IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J2234/09

CASE NO: J2193/09

In the matter between:

SETLHOANE REBECCA DINCE	1ST APPLICANT
MOMPEI MOKGOTSI GUSTAPH	2ND APPLICANT
JOSIAS SIEGFRIED HLONGWA	3RD APPLICANT
H M MWELI	4TH APPLICANT

AND

DEPARTMENT OF EDUCATION NORTH WEST PROVINCE	1ST RESPONDENT
MEC: EDUCATION NORTH WEST PROVINCE	2ND RESPONDENT
OFFICE OF THE SUPERINTENDENT-GENERAL	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction1

[1] This is an application for leave to appeal against the whole of the judgment of this Court whose order was issued on 28th October 2009, under case numbers

J2234/09 and J2193/09 which were consolidated into one case. The respondents who are applicants in this present matter contended in their application for leave to appeal that another Court could reasonably come to a different conclusion for the following reasons:

"(a) An unfair suspension (also of a precautionary nature) is defined as an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 (the Act).

(b) In terms of section 191(1) of the Act, an employee may refer a dispute about an unfair labour practice to conciliation and if unresolved for arbitration to the Commission for Conciliation, Mediation and Arbitration, or to a Bargaining Council, with the requisite jurisdiction.

(c) Both the Applicants and the Respondents fall under the jurisdiction of the General Public Service Sectoral Bargaining Council (GPSSBC) in respect of the determination of unfair labour practice disputes pertaining to the alleged unfair suspension of an employee.

(d) In terms of section 157(1) read with section 158(2) read with section 158(3) of the Act, the Labour Court does not have jurisdiction in respect of matters that are required to be resolved through arbitration in terms of this Act unless the parties consent; hereto.

(e) The Respondents have not consented to the jurisdiction of the Labour Court to sit as arbitrator or to adjudicate the unfair labour practice dispute between the parties.

(f) This Honourable Court only enjoys jurisdiction to, in truly exceptional circumstances, grant interim relief pending the finalisation of an arbitration pertaining to an unfair labour practice.

(g) No such exceptional circumstances existed in the present matter and final relief had been granted in any event.

(h) The Honourable Court erred in assuming jurisdiction, alternatively additionally in granting final relief.

(i) The Honourable Court erred insofar as it found that the Second Respondent lacked authority to suspend the Applicant from duty as a precautionary measure.

(j) The Honourable Court erred insofar as it found that a precautionary suspension must as a matter of substantive, alternatively procedural law, be preceded by a hearing.

(k) The Honourable Court erred insofar as it found that the provisions of Senior Management Service Handbook constituted a contract of employment enforceable in terms of section 77 of the Basic Conditions of Employment Act 1997.

(l) The Honourable Court erred in finding that the application was urgent and justified condonation of the Applicant's noncompliance with the Rules of this Honourable Court.

(m) The Honourable Court erred in failing to find that the Applicant enjoyed a sufficient alternative remedy to an interdict, such as an unfair labour practice referral in terms of section 186(2)(b) of the Act read with section 191 thereof, or an action for damages or compensation.

(n) The Honourable Court ought to have found one or more of the following:

(i) That the Labour Court enjoyed no jurisdiction to afford a final interdict to the Applicants.

(ii) That the Applicants failed to prove the requisites for final relief:

(iii) That the applications were not urgent.

(iv) That the precautionary suspensions of the Applicants were lawful.

[2] Mr Mweli on the other hand has filed an application to have an order directing the respondents to comply with the order made by this Court on the 28th October 2009, including declaring the respondents to be in contempt of Court for failing to comply with that order. In the application Mr Mweli also sought an order declaring that the general rule that leave to appeal and appeal suspend enforcement of an order should not apply in this matter.

The test for leave to appeal

[3] It is now trite that the test in applications of this nature is that of a reasonable possibility that another Court might come to a different conclusion than the one reached by the Court *a quo.* This test has been applied in various decisions of this Court and other Courts of this country. Therefore, what this Court must assess is the question of a reasonable possibility that another Court may come to a different conclusion to the one reached in the order of the 28th October 2009. The reasonable possibility that another Court may come to a different conclusion has to be assessed with reference to the facts and the law.

