REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2204 / 2014

In the matter between:

SIZWE MORGAN MAYABA **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

NERINE BEVERLEE KAHN N.O. **Second Respondent**

Heard: **18 September 2014**

Delivered: **19 September 2014**

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 – right to fairness applied only in process under the LRA

Unfair suspension – whether suspension unlawful – no general right to be heard or to be provided with reasons or information prior to suspension – suspension precautionary measure and not discipline

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] Although the name of the CCMA often appears on judgments in this Court, this matter is one of the few occurrences where the CCMA has actually come before this Court not in capacity as body responsible for dispute resolution, but as the employer itself. It is rather a unique experience. This being said, the applicant, as an employee of the CCMA (being the current first respondent), has brought an urgent application in terms of which the applicant seeks to challenge his suspension by the first respondent. The applicant is seeking final relief, in the form of an order declaring that his suspension by the first respondents was invalid and an unfair labour practice. The applicant then seeks consequential relief in the form of an order that his suspension be set aside with immediate effect pending the finalization of possible disciplinary proceedings against him.

[2] The applicant, in his notice of motion, has also asked for a mandamus against the first respondent, in which he seeks an order to enroll the applicant's unfair labour practice dispute and unfair discrimination disputes that he referred to the CCMA for conciliation in terms of the LRA, on 15 August 2014, for hearing within the 30 day conciliation time limit prescribed by the LRA. The applicant brought this part of the application because the CCMA only enrolled conciliation on 9 October 2014 in respect of these disputes. However, and having regard to the fact that this matter only came before this Court on 18 September 2014, the 30 day time limit has in any event already passed. Mr Malatsi, representing the applicant, conceded that this relief is no longer competent, and the applicant no longer persists with the same. I shall accordingly not consider this issue.

[3] The applicant has also sought a mandamus in the form of an order that any disciplinary proceedings against him must not be allowed to proceed until the other employees of the first respondent mentioned in the forensic report relating to this

matter are also 'fairly suspended'. Although Mr Malatsi conceded that the relief sought in this paragraph has no foundation in law, he did not abandon the same, and consequently I shall deal with this relief sought as well in this judgment.

[4] As touched on above, these are motion proceedings in which final relief is sought. The consequence is that in the case of any factual disputes, these factual disputes must be resolved on the basis of the principles 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 articulated as follows:

> '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.'

[5] A proper consideration of the affidavits in this matter fortunately reveals that very little facts are in dispute. Most of the factual matrix giving rise to this application are either undisputed, or common cause. The disputes however arise in the context of

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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.

what inferences should be drawn from these facts. In my view, 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 anything said 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 and inferences are concerned, on what is stated in the respondents' answering affidavit. On this basis, I will set out the background facts hereunder.

[6] As a final introductory comment, and because 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] I will now proceed to consider whether the applicant has satisfied these requirements.

Background facts

[7] The applicant is still currently employed by the first respondent as its supply chain manager. The applicant commenced employment on 1 September 2011. It is clear that this is a senior position at the first respondent and the applicant is in fact part of the first respondent's senior management.

[8] Unfortunately, the applicant has not attached his contract of employment to 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*

application. In addition, the applicant has not provided any particulars of how disciplinary and related proceedings are actually conducted in the first respondent where it comes to its own employees. The applicant has, in simple terms, not disclosed the relevant terms of the first respondent's disciplinary code and procedure and his own contract of employment.

[9] The catalyst for the events giving rise to this matter occurred when the first respondent, on 31 July 2014, received an interim forensic audit report relating to irregularities in the procurement of suitable leased premises to be occupied by the first respondent in the Western Cape. It was undisputed that the applicant was involved in such procurement. The report suggested various irregularities in such procurement. The report further, on face value, implicated the applicant in some of these irregularities. I say nothing about the accuracy or veracity of the report and need make no findings in this regard. Significantly, and to date, the applicant has actually not been charged with misconduct as a result of this report. As Mr Makapane, who represented the respondents said, the report was that which convinced the first respondent to conduct its own internal investigation into whether some of its employees, including the applicant, was involved in any misconduct in this regard. In the end, the only relevance the report has in this matter is not its content, but the mere fact that its existence spurred the first respondent into conducting its own internal investigation and that this would *inter alia* relate to the applicant.

[10] Having received this report on 31 July 2014, the applicant was called to a meeting with the chief financial officer (Ntombi Boikhutso) and the human resources manager (Joseph Mathebula) of the first respondent. In the meeting, the applicant was informed that he would be placed on special leave with immediate effect. The

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

applicant was presented with a letter, dated 31 July 2014 and signed by the second respondent, the gist of which was that the applicant was placed on special leave whilst the first respondent was considering whether to suspend the applicant, and whilst the first respondent was conducting an investigation into possible misconduct on the part of the applicant. The letter gave 5 concerns the first respondent had about the applicant and which were to be investigated. The applicant was required to leave the workplace immediately.

