REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

Of interest to other judges

Case no: JA 58/10

In the matter between:

MEMBER OF THE EXECUTIVE

COUNCIL FOR EDUCATION, NORTH **Appellant**

WEST PROVINCIAL GOVERNMENT

and

ERROL RANDAL GRADWELL **Respondent**

Heard: **06 March 2012**

Delivered: **25 April 2012**

CORAM: WAGLAY DJP, MOLEMELA AJA and MURPHY AJA

JUDGMENT

MURPHY AJA

[1] On 27 July 2010, the respondent made an urgent application to the Labour Court in terms of section 158(1)(a) of the Labour Relations Act[1] ("the LRA") challenging his suspension from employment as the acting head of the Department of Education in the North West Provincial Government. Section 158(1)(a) provides that the Labour Court may make any appropriate order including, as relevant in the present application, the grant of urgent interim relief, an interdict and a declaratory order. On 30 July 2010, van Niekerk J granted both a final order declaring the respondent's suspension by the appellant unlawful and an interdict prohibiting the Premier of the North West Province from filling the post of head of department of the Department of Education in the province unless and until the respondent was afforded an opportunity to be interviewed for the post. This is an appeal against his judgment.

[2] The appellant, the Member of the Executive Council for Education, North West Provincial Government, ("the MEC") was the second respondent *a quo*. The first respondent *a quo*, the Premier, is not joined in the appeal. The respondent, Mr Errol Gradwell, was a Chief Director in the department, and served as acting

1 No 66 of 1995

head from October 2009 until his suspension by the MEC on 15 July 2010.

[3] The respondent has not filed any opposing papers in the appeal and made no appearance at the hearing. As a result, the appeal is unopposed.

[4] The respondent's suspension was a consequence of claims of serious wrongdoing in the department raised by the Auditor-General in June 2010. On 13 July 2010, the MEC addressed a letter to the respondent informing him that he had received information alleging financial misconduct on his part in relation to the Bessie Mpelegele Ngwane Care Centre in Rustenburg. The allegations, set out in some details in the letter, relate to the suspected unlawful conversion of the privately owned Centre into an "ordinary public school", (which in terms of the governing legislation would have resulted in the provincial government assuming financial responsibility for the Centre); unauthorised expenditure in the form of a transfer of funds from the national nutritional program to fund the Centre; a lack of proper accountability in respect of funds paid to the Centre during 2009 and contraventions of the Public Management Finance Act ("the PFMA"). After setting out the allegations, the MEC stated that the information was serious enough to warrant an immediate investigation into possible acts of misconduct by the respondent. He then concluded:

> 'In an effort to accord you the benefits of being heard before a decision to suspend you from official duty is taken, you are hereby requested to show cause why the Department should not invoke the provisions of clause 2.7(2)(a) of Chapter 7 of the SMS handbook 2003 against you.'

The respondent was given until 10h00 on 14 July 2010 to furnish written representations.

[5] The "SMS Handbook" referred to in the letter is the "Senior Management Service Handbook" which applies to senior management in the public service. The terms and conditions of the senior management of the public service, from the level of

Director upwards, are not regulated by collective bargaining, but are determined by the Minister for the Department of Public Service and Administration by means of subordinate legislation issued in terms of the Public Service Regulations 2001, which determinations are referred to and known as the "SMS Handbook". The ministerial determinations in respect of misconduct proceedings are contained in Chapters 7 and 8 of the SMS Handbook. Paragraph 18.1 of the SMS Handbook provides that the suspension of Heads of Department must be dealt with in terms of Chapter 7 of the SMS Handbook, including paragraph 2.7(2) which provides as follows:

> '(2) **Precautionary suspension or transfer**
>
> (a) The employer may suspend or transfer a member on full pay if -
>
> - the member is alleged to have committed a serious offence; and
>
> - the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or State property.
>
> (b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.
>
> (c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The Chair of the hearing must then decide on any further postponement.'

Paragraph 18.2 of the SMS Handbook, which applies specifically to the suspension of heads of department, repeats verbatim the provisions of paragraph 2.7(2)(a). It is common cause that the provisions of paragraph 2.7(2) are applicable in this case.

