**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT BRAAMFONTEIN**

**Case no J 2622/08**

In the matter between:

**MOSWEU PAUL MOGOTHLE** Applicant

and

**THE PREMIER OF THE NORTHWEST PROVINCE** 1st Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE, CONSERVATION AND THE ENVIRONMENT** 2nd Respondent

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**JUDGMENT**

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**VAN NIEKERK J**

**Introduction and background**

[1] The applicant, the deputy director-general of the Department of Agriculture, Conservation and Development in the Northwest Province, brings this application, as a matter of urgency, to set aside his suspension.

[2] The applicant disavows reliance on the Labour Relations Act ("the LRA"). He founds this application on three grounds - breach of contract, breach of statute, and the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). The applicant contends that his suspension is unlawful for one or more of the following reasons:

- the decision to suspend him was taken by the respondents under direction from the Northwest legislature and not in the exercise of a discretion entrusted to them;
- certain jurisdictional preconditions for the suspension were not satisfied (these relate to an alleged breach of a regulatory measure governing the suspension of senior public sector employees); and
- he was not heard before the decision to suspend him was taken.

[3] The respondents oppose the application on three grounds:

- the application is not urgent;
- this court has no jurisdiction to grant the order that the applicant seeks unless he follows the procedures contemplated by the LRA; and
- in any event, the applicant's suspension (or "leave of absence" as it is described by the respondents) is valid and lawful.

[4] In so far as the "breach of statute" component of the applicant's claim is concerned, that claim is founded primarily on what is referred to as the "SMS code", a code of conduct governing senior management service within the public service. It is not clear to me from the papers whether the SMS code is a statutory or other regulatory measure, or a collective agreement, or both. I am accordingly unable, in this respect, to discern any clear right that might stem from the code as statute.

[5] In so far as the applicant's claim is based on PAJA, the judgment of the Constitutional Court in *Chirwa v Transnet Ltd and others* 2008 (3) BCLR 251 (CC) casts significant doubt on whether public sector employees have the right to claim that the exercise of a contractual power by their employers, where that conduct is concerned with labour and employment relations, constitutes administrative action for the purposes of PAJA. The majority judgments of Skweyiya J at para [73] and Ngcobo J at para [150] both hold that a remedy under section 33 of the Constitution is not available to public sector employees who complain of unfair conduct by their employers. Both judgments expressly leave open the question whether PAJA affords a remedy in these circumstances. In his minority judgment (at paragraph [194]) Langa CJ expressly states that his conclusion that Chirwa's dismissal was not administrative action under PAJA should not be construed to mean that dismissals of public sector employees would never constitute administrative action under PAJA. A fuller discussion on the interpretation of the *Chirwa* judgment follows below, but for present purposes

and for reasons that will become apparent, I do not regard it necessary to determine whether the applicant has a remedy under PAJA[1], and consider only that part of the applicant's claim that is founded in contract.

[6] The facts giving rise to this dispute are largely common cause. Their substance is set out below.

[7] The applicant was employed by the department with effect from 1 April 2006. He answers to the first respondent (the premier) and also to the second respondent (the MEC), to the extent that the premier has delegated her powers to him. The applicant's contract incorporates a number of statutory and other regulatory provisions, including, it would seem, the SMS code. The part of the code relevant to these proceedings reads as follows:

> "Precautionary suspension or transfer
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> (a) The employer may suspend or transfer a member on full pay if-
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> - the member is alleged to have committed a serious offence; and
> - The employer believes that the presence of a member at the workplace might jeopardize any investigation into the alleged

[1] The tenor of the majority judgments is that there is no such right.

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"

[8] On 4 November 2008, an article appeared in the Mail and Guardian in which imputations of corruption were levelled against the applicant. The article stated that the applicant, a member of Thathana Farms CC, was the beneficiary of a state grant and had signed the operative contract in both his official capacity, as a representative of the donor, and in his capacity as a representative of Thathana, the recipient of the grant.