[11] Of particular relevance to this matter, the letter dated 31 July 2014 specifically recorded that the first respondent was contemplating suspending the applicant, and he was given an opportunity to file representations by 5 August 2014 to show cause as to why he should not be suspended.

[12] On 4 August 2014, the applicant wrote to the second respondent complaining that the allegations against him were 'broad and vague' and that he was consequently unable to respond thereto. The applicant asked for 'detailed allegations' before he could respond. The applicant contended he was being unfairly treated by being placed on special leave. After asking for further time to respond, and on 14 August 2014, the first respondent, by way acting director at the time, Afzul Soobedaar, answered the applicant's letter of 4 August 2014, setting out three principal considerations where it came to the reasons as to why the applicant was placed on special leave. The applicant was asked to submit reasons why he should not be suspended by 20 August 2014.

[13] On 15 August 2015, the applicant referred two disputes to the CCMA (not in the capacity as his employer). The first dispute was an unfair labour practice dispute, in which the applicant contended that being placed on special leave without valid reason was an unfair labour practice. The second dispute was an unfair

discrimination dispute, in which the applicant contended that he believed he was being placed on special leave 'due to the colour of my skin'.

[14] Despite these dispute referrals, the applicant did make submissions on 19 August 2014 as to why he should not be suspended. The applicant in these submissions addressed the three main concerns he had been informed of, above. The applicant added further submissions relating to, in essence, that the transaction had been previously approved of, that all supply chain procedures had been followed, and that the investigation report was irregular and unfair. I do not intend to dwell on the contents of these submissions, as it simply is not relevant for the purposes of this application. The fact remains that the applicant did make fairly detailed submissions.

[15] It was undisputed that the first respondent considered these submissions. On 28 August 2014, a letter was drafted and this was signed on 29 August 2014 by the second respondent. This letter recorded that the applicant's representations were considered, but it was decided that the first respondent would proceed in suspending him. Of some importance to the matter now before him, the letter recorded that the applicant was being suspended because his presence at work would prejudice the ongoing investigation that was taking place at the time. It was further recorded that considering the nature of the allegations involved, it was not desirable for the applicant to be present at the workplace. The applicant was specifically informed that the suspension was a precautionary suspension pending the outcome of a formal disciplinary process in which the applicant will receive a full and proper opportunity to answer any allegations against him.

[16] In an internal memorandum addressed to CSC's and department heads on 29 August 2014, these employees were briefed in short on the salient issues surrounding the Cape Town lease, and it was recorded that the supply chain manager (the applicant)

was placed on special leave pending an investigation. The applicant complained about this last statement, but it is clear that this statement was factually correct in all respects. As at 29 August 2014, the applicant was not yet suspended, as it was undisputed that the suspension letter, despite being dated and signed on 28 and 29 August 2014, was only presented to him on 1 September 2014.

[17] Following the presentation of the letter of suspension to him on 1 September 2014, the applicant then, on 11 September 2014, brought the urgent application to the Labour Court, which is the application now before me. Mr Malatsi confirmed to me in argument that the applicant had not challenged his actual suspension as an unfair labour practice to the CCMA, as the applicant has lost all hope and confidence that the CCMA would deal with it fairly. In substantiation for this contention, Mr Malatsi referred me to the fact that the two earlier disputes referred by the applicant to the CCMA on 15 August 2014 was only set down for 9 October 2014, when the CCMA was legally required that conciliation be set down in 30 days, and as far the applicant was concerned, this showed the CCMA's mala fides.

Urgency and jurisdiction

[18] The Court in *Gcaba v Minister for Safety and Security and Others*[4] said that jurisdiction means 'the power or competence of a court to hear and determine an issue between parties'. Therefore, and where urgent intervention in the suspension of an employee is sought, I accept that the Labour Court has the competence and power in terms of Section 158 to do so.[5] The Court in *Booysen v Minister of Safety and*

[4] (2010) 31 ILJ 296 (CC) at paras 74 – 75.
[5] 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 ….*'.

Security and Others[6] specifically dealt with these powers and held that '…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.' In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[7] the Labour Appeal Court confirmed the jurisdiction of the Labour Court to entertain urgent applications specifically relating to the challenge of suspensions, but said that it should only be entertained the case of '…. extraordinary or compellingly urgent circumstances'.[8] Therefore, and in deciding whether to afford the applicant relief, I must consider where there are any extraordinary circumstances present. I will deal with this hereunder.

[19] Where it comes to urgency in general, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[9] 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.'

[20] Based on that the Court said in *Jiba*, and where it concerns the general Rule 8

[6] (2011) 32 ILJ 112 (LAC) at para 54.
[7] (2012) 33 ILJ 2033 (LAC).
[8] Id at para 46.
[9] (2010) 31 ILJ 112 (LC) at para 18. I may mention that this case also concerned an application relating to a challenge of a suspension.

considerations of urgency, I am satisfied that the applicant has made out a sufficient case of urgency. The applicant was only actually suspended on 1 September 2014. The period of some 7 working days taken for the applicant to take advice on what he needed to do and for this application to be prepared, settled, signed, served and filed, is not unduly excessive, and can be considered to be sufficiently prompt 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 sufficient grounds to finally determine this matter as one or urgency.[10] But whether exceptional circumstances indeed exist is an entirely different matter.

