REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1397/12

GLYNNIS BREYTENBACH **Applicant**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Heard on: 25 June 2012

Delivered on: 18 July 2012

Summary: The grant of interdict to set aside precautionary suspension of a senior manager on urgent basis – applicability of the audi alteram partem rule – striking out of disputed evidential material.

JUDGMENT

CELE J

Introduction

[1] The applicant approached this Court on urgent basis in term of section 158 (1) (a) (ii) of the Act[1] and rule 8[2] seeking to be granted an order in the following terms:

1. that this matter be dealt with as one of urgency. Insofar as the applicant has not complied with the rules of this court, her failure to do so is condoned.

2. that the respondent's suspension of the applicant on 30 April 2012 is declared to have been unlawful.

3. that the respondent's suspension of the applicant on 30 April 2012 is set aside. The respondent is directed to reinstate the applicant and to allow her to resume the normal duties in which she was engaged at the time of her suspension.

4. that the respondent is ordered to pay the applicant's costs.

5. that the applicant is afforded further and/or alternative relief.

[2] The application has been opposed by the respondent in its capacity as the employer of the applicant.

Factual background

[3] The applicant is a Senior Deputy Director of Public Prosecutions and the head of the Pretoria Regional Office of the Specialised Commercial Crime Unit

1 The Labour Relations Act Number 66 of 1995.
2 of the rules for the proper conduct of proceedings in this Court.

(SCCU) of the National Prosecuting Authority (NPA). The respondent is the National Director of Public Prosecutions (NDPP). She is the head of the NPA in terms of section 179(1)(d) of the Constitution of the Republic of South Africa, 1996 read with the National Prosecuting Authority Act 32 of 1998. The incumbent in the office of NDPP is Advocate Nomgcobo Jiba as the Acting NDPP with effect from 28 December 2011.

[4] The applicant is an experienced prosecutor and advocate since 1987 and 1992 respectively. She has since 1990 specialised in the prosecution of commercial crimes, working in various levels. From 1998 to 1999 she worked as a Senior State Advocate in the Office of the Director of Public Prosecutions in Pretoria. She progressed to various levels and is currently a Senior Deputy Director of Public Prosecutions.

[5] Since 2007, she is the Head of the Regional Office of the SCCU which specialises in the investigations and prosecutions of complex commercial crimes. As such head, she is in charge of the overall prosecutions done by her staff in the regional office of the SCCU. She personally handles the most complex cases and those that she deems to warrant her personal attention for whatever reason. She is employed by the NPA in terms of sections 15 and 19 of the NPA Act read with the Public Service Act, 1994 and the Public Service Regulations, 2001. Her post is classified as part of the Senior Management Service (SMS) subject to the provisions of Chapter 4 of the Public Service Regulations. The rules applicable to the SMS are published in the SMS Handbook in terms of Regulation D of Part I of Chapter 4 of the Public Service Regulations.

[6] On 31 October 2011, an attorney, Mr Ronald Mendelow, acting on behalf of his client Imperial Crown Trading 289 (Pty) Limited (ICT), laid a complaint against the applicant with the NDPP. The complaint has a genesis from a civil dispute which arose between the Department of Mineral Resources, Kumba Iron Ore Limited with its subsidiary Sishen Iron Ore Co (Pty) Limited (Sishen), Arcellor Mittal SA Limited (Mittal) and ICT. This dispute is the subject matter in the High Court judgment in *Sishen Iron Ore Co and others v The Minister of*

Mineral Resources and others, case 28980/10, handed down on 15 December 2011.

[7] Sishen held 78,6% and Mittal 21,4% of the old order iron ore mining rights in land in the Kuruman district in the Northern Cape. Sishen operated an opencast iron ore mine on the land in terms of an agreement with Mittal. It is one of the largest opencast iron ore mines in the world. The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) came into operation on 1 May 2004. It created a new mineral rights regime. Item 7 of Schedule II allowed the holders of old order mining rights to apply to the Minister of Mineral Resources within five years, that is, until 30 April 2009, for conversion of their old order mining rights into new order mining rights under the MPRDA. If they failed to do so, their old order rights lapsed and became available for allocation to others on a first-come-first-served basis.