[9] The applicant claims that the grant was made in the regular and ordinary course of a state subsidy scheme, and that he had nothing to do with the decision to allocate the grant. He states that he was particularly concerned at the implications of a conflict of interest in the context of the implementation of the decision to allocate a grant to Thathana, and for this reason, over and above the procedures relevant to the application for a grant, on 30 January 2008, he

formally made full disclosure to the MEC of his status and that of his family members as members of the close corporation seeking the grant. In his memorandum to the MEC, the applicant states: "*I belief (sic) it is ethically and morally correct to obtain approval with regard to this corporation to avoid a conflict of interest and possible claims of abuse of my position*". The MEC countersigned the memorandum on the same day thereby both acknowledging the applicant's disclosure and approving the grant. In these circumstances, the applicant avers that his signature of the relevant funding agreement was a formal culmination of a process whose substantive outcome had already elsewhere been determined. The respondents do not dispute these full and candid averments, and I accept therefore that the applicant made full disclosure to the MEC of his interest in the grant that is the subject of the proposed investigation that forms the raison d'etere of the applicant's suspension.

[10] On 10 November 2008, the MEC appointed Sekela Auditors to investigate the allegations made in the article. At this point, the MEC self-evidently considered that there was no risk that the applicant might compromise the investigation, because he took no steps to suspend him.

[11] On 11 November 2008, the newspaper article was referred to the legislature for debate, which took place on 13 November. The official minute of the debate is recorded in the following terms:

> "Deputy Speaker summed up the recommendations that emanated from the debate as follows:
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> - That the Legislature must initiate an investigation into the allegations under discussion through its structures like the Provincial Public Accounts Committee;
> -That the provincial Treasury must intervene and take over the administration of this department while the investigation unfold or consider invoking Section 100 of the constitution, Act 108 of 1996 and
> -That the Accounting Officer and the MEC must be put on suspension pending the outcome of the investigation."

[12] On 17 November 2008, the MEC wrote a letter to the applicant in which he referred to the debate in the legislature. He also confirmed the appointment of Sekela Auditors to provide an audit report without delay. The letter makes specific reference to the SMS regarding a possible precautionary suspension, and records that the MEC did not intend to invoke those provisions. He states the following:

> "In an effort to give the investigation process space and latitude to proceed without being hindered and also to allow the process to unfold without any inferences of being jeopardised by your continued presence at work, it is my sincere request that you take

> leave of absence from your official duties with effect from 18 November 2008 until such time as the investigation process is completed."

The applicant did not challenge this "leave of absence" on the basis that he had been assured by the MEC that the investigation would be completed by month end, and that it had been agreed that he would return to work on 1 December 2008.

[13] The Mail and Guardian article came up for discussion in the legislature for a second time on 18 November 2008. This time the legislature adopted the following resolution:

> "(i) That the Provincial Legislature takes a responsibility and initiates a forensic investigation led by the Auditor General Office into the allegations and that the investigation initiated by MEC Serfontein should no longer proceed. which must be conducted by the Office of the Auditor General.
> (ii) That the House must recommend to the Premier to put the HOD of the Department of Agriculture, Conservation & Environment on extended leave pending the outcome of the investigation.
> (iii) That if the investigation findings implicate the MEC in the alleged irregularities, which will in contravention with Section 136 of the

> Constitution Act 108 of 1996. The Premier must do what is required of her in terms of the provisions of the Constitution of RSA (sic).

[14] On 19 November 2008, the deputy speaker of the legislature wrote a letter to the MEC. In the letter, the deputy speaker stated the following:

> "Consistent with the constitutional responsibility of exercising oversight on the executive by the NWPL, the injunction which equally bestows the legislature with powers to make decision which are peremptory and as such binding on the executive, in the foregoing instance likewise, we have thus taken the following decision."

The letter proceeded to record the terms of the resolution adopted the previous day, and concluded by recording the deputy speaker's trust that "the contents herein are self-explanatory".