The issue of a clear right

[21] From the outset, I specifically asked Mr Malatsi to indicate to me where the applicant's clear right in this matter lay. In other words, on what legal basis did the applicant challenge his suspension? According to Mr Malatsi, the applicant has a right to be fairly treated in terms of his contract of employment. Mr Malatsi stated that general considerations of fairness and equity must apply where employees such as the applicant are suspended, and this entails that such employees, prior to suspension, must be presented with proper particulars and information about the allegations of misconduct against them, they must be given a proper and fair opportunity to be heard, and then only, if the employer still decides to suspend the employee, they must be given proper and substantiated reasons for having been suspended. According to Mr Malatsi, this right to 'fairness' must be inferred or infused into the employment contract by virtue of the provisions of the LRA and the Constitution. In short, the case of the applicant was that applicant has the right to

[10] See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) ; *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (2007) 28 ILJ 2796 (LC) at para 12 ; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital*

fairly treated when being suspended, and *in casu*, this did not happened.

[22] In the current matter, it is undisputed that the suspension of the applicant was instituted as a precautionary measure. It is equally undisputed that currently, an investigation is still ongoing and that no actual charges have as yet been brought against the applicant. The first respondent has said, and I accept this, that the applicant is suspended because it was feared that his presence at work could interfere with or hamper or prejudice the ongoing investigation. The aforesaid being the case, and in deciding whether the applicant has the right to fairness prior to suspension as he contends, it must firstly be considered what exactly the nature of precautionary suspension is.

[23] Precautionary suspension is not discipline. By implementing precautionary suspension on an employee, the employer is not disciplining the employee. The only instance where suspension is discipline of an employee is where the suspension is imposed as an actual disciplinary sanction imposed pursuant to disciplinary proceedings. Where suspension is imposed as a precautionary measure, this is a prelude to possible disciplinary action, but not disciplinary action itself.

[24] The point in time when the employee is then actually subjected to discipline, is when the disciplinary action itself is commenced by way of the employee being called on to answer specified allegations of misconduct. This is done by way of a notification of institution of disciplinary proceedings, and this notification then identifies the allegations the employee must answer. Prior to furnishing this disciplinary hearing notification, and where there is a pending investigation, there is no finality as to the actual misconduct the employee must answer for or even if there is indeed misconduct the employee must answer for. It is the outcome of the investigation that

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Aire v Meintjes and Another (2012) 33 ILJ 629 (LC) at para 21 – 24.

determines what the employee must answer. Accordingly, any suspension of the employee pending this investigation preceding the actual institution of disciplinary proceedings, simply cannot be the actual conduct of discipline itself. This suspension has a specific and rational purpose, being to mitigate further risks and prejudice to the employer in the conduct of the investigation, and therefore, in simple terms, to advance and protect the investigation against possible interference by employees being investigated. This is, as a matter of common sense, exactly what 'precaution' would be. In *Koka v Director General: Provincial Administration North West Government*[11], Landman J (as he then was) referred with approval to the following remarks made by Denning MR in *Lewis v Heffer and others* [1978] 3 All ER 354 (CA) at 364*c*-*e*:

> 'Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and he is suspended until he is cleared of it. No one, as far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply....''

I fully agree with this reasoning. In my view, this succinctly articulates the very purpose of what precautionary suspension is. This has to mean that at the 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*, which would include the right to be heard, the right to full particulars, and reasons.

[11] (1997) 18 ILJ 1018 (LC).

[25] But, as always, general principles are not the alpha and omega. Like most such unilateral acts, these kind of acts are not immune from legal challenge. What is critical however, is the foundation of the challenge. In other words, what can properly form the legal basis for a legal challenge of precautionary suspension? In my view, three such legal grounds exist, which I will now set out.

[26] Firstly, a suspension can be challenged on the basis that it is invalid. This would be the case where the very imposition of the suspension per se is *ultra vires* the powers of the functionary effecting the suspension. Another example in this regard would be where specific regulatory provisions of the employer in the workplace do not permit the act of suspension or even prohibit it. In such instances, the suspension is *ultra vires*, and accordingly invalid. An Illustration of these kind of instances can be found in *Sephanda and Another v Provincial Commissioner, SA Police Service, Gauteng Province and Another*[12] which concerned a precautionary suspension implemented when the disciplinary hearing itself was already well underway, and precautionary suspension was thus no longer permitted. Another illustration is found in *Mbatha v Ehlanzeni District Municipality and Others*[13] which concerned a delegation of the power to suspend to the mayor when this power was not capable of being so delegated. The applicant, *in casu*, has not made out a case of invalidity. There is no evidence or contention of any regulatory provisions in the first respondent prohibiting suspension, or that the second respondent who signed and issued the suspension letter was not allowed to suspend the applicant. Accordingly, the applicant's basis of legal challenge of the suspension cannot resort under this category.

