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or State property.
> (*b)* A suspension or transfer of this kind is a precautionary measure that does

not constitute a judgment, and must be on full pay.

(c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The Chair of the hearing must then decide on any further postponement.'

[24] Mr Scholtz, appearing for the applicant, contended that the above provisions of the SMS Handbook supports the conclusion that the SMS Handbook contemplates the right to be heard prior to suspension and for proper reasons to be provided for suspension as elements of the *audi alteram partem* principle in the case of suspensions, and that the respondents' failure to do so in this instance rendered the suspension of the applicant to be unlawful as it would be in breach of the SMS Handbook. The first and most immediate problem with the contention of Mr Scholtz is that the clear text of the SMS Handbook does not support his contentions. The text does not provide for the right to be heard prior to suspension and for written reasons for suspension. Far from it – the text actually clearly supports a unilateral act of the respondents as a precautionary measure based on a belief. There is simply no basis on which a simple literal interpretation and application of the clear text of clause 2.7(2) of chapter 7 of the SMS Handbook can establish a foundation for the right to be heard prior to suspension and for proper reason to be given for suspension.

[25] A further contention by Mr Scholtz was that the provisions of clause 2.1(1)(g)[20] and 2.2(1)(d)[21] of chapter 7 of the SMS Handbook incorporated the right to be heard prior to suspension into clause 2.7(2) specifically dealing with suspensions, as a

[20] This clause reads '*The purpose of this Code and Procedure is to - …. (g) prevent arbitrary or discriminatory actions by supervisors towards members*'

[21] This clause reads '*The following principles inform the Code and Procedure and must inform any decision to discipline a member: …. (d) A disciplinary code is necessary for the efficient delivery of service and the fair treatment of members, and ensures that members – have a fair hearing in formal or informal setting; are timeously informed of allegations of misconduct made against them; and receive written reasons for a decision taken.*'

contractual right. This is not the case. A proper reading of chapter 7 of the SMS Handbook as a whole shows that if anything, and where it comes to the assessment and determination as to whether conduct by the employer in terms of the SMS Handbook is fair, the provisions of the LRA are applied. This is found in the introduction to the chapter in clause 1.2, and the fact that the Code of Good Practice in Schedule 8 of the LRA is considered to be part and parcel of the whole code and procedure contained in the SMS Handbook.[22] It is also stated that nothing in the SMS handbook detracts from the right of an employee to utilize the dispute resolution mechanisms under the LRA.[23] Mr Scholtz's reliance on clause 2.2 of chapter 7 is also misplaced, as this clause relates to the decision to discipline itself and as stated above, suspension is not discipline nor disciplinary action. To put it simply – clause 2.2 of chapter 7 has nothing to do with suspension. The Court in *Chibi v MEC: Department of Co-operative Governance and Traditional Affairs (Mpumalanga Provincial Government) and Another*[24] specifically said that the SMS Handbook incorporates the LRA's Code of Good Practice. This has to mean that where it comes to rights as envisaged by the LRA that arise where the SMS Handbook is applied, all the provisions of the LRA find application, including the dispute resolution process.

[26] In the circumstances, the foundation for the applicant's clear right cannot not lie in the text of the SMS Handbook as it stands and where it concerns suspensions, in respect of the issue of the application of *audi alteram partem* principle, as the Handbook's clear wording does not support it. The question now is whether the right to be heard prior to suspension and for reasons to be provided for suspension can be implied into or be held to be a tacit term of the SMS Handbook. This is actually the real basis for the case of the applicant as presented by Mr Scholtz. In order to properly address this issue, once and for all, a proper historical context, followed by

[22] See clause 2.4(1) of chapter 7 of the SMS Handbook
[23] See clause 2.9 of chapter 7 of the SMS Handbook
[24] (2012) 33 ILJ 855 (LC) at para 27

the determination of the current position, is needed. In this judgment hereunder, I will simply refer to these pertinent issues in the context of suspension as "the right to be heard and reasons".

[27] The Court for the first time in *Koka*[25] authoritatively determined the issue of right to be heard and reasons in the case of suspensions. The Court concluded that there was not a right to be heard prior to suspension being effected in the context of what the Court called a "holding operation".[26] This approach was the followed in a number of subsequent judgments, and I for example refer to *Mabilo v Mpumalanga Provincial Government and Others*[27], *Perumal v Minister of Safety and Security and Others*[28], and *SA Municipal Workers Union and Another v Nelson Mandela Metropolitan Municipality and Others*.[29]