[15] After receiving notice of the resolution, the MEC terminated Sekela's mandate and waited for the Auditor General's office to commence its investigation. On 1 December 2008, the applicant reported for duty. The MEC told him that because Sekela's mandate had been terminated, and because the auditor-general's office had not yet commenced its investigation, he would require time to consider the matter and discuss it with the acting premier. The MEC discussed the matter with the acting premier and then resolved that the

applicant's leave be extended to the 14th December 2008 so that the auditor-general's investigation might commence.

[16] On 3 December 2008, the MEC addressed a letter to the applicant confirming that the applicant was placed on extended leave of absence until 14 December 2008. The rationale proffered for the leave of absence was the anticipated investigation by the auditor-general. The MEC sought to distance himself from the legislature's resolution and what purported to be no less than a directive from the deputy speaker:

> "Take notice that my decision to place you on leave has no or little relation with the resolutions or the decisions of the North West Provincial Legislature on 18 November 2008 as I do not agree with running the Department without a substantive HOD. I have considered this matter purely on the basis that I need to give the investigation, if any, a chance to take place without any perceived jeopardy on your part".

[17] The MEC states that it then became clear to him that 14 December was an unrealistic target date for the commencement and conclusion of the investigation. He therefore decided again to place the applicant on what he terms "extended leave" stating that he did not know precisely when the auditor-general would complete the investigation.

[18] On 5 December 2008, the MEC wrote a letter to the applicant placing him on extended leave of absence pending the outcome of the auditor-general's investigation. The operative paragraph of the letter reads:

> "After considering the resolutions taken at the Provincial Legislature sitting, I have decided, in consultation with the acting premier, to put you on extended leave of absence to allow the investigations to be taken by the Auditor General to take place unhindered"

[19] It is common cause that the applicant was not afforded a hearing before being placed on extended leave of absence. In their answering affidavit, the respondents deny that the SMS code makes provision for a hearing before a suspension is invoked, and aver that in any event, the applicant had every opportunity to raise whatever issue he wished when he was advised that he would be required to take extended leave..

[20] On 11 December 2008, the applicant filed this application.

**Fairness and the common law contract of employment**

[21] In a trio of recent decisions by the Supreme Court of Appeal, that court has emphasised the mutual relationship of trust and confidence that the common law contract of employment imposes on both employers and employees. In *Old Mutual Assurance Co SA v Gumbi* [2007] 8 BLLR 699 (SCA),

the SCA ruled that the common law contract of employment should be developed in the light of the Constitution, specifically to include a contractual right to a pre-dismissal hearing. The court reasoned as follows:

> "It is clear however that coordinate rights are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s39(2)) to harmonize the common law into the Bill of Rights (which itself includes the right to fair labour practices (s23(1))" (at par 5 of the judgment).

[22] The *Gumbi* judgment was confirmed in *Boxer Superstores v Mthatha & another* [2007] 8 BLLR 693 (SCA). In that case the court held:

> "This court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include a right to a pre-dismissal hearing (*Old Mutual Life Assurance Co SA Ltd v Gumbi*). This means that every employee now has a common -law contractual claim - not merely a statutory unfair labour practice right - to a pre-dismissal hearing" (at para 6 of the judgment).

[23] More recently, in *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA), the SCA derived a contractual right not to be constructively dismissed from what

it held to be a duty on all employers of fair dealing at all times with their employees (at 517C). This obligation, a continuing obligation of fairness that rests on an employer when it makes decisions that affect an employee at work, was held by the court to have both a procedural and a substantive dimension.