[27] Secondly, a suspension can be challenged on the basis that it is unlawful. Unlawful suspensions in fact have often featured before the Labour Court. A pertinent

[12] (2012) 33 ILJ 2110 (LC).

example is where the right or power of an employer to effect a suspension is subject to specific regulation that prescribes a designated process that must be followed before suspension can be implemented, and the employer then does not follow or contravenes that process. In simple terms, the unlawfulness is founded in the employer not complying with its own rules. This kind of regulation (rules) can be found in 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. However, and critically, the issue of the lawfulness of the suspension must be based solely on the provisions of the regulatory provisions themselves, as defined in such provisions, and thus would only concern the interpretation and application of these actual regulatory provisions in order to assess and determine whether there is compliance by the employer with the same.[14] In short, if the employer complied with the regulation, the suspension is lawful, but if not, it is unlawful. Fairness and equity is an irrelevant consideration. Again, and *in casu*, the applicant has made out no case in this regard. The disciplinary code of the first respondent was not placed before me. The applicant has provided no evidence of, nor did he refer to any specific regulatory provisions prescribed in the first respondent, that must first be complied with before his suspension could be implemented. Accordingly, the applicant cannot rely on this legal basis of challenge of his suspension, as well.

[28] That then leaves only the third ground of legal challenge, being the challenge of the suspension of the applicant on the basis that it is unfair. In fact, and properly

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[13] (2008) 29 ILJ 1029 (LC).

[14] For the most recent of such kind of 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).

considering the submissions of Mr Malatsi and the content of the founding affidavit, this is squarely where the applicant pitched his case. But the problem for the applicant is that a suspension would only be unfair if it is found to be unfair in terms of the unfair labour practice provisions of the LRA and this finding must be made 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.' Therefore, and firstly, the statute (LRA) regulates and determines the issue of unfair suspensions. Secondly, the statute attaches a prescribed process in determining whether a suspension is fair or unfair. The prescribed process is firstly 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.[15] It is in terms of this prescribed process and in these forums that all the provisions of the general right to fairness, which would include the application of the provisions of the *audi alteram partem* principle, would find application. The applicant has conceded that he has not, as at date of this application, challenged his suspension as an unfair suspension to the CCMA in terms of the provisions of the LRA.

[29] I must say that I have found the applicant's case to be somewhat contradictory. On the one hand, and in paragraph 2.6 of the notice of motion, the applicant specifically relies on the provisions of section 186(2)(b) of the LRA, where he asks that his suspension be declared to constitute an unfair labour practice. In simple terms, he is asking this court to decide an unfair labour practice instead of the CCMA. On the other hand, the applicant does not rely on an unfair labour practice per se, but on a general right of fairness and equity to be inferred into his contract of employment

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

based on the provisions of the LRA and the Constitution. In the interest of proper determination of this matter, I will however deal with both these grounds raised, hereunder.

[30] I will firstly deal with, and describing it in its simplest terms, the issue of implied fairness that must be adhered prior to and in effecting suspension. As I have touched on above, the Court in *Koka*[16] said that there was not a right to be heard prior to precautionary suspension being effected, and the Court in that judgment described this kind of suspension to be a 'holding operation.'[17] This approach in *Koka* was followed in a number of subsequent judgments, and I for example refer to *Mabilo v Mpumalanga Provincial Government and Others*[18], *Perumal v Minister of Safety and Security and Others*[19], and *SA Municipal Workers Union and Another v Nelson Mandela Metropolitan Municipality and Others*.[20]

[31] However, and in two judgments of the SCA in *Old Mutual Assurance Co SA Ltd v Gumbi*[21] and *Boxer Superstores Mthatha* and A*nother v Mbenya*[22], the suggestion was made that the common-law contract of employment had been developed in accordance with the Constitution to include a right to a pre-dismissal hearing to be inferred into the contract itself. This meant, simply put, that the right to a fair labour practice had to be inferred into the contract of employment, and this seems to support what Mr Malatsi is submitting on behalf of the applicant. In fact, and applying the same basis of reasoning and with specific reference to these two judgments, Van Niekerk J in *Mogothle v Premier of the North West Province and Another*[23], when considering the very issue of the suspension of an employee, held as follows:

[16] *Koka v Director General: Provincial Administration North West Government* (*supra*).
[17] Id at 1028E – 1029D.
[18] (1999) 20 ILJ 1818 (LC) at paras 23 – 24.
[19] (2001) 22 ILJ 1870 (LC) at paras 25 – 28.
[20] (2007) 28 ILJ 2804 (LC) at para 14.
[21] (2007) 28 ILJ 1499 (SCA).
[22] (2007) 28 ILJ 2209 (SCA).

> '…. 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 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.'

Van Niekerk J in *Mogothle* then concluded as follows:[24]

> '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.'