[28] Then came two judgments of the SCA in *Old Mutual Assurance Co SA Ltd v Gumbi*[30] and *Boxer Superstores Mthatha* and A*nother v Mbenya*[31], which appeared to suggest that the common-law contract of employment had been developed in accordance with the Constitution to include a right to a pre-dismissal hearing, which meant that every employee now had a common-law contractual claim and not merely a statutory unfair labour practice right to a pre-dismissal hearing. Following these judgments and in in *Mogothle v Premier of the North West Province and Another*[32] Van Niekerk J applied what the learned Judge considered to be the ratios of the judgments in *Gumbi* and *Boxer Superstores* to the very issue of the suspension of an employee, and held as follows: '…. the SCA has unequivocally established a contractual right to fair dealing that binds all employers, a right that may be enforced by all employees both

[25] *Koka v Director General: Provincial Administration North West Government* (*supra*) footnote 15
[26] Id at 1028E – 1029D
[27] (1999) 20 ILJ 1818 (LC) at para 23 – 24
[28] (2001) 22 ILJ 1870 (LC) at para 25 – 28
[29] (2007) 28 ILJ 2804 (LC) at para 14
[30] (2007) 28 ILJ 1499 (SCA)
[31] (2007) 28 ILJ 2209 (SCA)

in relation to substance and procedure, and which exists independently of any statutory protection against unfair dismissal and unfair labour practices. This court is bound by the authorities to which I have referred and is obliged, in the absence of any higher authority, to enforce the contractual right of fair dealing as between employer and employee.' Of importance to the analyses in this judgment, Van Niekerk J in *Mogothle* then concluded as follows:[33]

> '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.'

[29] The judgment in *Mogothle* then constituted the prevailing law, and was followed in a number of further judgments, being that of *Dince and Others v Department of Education, North West Province and Others*[34], *Baloyi v Department of Communications and Others*[35], and *Police and Prisons Civil Rights Union on behalf of Masemola and Others v Minister of Correctional Services*[36]. The effect of all of this was that, and pursuant to the judgment in *Mogothle*, the right to a hearing and reasons was read into the regulatory provisions governing suspension of employees

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[32] (2009) 30 ILJ 605 (LC) at para 24
[33] Id at para 39
[34] (2010) 31 ILJ 1193 (LC) at para 25
[35] (2010) 31 ILJ 1142 (LC) at para 25 – 29
[36] (2010) 31 ILJ 412 (LC) at para 36

in particularly the public service and the failure to afford these employees these rights was then determined to be unlawful conduct by the employer.

[30] The next judgment in the chronology was the judgment of the SCA in *SA Maritime Safety Authority v McKenzie*[37] where the Court specifically dealt with the issue of the incorporation of the general right to fairness and fair dealing into the contract of employment (and of course with it regulatory provisions in terms thereof). The Court in *McKenzie* analyzed the ratios of the judgments in *Gumbi* and *Boxer Superstores* and held:[38] 'The two decisions that are said to have had the effect of imputing into contracts of employment a right to fairness, and in particular a right to a fair hearing prior to dismissal, are Old Mutual Life Assurance Co SA Ltd v Gumbi and Boxer Superstores Mthatha v Mbenya. It is as well to consider precisely what was decided in those cases.' From this, it is clear that the SCA in McKenzie specifically considered the judgments of *Gumbi* and *Boxer Superstores*. I find it necessary to highlight this, because Mr Scholtz continued in his submissions to rely on the judgments of *Gumbi* and *Boxer Superstores* to substantiate his submissions, despite being specifically confronted with the judgment in *McKenzie*. Wallis AJA in *McKenzie* then specifically first dealt with and analyzed the judgments in *Gumbi* and *Boxer Superstores* and concluded:[39]

> 'I have already pointed out that what was said to be the finding in *Gumbi* was obiter and I do not think that its repetition in *Boxer Superstores* takes the matter further. …'

And:[40]

> 'I have already pointed out that what was said in *Gumbi* in that regard was obiter

[37] (2010) 31 ILJ 529 (SCA)
[38] Id at para 38
[39] Id at para 48
[40] Id at para 51

and not an authoritative finding by this court. ….'

[31] What is pertinently clear from the judgment of Wallis AJA in *McKenzie* is that the judgments in *Gumbi* and *Boxer Superstores* simply cannot serve as authority for the proposition that a general right to fairness and fair dealing, and with this the right to be heard and reasons, can be inferred into the contract of employment or regarded as a tacit term therein. The Court in *McKenzie* then proceeded to specifically determine this issue and I wish to refer several pertinent extracts from this judgment in this regard, where the Court said the following:[41]

> ' …. 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.'

The Court went further and said the following:[42]

> '…. 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

[41] Id at para 27

> imply such provisions into contracts of employment because the LRA already includes the protection that is necessary.'

The Court then concluded:[43]

> ' …. 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.'