[24] The development of the common law by the SCA is not uncontroversial. It has been criticised, amongst other grounds, for opening the door to a dual jurisprudence in which common law principles are permitted to compete with the protection conferred by the unfair dismissal and unfair labour practice provisions of the LRA. (See, for example, Halton Cheadle "*Labour Law and the Constitution*", a paper given to the annual SASLAW Conference in October 2007 and published in Current Labour Law 2008, the comments by PAK le Roux at page 3 of the same publication, and the article by Paul Pretorius SC and Anton Myburgh "*A Dual System of Dismissal law: Comment on Boxer Superstores Mthatha & another v Mbenya" (2007 28 ILJ 2209 (SCA)"* published in (2007) 28 *ILJ* 2172).[2] Be that as it may, the SCA has unequivocally established a contractual right to fair dealing that binds all employers, a right that may be enforced by all

[2] The authors of the latter article acknowledge that the South African constitution contemplates the development of the common law, but they note that the English courts, for what appear to be policy-related reasons, have adopted a rather different course. The authors quote Lord Millet in *Johnson v Unisys* Ltd [2001] 2 All ER 801 (HL) who said: *"But the creation of a statutory right [against unfair dismissal] has made any such development of the common law both unnecessary and undesirable... the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost"* (at para 80).

employees both in relation to substance and procedure, and which exists independently of any statutory protection against unfair dismissal and unfair labour practices.[3] 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.

**Does the *Chirwa* judgment deny the applicant a claim in contract?**

[25] This brings me to the respondents' argument that in the absence of any reliance by him of the provisions of the LRA, this court has no jurisdiction to entertain the applicant's claim. Mr Pretorius SC, who with Mr Makola appeared for the respondents, submitted that a broad reading of the judgment in *Chirwa v Transnet Ltd* (supra) had the effect of overruling the trio of judgments by the SCA to which I have referred above. If the applicant had any claim, it was one contemplated by the LRA and no other.

[26] The narrow question that the Constitutional Court considered in *Chirwa*, was, of course, whether parliament had conferred jurisdiction to determine Ms Chirwa's claim (an alleged unfair dismissal of a public sector employee[4]) on this court and other dispute resolution institutions established by the LRA and

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[3] There is an obvious overlap here - the jurisprudence developed under the statutory regime will obviously the nature and extent of the contractual right of fair dealing.

[4] Chirwa claimed an administrative law remedy in the High Court in circumstances where unfair labour practice proceedings initially instituted by her in terms of the LRA in the CCMA had been abandoned.

whether, expressly or by necessary implication, the jurisdiction of the High Court had been ousted. At a higher, perhaps more policy-orientated level, the *Chirwa* judgment might be read to require that all employment-related disputes involving allegations of unfair conduct by both public and private sector employers ought to be dealt with in terms of the dispute resolution institutions and mechanisms established by the LRA. This reading of the *Chirwa* judgment requires that in a labour-related dispute, any remedy established by the LRA must be pursued to the exclusion of any other that might previously have been thought to exist. Put another way, it suggests that the objective of the LRA was to be exhaustive of all rights arising from employment.

[27] The interpretation of *Chirwa* judgment has spawned a complex and controversial debate - this much is evident from the judgments of the full bench of the Ciskeian High Court in *Nonzamo Cleaning Services v Appie & others* [2008] 9 BLLR 901 (Ck), *Nankin v MEC, Department of Education, Eastern Cape Province & another* [2008] 5 BLLR 489 (Ck) and the judgment by the SCA in *Makambi v MEC Department of Education, Eastern Cape* [2008] 8 BLLR 711 (SCA).[5]

[5] See in particular the judgment by Nugent JA who states that he is unable to discern any clear legal as opposed to policy basis for the majority judgments (at paragraph [21]. Nugent JA adopts a narrow view of the *Chirwa* decision, suggesting, "*apart from its jurisdictional ruling, Chirwa indicates the dismissal of a public-service employee does not constitute administrative action*" (at paragraph [21]).