[6] The respondent replied to the MEC's letter on 14 February 2010, confirming that he had received the MEC's letter the previous evening. He admitted his involvement with the Centre, but maintained that it had been converted to an ordinary public school with the authorisation of the Chief Director: Education Support Services and the previous head of department. With regard to the allegations of unauthorised expenditure, improper accounting and contravention of the PFMA, he requested to be provided with more information in order to be afforded the opportunity to "respond more meaningfully". He further complained that he had been afforded insufficient time to respond to the charges against him.

[7] The MEC responded on the same day as follows:

> 'I have considered your response to my letter dated 13 July 2010 and served on you yesterday regarding the Bessie Mpelegele Ngwane Care Centre.
>
> The purpose of the said correspondence from me was to request you to give me reasons as to why I should not suspend you from duty pending investigations into allegations made against you relating to the Bessie Mpelegele Ngwane Care Centre. The purpose was not to list possible charges against you as the allegations must still be investigated. You were only requested to provide this office with any information at your disposal regarding this Centre and your involvement in the said Centre. The listed questions were to guide you as to the scope of your response.
>
> Please note that a decision to investigate has not yet been finalised, but this office awaits your further input to consider whether grounds exist to suspend you on the basis of the allegations made and/or to further investigate the allegations received by this office.
>
> In light of the above, I have decided to provide you with an extension of time. You are therefore requested to provide me with any further reasons why I should not place you on precautionary suspension pending investigations into the allegations made as set out in the initial letter. Your response must reach me

on/before 16:30 today.'

[8] The respondent replied to this saying that he would be unlikely to respond before Monday 19 July 2010 and requested permission to travel to Rustenburg on 15 July 2010 so that he could "engage with the documentation alluded to" in order to prepare a response.

[9] The respondent was suspended by the MEC on 15 July 2010 by way of a letter of suspension. The MEC set out the history of correspondence regarding the accusations of serious misconduct and informed the respondent that he had duly considered the representations which the respondent had made in his letter of 14 July 2010. He explained that since he had decided to commission a thorough and immediate investigation into the allegations of misconduct, and believed the respondent was in a position to interfere with witnesses and documentary evidence, he had decided to invoke the provisions of paragraph 2.7(2) of the SMS Handbook. He notified the respondent that the precautionary suspension would be for a maximum period of 60 days and would be with full pay and benefits.

[10] The application for urgent relief was filed on 26 July 2010 and, as already mentioned, was heard on 27 July 2010. In his founding affidavit, the respondent contended that his suspension was motivated *inter alia* by the "improper motive of destabilising and removing me from contention for the post of Head of Department". He explained that he was acting in the post and had been short-listed to be interviewed on 20 July 2010. In light of his suspension, the respondent had sought through his attorneys to obtain an undertaking to be interviewed at a later date. This was refused but it was communicated to the respondent that he should attend the interview on 20 July 2010. The respondent did not attend the interview. He claimed that there was a politically favoured candidate and that the "unfounded investigation allegations" for his suspension were "simply a ploy" to frustrate his preparation for the interview.

[11] As regard the legal basis for the suspension, the respondent submitted that there was no justifiable reason to believe that he had engaged in serious misconduct. He maintained that the allegations were too wide and that he was unable to deal with them meaningfully. He did not deal directly with the allegations that he had unlawfully or improperly converted the Centre to an ordinary public school and transferred funds to it from the national nutritional program without the necessary authority. He submitted that there was no objective reason to deny him access to the workplace, and denied that he had much contact with his subordinates and contended that his right to integrity and reputation outweighed any risk that he might interfere with the investigation. He claimed (puzzlingly, in my view, in light of the contents of the letter of suspension) that the MEC had not made a decision to institute an investigation and thus that there was no basis for his suspension on that score as well. And finally, he asserted that there had not been compliance with the principle of *audi alteram partem* in that the allegations against him had not been sufficiently particularised and he was denied sufficient time to respond to them.