[8] Sishen duly applied for the conversion of its old order mining rights. Mittal however omitted to do so. When it became apparent that Mittal's old order mining rights would lapse on 30 April 2009, both Sishen and ICT applied to the Minister at the offices of the Department of Mineral Affairs in Kimberley, for new order mining rights which were thought to become available for allocation to third parties when Mittal's old order mining rights lapsed. Sishen applied for new order mining rights and ICT for new order prospecting rights.

[9] In due course the Minister granted ICT's application and refused Sishen's application. Sishen took the Minister's decisions on review to the High Court. which held that, on conversion of Sishen's old order rights, it acquired 100% of the new order mining rights on the land (despite the fact that it had only held 78,6% of the old order mining rights). There were consequently no longer any new order mining rights available for allocation to Sishen or ICT. The Minister's grant of prospecting rights to ICT was thus invalid.

[10] On 21 September 2010, while the application for review was pending, Sishen lodged a criminal complaint of fraud and forgery against ICT with the Serious Economic Offences Unit of the Hawks in Pretoria. The essence of its

accusation against ICT was that it had forged a title deed and had made fraudulent misrepresentations in its application for prospecting rights. This case against ICT was initially taken to a prosecutor in Kimberley but was later moved to the SCCU in Pretoria. The applicant took charge of the case on the basis that she regarded it as too complex to allocate to any of her junior staff. The investigating officer was Captain Irene van Rensburg who resigned and Lieutenant Colonel Sandra van Wyk of the Serious Economic Offences Unit of the Hawks took over.

[11] ICT had also lodged a fraud complaint with the Serious Economic Offences Unit of the Hawks against Sishen's holding company, Kumba. Superiors at the Economic Offences Unit wanted the Kumba case to be dealt with separately from the ICT case. The applicant was not responsible for the investigation of the complaint against Kumba. ICT later complained that the applicant was not even-handed in her handling of the complaints against ICT and Kumba.

[12] Sishen appointed Advocate Michael Hellens to advise them and to protect their interests in the ICT case. The applicant invited him and his attorney to her office to explain aspects of the civil dispute to her and Captain Van Rensburg. When Lt-Colonel Van Wyk later took over as investigating officer, she again invited him and his attorney to her office to give her the same explanation. She did so believing that the civil dispute had generated a large body of evidence which had in turn given rise to very complex issues of fact and law.

[13] In the course of investigating the ICT case, the applicant and Lt-Colonel Van Wyk applied for a search warrant in terms of section 21[3], to search certain premises including those of ICT. They asked for Mr Hellens' assistance with the preparation of the application for the search warrant. The search warrant was issued by a magistrate in Kimberley on 26 July 2011 and was executed by SAPS. They seized a large volume of evidence including documents and electronic evidence downloaded from a computer and two cellular telephones at ICT's offices.

3 of the Criminal Procedure Act No 51 of 1977.

[14] On Friday 19 August 2011, ICT launched an urgent application in the Kimberley High Court for the search warrant to be set aside and for the return of evidence seized under it. An interim default order was granted, in terms of which SAPS had to deposit all the evidence seized under the warrant with the Registrar of the High Court for safekeeping pending the determination of the remainder of the application. The SAPS opposed ICT's application. Sishen and Kumba also sought and obtained leave to oppose it. All the respondents filed affidavits in opposition to ICT's application.

[15] The applicant also participated in the litigation in Kimberly including filing affidavits, taking legal advice from Mr Hellens on the proper cause of action to take. At that time, Lt-Colonel Van Wyk had deposed to an affidavit in the Kimberly High Court dispelling the allegation by ICT that Mr Hellens was conducting and directing the investigation. Lt-Colonel Van Wyk had said that Mr Hellens was not involved and that application for a search and seizure warrant was prepared by her assisted by the applicant. Mr Hellens was not mentioned. At that time both the applicant and Lt-Colonel Van Wyk downplayed the extent of Mr Hellens involvement in the criminal investigation. According to the respondent, it was also alleged that during the search and seizure, Mr Hellens, as Sishen/Kumba counsel, was granted unfettered and unhindered access to the premises and the seized documents.