[28] Although the judgment of the Constitutional Court in *Chirwa* is an obvious and clear endorsement of the virtues of the mechanisms, institutions and remedies crafted by the LRA and the merits of what Skweyiya J (referring to the explanatory memorandum accompanying the LRA) termed a "one-stop shop" for all labour-related disputes established by that statute, I do not understand the judgment expressly to exclude the right of an employee to pursue a contractual claim, either in this court (by virtue of the provisions of section 77(3) of the Basic Conditions of Employment Act (BCEA), or in a civil court with jurisdiction. Nowhere in the judgment is it unequivocally stated that the effect of the legislative reforms effected after 1994 and in particular, the creation of specific statutory remedies to address unfairness in employment practices, is to deprive an employee of any common law contractual rights, or of the right to enforce them in a civil court, or in this court, in terms of section 77(3) of the BCEA.[6] If the Constitutional Court in *Chirwa* had intended to make a ruling to this effect, overriding as it would have done a consistent line of judgments by the SCA , it would have done so in express terms.

[29] My conclusion that *Chirwa* does not have the effect of confining an employee only to the remedies provided by the LRA (thus precluding an

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[6] On the contrary, that position, articulated n the minority judgment of Froneman AJA in *Fedlife* and reflected in *Johnson v Unisys* (supra), has consistently been rejected by the SCA. In *Boxer Superstores*, Cameron JA endorsed the following passage in *Fedlife* -

> "Where …the subject of a dispute is the lawfulness of a dismissal, then the fact that it might also be, and probably is unfair, is quite coincidental for that is not what the employee's complaint is about" (at para 12).

employee from seeking to enforce any contractual remedy) does not fly in the face of the policy reasons that underpin the concern, expressed in the judgments of the majority of the Constitutional Court in *Chirwa*, to protect the integrity of the system of conciliation, arbitration and adjudication within specialist structures, a system agreed to by the social partners, after a careful balancing of competing interests. The BCEA, enacted some two years after the LRA, is just as much the product of negotiation by the social partners, and the Act represents as much of a finely balanced compromise as the LRA. When the social partners agreed to the terms of section 77(3) of the BCEA, they acknowledged that disputes concerning contracts of employment had not been eclipsed by the LRA, and that this court ought appropriately to be conferred with powers to determine contractual disputes, concurrently with the civil courts.

[30] In summary: the approach adopted by the majority of the SCA in *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) remains intact post-*Chirwa* - the LRA does not expressly or impliedly abrogate an employee's common law entitlement to enforce contractual rights. As controversial as the judgments in *Gumbi*, *Boxer Superstores and Murray* might be as a matter of law or policy, they unequivocally acknowledge a common-law contractual obligation on an employer to act fairly in its dealings with employees. This obligation has both a substantive and a procedural dimension. In determining the nature and extent of the mutual obligation of fair dealing as between employer and employee, the court must be guided by the unfair dismissal and unfair labour practice jurisprudence developed

over the years. If any “dual stream” jurisprudence emerges as a consequence and if this represents an undesirable outcome from a policy perspective, that is a matter for the legislature to resolve. Finally, if an employer acts in breach of its contractual obligation of fair dealing, the affected employee may seek to enforce a contractual remedy which may, by virtue of s77(3) of the BCEA, be sought in this court.

**Did the respondents act in breach of the obligation of fair dealing in suspending the applicant?**

[31] In so far as the substantive dimension of fair dealing in relation to suspension is concerned, Halton Cheadle has observed that suspension is the employment equivalent of arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. On this basis, he suggests that employees should be suspended pending a disciplinary enquiry only in exceptional circumstances. The only reasonable rationale for suspension in these circumstances, Cheadle suggests, is the reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. (See Cheadle “*Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA*” DPRU Working Paper no 06/109 DPRU, University of Cape Town, June 2006, also published in edited form in (2006) 27 *ILJ* 663, at paragraph [71]).