[12] In support of his request for an order interdicting the final appointment of a new head of department, the respondent made out the following case in paragraphs 30-32 of the founding affidavit:

> '30. I have applied for the post and already have been shortlisted and invited to an interview. This happened before my suspension. However, I have been deprived the opportunity to prepare for my interview. This deprivation is prejudicial to my chances meaningfully to participate in the job interview. Firstly, I have been frustrated and preoccupied with a "suspension". Secondly, I have been deprived of access to all the tools that would have assisted me in my preparation for the interview. Thirdly, I am psychologically impaired to perform to my optimum ability due to both suspension and seizure of my tools. Fourthly, I reasonably believe that my unlawful suspension would unfairly stigmatise and prejudice my candidature in the eyes of the interviewing panel.

> 31. The First or Second Respondent would not be prejudiced in affording me an opportunity to prepare myself for the interview. I therefore submit that I ought to be given a chance to be interviewed after having properly prepared for the interview, same as others. While it is undeniably so that practical steps would have to be taken to reconvene the interviewing panel, weighing against my constitutional right to fair labour practices, the balance of convenience tilts in my favour.
>
> 32. Should the process of appointment continue unabated, then the rights of the appointee will be severely affected by any subsequent finding that I was entitled to an interview. I would then suffer irreparable harm if it was held that the new appointee's rights entitle him or her to remain in the position. No alternative remedy could vindicate my rights."

[13] In response to the respondent's various averments, the MEC comprehensively set out the background and reasons for the suspension in his answering affidavit.

[14] The previous Head of Department, to whom the respondent had reported, was suspended on 2 October 2009 on suspicion of fraud, corruption and financial irregularities and subsequently resigned. Because no suspicion of misconduct against the respondent had as yet surfaced, the respondent, being Chief Director, was appointed as Acting Head of Department on 5 October 2009.

[15] In June 2010, the Auditor-General released a communication in respect of the department which contained audit queries in respect of financial transactions of the department. Staff of the Auditor-General subsequently met with the MEC and relayed various concerns, particularly regarding the developments at the Bessie Mpelegele Ngwena Care Centre.

[16] As Chief Director, the respondent was responsible for the region in which the Centre fell. The Centre was formerly a privately owned Centre caring for severely intellectually disabled children and young adults, and was registered with the Department of Social Development. No qualified educators (teachers) are

employed by the Centre. There is another publically funded school in the area which caters for intellectually disabled children. Officials in the department informed the MEC that the respondent had requested them to sign documentation registering the Centre as a public ordinary school after he brought them under the impression that the Centre was to be registered as a "privately owned special school". The Centre was issued with a registration certificate on 6 April 2009 registering it as a public ordinary school, when it is in fact not one and did not qualify for registration as such. It is not in fact a school at all and provides very basic educational services. The registration form, completed on 20 April 2009 after the registration certificate was issued, records that the respondent is the manager of the institution.

[17] Besides the fact that the conversion was done improperly, the possibility exists that there have been significant accounting irregularities and that the respondent stood personally to gain financially from the development of the Centre. In 2009, a large mining company, Anglo Platinum Ltd, donated an amount of R7,2 million for the construction of a new building for the Centre on land made available by the Rustenburg Municipality. The budgeted building cost was initially set at the amount of the donation, R7.2 million. Later, the respondent attempted to persuade the former Head of Department to advance an additional R9,7 million from department funds to finance a projected shortfall in the building costs. It is not clear from the papers whether any money was in fact transferred pursuant to this endeavour. However, R1.2 million of unauthorised expenditure was incurred in the form of funds diverted from the nutritional program to the Centre. A further amount of R704 865,50 was paid to the Centre in 2010-2011 for operating expenses. Neither of these amounts is reflected in the income statement of the Centre's audited financial statements. The only income indicated in the financial statements is an amount of R297 839, being contributions received from parents. In other words, R2 million (at least) of the department's money, earmarked for destitute children, is not accounted for and may have gone missing. The respondent was accountable as a matter of law for the payments made to the

Centre.