[16] The ICT case came before the High Court but was postponed several times. On 28 October 2011, the applicant was in attendance. Representatives of Sishen and Kumba also attended as respondents in ICT's application and the complainants in the underlying criminal investigation. Mr Hellens accompanied his clients as he held a watching brief in the matter.

[17] On 25 November 2011, the applicant was called to a meeting with Advocate Karen Van Rensburg, the Acting CEO of the NPA, Advocate Mzinyathi, and Dr Ramaite, a Deputy NDPP. Advocate Van Rensburg told her that they had received a complaint against her, without divulging the nature of the complaint or even the identity of the complainant. She said that they proposed to transfer the applicant to the office of the DPP, North Gauteng. The applicant

protested, saying if they did so, it would be tantamount to a conviction without a hearing and that she would resign in protest with immediate effect. Advocate Van Rensburg asked her to leave the room for them to consider her response.

[18] When she was called back in, Advocate Van Rensburg said that the applicant could continue with normal duties but had to withdraw from the ICT case. She agreed to do so. Particulars of the complaint against her and the steps proposed to be taken to investigate it were to be sent to her. After the meeting, she arranged with Advocate Paul Louw of her office to take over from her as the prosecutor in the ICT case. He did so.

[19] On 2 December 2011, Mr Wasserman, an Acting Senior Manager in the NPA's Integrity Management Unit, was appointed to head a team to conduct a preliminary investigation against the applicant. In January 2012, Mr Wasserman's investigation team said it had found that a *prima facie* case of misconduct by the applicant existed. On the strength of the preliminary findings by Mr Wasserman's team, on 01 February 2012, the NPA decided to initiate the process for the possible suspension of the applicant. On 1 February 2012, the NPA issued a notice of intention to suspend the applicant. She received the notice on 2 February 2012. Also, on 1 February 2012 the applicant heard that NPA had publicly announced that she had been suspended from duty. The media reported the announcement on the following day.

[20] An article in the City Press reported that the applicant had been suspended and quoted an NPA spokesperson Mr Mthunzi Mhaga as having said that all cases she was handling would be re-assigned to other equally capable prosecutors within the NPA. Mr Mhaga also confirmed in an interview with Talk Radio 702 on 2 February 2012 that the applicant had been suspended. While the respondent conceded to having issued the public statement about the suspension of the applicant, it contended that a communication error had taken place resulting in such unintended announcement.

[21] The applicant consulted with and briefed an attorney, Mr Gerhard Wagenaar, who was to find out from the NPA whether she had indeed been suspended. He met with Mr Ronnie Pather of the NPA on 2 February 2012. Mr Pather gave him a letter for the applicant from Advocate Van Rensburg dated 1 February 2012. It stated that the NPA intended to suspend her and gave her 48 hours to give reasons why she was not to be suspended. The only reason she gave for their intention to suspend her was that she had abused her powers in execution of her duties as a Senior Deputy Director of Public Prosecutions in an investigation under the Kimberley or the ICT case.

[22] Mr Wagenaar addressed a letter to Advocate Van Rensburg on 6 February 2012, enquiring whether it was true that the decision to suspend the applicant had already been taken and he asked for a copy of the complaint as the applicant felt she could not otherwise meaningfully respond to it. Advocate Van Rensburg responded on the same day but to no satisfaction to the applicant and her attorney. She felt that she had not been given any meaningful explanation of the allegations against her to so as to respond accordingly. The applicant did not submit any reasons within the 48 hours given to her of why she was not to be suspended. All that NPA had from the applicant was her affidavit of 8 February 2012 in which she responded to the same accusations made in the ICT's replying affidavit in the Kimberly matter.

[23] The NPA's public announcement that the applicant had already been suspended, Advocate Van Rensburg's failure to confirm whether that was so and her refusal to give the applicant a copy of the complaint or any meaningful particulars about it, made the applicant feel that the NPA had decided and was determined to suspend her and was merely paying lip service to the requirement that she be afforded an opportunity to put her side of the case.

[24] On 14 and 17 February 2012, Mr Wagenaar addressed further letters to Advocate Van Rensburg, in which he asked her as a matter of urgency, to furnish a copy of the complaint or particulars of it. The request was not favourably met.