[32] Not only am I bound by the above reasoning in *McKenzie*, but I respectfully agree with the same.[44] Any reliance on the judgments in *Gumbi* and *Boxer Superstores* so as to establish a right to be heard and reasons as being implied where an employee is suspended is entirely misplaced, and these judgments cannot serve as substantiation for such a case. I therefore conclude that any employee's right not to be unfairly suspended is fully and only determined by the provisions of the LRA, and is subject to all the limitations in the LRA, and cannot be implied into the employee's contract of employment or disciplinary code or other regulatory provisions dealing with suspension.

[33] As a final determination of the question of any implied right not to be unfairly suspended, I further refer to the fact that an employee cannot base his or her right not to be unfairly suspended on the general right to a fair labour practice as found in

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[42] Id at para 33
[43] Id at para 56
[44] See also *Biyase v Sisonke District Municipality and Another* (*supra*) footnote 18 at para 21

Section 23(1) of the Constitution.[45] 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*[46] 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 the LAC in *Gradwell*.[47]

[34] What is now clear is that as a general proposition 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 (or bargaining council as the case may be). In this regard, the Court in *Gradwell*[48] 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

[45] Act 108 0f 1996. Section 23(1) reads '*Everyone has the right to fair labour practices*'
[46] (2007) 28 ILJ 1909 (CC) at para 51
[47] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (*supra*) footnote 11 at para 34 ; See also *Booysen v SA Police Service and Another* (2009) 30 ILJ 301 (LC) at para 37 – 38
[48] Id at para 46

> 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.'

The only exception to the above would be where the regulatory provisions specifically regulating and determining the suspension of employees in an employer makes specific provision in such regulatory provisions to a suspension having to be fair and of particular relevance to this matter, specifically provides for the right to be heard and reasons. This exception is however not a true exception to the general proposition articulated above. The reason for this is because where a suspension is "unfair", so to speak, because of non compliance with specific regulatory prescriptions to this effect by the employer; the issue is not really one of unfairness. The unfairness manifests itself in the form of actual non compliance with the prescribed rules, and thus is actually unlawful conduct. The unfairness, simply put, is not unfairness per se but non compliance with the rules and is thus unlawful.

[35] This then brings me back to the judgment in *Mogothle*.[49] I firstly wish to state that it is clear that not only was this judgment decided before the judgment of the SCA in *McKenzie*, but the learned Van Niekerk J in *Mogothle* specifically relied on the judgments in *Gumbi* and *Boxer Superstores* in coming to his conclusions which is clearly now been held in *McKenzie* not to have been authority for such conclusions. 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, and of specific relevance to the current matter in any regulatory provisions dealing with suspension. With respect, this must finally contradict the judgment in *Mogothle*, and as such, I do not consider myself

bound by the judgment in *Mogothle* and all the judgments following it insofar as the judgment in *Mogothle* seeks to rely on and is regarded as authority for the general right of fairness implied into the employment contract and employment provisions as a basis for a conclusion that an employee is entitled to be heard before suspension and is entitled to reasons for suspension. In the recent judgment of *Lebu v Maquassi Hills Local Municipality (1)*[50] which was indeed 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.'

[36] Therefore, the current state of the law, as I see it, is now clear. There is no general right of fairness to be implied into a contract of employment of an employee or in any other employment provisions at an employer, regulating the employment relationship. This would include the SMS Handbook in the current matter. If an employee wants to challenge the fairness of his or her suspension, based on any general right of fairness, this can only be done in terms of the unfair labour practice provisions of the LRA, and with it, the dispute resolution provisions prescribed by the LRA. It is however still possible for the Labour Court to in terms of its general powers referred to above intervene in such unfair suspension proceedings, but only if exceptional circumstances and compelling considerations of urgency are shown, and even then also only as an interim measure pending final determination in the prescribed statutory dispute resolution process. As the Court made it clear in Gradwell:[51]

> '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

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[49] (*supra*) footnote 32
[50] (2012) 33 ILJ 642 (LC) at para 12

[51] Id at para 45

> 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.'

[37] Therefore, any contention by Mr Scholtz of any kind of implied term in the SMS Handbook which would bestow the right to be heard prior to suspension and the right to be given reasons for suspension, on the applicant, must be rejected. As Mr Scholtz specifically stated that the applicant does not rely on any unfair labour practice, the applicant cannot rely on any general right to fairness and fair dealing. The applicant has not referred any unfair labour practice dispute to the bargaining council. The applicant has also specifically said in her founding affidavit and replying affidavit that she does not need to show any exceptional circumstances and in fact has not even attempted to show exceptional circumstances. All of this means that this Court cannot even come to the applicant's assistance on the basis of exceptional circumstances or compellingly urgent considerations, as an interim measure.