[18] Added to that, according to the MEC, the respondent has held directorships in various property development, building and construction entities which perhaps were intended to benefit from construction work on the building. For that reason the ambit of the investigation has been extended to look into the possibility of nepotism and personal gain in addition to the various other financial transgressions discovered by the Auditor-General.

[19] Taking account of this information, the MEC formed the preliminary opinion that there were serious allegations of misconduct against the respondent relating to a lack of accountability in respect of funds paid to the Centre, the unlawful conversion of the Centre into a public school, unauthorised and wasteful expenditure, and the possibility of inappropriate personal financial gain by the respondent. Likewise, because the respondent had virtually unlimited authority over his subordinates and access to all the documentation in relation to the department's dealings with the Centre, and considering that the respondent had been accused of abusing his managerial authority by pressurising subordinates to sign documents, the MEC believed that the respondent's continued presence at the workplace might jeopardise the process of investigation. By then, the MEC had appointed a reputable firm of forensic investigators to conduct the investigation which was scheduled to commence on 19 July 2010. That too explained his reluctance to extend the time afforded to the respondent to make representations. He sought to strike a balance between affording the respondent an opportunity to respond and protecting the interests of the department by preventing the respondent from compromising the investigation and negating the purpose of the suspension.

[20] In his replying affidavit, the respondent declined to canvass the merits of the allegations against him. Instead, he maintained that "the voluminous response" of the appellant had "missed the boat as to what this application is about (or not about)". He remained adamant, curiously, in light of the information disclosed by

the MEC, that it was impossible to reply to the charges of misconduct because the appellant had refused to furnish him with relevant particulars. He submitted that the application had to be determined on three grounds; namely: whether the appellant possessed the legal authority to suspend him (this ground appears to have been abandoned later); whether the appellant had afforded him a reasonable opportunity to be heard before taking the decision to suspend him; and, thirdly, whether the refusal of his request for further details regarding the allegations of misconduct was justifiably refused by the appellant. He argued that the suspension operated "automatically" to infringe his fundamental rights to human dignity and reputation and contravened his "exceptional right" to compete for an employment opportunity.

[21] Much of the replying affidavit deals with the question of authority and the limited time within which to respond to the allegations. As just intimated, the respondent opted to make no averments countering any of the specific allegations regarding unauthorised or wasteful expenditure and the failure to put accounting controls in place. Importantly, he did not deny, or even respond to, the charge that he had unlawfully or inappropriately diverted funds earmarked for the nutritional program. Moreover, although he stated that he had resigned certain directorships before accepting the acting position, the respondent did not identify the companies involved, and, more notably, did not contest the allegation that he was involved in a construction company that stood to benefit from the expansion and development of the Centre.

[22] In his reasons for judgment, handed down some days after he upheld the application for urgent relief, the learned judge *a quo* observed that paragraph 2.7(2) of the SMS Handbook had to be read in conjunction with the principles applied by the Labour Court in relation to such suspensions, specifically:-

- the employer should have reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct;

- there must be an objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the misconduct; and

- the employee should be afforded the opportunity to state a case before the employer makes a final decision to suspend.

[23] The judge *a quo* held that the respondent's suspension was unlawful, and declared it to be so, essentially for two reasons. Firstly, he felt there was no objectively justifiable reason to deny the applicant access to the workplace; and secondly he was of the opinion that the respondent had not been afforded a proper right to be heard prior to his suspension. Having reached those conclusions, the judge deemed it unnecessary to consider whether the employer had a justifiable reason to believe that the employee had engaged in serious misconduct. In paragraph 10 of his reasons he stated:

> 'In view of the conclusions to which I have come, it is not necessary for me to consider whether the allegations of misconduct made against the applicant have any reasonable basis - it is in any event not possible to do so on the papers before me not least because the applicant was denied the opportunity to make full representations prior to his suspension.'

In my respectful opinion, for reasons which will appear presently, the learned judge erred on both the law and the facts and followed an incorrect approach.