[32] The procedural dimension of the obligation of fair dealing in suspension has been the subject of two broad approaches. The first is that adopted by this court in *Koka v Director General: Provincial Administration North West Government* (1997) 18 ILJ 1018 (LC). In that case, Landman J considered the statutory definition of unfair labour practice, and in particular the reference to suspension or any other form of disciplinary action short of dismissal in respect of an employee. The case concerned the suspension of a public sector employee on terms that accorded the employee half his emoluments for the period of suspension. Although the court dealt with the matter as one concerning a suspension without pay, none of the principles recognised and applied in the judgment turn on this fact. The court distinguished two kinds of suspension - the first being a "holding operation", where the purpose of suspension is not to impose discipline but for reasons of good administration; the second being suspension as a form of discipline as a penalty, one less stringent than dismissal. The court concluded that the definition of "unfair labour practice" was sufficiently broad to cover both forms of suspension, and dismissed an application for interim relief, setting aside the suspension, on the basis that the applicant's proper remedy was to refer the dispute to the appropriate bargaining council for conciliation. In doing so, the court was obviously persuaded by the remarks made by Denning MR in *Lewis v Heffer & others* 1978 (3) All ER 354 (CA):

> "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…" (at 364 c-e).

[33] I would make three observations regarding the facts in *Koka* and Landman J's conclusion. The first is that the claim was one brought squarely under the unfair labour practice provision of the LRA, but in circumstances where the remedies available to the applicant in the ordinary course under that statute had not been invoked. That distinguishes the case from the present, where the applicant disavows any reliance on the LRA. Secondly, on the facts of *Koka*, the applicant had been invited to a formal hearing to appear to give reasons why he should not be suspended, in circumstances where the reasons for the proposed suspension had been disclosed to him. The notice of suspension was issued only after the hearing, at which the applicant had been given the fullest opportunity to contest both the allegations made against him and the reasons proffered by his employer for the proposed suspension, and to provide substantial information

about his personal circumstances and the impact that any suspension might have on those circumstances.. Thirdly, the *Koka* judgment, to the extent that it holds that there is no right to be heard prior to a suspension in the form of a 'holding operation' (at 1029G-H, where the court refers to *Dickson v Commonwealth* 1992 55 CLR 34 at 44)[7] is at odds with the decision of the Cape Provincial Division of the High Court in *Muller v Chairman, Ministers' Council, House of Representatives* (1991) 12 ILJ 761 (C).

[34] The second (and preferred) approach to procedural fairness is reflected in *Muller,* where the court granted an urgent application in which the applicants, officers in the public service, sought an urgent review of their suspension pending disciplinary action. Although the remedy sought was administrative in nature, the judgment delivered by the court (Howie J, as he then was, with Nel J concurring) is a masterful review of domestic and comparative authorities on the application of the *audi alteram partem* principle in the context of the suspension of public sector employees. The court rejected the approach represented by the *Lewis* judgment, and adopted instead the approach of *Dixon v Commonwealth* (1981) 55 FLR 34, *Schmohl v Commonwealth* 1983 ACTR 24 and *Birss v Secretary of Justice* (1984) 1 NZLR 513, refusing to follow *Jacobs v Minister van*

[7] The case is incorrectly cited. The citation reflected in the *Muller* judgment is *Dixon v Commonwealth* (1981) 55 FLR 34 (see the *Muller* judgment at 773E). More fundamentally, though, the *Dixon* judgment does not support the proposition that suspension, as a holding operation does not require the employee to be heard. On the contrary, the court in that case held that a twofold decision to suspend and to withhold remuneration was invalid, because of the employer's failure to comply with the *audi alteram partem* principle.

*Justisie* and *Swart & others v Minister of Education & Culture, House of Representatives & another* 1986 (3) SA 331 (C), both of which had previously held that the *audi* rule did not apply in the case of suspensions effected in terms of the relevant legislation. In *Muller*, the court concluded that the interests of fairness demanded a hearing before suspension, and noted the "startling unfairness" with which the denial of that right could operate (at 524F).[8]

[35] Although, as Mr Pretorius submitted, the *Muller* case was concerned with the application of the *audi* rule to a suspension in a statutory context and in circumstances where the employees concerned had been suspended without pay, the court's observations of the unfairness necessarily visited on a suspended employee remain relevant, in my view, to a determination of what might constitute fair dealing in a contractual context.