[38] What Mr Scholtz then proceeded to do was to refer to a number of authorities where the Court found suspensions to be unlawful, but when doing so, he unfortunately failed to give context to any of these decisions. I hasten to say that some of these decisions in fact contradict the basis of Mr Scholtz's arguments. The first judgment referred to is that of *Lebu v Maquassi Hills Local Municipality (1)*[52] which Mr Scholtz was at pains to point out he was involved in and was successful in. What Mr Scholtz failed to refer me to was the fact that this judgment was not based on the implied right he was arguing before me. In fact, and in *Lebu v Maquassi Hills Local Municipality (1)* the Court specifically said:[53] 'It must also be borne in mind that the language of the

[52] (*supra*) footnote 50
[53] Id at para 36

contract of employment and the regulations is clear in this case. The employee has a contractual right to know what the reasons are for his intended suspension, and to make representations in regard thereto. This is not a case where the employee's claim is based on an implied right to fairness.' This judgment is actually support for what I have said above. It is only the specific language of the regulatory provisions dealing with suspension that determines if a suspension is unlawful or not, and not some or other implied term incorporating general principles of fairness. Mr Scholtz then referred to *Lebu v Maquassi Hills Local Municipality (2)*[54] but this reference shares a similar fate as his first reference, for the reason that in this judgment the Court once again determined the lawfulness of the suspension on the basis of the specific wording of the regulatory provisions only[55] where the Court said:[56] 'In the present instance, the municipality notified the applicant of its justification for his suspension on the same day that he was suspended. The municipality also failed to articulate the purpose of the applicant's suspension. In my view, therefore, the applicant's suspension constituted a breach of regulation 6 and he is entitled to the relief that he seeks.'

[39] As to further judgments where the Court determined the question whether a suspension was lawful based only on the wording of the relevant regulatory provisions relating to suspension as it stood, reference is firstly made to *Ntuli v SA Police Service and Others*[57] in which case the employee did submit written representations as prescribed by the regulation and the Court said that:[58] 'It is clear from the aforegoing that the respondents have followed the prescribed procedure in terms of

[54] (2012) 33 ILJ 653 (LC)
[55] The relevant provisions are found in regulation 6 of the Municipal disciplinary regulations which records in regulation 6(2) that '*Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven (7) days of being notified of the council's decision to suspend him or her*' and further in regulation 6(5) that '*The municipal council must inform (a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended*'
[56] Id at para 17
[57] (2013) 34 ILJ 1239 (LC). The Court inter alia dealt with regulation 13(2)(a) of the SAPS Discipline Regulations which provides that '*before suspending an employee without remuneration, the employee is afforded a reasonable opportunity to make written representations ….*'
[58] Id at para 20

regulation 13. In those circumstances, the applicant has not established a prima facie right not to be suspended.' Similarly, and in *Biyase v Sisonke District Municipality and Another*[59] the Court said that:[60] 'In terms of regulation 6, the applicant had a clear right to be given seven days' notice of the council's intention to suspend him. He was given notice on 27 October to submit representations by 31 October. That amounts to four days' notice. It is a contravention of the regulations. Technical as it may seem, it renders the suspension unlawful.' In *SA Municipal Workers Union on behalf of Mathabela v Dr J S Moroka Local Municipality*[61] the Court concluded that:[62] 'The applicant was suspended on 23 July 2010 and the enquiry commenced within 60 days thereof, but it was only on 12 October 2010 that the employer asked the chairperson of the enquiry to extend the suspension which he did. Accordingly, the suspension period of 60 days had expired by the time the chairperson made this ruling and he could not have been acting in terms of the powers given him under clause 14.3.' Finally and in *Nyathi v Special Investigating Unit*[63] the Court concluded that:[64] 'I am therefore persuaded by the argument that the suspension of the applicant expired after 90 days and that the extension thereafter is unlawful.' The golden thread running through all these judgments is that of a literal application of the regulatory provisions relating to suspension as they stand by the Court, in order to determine whether the suspension is lawful.