[24] The judge's conclusion that the MEC did not have 'an objectively justifiable reason to deny the employee access to the workplace' was predicated upon his findings that before such a course of conduct could be justifiable the MEC had to have taken a decision to conduct an investigation, and that in this instance the MEC had not done so. The requirement of paragraph 2.7(2) is that the employer should believe (reasonably) that the presence of the employee 'might jeopardise any investigation …' The judge was of the opinion that if no decision to

investigate is taken before imposing a suspension, then a condition precedent to the lawful exercise of the power has not been fulfilled. As he put it: 'there ought at least to be a decision to conduct the investigation before suspension is contemplated.' He found that the MEC decided to suspend the respondent before he took a decision to investigate and hence that the suspension was unlawful. The conclusion, in my view, sets the standard too high and is in any event factually erroneous.

[25] The learned judge based his factual finding on a sentence in the MEC's letter to the respondent dated 14 July 2010 which reads:

> 'Please note that a decision to investigate has not yet been finalized, but this office awaits your further input to consider whether grounds exist to suspend you on the basis of the allegations made and/or to further investigate the allegations received by this office.'

This statement cannot alone serve as categorical proof that the condition precedent had not been met. The wording of paragraph 2.7(2) does not unequivocally require the employer to take a conclusive decision to investigate before the power can be lawfully exercised. It is enough that any (current or future) investigation might be jeopardised. The use of the word "any" intimates that if an investigation is within contemplation the precondition will be met. The statement in the letter of 14 July 2010 makes it abundantly plain that such an investigation was being contemplated, but that due process required the respondent's input before a final decision was taken.

[26] But even were a decision to investigate a prerequisite to the lawful exercise of the power to suspend, the MEC averred, and the available evidence confirms, that such a decision was in fact taken prior to the suspension. In the letter of suspension dated and delivered to the respondent on 15 July 2010, the MEC stated:

> 'Consequently I have decided to commission a thorough and immediate investigation into the allegations of misconduct which are levelled against you in your capacity as Chief Director and acting Superintendant-General pertaining to the registration and funding of the Bessie Mpelegele Ngwane Care Centre, and all acts and omissions ancillary thereto. In an effort to allow the investigation process to continue without any real and/or perceived hindrance and/or influence on your part and on the basis of the seriousness of the allegations against you, I have decided to invoke the provisions of Clause 2.7(2)(a) of Chapter 7 of the SMS Handbook …'

[27] In the result, the learned judge's supposition that the suspension was unlawful, because there was no objectively justifiable reason to deny the applicant access to the workplace when no investigation was under way, was both legally and factually incorrect.

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

[29] The judge *a quo* accordingly erred in declining to adjudicate on the papers whether the MEC had a justifiable reason to believe that the respondent had

engaged in serious misconduct. It was possible to do so on the papers; and whether the respondent was denied a hearing prior to suspension had no bearing on his ability to deal with the damning allegations made against him in the answering affidavits. The matter could and should have been resolved in accordance with the principles laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2]. Where disputes of fact arise on the affidavits in motion proceedings, a final order (be it a declarator or an interdict) may be granted provided those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent (excluding those that are untenable or patently un-creditworthy), justify such an order. In other words, relief should be granted only if the common cause facts and the tenable version of the respondent form an adequate basis for the remedy.

[30] In the present case, the MEC's version sets out a detailed and compelling *prima facie* case of serious misconduct against the respondent. As discussed earlier, most of the allegations were not even canvassed, never mind denied, by the respondent in reply. The reasons he advanced for not dealing with them are at best spurious, if not misleading. By the same token, the case made by the MEC that the respondent's presence at the workplace '*might* jeopardize any investigation' was both logical and justifiable in light of the seriousness of the alleged misconduct. The complaint against the respondent includes the accusation that the respondent brought pressure to bear on his subordinates to act inappropriately and the assertion that he would be in a position to do so again were he to remain in the post.

[31] In the final analysis, therefore, the outcome on the evidence presented is that the conditions precedent to the lawful exercise of the power of suspension (a *prima facie* case of serious misconduct and a risk of the investigation being jeopardized) were indeed fulfilled. The only remaining question in relation to the legality of the suspension is whether the suspension was unlawful because the

2 1984 (3) 623 (A) at 634 H-I.