[32] Based on the above, it would seem that the argument by Mr Malatsi for the applicant has proper substance. But, unfortunately, that is not where the story and analyses ends. The judgment in *Mogothle* did constitute the prevailing law for some time after being handed down in 2009, and was followed in a number of further judgments, being that of *Dince and Others v Department of Education, North West Province and*

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[23] (2009) 30 ILJ 605 (LC) at para 24.
[24] Id at para 39.

Others[25], *Baloyi v Department of Communications and Others*[26], and *Police and Prisons Civil Rights Union on behalf of Masemola and Others v Minister of Correctional Services*[27]. This meant, in simple terms, that the right to a hearing, information and reasons was read into the contract of employment and regulatory provisions governing suspension of employees, and the failure to afford employees these rights was then determined to be unlawful conduct by the employer, because of simply being in contravention to this implied right to fairness.

[33] The next chapter in this tale comes with the handing down of the judgment of the SCA in *SA Maritime Safety Authority v McKenzie*[28] in February 2010. In *McKenzie*, the Court again specifically dealt with the issue of the incorporation of the general right to fairness and fair dealing into the contract of employment. The Court in *McKenzie* specifically considered the judgments in *Gumbi* and *Boxer Superstores*:[29] Wallis AJA (as he then was) in *McKenzie*, with specific reference to the judgments in *Gumbi* and *Boxer Superstores*, held:[30]

> '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. …'

[34] What Wallis AJA in *McKenzie* then did was to conclude 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 itself specifically determine this

[25] (2010) 31 ILJ 1193 (LC) at para 25.
[26] (2010) 31 ILJ 1142 (LC) at para 25 – 29.

[27] (2010) 31 ILJ 412 (LC) at para 36
[28] (2010) 31 ILJ 529 (SCA).
[29] Id at para 38.
[30] Id at para 48.

issue and I wish to refer several pertinent extracts from this judgment in this regard, the first being where the Court said the following:[31]

> ' …. 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:[32]

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

The Court then concluded:[33]

> ' …. 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

[31] Id at para 27.
[32] Id at para 33.
[33] Id at para 56.

> 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.'

[35] Not only am I bound by the above reasoning in *McKenzie*, but I respectfully agree with the same.[34] Any reliance on the judgments of *Gumbi* and *Boxer Superstores* so as to establish a right to be heard, right to information and being given reasons where it comes to suspension of an employee, being implied into the employment contract of the employee, is entirely misplaced, and these judgments cannot serve as substantiation for such a conclusion. It therefore follows that the right to a fair suspension does not arise from the employment contract and cannot be implied into it. That has to mean that the right to a fair suspension is firmly grounded in the LRA and can only be determined by way of the provisions of the LRA. This finally also means that the enforcement of this right is subject to all the limitations and prescriptions in the LRA.

[36] As Mr Malatsi also referred to the Constitution as a basis for his contention of an implied right to fairness in the employment contract, the simple reality is that the general right to a fair labour practice as found in section 23(1) of the Constitution[35] cannot be so relied upon. 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 (and this includes suspension). In *SANDU v Minister of Defence and*

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[34] See also *Biyase v Sisonke District Municipality and Another* (*supra*) at para 21.
[35] Act 108 0f 1996. Section 23(1) reads 'Everyone has the right to fair labour practices'.

Others[36] 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*.[37]

[37] In my view, all of the above makes it clear 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) by the LRA, with such statute being the source of this right. In this regard, the Court in *Gradwell*[38] said:

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

[36] (2007) 28 ILJ 1909 (CC) at para 51.
[37] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (*supra*) at para 34; See also *Booysen v SA Police Service and Another* (2009) 30 ILJ 301 (LC) at para 37 – 38.
[38] Id at para 46.

This effect of this ratio is in my view clear. The applicant, as a matter of principle, cannot approach this Court to have his suspension declared unfair, but can only approach the CCMA in terms of the dispute resolution provision of the LRA. The only exception would be if the applicant is able to show extraordinary or compellingly urgent circumstances.

[38] In the end, therefore, the judgment in *Mogothle*[39] is simply no longer the prevailing legal position. 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 and processes of the LRA, and cannot be implied into the contract of employment. This would include the issue of precautionary suspension. The judgment in *McKenzie* was confirmed by the LAC in *Gradwell*. In the recent judgment of *Lebu v Maquassi Hills Local Municipality (1)*[40] which was indeed decided after *McKenzie*, the Labour Court 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.' I agree with this conclusion.

[39] In short, there is no general right of fairness to be implied into a contract of employment of an employee. 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, by way of utilizing the dispute resolution provisions prescribed by the LRA. Whilst this Court may still retain the general power to intervene in a suspension of an employee, this power should only be exercised if exceptional circumstances or compelling considerations of urgency are shown, and even then only as an interim measure

[39] *Mogothle v Premier of the North West Province and Another* (*supra*).