[4] Mr Vally, for the second respondent, in his submission regarding the approach to adopt when dealing with leave to appeal referred to two cases. The first case as he stated was the *New Clicks v Minister of Health* and the second case was that of *Hlophe v Constitutional Court.* In both cases Mr Vally did not give the citation. In the *Hlophe* matter he indicated that it was an unreported judgment and that he would arrange to have the copy forwarded to the Court as soon as he arrives at his chambers but to date the Court is still to receive the copy.

[5] I assume by *New Clicks v Minister of Health,* Mr Vally was referring to the *Pharmaceutical Society of SA and Others v Minister of Health and Another; New Clicks South Africa (Pty) v Tshabalala- Msimang NO and Another 2005(6) BCLR 576 (SCA).* If I understood the submission correctly, it was that leave to appeal in that case was granted automatically because one of the three judges gave a dissenting minority judgment. Thus according to this argument, application for leave to appeal has to be granted whenever there is a dissenting

judgment irrespective of how wrong or distinguishable that judgment may be to the one appealed against. In any case if I am correct that the judgment relied on is the one referred to above, I have not found anything in that judgment that supports this proposition. The leave to appeal in that matter was still pending before the Court a quo when the applicants approached the Supreme Court of Appeal (SCA) with a petition for leave to appeal. The issue in that matter centered on the issue of whether the applicants were entitled to approach the SCA whilst leave to appeal was still pending before the Court a quo. The contention of the respondents is not supported by even what was said by the Court a quo when it finally made its judgment on the leave to appeal. Hlophe JP, in that judgment apparently said that the fact that there was a minority judgment did not mean that another Court might reasonably agree with the minority.

The issue of urgency

[6] The reasons for treating the matter as urgent and accordingly condoning non compliance with the forms and service requirements provided for in the Rules of the Court are dealt with in the judgment and need no further repeat in this judgment. I do not believe that another Court considering the facts and the circumstances may fault this Court for the manner in which it exercised its discretion of condoning non compliance with the rules and treating the matter as one of urgency.

Issue of jurisdiction

[7] The theme of the respondents' contention from paragraph (a) to (h) of the grounds of leave to appeal relates to the submission that the Court lacked

jurisdiction to entertain the applicants' application. The enquiry to determine whether another Court may come to a different conclusion that this Court did not have jurisdiction turns around the issue which this Court was asked to undertake and that relates centrally to the relief which the applicants sought.

[8] In dealing with matters of this nature the issue of jurisdiction may be located within the provisions of both the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (the BCEA). Section 77(3) of the BCEA provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

[9] In terms of section 158(1)(iv) of the LRA this Court has the power to grant a declaratory order. Its jurisdiction is governed by the provisions of section 157 of the LRA. Section 157(1) clearly provides that the Labour Court has jurisdiction in respect of all matters that elsewhere in terms of the Act or any other law are to be determined by the Labour Court. Thus on this basis the applicants had approached the correct forum for assistance. The question is then whether the Court had the power to grant reliefs sought or their remedies could be located somewhere in other remedies provided for in the LRA or any other law.

[10] In his argument on behalf of the second respondent, Mr Vally argued that there are reasonable prospects that another Court will come to a different finding and conclusion. He argued that another Court may come to a different conclusion because this Court in its judgment acknowledged that there were decisions with

opposing opinion regarding the issue at hand. The argument is based on what this Court said at paragraph [17] of the judgment where it is stated that:

> *"[17] The issue of whether an employee has a right to be heard prior to his or her suspension has received attention in a number of cases. There are those earlier cases that held that there is no right to be given a hearing before an employee can be suspended. The approach of these cases suggests that the power to suspend by those in authority is unlimited and can be exercised in whatever manner by those in power."*

[11] In the second respondent's supplementary grounds for leave to appeal which were submitted in the morning of the hearing and which were not properly presented in that they were not signed by the State Attorney, the second respondent contended that:

> *"3. The learned Judge in his analysis of the law, alluded, correctly in our view, that there is authority both for the proposition that an employee has a right to be heard prior to his or her suspension and that there is no right to be given a hearing before an employee can be suspended."*

[12] It was on the basis of the above submission that Mr Vally argued that it was imperative that the Court should grant leave to appeal to the Labour Appeal Court. This argument is, in my opinion, unsustainable because this Court stated very clearly at paragraph [23] of its judgment that:

"[23] The important principle enunciated in Mhlauli and Muller's cases is that the principle of audi altarem partem rule applies in cases of suspension. It is also important to note that the Court in that case held that the correct approach to adopt in cases of suspension was that enunciated in the Muller's case. I align myself with that approach and wish to emphasize that the prejudice that an employee may suffer in a case of suspension is not limited to financial prejudice in the case where the suspension is without pay."

[13] The second respondents' argument is that leave to appeal need to be granted because of the *stare decisis* rule and the rule of law, bares no merit in context of this matter. The submission, as I understand it, is based also on the argument that the judgment of this Court is in conflict with other decisions of the other Labour Courts, in particular those of *Koka v Director General: Provincial Administration North West Government [1997] 17 BBLR 874(LC) and Dladla v Council of Mbombela Municipality & Another (2008) 8 BLLR 751 (LC).*

[14] Before dealing with the distinction between the present matter and the above judgments and the extent to which those judgments do not support the respondent's contentions, it is apposite in the broader context of the issue of jurisdiction as raised by the respondents that regard be had to the clarity that has been made in relation to the debate that arose as a result of the decisions in the *Fredericks and Others v MEC for Education and Training, Eastern Cape and*

Others 2002 (2) BCLR 113 (CC) and Chirwa v Transnet and others 2008 (3) BCLR 251 (CC).

[15] The debate was clarified in the recent judgment of *Vuyile Jackson Gcaba v Minister for Safety and Security [2009] ZACC 26 (CC).* In dealing with the issue of precedent which was one of the basis upon which the respondents relied upon in this matter, Van Der Westhuizen J, had this to say:

> *"[62] Therefore, precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot "rule" unless it is reasonably predictable."*

[16] In the light of what I have said earlier and further analysis later in this judgment I do not believe that the decision of this Court is in conflict with the above principle and its other details as discussed by the Learned Judge.

[17] In dealing specifically with the issue of jurisdiction the Court in *Gcaba* matter (at para [75]) held that jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. In this regard the Learned Judge said:

> *"[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting*

affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."

[18] Also of importance is the finding of the Court that the LRA does not intend to destroy causes of action or remedies neither should section 157 be interpreted to do so. In the present instance the applicants formulated their cause of action as being based on having the conduct of the respondents declared unlawful and not unfair. This cause of action and the remedy thereof as will appear later is different to that which was sought in the *Koka* matter.

[19] I now proceed to deal in details with the distinction between this matter and the decisions in the *Koka* and *Dladla* matters. I also deal in much detail with the English judgment upon which the *Koka* judgment was based on.

[20] In my view a closer reading of the *Koka* matter reveals that the real reason for declining to intervene and grant the applicant the relief sought was because of the manner in which the applicant had formulated his relief. The applicant in

that case formulated the relief he sought specifically at paragraph 3 (three) as follows:

> *"Interdicting and restraining the respondent from suspending and terminating the applicant's contract of employment without complying with fair labour pratices." (My underlining)*

[21] It is apparent from the above that the applicant sought a relief based on the cause of action founded in the unfair labour practice whose remedy is provided for under section 186 (2) (b) of the LRA. The applicants' cause of action in the present instance is not based on the unfair labour practice but on the unlawfulness of their suspensions.