[25] On 8 February 2012, after seeking and obtaining permission from Advocate Mrwebi, the applicant deposed to an affidavit for the Kimberly High Court matter. For the first time the applicant admitted the involvement of Mr Hellens in the drafting of the search and seizure warrant, but said that it was not uncommon in complex matters for the State or prosecution to solicit the assistance of outside counsel. According to the respondent, Mr Hellens had no business in drafting and settling affidavits on behalf of the State, including affidavits deposed to by the applicant and Colonel Van Wyk. Mr Hellens was not counsel for the State. He was counsel for Sishen/Kumba, an adversary of ICT in the criminal investigation.

[26] The essence of the complaint lodged against the applicant and Captain Van Wyk was that they had aligned themselves with Mr Hellens and his clients. ICT's complaint was further that the applicant did not consider certain Sishen and Kumba officials to be suspects in the investigation of the criminal complaint ICT had laid against them. They said that the applicant had clearly become involved in that investigation, and yet her conduct and that of Mr Hellens at court on 28 October 2011, supported their suspicion that she had no true intention to investigate ICT's complaint against Sishen and Kumba. The allegations that were made against the applicant questioned her impartiality, objectivity and whether the applicant was in contravention of section 32 of the NPA Act. The NPA regarded the allegations as serious given the role of the NPA and its prosecutors in the prosecution of crime. They are required by section 32 of the NPA Act and the code of conduct for prosecutors and the prosecution policy to act impartially, and without fear, favour or prejudice.

[27] On 7 February 2012, Mr Wasserman requested the applicant to surrender the NPA laptop allocated to her, so that he could conduct investigations into the ICT complaints. The applicant undertook to make the laptop available and to allow the making of a copy of the harddrive on the assurance by NPA that it would have access only to official and not private information, asserting a claim that she had a right to the protection of her private material on her computer. The applicant was however, not suspended then and, with the

exception of the exchange of correspondence between her attorney and Advocate Van Rensburg no further developments of note took place until April 2012.

[28] On 18 April 2012, Mr Wasserman met with the applicant and Mr Wagenaar, as her attorney. Mr Wasserman handed them a copy of ICT's original letter of complaint of 31 October 2011 and a letter from Mr Wasserman dated 18 April 2012. His letter informed her of the NPA's intention to suspend her and invited her written response by 25 April 2012. ICT's complaint made the same accusations as those made in the Kimberly High Court matter to which the applicant had responded in her affidavit. She then gave Mr Wasserman a copy of that affidavit. She was informed for the first time of the nature of the complaint against her but she felt she was still not informed of the reasons why the NPA considered suspending her. She felt she could, for the first time, make meaningful representations about the complaint against her but still could not make any representations on the proposed suspension and she consulted with her attorney.

[29] On Monday 30 April 2012, when the applicant arrived at her office she was met by two NPA officials who handed to her the letter of suspension from the Acting NDPP dated 23 April 2012. The letter said in paragraph 3 that: 'After careful consideration of the facts at our disposal, you are hereby precautionary suspended'. She was to adhere to the directive of the letter of suspension that she had to refrain from any contact with any of the staff of the NPA. The NPA further issued a public statement of that suspension on which the media reported later the same day.

[30] Mr Wagenaar addressed further letters to the NPA on 2 and 3 May 2012*, inter alia,* asking for the facts leading to and the reasons for the decision to suspend the applicant and he also asked the NPA for an undertaking that it would adhere to the prescribed limit of 60 days within which her disciplinary enquiry would be held. He asked for a list of witnesses with whom the applicant was not to have contact.

[31] The Acting NDPP responded to Mr Wagenaar's letter of 2 May 2012 in a letter dated 4 May 2012 saying that the decision to suspend the applicant was based on the seriousness of the allegations against her and the NPA's belief that her continued presence at work might jeopardise the investigation into the allegations against her. She declined to identify the NPA witnesses with whom the applicant was not allowed to have contact and merely said that this prohibition was a precautionary step to avoid possible interference with the investigation. She said the information to which she had had regard in her decision to suspend the applicant comprised ICT's complaint and the applicant's and Colonel Van Wyk's affidavits made in response to ICT's accusations in its replying affidavit.