[40] (2012) 33 ILJ 642 (LC) at para 12.

pending final determination by way of the prescribed LRA statutory dispute resolution process. As the Court made it clear in *Gradwell*:[41]

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

[40] Accordingly, what the applicant must do to convince this Court to intervene is to show either exceptional circumstances or compelling considerations of urgency. In this regard, and as I will now discuss, the applicant has made out no proper case.

[41] I will firstly consider whether the manner in which the applicant was dealt with, on the facts, illustrate such patently and gross unfair circumstances so as to substantiate exceptional circumstances, justifying intervention by this Court. I will start with the following reference to what the Court said in *Gradwell*:[42]

> '…. 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

[41] Id at para 45.

> 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 this ratio, and also considering what the Court said in *Koka*[43], I am of the view that the applicant, overall, was fairly treated. As soon as the first respondent received the audit report on 31 July 2014, it first sought to mitigate its risks by placing the applicant on special leave the very next day. It is also clear that the audit report motivated an internal investigation by the first respondent into the conduct of its relevant employees and this investigation is in fact ongoing. The first respondent actually communicated with the applicant about his possible suspension and gave proper answers to the questions he asked. The applicant was allowed the opportunity to make representations as to his possible suspension and did so. The first respondent considered these submissions. In the end, the first respondent is justified in conducting an investigation. It is entitled to protect the integrity of the investigation by placing the applicant on precautionary suspension. Finally, the applicant was actually informed his suspension was a precautionary measure. There is simply nothing extraordinary in any of this.

[42] The evidence shows that the applicant was suspended based on the belief by the respondents that his continued presence at work would interfere with the ongoing investigation. It is not necessary for this belief to be substantiated by objective facts at this point in time. What this belief entails is a reasonable apprehension of risk to the investigation, considering the purpose and scope of the investigation and proceedings to follow, and considering the nature of the allegations against the employee. The respondents are entitled to form their own belief in this respect, as basis for the suspension, even if at this stage it may be a subjective belief based on

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[42] Id at paras 44 – 45.
[43] *Koka v Director General: Provincial Administration North West Government* (*supra*).

as yet unsubstantiated allegations. In *Dladla v Council of Mbombela Local Municipality and Another (2)*[44] the Court, albeit with reference to specific disciplinary provisions in that case which prescribed that suspension of an employee must be founded on a belief of interference, said:

> '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)

I can find no reason why the same considerations cannot apply *in casu*. The first respondent has made it clear that it has the belief that the presence of the applicant at work could prejudice the investigation. I accept that at this stage, there is some subjectivity prevalent in this belief. But that does not matter. The fact is that there does exist an audit report which indicates the existence of irregularities and does implicate the applicant in some of it. The subject matter of the audit report and following investigation resorts under the scope and duties of the applicant. The first respondent is entitled to conduct a further investigation, and is concerned the applicant may prejudice this investigation. A subjective view against this background is acceptable to substantiate a precautionary suspension.

[43] One also needs to consider the seniority and influence of the position of the

[44] (2008) 29 ILJ 1902 (LC) at para 19 and 21.

applicant. I accept the applicant is in senior management, and his position carries influence. Considering that at least part of the intended investigation would concern the applicant and relate to him and his duties, it is a matter of simple logic that his continued presence at work would be, at the very least, extremely uncomfortable for subordinates and fellow employees. The applicant's seniority also creates a risk that he could be in a position to possibly tamper with evidence or influence subordinates, being a case pertinently made out by the respondents in the answering affidavit. As a matter of principle, the more senior the position of the employee where it comes to instances of possible irregular 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*[45] it was held as follows, which in my view illustrates the point I make in this regard:

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

[44] Therefore, and based on all of the above, there is simply nothing grossly or patently unfair in the suspension of the applicant so as to substantiate a contention of exceptional circumstances or compelling considerations of urgency. I am satisfied, on the facts before me, that the applicant was overall, and considering what is required for precautionary suspension to be fair, fairly suspended. The applicant is not entitled to detailed reasons for his suspension. Nor was he entitled to a right to

[45] (2006) 27 ILJ 1921 (LC) at paras 27 – 28.

be heard before his suspension. Also, he was not entitled to the detailed information he required. The allegations raised in the audit report was certainly serious. The first respondent was thus entitled to form the belief that it did, and act accordingly.

[45] The applicant raised the issue of reputational and professional prejudice to him caused by the suspension. But this cannot serve to establish exceptional circumstances. Surely this kind of contention would apply to virtually each and very suspended employee in a senior position. If this would be a basis for the Labour Court to intervene in suspension proceedings, then virtually all suspension cases of senior employees would be exceptional and directly end up in the Labour Court instead of in the CCMA where they belong. Such a situation would contradict the specific dispute resolution provisions of the LRA, and would undermine the effective and orderly resolution of employment disputes in the manner prescribed by law.[46] In *Mosiane v Tlokwe City Council*[47] 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 with the following reference to what the

[46] See 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.
[47] (2009) 30 ILJ 2766 (LC) at para 17.