[40] I next intend to deal with judgments that specifically dealt with the SMS Handbook also at stake in the matter now before me. In *Lekabe v Minister: Department of Justice and Constitutional Development*[65] the Court, and despite the judgment of Van Niekerk J in *Mogothle* to which the Court referred, considered clause 2.7(2)*(c)* of the

[59] (2012) 33 ILJ 598 (LC). The Court again in this judgment dealt with regulation 6 of the Municipal disciplinary regulations.
[60] (*supra*) footnote 18 at para 25
[61] (2011) 32 ILJ 2000 (LC). In this case the Court dealt with clause 14.3 of an employment contract with stipulated that the employer must hold a disciplinary enquiry within 60 days of the suspension, provided that the chairperson of the hearing may extend such period, failing which the suspension terminates.
[62] Id at para 9
[63] (2011) 32 ILJ 2991 (LC). The Court dealt with clause 9.2 of a disciplinary policy which read that '*If formal disciplinary proceedings are not instituted against a suspended member within 90 days from the date of his/her suspension, the suspension shall lapse*'
[64] Id at para 27

SMS Handbook[66], and held that:[67] 'Thus the right of the employee in the event that the employer does not uplift the suspension on the expiry of the 60 days is to file an unfair labour practice claim or bring an application to have an order directing the employer to uplift the suspension.' In *Dince and Others v Department of Education, North West Province and Others*[68] Molahlehi J followed the judgment in *Mogothle* and concluded that implied in the SMS Handbook was the general right to fairness and fair dealing, but once again, this judgment was also decided before the judgments in *McKenzie* and *Gradwell* as fully discussed above. Then in *Mapulane v Madibeng Local Municipality and Another*[69] the SMS Handbook was again considered and applied only on its literal content as it stood. This then brings me back full circle to the judgment of the LAC in *Gradwell*, which also specifically concerned the SMS Handbook. The Court in *Gradwell* first referred to the reasoning of the Judge in the Court a quo, and said:[70]

> '…. the judge erred in his approach to determining the lawfulness of a suspension in terms of para 2.7(2). His choice not to consider the serious allegations against the respondent was mistaken. As a general rule, a decision regarding the lawfulness of a suspension in terms of para 2.7(2) will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the reasonableness of the employer's belief that the continued presence of E the employee at the workplace might jeopardize any investigation etc. The justifiability of a suspension invariably rests on the existence of a prima facie reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible meaningfully to engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable.'

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[65] (2009) 30 ILJ 2444 (LC)
[66] This is the provision in the SMS handbook that limits the suspension period to 60 days.
[67] Id at para 19
[68] (2010) 31 ILJ 1193 (LC) at para 25
[69] (2010) 31 ILJ 1917 (LC) at para 16

The Court in *Gradwell* then concluded:[71]

> 'In the final analysis, therefore, the outcome on the evidence presented is that the conditions precedent to the lawful exercise of the power of suspension (a prima facie case of serious misconduct and a risk of the investigation being jeopardized) were indeed fulfilled.'

[41] The above ratio of the judgment in *Gradwell* is in my view clear, the effect of which is that the applicant is left in this matter only with the wording of the SMS Handbook, as it stands, to establish an unlawful suspension based on the right to be heard prior to suspension and being provided reasons for suspension. Having regard to the specific provisions of the SMS Handbook referred to above, the applicant cannot substantiate any such a case. The SMS Handbook makes no provision whatsoever for the right to be heard prior to suspension or the providing of reason for suspension. Even worse, and as I have referred to above, the SMS Handbook itself makes the provisions of the LRA applicable to the Code and Procedure in the Handbook, which in essence means that this not only includes the rights as defined in the LRA with all its limitations, but also the dispute resolution processes prescribed by the LRA.

[42] Merely for the sake of completeness, and if some or other form of the application of the right to be heard can be considered to be part of the SMS Handbook on suspensions, which I maintain is not the case, the Court in *Gradwell* said the following:[72]

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[70] Id at para 28

[71] Id at para 31

[72] Id at para 44 – 45

> '…. 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. ….'

Considering the facts of the current, this is certainly a case where, in my view, any such right to be heard prior to suspension can be attenuated with all the necessary safeguards referred to being in place. In fact, and in the current matter, the disciplinary hearing has already been set down.

[43] In effect all that the SMS Handbook requires is that the alleged misconduct must be serious and the respondents must have the belief that the presence of the applicant at work would prejudice the investigation. There can be no doubt on the evidence in this matter that the alleged misconduct is serious. As has been set out above, it concerns tender irregularities, breach of the Public Finance legislation, and in essence dishonest conduct. It is also clear that the applicant was indeed suspended based on the belief by the respondents that her continued presence at work would interfere with the ongoing investigation. 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 this point in time. What this belief entails is a reasonable apprehension of risk, in the light of the purpose and scope of the investigation and proceedings to follow, as considered together with the

nature of the allegations against the employee. The respondents are entitled to their 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. In *Dladla v Council of Mbombela Local Municipality and Another (2)*[73] 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:

> '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)

[44] One also needs to consider the seniority and influence of the position of the applicant. This was an important issue to the respondents when they considered whether or not to suspend the applicant, as appears from the answering affidavit. The facts relating to this have been set out above. Considering that this investigation process is directly aimed at the applicant, it is a matter of simple logic that her continued presence at work would be, at the very least, extremely uncomfortable for the subordinates of the applicant in the department she is responsible for and where the investigation would be centred. The applicant's

[73] (2008) 29 ILJ 1902 (LC) at para 19 and 21

seniority also creates a risk that she could be in a position to possibly tamper with evidence or influence subordinates, being a case pertinently made out by the respondents. As a matter of principle, the more senior the position where it comes to instances of possible irregular or 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*[74] it was held as follows, which in my view 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.'