MEC failed to observe the principle of *audi alteram partem*.

[32] The court *a quo* held that the respondent was not afforded a proper right to be heard prior to his suspension because the time constraint imposed by the MEC inviting him to make representations was patently unreasonable. After the MEC agreed to an extension, the respondent in effect had about 18 hours in which to make representations. The MEC took the position that had he been obliged to afford more time than that granted, the delay would have negated the purpose of the suspension, namely the prevention of interference with the investigation. He believed the respondent had ample knowledge at his disposal and adequate time to address the allegations made against him, and that he did in fact make representations in his letter of 14 July 2010, which were taken into account. The Labour Court disagreed. Beyond stating that the time afforded was unreasonable, it did not however elaborate on why it considered that to be so.

[33] In his founding affidavit, the respondent based his right to a hearing on the provisions of the Promotion of Administrative Justice Act [3] ("PAJA") as well as an alleged violation of his constitutional rights. He stated:

> 'The Second Respondent, which is an organ of State, has acted unreasonably, and has denied me the very basic rights of natural justice. In so doing it has not only violated my constitutional rights to human dignity and reputation but also contravened the relevant provisions of PAJA.'

[34] The judge *a quo* recognised that "the legal basis for the applicant's claim was not articulated with any degree of precision". Despite that he did not discuss why the *audi* rule applied to a precautionary suspension. In keeping with prevailing and generally accepted practice, he merely assumed that it inevitably would. That assumption has been challenged by the MEC before us. The source of the duty to afford procedural fairness in cases of precautionary suspension is not obvious, nor a question free from difficulty. This led the MEC to submit on appeal that the

3 No 3 of 2000.

respondent had failed to disclose a cause of action in respect to the right of a hearing prior to suspension. Firstly, he contended correctly that the decision of the Constitutional Court in *Chirwa v Transnet Ltd and Others* [4] leaves no doubt that dismissals in the public sector do not constitute administrative action and consequently PAJA finds no application. Secondly, direct reliance on the fundamental rights contained in the Constitution is impermissible when the right in issue is regulated by legislation, as in this case by the LRA[5]. And, thirdly, because the respondent specifically failed to plead any express, implied or tacit contractual term entitling him to a hearing prior to suspension, the MEC submitted, the court *a quo* erroneously assumed the existence of such a term when in fact and in law no such term existed as part of the contract.

[35] For some time now, our courts have recognised the right of an employee to a hearing prior to a decision to suspend. There has nonetheless been a discernable difference in opinion among judges about the nature and extent of that right, predictably depending on the purpose and nature of the suspension in question. Suspension, as is well-known, may take place for different reasons. As in the present case, an employee may be suspended as a precaution or a "holding operation", pending an investigation or a disciplinary hearing, or, alternatively, suspension may be a disciplinary sanction imposed as a penalty short of dismissal.

[36] In *Muller v Chairman, Minister's Council, House of Representatives, and Others,*[6] Howie J held a precautionary suspension without pay pending a disciplinary enquiry to be invalid for non-compliance with the *audi alteram partem* rule. The decision can no longer be regarded as persuasive authority because it was founded on the assumption (then valid) that a suspension of a public official was administrative action reviewable on administrative law grounds. The learned judge delineated the issue thus:

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4 [2008] 2 BLLR 97 (CC).
5 *SANDU v Minister of Defence and Others* [2007] 9 BLLR 785 (CC) at 804.
6 1992 (2) SA 508 (C).