Court said in *Dladla v Council of Mbombela Local Municipality and Another (2)*:[48] 'In my view, the applicant's image and reputation cannot be the basis upon which this court can overturn the suspension.'

[46] Considering all of the above, I conclude that the applicant failed to establish the existence of a clear right. In short, the applicant has no right to fairness in terms of his contract of employment. The applicant has illustrated no exceptional circumstances or compelling considerations of urgency justifying intervention by this Court. There is simply no reason why the applicant cannot pursue his allegation of unfair suspension in the normal course, and as prescribed by the LRA. The applicant's application must fail for this reason alone.

Alternative remedy

[47] I will however nonetheless consider the issue of an alternative remedy. Based on what I have already referred to above, the applicant certainly has a suitable alternative remedy. I wish to refer to three judgments just to illustrate the point. In *Biyase v Sisonke District Municipality and Another*[49] 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 in *Lebu v Maquassi Hills Local Municipality (1)*[50] the Court said: '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

[48] (*supra*) at para 43.
[49] (*supra*) at para 30.
[50] (*supra*) at para 43.

council in terms of s 191 of the LRA.' And finally in *Nyathi v Special Investigating Unit*[51] the Court said: '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.'

[48] The applicant has stated that he has deliberately not referred an unfair suspension dispute to the CCMA, in essence because he says has lost faith in the CCMA. The applicant states that the CCMA deliberately did not schedule the conciliations pursuant to his two dispute referrals on 15 August 2014, so as to prejudice him and support his suspension. I find no merit in these contentions. The first respondent has explained that LRA matters concerning its employees are dealt with by and transferred to its national office, and not dealt with in one of the regions, which is what happened in this case. In any event, the applicant had already received, on his own version, the conciliation set downs on 8 September 2014, which is consistent with this explanation of the respondents. Also, and considering the applicant was suspended on 1 September 2014 already, scheduling his disputes for conciliation on 9 October 2014 only, could have no impact at all on his suspension. I may also mention that the fact that conciliation does not take place within 30 days can have no impact at all on any case of the applicant. In fact, and after 30 days, he accrues the right to forthwith pursue the dispute by way of either arbitration or adjudication, as the case may be. The applicant is seeking to attribute untoward motive to the respondents where none exists.

[49] In my view, the above contention of the applicant were nothing more than a deliberate design in the current matter to avoid the CCMA dispute resolution processes. This approach of the applicant, as I have said, in unfounded in fact. What the applicant is thus in my view doing, and respectfully using the words of

[51] (2011) 32 ILJ 2991 (LC) at para 18.

Wallis AJA in *McKenzie*[52] was to bring a 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 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.'[53] In the current matter, the case of the applicant is really one of alleged unfairness, and as such, the statutory prescribed alternative remedy in terms of the LRA must apply.

[50] This leaves only one issue to consider. Mr Malatsi submitted that the CCMA is not like any other employer. Mr Malatsi stated that because of the nature of the functions of the CCMA, and its role in the employment dispute resolution environment, it should be held to higher standards than all other employers. In a nutshell, the contention of Mr Malatsi was that all the legal principles that apply to all other employers, as set out above, cannot apply to the CCMA, and because of its nature, everything the CCAM does vis-à-vis its employees must be automatically infused with fairness. This same motivation was also advanced by Mr Malatsi for the applicant asking this Court to determine his suspension as an unfair labour practice rather than the CCMA. Mr Makapane for the respondents refuted these contentions. He submitted that there is a clear distinction between the CCMA as an employer of its own personnel and the CCMA as statutory dispute resolution body in terms of the LRA. Mr Makapne submitted that the CCMA as employer of its own personnel is just like any other employer. Mr Makapane further added that the CCMA would in any event in its dispute resolution functions with regard to the actual disputes pursued by the applicant in terms of the LRA, to the CCMA, use an independent panel it had approved for such very purposes (meaning dealing with employment disputes of its

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[52] (*supra*) at para 56.
[53] See *McKenzie* (*supra*) at para 33; See also *Moloto v City of Cape Town* (2011) 32 ILJ 1153 (LC) at para

own employees).

[51] I have already said that I think much of the applicant's case with regard to his alleged concerns about the partiality and mala fides of the CCMA is that of a deliberate design to suit his purposes in this application, rather than a genuine concern. In fact, and using the applicant's own reasoning, if any employer is able to rise above internal considerations and mala fides, it would be the CCMA. Therefore there is no reason not to accept that the CCMA will properly deal with any dispute the applicant may wish to submit to it, in its capacity as dispute resolution forum in terms of the LRA, and I accept that it would ensure fairness by using this independent panel referred to.