[45] Therefore, and based on all of the above, the applicant has equally failed to make out a case that her suspension was unlawful. The applicant is not entitled to reasons for her suspension nor was she entitled to a right to be heard before her suspension. The allegations of misconduct against her is very serious and amount to allegations with an element of dishonesty. The respondents were entitled to form the belief that they did, and fully complied with the provisions of the SMS handbook as it stands in effecting the suspension of the applicant. Finally, the suspension is on full pay and in terms of the SMS Handbook will be limited to 60 days. All conclusions of fact and law leaves no room for any other finding than that of the suspension of the applicant being lawful.

[74] (2006) 27 ILJ 1921 (LC) at para 27 – 28

[46] Mr Scholtz also urged me to intervene based on the issue of the possible reputational and professional prejudice to the applicant, together with possible prejudice in job advancement, bonuses and the like caused by the suspension of the applicant. I am compelled to decline Mr Scholtz's invitation in this respect. 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 as found in the specific provisions in the LRA dispute resolution process, and undermine the effective and orderly resolution of employment disputes in the manner prescribed by law.[75] In *Mosiane v Tlokwe City Council*[76] 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 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)*:[77] 'In my view, the applicant's image and reputation cannot be the basis upon which this court can overturn the suspension.'

[47] I will next deal with the issue of the allegations of ulterior motives and mala fides

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[76] 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*.'
[76] (2009) 30 ILJ 2766 (LC) at para 17
[77] (*supra*) footnote 73 at para 43

which the applicant raised as being the reason behind her suspension. These allegations are principally founded in what is nothing more than bald and unsubstantiated allegations of political motivation being the cause of the suspension in the founding affidavit. The problem the 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 respondents' denial that this was ever the case. The respondents have clearly and unequivocally, and with proper motivation, disputed that the suspension had anything to do with any ulterior motives and contend that the actual charges put forward as they stand would constitute a proper cause for suspension. In *Kroukam v SA Airlink (Pty) Ltd*[78] 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* to be exercised, there is insufficient evidence to justify a conclusion that the applicant's suspension was motivated or caused by ulterior motives of a political nature.[79] I have little hesitation in concluding, on the evidence, that there was proper cause for the respondents to have suspended the applicant, considering the nature of the allegations made against her. 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 and substantiate these allegations, together with the need to ensure the integrity of the process until completion of the disciplinary hearing, which constituted the motivation for the applicant's suspension.

[78] (2005) 26 *ILJ* 2153 (LAC) at para 86
[79] 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

[48] The final issue raised by the applicant is that because the applicant had already been given notice to attend a disciplinary hearing on 14 October 2013, the suspension is in essence moot (academic). This contention has no substance. As I have already made it clear above, suspension is a precautionary measure. It is designed to mitigate risks pending disciplinary proceedings. Suspension is not an investigative tool in itself, but facilitates proper investigation. The fact that an investigation may have been completed and the employee charged, does not mean that along with the charge been conveyed and the disciplinary hearing convened, suspension must be lifted. In fact, and in general, such a suggestion is preposterous. To illustrate with an example – assuming an employee is suspected of fraud and is suspended pending an investigation into this and this investigation then substantiates that there is justification in bringing fraud charges against an employee, then surely it is ridiculous to now place the employee back at work until the disciplinary hearing happens just because that very fraud charge is then instituted. In fact, this situation should provide even more justification in continuing with the suspension, as allegations which initially formed the basis of a belief are now actually *prima facie* substantiated by charges. The fact remains that until an ultimate finding is made in the disciplinary proceedings, such proceedings have not been completed, and as such, the same need for risk averment and implementing precautionary measures still exist. To put it bluntly, and until disciplinary proceedings are completed, the possibility of witnesses being influenced or intimidated and evidence being tampered with still exists if the employee is at work. In the SMS Handbook, applicable to the current matter, the employer (respondents) is given 60 days as a prescribed maximum suspension period between the suspension and actual discipline. Once suspended, there is no reason why the suspension falls away just because disciplinary proceedings are actually initiated before the 60 days are up. In fact, clause 2.7(2) of the SMS handbook says nothing about suspension lapsing in

such circumstances. By way of comparison, I refer to *Lekabe v Minister: Department of Justice and Constitutional Development*[80] where the Court said:

> 'Turning to the specific issue in the present instance, in my view it could never have been the intention of the parties that clause 2.7(2)*(c)* of the SMS Handbook should take away the right of an employer to discipline an employee on the expiry of the 60 days from the date of suspension. In essence the case of the applicant in the present instance is that the right of the respondent to proceed with the disciplinary hearing prescribed on the expiry of the 60 days from the date of his suspension.
>
> In my view clause 2.7(2)*(c)* deals with suspension and not disciplinary action. There is nothing in this clause that says an employer would lose the right to discipline an employee on the expiry of the 60 days from the date of the suspension. I have not been able to find even a basis for implying the interpretation sought by the applicant or the one given by the court in *Mlambo* At best, as I see it, the suspension falls away after the 60 days unless the chairperson of the disciplinary hearing extends that period.'

Similarly, and in the current matter, there is nothing in the SMS Handbook which provides that suspension expires just because disciplinary proceedings are convened. Clause 2.7(2) provides for the employee being suspended and once suspended, that such suspension only endure for 60 days, as suspension is coupled with this time limit for the actual institution of disciplinary proceedings. Once disciplinary proceedings are actually convened, it is then the function of the chairperson of the disciplinary hearing to determine the issue of further suspension once this 60 day period expires. Therefore, suspension is not rendered academic simply because disciplinary proceedings are convened. The applicant's contentions in this regard fall to be rejected.

[80] (*supra*) footnote 65 at para 16 – 17

[49] Considering all of the above, the applicant has thus failed to establish a clear right in support of the relief sought by her. The fact is that the applicant's suspension was not unlawful.

Alternative remedy

[50] The next issue to deal with the issue of the absence of an alternative remedy as requirement for the relief sought by the applicant to be granted. Once again, I refer to the fact that the applicant disavowed any reliance on unfairness in terms of the LRA and the unfair labour practice therein. The reason why the applicant does so is immediately apparent. In *Biyase v Sisonke District Municipality and Another*[81] the Court held: 'The applicant specifically disavows any reliance on an unfair labour practice in the form of unfair suspension as contemplated by s 186(2)*(b)* of the Labour Relations Act. Had he relied on that provision, he may have had an alternative remedy by referring an unfair labour practice dispute to the relevant bargaining council in terms of s 191 of the LRA.' Similarly the Court in *Lebu v Maquassi Hills Local Municipality (1)*[82] said that: 'As I have pointed out, the applicant does not allege an unfair labour practice in the form of unfair suspension as contemplated by s 186(2)(b) of the Labour Relations Act. Had that been the case, he would have had an alternative remedy by referring an unfair labour practice dispute to the relevant bargaining council in terms of s 191 of the LRA.' I finally refer to *Nyathi v Special Investigating Unit*[83] where the Court concluded: 'It must again be emphasized that the applicant is not challenging the *fairness* of the suspension in these proceedings. It is trite law that the CCMA is vested with the jurisdiction to decide that issue.'

[51] It is based on these judgments that it is clear that the applicant's design in the current matter is deliberate. This design is to try and circumvent the impediment to the relief

[81] (*supra*) footnote 18 at para 30
[82] (*supra*) footnote 50 at para 43
[83] (*supra*) footnote 63 at para 18

now sought by the applicant of the available alternative remedy that exists in this case where unfairness is really the true basis for the challenge of the suspension. By labelling the suspension unlawful and steering away from the unfair labour practice issue, the applicant attempts to establish a basis upon which to distance these proceedings from the prescribed statutory dispute resolution process under the LRA which must be followed if the issue of unfairness is at stake. I say the applicant's design is deliberate because despite having purportedly disavowed the unfair labour practice, Mr Scholtz nonetheless persisted to try and substantiate his case on the basis of a general right to fairness and fair dealing, and still tried to imply such provisions into the SMS Handbook. Mr Scholtz still sought to rely on the judgments in *Gumbi* and *Boxer Superstores* and the *audi alteram partem* principle. What Mr Scholtz was thus in my view doing, and respectfully using the words of Wallis AJA in the judgment of *McKenzie*[84] was to bring 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'. This Court should be astute in considering what constitutes the true basis for the challenge by an applicant of the lawfulness of a suspension so as to not '…. 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.'[85] In the current matter, the case of the applicant is really one of alleged unfairness under the guise of unlawfulness, and as such, the statutory prescribed alternative remedy in terms of the LRA must apply.