> 'Now the correct approach to the question whether the *audi* rule applies in a statutory context is this. When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates the contrary … The question referred to therefore has two components - (a) has there been a decision causing prejudice here and (b) has a hearing been excluded by the Legislature?'[7]

[37] After extensively reviewing the authorities, Howie J held that a precautionary suspension invariably prejudiced the rights of an employee and that the specific provisions of the legislation applicable in the case before him did not exclude a hearing. Referring to various decisions of foreign courts, the learned judge elucidated upon the prejudice that ordinarily would attend a suspension. He observed:

> 'That reasoning is persuasive and casts the nature and implications of a public service officer's suspension without pay in telling and accurate perspective. Such suspension unquestionably constitutes a serious disruption of his rights. 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 … There are indeed substantial social and personal implications inherent in that aspect of suspension …'[8]

[38] While the approach to the question of whether the *audi* rule applies or not, as I have said, is no longer authoritative, (because of the decision of the Constitutional Court in *Chirwa v Transnet Ltd and Others*[9] that labour practices in the public service do not constitute administrative action), the rationale for the need for a hearing remains compelling and persuasive.

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7 *Muller v Chairman, Minister's Council, House of Representatives* at 516H
8 *Muller v Chairman, Minister's Council, House of Representatives* at 523 B-D.
9 Note 4 above

[39] In *Koka v Director-General: Provincial Administration North West Government,*[10] the Labour Court held that a "holding operation" suspension without pay was in effect the same as a disciplinary suspension, and as such could be an unfair labour practice in terms of the then prevailing definition in item 2(1)(c) of Schedule 7 to the LRA - since repealed. Although not required to decide the point, the court expressed doubt that a holding operation suspension would require the employee to be heard at the time of suspension on the ultimate question of whether the charge is or is not made out[11].

[40] In *Mabilo v Mpumalanga Provincial Government and Others*[12], the applicant had been suspended from duty on full pay pending a disciplinary inquiry into various charges against him. He had been afforded five working days to provide satisfactory reasons why he should not be suspended. The court was not prepared to find that the employer had committed an unfair labour practice. It distinguished *Muller* on the grounds that the applicant would receive full pay during the period of suspension. It held that the maintenance of the integrity and morale of the employer required the action to be taken and described the suspension as 'a necessary measure aimed at promoting orderly administration'.[13]

[41] The approach of the Labour Court from then on has not been wholly consistent, and various formulations of the applicable standard have been expressed.[14] In most cases the Labour Court has held the view that the *audi alteram partem* rule applies in precautionary suspension cases, notwithstanding the mitigation of the detrimental consequences by the payment of full pay, because the prejudice an employee may suffer as a result of suspension is not limited to financial loss but may extend to issues of integrity, dignity, reputation and standing in the

10 [1997] 7 BLLR 874 (LC).
11 *Koka v Director-General: Provincial Administration North West Government* at 884G.
12 [1999] 8 BLLR 821 (LC).
13 *Mabilo v Mpumalanga Provincial Government* at 826 A, para 17.
14 See in this regard *Ngwenya v Premier of KwaZulu Natal* [2001] 8 BLLR 924 (LC); *SAPO Ltd v Jansen van Vuuren NO. and Others* [2008] 8 BLLR 798 (LC); *Mogothle v Premier of the North West Province and Another* [2009] 4 BLLR 331 (LC); and *Dince and Others v Department of Education North West Province and Others* [2010] 6 BLLR 631 (LC).

community.

[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 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'[15]. 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 in all contracts of employment on account of natural justice being the proven best means of producing correct, legitimate, just and better decisions. But as the issue was not raised on the pleadings in the court *a quo*, this is not that case.

[43] The court *a quo* in all likelihood implicitly founded the right of the respondent to a hearing on the right of every employee in terms of section 185(b) of the LRA not to be subjected to unfair labour practices. Section 186(2) of the LRA defines an unfair labour practice to mean *inter alia* any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee. Grogan, *Workplace Law*[16], suggests that the term "suspension" in section 186 (2) refers only to suspension imposed as a disciplinary penalty and not to the situation when an employer suspends an employee pending a

15 *Alfred McAlpine and Son v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531 E-H.
16 (Juta,2009 10th Ed) at 83.

disciplinary hearing. I assume his interpretation rests on the express wording of section 186(2)(b), which reads:

> 'the unfair suspension of an employee or any *other* unfair disciplinary action short of dismissal in respect of an employee' (my emphasis).