[32] The applicant initially regarded the complaint against her as spurious, baseless and wholly unsubstantiated. On 1 June 2012, the applicant launched this application. On 11 June 2012, the applicant was served with a notice to attend her disciplinary enquiry which was scheduled to take place on 19 June 2012. The charges levelled against her were detailed in the charge sheet which on 18 June 2012 was later amended in order to provide further particulars to the allegations levelled against her.

[33] The Applicant launched this application principally on the grounds that her suspension was for an ulterior motive, was unfair and had therefore to be set aside. She alleged that her suspension related to the role she played as a prosecutor in the matter involving Lt General Mdluli. The applicant contended that she was suspended in order to protect General Mdluli from prosecution. Advocate Jiba was said to have merely used the ICT complaint against the applicant as an excuse to suspend her. In response to these submissions, the respondent said that the applicant had recklessly and falsely made serious allegations against Advocate Jiba. That was said to have been carefully devised by the applicant to divert attention from the serious allegations she was facing regarding her conduct, which conduct was said to have tarnished the good name of the NPA and brought the NPA into disrepute. The applicant was said to have persisted with serious unsubstantiated allegations in circumstances in which she knew that those allegations were false and were a

ploy on her part devised to divert attention from the serious allegations levelled against her.

[34] The respondent denied that the allegations contained in the applicant's affidavit relating to the criminal investigations against General Mdluli were relevant to these proceedings. It submitted that the allegations were frivolous, irrelevant and vexatious. The conduct of the applicant in this matter was said to amount to an abuse of the processes of the court. The respondent contended that it would be seriously prejudiced if the allegations contained in the applicant's affidavit were not struck out in the sense that the respondent would be required to deal with irrelevant allegations which were never considered when the decision to suspend the applicant was made.

[35] A summary of the facts alleged by the respondent to be frivolous, irrelevant and vexatious with the result that the respondent would be seriously prejudiced if the allegations contained in the applicant's affidavit were not struck out follows hereunder.

[36] Two members of staff working under supervision of the applicant, Advocate Jan Ferreira and Advocate C B Smith were in charge of investigations for fraud and corruption against a very senior member and head of the Crime Intelligence Unit of the SAPS, one Lieutenant General Richard Mdluli. The investigating officer in the matter was Colonel Kobus Roelofse, a senior officer of the SAPS' special investigations known as the Hawks.

[37] On 24 October 2011, General Mdluli was arrested on the fraud and corruption charges. It seems that after his arrest, some members of the Crime Intelligence Unit working under him came forward with incriminating evidence which led to further investigations of fraud and corruption charges against him.

[38] On 17 November 2011, General Mdluli's attorneys, Messrs Maluleke Seriti Makume Matlala Inc, handed written representations to Advocate Lawrence Mrwebi, as the Special Director of Public Prosecutions and National Head of

the SCCU. They asked for the fraud and corruption charges against General Mdluli to be withdrawn. On 21 November 2011, Advocate Mrwebi forwarded the representations to the applicant, asking for a full report on the matter by 25 November 2011. The applicant henceforth took charge of the matter. She asked her colleague Advocate Smith to prepare the report requested by Advocate Mrwebi. Advocate Smith prepared such a report dated 22 November 2011, refuting the allegations on which General Mdluli's representations were based.

[39] She forwarded Advocate Smith's report *per* memorandum dated 24 November 2011 to Advocate Mzinyathi, the DPP North Gauteng, and to Advocate Mrwebi, pointed out that General Mdluli's representations were based on wild and unsubstantiated allegations and recommended that his prosecution be continued so that a court could decide on his guilt or innocence.

[40] On 28 November 2011, the applicant received a further memorandum from Advocate Mrwebi, copied to Advocate Mzinyathi. He was dissatisfied with Advocate Smith's memorandum and required a summary of the docket, an analysis of the evidence and an analysis of the applicable law together with the entire docket by no later than 2 December 2011. She asked Advocate Smith to prepare the report required by Advocate Mrwebi. He did so in a memorandum dated 30 November 2011 and attached an electronic copy of the docket to it. She forwarded the memorandum to Advocate Mzinyathi and copied it to Advocate Mrwebi in a memorandum dated 30 November 2011.