[36] The right to be heard prior to suspension has been the subject of two recent decisions by this court. In *HOSPERSA & another v MEC for Health, Gauteng Provincial Government* [2008] 9 BLLR 861 (LC), Basson J granted relief, on an urgent basis, to an employee who had been transferred for reasons relating to alleged misconduct. The judgment draws an analogy in this context with the suspension of an employee pending a disciplinary enquiry, and expressly holds that an employee is entitled to a hearing before the employer

[8] *Muller* has been followed in a number of cases - see, for example*, Mhlauli v Minister of Home Affairs & others* (1992) 13 *ILJ* 1146 (SE).

acts against the employee. In *SAPO Ltd v Jansen van Vuuren NO and others* [2008] 8 BLLR 798 (LC), Molahlehi J stated:

> "There is, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words, unless circumstances dictate otherwise, the employer should offer an employee an opportunity to be heard before placing him or her on suspension" (at para 37).

[37] I do not think that what the court intended by this statement was that a hearing prior to a suspension should be modelled on what has been termed the "criminal justice model" with all of the hallmarks of a criminal trial. This court has held previously that the Code of Good Practice : Dismissal in Schedule 8 to the LRA envisages a less formal; process, one in which the employer and employee engage in what the ILO's Committee of Experts has termed, in the context of pre-dismissal procedures, a process of dialogue and reflection between the parties.[9]

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[9] See *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 *ILJ* 1644 at 1653.

I see no reason why the same conception of procedural fairness should not apply prior to a proposed suspension pending an investigation into alleged misconduct.

[38] This statement by Molahlehi J is also a response, I believe, to the trend apparent in this court in which employers tend to regard suspension as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worse still, to view suspension as a convenient mechanism to marginalise an employee who has fallen from favour.

[39] 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 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.

**Application of principles to the facts**

[40] It is common cause that on 17 November 2008 the MEC wrote to the applicant stating that while he did not wish to invoke the provisions of the SMS code, he "sincerely requested" that the applicant take leave from 18 November 2008 until the Sekela Auditors investigation was completed. This would permit "*the necessary processes to be undertaken without any perceived jeopardy and/or influence on your part*". In the MEC's letter dated 19 November 2008, this time responding to resolutions of the legislature, the applicant was placed on extended leave of absence until 14 December 2008, "*mainly to allow the anticipated investigation by the Auditor General to take place during that period*." The MEC added: "*I have considered this matter purely on the basis that I need to give the investigation, if any, a chance to take place without any perceived jeopardy on your part*." What jeopardy the applicant might suffer is not made clear - what is clear though is that not once in any of his correspondence with the applicant did the MEC refer to the jeopardy in which the department or other third parties might be placed should the applicant be permitted to remain at work, or the danger that he might pose to the safety or well-being of any person.

[41] The principle of fair dealing further required that the MEC exercise an independent discretion in relation to any decision to suspend the applicant. The papers filed in this application bear out the applicant's contention that the legislature considered itself entitled to give the department instructions to suspend the applicant, and that in suspending him, the MEC heeded those

instructions. In his founding affidavit, the applicant makes the express allegation that the MEC would not have acted as he had if the legislature had not passed the resolution it did. Although the allegation is denied only in general terms, the undisputed facts bear out this conclusion. By the time the applicant was finally suspended, the MEC had changed his position no less than five times: first he appointed Sekela Auditors but left the applicant unsuspended; then, by agreement, he suspended the applicant until the end of November; then he withdrew Sekela's mandate; then he unilaterally suspended the applicant until the middle of December; and finally, he suspended the applicant indefinitely. These shifts in position precisely match the resolutions adopted by the legislature, and what the deputy speaker regarded as instructions that he considered the legislature entitled to issue. The MEC's conduct smacks of a subservient and inappropriate response to the legislature. Fairness required the MEC to exercise an independent discretion, one that would have acknowledged the legislature's position but that would have accounted too for other competing interests, not least those of the applicant.