The prohibition evidently targets unfair disciplinary action. That purpose, however, does not operate to exclude unfair acts or omissions in relation to precautionary suspensions. As Grogan rightly points out, insofar as a precautionary suspension invariably forms part of the procedure leading to disciplinary action it is inherently disciplinary in nature. Consequently, the dictates of fairness (procedural and substantive) apply to all suspensions equally, regardless of the form a particular suspension takes, be it employed as a holding operation or as a disciplinary sanction or penalty.

[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, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it[17]. 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 minimised. Secondly, the period of suspension often will be (or at least should be) for a limited duration. The SMS Handbook for example imposes a 60 day limitation.

17 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC).

And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness.

[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[18]. 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

18 *Mantzaris v University of Durban - Westville and Others* [2000] 10 BLLR 1203 (LC) at 1212.

granting urgent interim relief pending the outcome of the unfair labour practice proceedings.

[47] 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 of whether the existence of the arbitration remedy precludes relief in the form of a declarator in all cases. There is no need to do so, since in the final analysis I am satisfied that the suspension was both fair and lawful in that there was compliance with the *audi* rule. The respondent was afforded enough time to make representations before the decision to suspend him was taken. In the circumstances of this case, taking account of the respondent's position, the serious nature of the allegations against him, the possibility that he could adversely influence the investigation, the public interest in ensuring that allegations of corruption and mismanagement at the highest levels of the public service are acted against swiftly and efficiently, and the limited prejudice to the respondent by reason of the suspension being on full pay and for a limited duration, the respondent had a reasonable and fair opportunity to make representations in response to the allegations made against him, which were clearly set out by the MEC in the relevant correspondence.

[48] In the result, the court *a quo* erred in granting the declarator that the suspension was unlawful and in setting it aside. The appeal on these grounds must accordingly be upheld.

[49] I turn now to the second leg of the relief granted by the court *a quo*. It will be recalled that the respondent sought and obtained an order interdicting the Premier and the MEC from appointing any person to the post of Head of Department/Superintendant General of the Department of Education unless and until he had been afforded a fair opportunity to be interviewed for the post.

[50] The learned judge *a quo*, no doubt under pressure in the urgent court, granted

the interdict on a mistaken understanding of the content of an agreement reached by counsel. He understood counsel to have agreed that if the respondent succeeded in obtaining the declarator that the entitlement to the interdictory relief would follow. He accordingly did not weigh the competing contentions of the parties in relation to the issues and made no findings in that regard. According to counsel for the MEC, that was not in fact the agreement. The parties agreed only that should the respondent be *unsuccessful* in respect of the suspension issue, he would automatically *not* be entitled to relief in respect of the interdict.

[51] Whatever the misunderstanding regarding the agreement between counsel, the interdict should not have been granted anyway, because the requisites for an interdict were not established. There was no evidence that any right to be interviewed (if there was indeed such a right), had been infringed in any way. The respondent was invited twice to interview for the post, but declined because he felt prejudiced by his suspension. He was moreover aware of the interviews and had adequate time to prepare, especially in view of the fact that he was interviewing for the post he had occupied for a considerable period. There was also no reasonable apprehension of irreparable harm. Had he attended the interview and been aggrieved by the outcome or the process, including unfair consideration of the allegations against him, he could have sought appropriate alternative relief.

[52] Accordingly, the court *a quo* erred also in granting the interdict. The urgent application ought consequently to have been dismissed in its entirety with costs.

[53] As for the costs of appeal, the appeal itself was unopposed and no costs award should follow. However, the application for leave to appeal was vigorously opposed and the MEC has sought and is entitled to those costs.

[54] The following orders are issued:

(i) The appeal is upheld.

(ii) The orders made by the Labour Court on 30 July 2010 are set aside and substituted as follows:

'The application is dismissed with costs.'

(iii) The respondent is ordered to pay the appellant's costs in the application for leave to appeal to this Court.

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JR Murphy AJA

I agree.

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Waglay DJP

I agree

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Molemela AJA

APPEARANCES:

FOR THE APPELANT: Adv M G Hitge Instructed by Henk Wissing Attorneys