[52] I also agree with Mr Makapane's contentions that a clear distinction must be drawn between the CCMA as employer on the one hand, and the CCMA as dispute resolution functionary in terms of the LRA on the other. In my view, the CCMA has two distinctive parts. The first part relates fulfilling the functions bestowed on it by virtue of the LRA, through commissioners. The second part is that in order to effectively and properly provide these functions, there must be a proper support structure. The vast array of commissioners and dispute cases spread across the entire country in a number of offices and regional offices must be managed, administered and supported. Infrastructure must be provided, controlled and managed. As to this second part, this is no different to the functions of any other employer managing, administering and controlling its business. If I may describe it simply – the business of the CCMA is dispute resolution through commissioners, and it manages such business using its own employees such as the applicant just like any other employer.

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[53] In *Zimema v Commission for Conciliation, Mediation and Arbitration*[54] the Court dealt with disciplinary proceedings by the CCMA against its national registrar at the time. The employee in that case sought an order from the Labour Court in terms of section 158(1)*(a)* (iii) authorizing him to approach the Labour Court directly and not use the statutory dispute resolution processes under the LRA which would take him to the CCMA. He contended that referring the dispute to the CCMA for conciliation and arbitration was inappropriate and prejudicial, because the very body that decided that he was guilty of the misconduct would deal with his dispute, and he was also concerned that the process would be interfered with by the Director of the CCMA. The Court deal with these contentions as follows in refusing to grant the applicant in that case the order sought:[55]

> 'Although the applicant may have valid concerns about referring the dispute for conciliation and perhaps arbitration to the very body that dismissed him, it is a 'knowledgeable outsider' who will deal with the question of conciliation and arbitration and not the Director of the CCMA.'

The Court in *Zimema* in fact concluded that the dispute resolution process in section 191 remained peremptory. I agree with this reasoning. It is a manifestation of the separation of the two parts of the CCMA. The fact is that any commissioner dealing with the matter is a 'knowledge outsider', especially considering the use of the independent panel referred to. As an illustration that a dismissed employee of the CCMA can still receive relief and succeed in his or her case, Mr Makapane also referred to *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*[56] where a dismissed convening senior commissioner of the CCMA was found to have been unfairly dismissed. The simple fact is that the applicant cannot pre-

[54] (2001) 22 ILJ 254 (LC).
[55] Id at para 9.

[56] (2008) 29 ILJ 2189 (LAC).

judge what may happen at the CCMA. He must follow the process prescribed by law. If the CCMA does provide him with justice, where it is shown to be deserved, the applicant has recourse to the Labour Court and possibly Labour Appeal Court as well.

[54] The applicant has also mentioned that some of the employees implicated in the audit report were not suspended as he was. The problem with the applicant's case in this regard is, simply, that he actually made out no case. He did not identify these employees and he provided no factual foundation for any conclusion that these employees are in fact equally responsible and comparable to him but were not suspended. The applicant, so to speak, not only did not compare apples with apples, but in fact conducted no proper comparison at all. In any event, suspension as I have said is not discipline, and this issue can be competently raised in any disciplinary proceedings against the applicant on the basis of a defense of inconsistency.

[55] Therefore, I conclude that the applicant has proper alternative remedies available to him. He has the statutory dispute resolution process actually prescribed by the LRA where the issue of the fairness of his suspension, coupled with proper consequential relief, can be adequately addressed. The applicant also had the disciplinary proceedings (if instituted) in which he can ask for any information he may need to properly conduct his case, and then properly state his case and raise any defenses he wants, including that of inconsistency. The applicant has accordingly also not satisfied the interdict requirement of the absence of a suitable alternative remedy.

Concluding remarks

[56] I remain 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 statements made by the Court in *Mosiane v Tlokwe City Council*:[57]

> '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.'

[57] 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:[58] '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

[57] (2009) 30 ILJ 2766 (LC) at para 15 – 16.

precludes relief in the form of a declarator in all cases.' I in the past dealt with this issue on the basis of having heard detailed legal argument on an opposed basis by two parties, in the judgment of *Robert Madzonga v Mobile Telephone Networks (Pty) Ltd*[59] 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.'

[58] In the light of all the above, the applicant has failed to establish the existence of a

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[58] Id at para 47.

clear right. The applicant has also failed to show that he has no suitable alternative remedy. The applicant has not referred a suspension dispute to the CCMA, when the actual challenge of such suspension is firmly founded in fairness. The applicant has shown no exceptional circumstances or compelling considerations of urgency to exist, which would justify intervention by this Court. The applicant's application must thus fail.

[59] This then only leaves the issue of costs. The applicant has elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. The applicant was legally assisted from the outset, and clearly knew he could and should pursue his dispute to the CCMA. The applicant in my view designed his 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. Added to this, the bulk of the annexures to the applicant's founding affidavit and replying affidavit are close on 200 pages of irrelevant documents. Volume does not create merit. There is accordingly simply no reason why costs should not follow the result in this matter.

Order

[60] I accordingly make the following order:

The applicant's application is dismissed with costs.

[59] Unreported Judgment dated 30 August 2013 under case number J 1867 / 13 at paras 62 – 63.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

APPLICANT: Advocate H Malatsi

Instructed by Langa Attorneys

RESPONDENTS: Mr K S Makapane of Bowman Gilfillan Attorneys