[41] On 4 December 2011, the applicant received two memoranda from Advocate Mrwebi. The first was a covering memorandum which referred to the second as a consultative note. Advocate Mrwebi instructed in the covering memorandum that, for the reasons set out in the consultative note, the charges against Lt-General Mdluli and Colonel Barnard were to be withdrawn immediately. From the consultative note the applicant understood the only reason for the withdrawal of the charges to have been that, Advocate Mrwebi was of the view that the investigation of the fraud and corruption charges

against General Mdluli was the exclusive preserve of the Inspector General of Intelligence in terms of section 7(7) (cA) of the Intelligence Services Oversight Act 40 of 1994. The applicant totally disagreed with the decision taken and reasons proffered by Mr Mrwebi for the withdrawal of charges against Lt-General Mdluli. She consulted with Mr Mzinyathi as her immediate superior. On 14 December 2011, the fraud and corruption charges against General Mdluli were withdrawn.

[42] When the Inspector General of Intelligence was to an extent involved in this matter, he issued a letter received by the applicant under cover dated 23 March 2012 from General Dramat of the SAPS, stating that the matter fell out of his scope of operation in. The contents of that letter were a subject of subsequent discussion held by the applicant and Mr Mrwebi on 26 March 2012.

[43] On 27 March 2012, the applicant received a memorandum from Advocate Mrwebi calling on her to explain how and why his consultative note of 4 December 2011 had been disclosed to General Dramat and to the Inspector General of Intelligence. The applicant explained that she had given a copy of his consultative note to Brigadier Moodley of the Hawks, the superior officer of the investigating officer Colonel Roelofse. Advocate Mrwebi responded to the letter from the Inspector General of Intelligence. He did not contest the views expressed by the Inspector General of Intelligence and no longer insisted that the latter had the sole preserve to investigate the fraud and corruption charges against General Mdluli. He did not attempt to defend this proposition which had been the sole basis of his instruction of 4 December 2011 that the fraud and corruption charges against General Mdluli be withdrawn. He however refused to reconsider his decision.

[44] The applicant and Advocate Ferreira prepared a memorandum dated 13 April 2012 for submission to Advocate Jiba to persuade her to reinstate the charges withdrawn by Mr Mrwebi against General Mdluli and that an instruction that the prosecution of General Mdluli be withdrawn, was a mistake. The memorandum was delivered to Advocate Jiba, the Deputy

NDPPs and Advocate Mrwebi only on 24 April 2012. Six days later the applicant was served with a letter of suspension from Advocate Jiba dated 23 April 2012.

The application to strike out

[45] The respondent submitted that the applicant was suspended on the basis of her alleged misconduct relating to the investigations into the criminal complaint laid against ICT by Sishen/Kumba and that she was aware of the true reason for her suspension. In her affidavit, the applicant sets out in detail the nature of the criminal investigations against General Mdluli, the role she played in the case and the reasons why she believes that she was suspended in order to sidetrack the prosecution of General Mdluli. It was submitted that the respondent had proved the two requirements for the success of a striking out application being that:

- the allegations contained in the paragraphs which are subject to this application are scandalous, vexatious or irrelevant.

- severe prejudice if the allegations contained in the offending paragraphs are not struck out.

[46] Had the respondent sought to discipline the applicant for her role in the General Mdluli matter by having recourse to the ICT matter, the respondent would probably not have confessed to it. Accordingly this issue is not as simple as the respondent would have court believe. As alluded to before, on 25 November 2011, the applicant was called to a meeting with Advocate Karen Van Rensburg, the Acting CEO of the NPA, Advocate Mzinyathi, and Dr Ramaite. The four officials must have had a prior discussion of the matter for which they came to see the applicant. If not, it begs the question who selected them and why they would take the trouble to participate in an anonymous meeting. On 1 February 2012, NPA issued a notice of intention to suspend the applicant and publicly announced it. An article in the City Press reported that the applicant had been suspended and quoted Mr Mhaga as

having said that all cases she was handling would be re-assigned to other equally capable prosecutors within the NPA. Mr Mhaga also confirmed in an interview with Talk Radio 702 on 2 February 2012 that the applicant had been suspended. Mr Mhaga would have had a discussion with a certain NPA official or officials on this matter to have erroneously issued the press statement. The letter of suspension of the applicant dated 23 April 2012, issued by Advocate Jiba, sought to operate with immediate effect and yet it was handed to her one week later. Advocate Jiba has offered her explanation on this delay.