[52] I am concerned with the plethora of cases that come before the Labour Court brought by senior employees in the public sector to challenge their suspensions on an urgent basis, which in essence amount to bypassing the prescribed dispute resolution processes in the LRA for such kind of disputes. I fully align myself with the following

[84] (*supra*) footnote 37 at para 56
[85] See *McKenzie* (*supra*) at para 33 ; see also *Moloto v City of Cape Town* (2011) 32 ILJ 1153 (LC) at para 10 – 11

statements made by the Court in *Mosiane v Tlokwe City Council*:[86]

> '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 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.'

[53] In *Gradwell*, the Court in fact expressed its doubts whether the Labour Court would be competent or have jurisdiction to grant final declaratory relief in declaring a suspension unfair, where the Court said:[87] '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.' I have fortunately had the opportunity to address this very issue, and also fortunately pursuant to detailed legal argument on an opposed basis by two parties, in the judgment of *Robert Madzonga v*

[86] (2009) 30 ILJ 2766 (LC) at para 15 – 16

Mobile Telephone Networks (Pty) Ltd[88] where I said:

> '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 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 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.'

[54] In the light of the above reasoning, the applicant's application in the current matter must fail as well on the requirement of the absence of an alternative remedy. The applicant has not referred a suspension dispute to the bargaining council, when it

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[87] Id at para 47

actually appears that the basis of her challenge of her suspension is based on considerations of fairness. 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.

Conclusion

[55] In presenting his case in this matter, Mr Scholtz stated with some satisfaction that he was a regular proponent of urgent applications to the Labour Court based on the *audi alteram partem* principle, in which suspensions are challenged, and that he would often come away with relief in hand. Such kind of approach is to be strongly discouraged. In this context, and so as to give clarity on this issue of the competency of the challenge of suspensions to the Labour Court by way of urgent applications, once and for all, I conclude and state as follows:

[55.1] Where the basis for the challenge of the suspension is one of the application of a general right to fairness and fair dealing, which includes the application of the *audi alteram partem* principle, the Labour Court should not, on the basis of it not being generally competent for the Court to exercise its jurisdiction, entertain such applications, unless such applications are applications for interim relief pending the conclusion of the dispute resolution process prescribed by the LRA for unfair labour practices, and also unless exceptional circumstances and compelling considerations of urgency are shown by such applicants;

[88] Unreported Judgment dated 30 August 2013 under case number J 1867 / 13 at para 62 – 63

[55.2] Where the suspension is challenged on the basis of the application of a general right to fairness and fair dealing, which includes the application of the *audi alteram partem* principle, this cannot be a challenge on the basis that the suspension is unlawful, but would be challenge on the basis that the suspension is unfair. The only exception would be where the regulatory provisions in an employer, which regulate and determine the very issue of suspensions in an employer, specifically and in the actual text of the regulatory provisions records and determines that the *audi alteram partem* principle specifically applies. In the case of this exception the suspension would be unlawful not because of the application of a general right to fairness and fair dealing, but because the employer has breached its own specific and prescribed rules;

[55.3] The Labour Court would be generally competent to consider and finally determine urgent applications to challenge suspensions on the basis that such suspensions are unlawful and/or invalid, without exceptional circumstances and compelling considerations of urgency having to be shown by such applicants, provided the normal rules relating to all urgent applications are of course still complied with. The contentions of unlawfulness or invalidity can only be founded and substantiated on the specific text of the rules as contained and prescribed in the employer's own regulatory provisions, and no reliance can be placed on any implied provision, and especially not the *audi alteram partem* principle as such implied provision. The Court should further at all times carefully consider what the actual and true nature of the contention of invalidity and unlawfulness by the applicant is, in order to avoid a designed circumvention of the provisions of the LRA relating to suspensions under

the guise of unlawfulness or invalidity, where it is in fact is an issue of unfairness.

[56] In the light of all of the above, 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, in circumstances where the actual basis of the applicant's case is founded on general principles of fairness and fair dealing. The applicant never sought interim relief and never pursued a dispute to the bargaining council, as she should have. The text of the SMS Handbook, as it stands, does not support any interpretation that it specifically prescribes the *audi alteram partem* principle as part and parcel of the rules of the respondents and as such there can be no case of unlawfulness in this regard. As the applicant must prove all three 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.

[57] 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 she could and should pursue her dispute to the bargaining council. Mr Scholtz in fact designed the applicant's case so as to try and avoid the application of the provisions of the LRA, despite still wanting to rely on the general principle of fairness before the Labour Court. There is accordingly simply no reason why costs should not follow the result in this matter.

<u>Order</u>

[58] 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: Mr W P Scholtz of Scholtz Attorneys

RESPONDENTS: Adv W R Mokhari SC (with Adv M J Mojela)

Instructed by The State Attorney