[42] In short: nowhere in the correspondence between the parties is there any allegation that the applicant's continued presence might jeopardise any of the investigations that were proposed, nor is there any suggestion that the well-being or safety of any person or property would be endangered. The respondents have failed in their affidavits to produce any substantive evidence to satisfy either of these requirements.

[43] In regard to procedural fairness, I noted above that it is common cause that they applicant was not afforded a hearing. Although the SMS code is silent on the requirement of a hearing, for the reasons recorded above, the *audi alteram partem* principle required that prior to his indefinite suspension, the applicant be given an opportunity to state a case in response to any proposal to that effect made by the respondents. To the extent that the respondents make the argument that the applicant had an opportunity to request a hearing at which submissions could be made but chose not to do so, this submission overlooks the point that it is not for the employee to request a hearing, but for the employer to offer one.

[44] To summarise: there is no clear reason articulated by the respondents as to why the applicant's suspension was necessary in order to protect the integrity of the proposed enquiry, nor have the respondents established any basis on which it might be suggested that the applicant's continued presence at work would endanger the safety or well-being of any person. Further, the respondents failed to afford the applicant any substantial right to a fair hearing prior to his suspension.

[45] For these reasons. I am satisfied that the applicant has established a clear right to the relief that he seeks.

**Other requirements relevant to final relief**

[46] In relation to urgency, the applicant avers that his employment gives him the right to work in order to satisfy the incorporeal and emotional need that the right to work confers, and that his prospects of earning pre-set performance targets are compromised unless he works the full year. The respondents submit that the applicant's suspension will not prejudice his rights to any bonus to which he may become entitled, and that in any event, in terms of the SMS code, any suspension is limited to 60 days, at which point a disciplinary hearing must be convened. .

[47] In regard to the prejudice suffered by the applicant, *Muller's* case, although it dealt with the additional dimension of a deprivation of remuneration during a period of suspension, emphasises the personal and social consequences that suspension brings. The link between the freedom to engage in productive work and the right to dignity was recently emphasised by Nugent JA in *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA), where he stated:

> "The freedom to engage in productive work - even where that is not required in order to survive - is indeed an important component of human dignity… for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth - the

> fulfilment of what it is to be human - is most often bound up with being accepted as socially useful" (at paragraph [27].

In so far as the 60-day limitation is concerned, as I already noted, the respondents have cast the applicant's suspension as a period of "indefinite leave", suggesting that it is intended to be indefinite. Taken cumulatively, the non-pecuniary consequences for the applicant of his suspension and its indefinite nature satisfy the requirements of urgency in this instance.

[48] Finally, I am also satisfied that the applicant has no other alternative remedy. The respondents submit that the applicant may seek adequate redress in terms of the unfair labour practice provisions of the LRA. That may be so, but the applicant has elected (as he is entitled to do for the reasons reflected above) to pursue a contractual remedy. The fact that the applicant may have some other cause of action that he elects not to invoke is no consequence. The respondents' claim, in these circumstances, that an action for damages will cure any loss that the applicant has suffered, takes no account of the fact that a claim for damages is costly, time consuming and complex, and that it, in any event, it cannot account for the detrimental consequences of indefinite suspension, especially those of a more incorporeal nature referred to by Nugent JA in the *Watchenuka* judgment (supra).

[49] The applicant is entitled to the relief that he seeks. I accordingly make the following order:

1. The decision of the second respondent requiring the applicant to take leave of absence is set aside.

2. The respondents, jointly and severally, are to pay the costs of these proceedings

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**ANDRE VAN NIEKERK**

**JUDGE OF THE LABOUR COURT**

**5 JANUARY 2009**

Appearances:

For the applicant: Adv MSM Brassey SC

Instructed by SM Mookeletsi Attorneys

For the respondents: Adv PJ Pretorius SC and Adv BL Makola

Instructed by Kgomo, Mokhetle & Tlou Attorneys