[47] When the totality of these circumstances and facts are seen together, they create a serious doubt on the probabilities the explanation proffered by the respondent in respect of them. When the applicant initiated this application she did not know the misconduct with which the respondent would charge her and the details thereof. To aver that she sought to detract attention away from that charge therefore has no merits at all. It has to be remembered that she did to seek to attack the charge or charges against her in this application but rather to have the suspension set aside. There is therefore no room for confusion.

[48] Accordingly therefore, the application to strike out identified portions of the evidence of the applicant contained in her founding affidavit is dismissed.

<u>The suspension</u>

[49] In the main, the application to set aside the suspension is premised on the submissions that:

- an employee in the state service has a contractual right to procedural fairness in terms of the *audi alteram partem* rule,

- the principle of *audi alteram partem* rule includes the right to sufficient information so that the employee can make meaningful representations and an obligation on the employer

to consider the representations and that

- the respondent, as the employer, failed completely in these regards.

[50] The circumstances under which the respondent is said to have denied the applicant her right to the applicability of the *audi alteram partem* rule as a consequence of which its conduct is said to be unlawful are detailed in the main and the supplementary heads of argument.

[51] The rules applicable to the SMS are published in the SMS Handbook in terms of Regulation D of Part I of Chapter 4 of the Public Service Regulations. Chapter 7 deals with misconducts and Incapacity. Section 2 of Chapter 7 of the SMS Handbook deals with disciplinary matters and paragraph 2.7(2)(a) thereof provides that:

> 'The employer may suspend or transfer a member on full pay if –
>
> - the member is alleged to have committed a serious offence; and
>
> - the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property.'

[52] Paragraph 2.7(2)(c) states that, if a member is suspended as a precautionary measure, 'the employer must hold a disciplinary hearing within 60 days' but that the chair of the hearing 'may then decide on any further postponement'

Applicable legal principles

Urgency of this application

[53] The applicant did not wait for the lapse of 60 days within which the

respondent had an option to hold a disciplinary hearing. She waited for about 30 days after the letter of her suspension was handed to her. The period is about 38 days from the date of issue of the letter of suspension, which was to operate with immediate effect. In my view, the diminution of 60 days could reasonably be construed as the commencement of urgency in the matter as the days within which the respondent could lawfully and fairly discipline its employee were running out. The applicant raised reputational damage as a basis for lifting the suspension or for granting a declaratory order as on urgent basis. She averred that the suspension should not be perpetrated any longer than was absolutely necessary, thus alluding to the matter being what is often referred to as semi-urgent. The 30 to 38 days waiting period could therefore not be construed as unacceptable as contended by the respondent.

The audi alteram partem rule

[54] The applicant contended that she had a right to be heard before she could be suspended and she relied on the applicability of the *audi alteram parte* rule. She referred court to a number of decisions. In *Muller and Others v Chairman of the Ministers' Council: House of Representatives and Others,* [4] the court said at 775H - 776A:

> 'Such suspension unquestionably constitutes a serious disruption of his right. The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred, are not so immediately realised by the outside observer and appear, with respect, perhaps to have been underestimated in the *Swart* and *Jacobs* cases. There are indeed substantial social and personal implications inherent in that aspect of the suspension. These considerations weigh as heavily in South Africa as they do in other countries.'

[55] From the onset, it needs to be observed that an employer has a general right

4 (1991) 12 ILJ 761 (C). See also *SA Post Office v van Vuuren NO and Others* (2008) 29 (LC); *Mogothle v Premier of the Northwest Province and Another* (2009) 30 ILJ 605 (LC); *Lebu v Maquassi Hills Local Municipality and Others* (2) (2012) 33 ILJ 653 (LC) and *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA).

to discipline its employees. It will only be in exceptional cases that this Court will intervene in uncompleted disciplinary proceedings[5]. Ordinarily precautionary suspension is not an end to itself. It should be followed by a decision to charge an employee with acts of misconduct or the setting aside of suspension where evidence could not sustain the suspicion earlier formed, on the basis of which suspension was resorted to in the first place. The disciplinary hearing, if held, provides the employee the first opportunity to deal with the charge or charges and the circumstances of the suspension. This aspect distinguishes suspension measures from those administrative procedures in which the principle of *audi alteram partem* rule was held to be applicable[6].

[56] In the present matter though, the respondent is better advised to thread with very great circumspect in exercising its right to discipline the applicant. In light of the the North Gauteng High Court (per Makgoba J) in an application brought by Freedom Under Law against General Mdluli, there is a real likelihood that by exercising that right it might be found to be flouting and frustrating the aims and objects of the investigations ordered by that court to be conducted thus being contemptuous towards that decision. It has been shown in these proceedings that the applicant will probably be a vital official in that probe. If she is found guilty and is dismissed she will be handicapped from utilising the tools of trade she might need in those investigations. The justice sought to be striven for in the matter of General Mdluli would have been seriously compromised.

[57] In opposing this application the respondent has relied on the decision in *Member of Executive Council for Education, North West Provincial Government v Errol Randal Gradwell*[7]. In respect of a right to be heard before the employer decides to suspend an employee, the following was said:

> ‘[42] There is nevertheless a noticeable lack of clarity in the case law about the basis upon which the *audi alteram partem* rule applies. Since *Chirwa* it is

5 *Booysen v SAPS and Another* [2008] 10 BLLR 928 (LC).
6 A number of such decisions were relied on by this court in *Baloyi v Department of Communications and Others (*2010) 31 ILJ 1142 (LC).
7 Yet unreported Case number JA 58/10 delivered on 25 April 2012 (LAC).

irrefutable that the Labour Court may not review a suspension of an employee in terms of section 6(2)(c) of PAJA on the grounds of procedural unfairness. As I have mentioned, the MEC's main criticism of the court *a quo's* reasoning is that it assumed without justification that the contract of employment contained an implied term, as part of a duty of fair dealing perhaps, providing for a right to be heard prior to the imposition of a precautionary suspension. As far as I am aware, there is no decided case, and we were referred to no other authority, in which it has been held or argued that the common law contract of employment has developed to the point that a right to a hearing prior to suspension forms one of the *naturalia* of the contract, being "an unexpressed provision of the law of contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties". A court, in an appropriate case, could legitimately rule that contemporary constitutional *mores* endorse the incorporation of a right to a hearing before suspension as an implied term...

[44] The proposition that all suspensions should be procedurally fair to avoid the stigma of an unfair labour practice, on the other hand, requires some qualification. Fairness by its nature is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interest and expectations affected by it, the circumstances in which it is made and the consequences resulting from it.

[45] 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.

[46] 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 section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the labour court in terms of section 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, 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.' [Footnote omitted]

[58] It follows from the *Gradwell* decision that suspension of an employee if challenged, gives rise to a labour dispute relating to unfair labour practice. Section 185(b) read with 186(2) of the Act categorizes a suspension as an unfair labour practice. Unfair labour practice disputes must be referred to the Commission for Conciliation, Mediation and Arbitration, (CCMA) or a Bargaining Council for conciliation and arbitration[8]. This Court does not have jurisdiction to adjudicate on a suspension, whether categorized as unlawful or unfair, which the Act has conferred exclusive jurisdiction on the CCMA and Bargaining Council. The facts of this matter appear to be in all fours with those in the *Gradwell* decision and the legal principles outlined therein must therefore be followed by this Court.

[59] The applicant has not shown the existence of any extraordinary or compelling urgent circumstances to justify a final declaration of the unlawfulness of her suspension. There are reasonable prospects that if the disciplinary hearing against her is persisted with, it will be finalised within a reasonable time period. If not, she may refer an unfair labour practice dispute.

[60] Having reflected on the fairness and appropriateness of the costs order, the following order shall issue:

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8 See section 191 of the Act.

1. The application is dismissed.

2. No costs order is made.

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Cele J

Judge of the Labour Court.

APPEARANCES:

FOR THE APPLICANT:	Advocates Redding SC and Grundlingh Instructed by Gerhard Wagenaar Attorneys
FOR THE RESPONDENT:	Advocate Mokhari SC with M Zulu and T Motloenya instructed by the State Attorneys