[22] The facts in the *Koka* matter are also distinguishable from the present case in that, in that case the applicant was afforded a hearing in that he was issued with a notice calling on him to show cause why he should not, *"appear on a suspension hearing in terms of section 22(7) . . . of the Public Service Act of 1994."* The summary of the case and the issues arising from the *Koka* case are well summarized by the editor in the head-note where the following is said:

> *"In seeking to determine what relief was sought, the Court found that the application was not framed as a review application in terms of rule 7, and accordingly could not be treated as such. The applicant had also disavowed any direct reliance on his constitutional right to fair labour practices. The Court found that the most likely ground upon which the applicant had approached it was an unfair labour practice as contemplated in item 2(1)(c) of Schedule 7 to the Act."*

The learned editor goes further in the head-note to say:

> *"A further issue, was the appropriate forum in which a complaint regarding an alleged unfair suspension was to be pursued. In casu, the proper course was for the applicant, a public servant, firstly to refer the matter to the Public Service Bargaining Council and then, if no settlement were reached, to request the Council to arbitrate the matter."*

[23] In this respect it is also important to note the observation made at page 882- D where Landman AJ, as he then was, under the heading *"A residual unfair labour practice?"* had the following to say:

> *"It seems then that the applicant approaches this court for relief on the basis that the applicant's suspension without pay, and the subsequent decision to pay only half of his emoluments constituted a residual unfair labour practice as is contemplated in item 2(1)(c) of schedule 7 to the LRA"*

[24] The *Koka* matter is also different in that after calling on him to show cause why he should not be suspended the decision to suspend with reasons was communicated to him in writing.

[25] In analyzing the decision in the *Koka* matter in the earlier judgment this Court found that, that decision was largely influenced by what was said by Lord Denning MR in the case of *Lewis v Heffer & Others 1978 (3) All ER 354 (CA)*. A close scrutiny of that case reveals that the facts of that case are distinguishable from those of the present case and even those in the *Koka* matter. The Court in that case was dealing with a dispute that had arisen between two factions in the

Labour Party in the Parliamentary constituency of Newham North-East. After one faction obtained control of the local constituency the other embarked on boycotts and serious disturbances occurred. It was as a result of this that the National Executive Committee of the Labour Party ("the NEC") decided that the state of affairs in the constituency was so serious that there would have to be an enquiry into its affairs. The NEC accordingly resolved to suspend the general committee, the executive committee and the officers of the constituency party pending the results of the enquiry and to authorize the party's national agent to conduct the day-to-day affairs of the constituency party and to take the necessary steps to convene the next general committee meeting. Those who were suspended were not given a hearing before the suspensions were effected. The Court in concluding that the rules of natural justice did not apply on the facts of that case was based on the provisions of the Constitution and the Standing Orders of the Labour Party.

[26] In South Africa the case that comes closer on the facts to that the *Lewis's case* which also deals with the same issue of the rules of natural justice, is the case of *Marais v Democratic Alliance 2000 (2) BCLR 171 (C).* Similar to the *Lewis's* case the *Marais* matter concerned the removal of a mayor due the political turbulence within the Democratic Alliance (DA). After a brief overview of the concept of *"natural justice,"* its origin in the English law and comparing it with ours, Van Zyl J, seating with Hlophe JP (at para 68) says:

"[68] Suffice it to say that the English legal concept of natural justice is of a flexible nature, in that its requirements fluctuate in accordance with the facts and the circumstances of the case."

[27] The Learned Judge went further to indicate that in English law natural justice is associated with fairness. In this respect he quoted what was said in the *Lewis's* case where Ormrod LJ is quoted having said: *"Natural justice is but fairness writ large and juridically."* It would appear to me that fairness which seems to be infused into the concept of natural justice in the English law is no different to our *audi rule*. In this respect one of the answers given by Lord Mustill, to the question of, *"What does fairness require…,"* in the case of *Doody v Secretary of State for the Home Department and other appeals [1993] 3 All ER 92 (HL)* at 106e-h was:

"(5) Fairness will very often require that a person who might be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken, with the view to producing a favourable result, . . ."

[28] The other English case which was also decide by Lord Denning and which, I believe is apposite the present matter and has persuasive pronouncements in it, is that of *Langston v Amalgamated Union of Engineering Workers and another [1974] 1 All ER 980.* The facts of that case are very instructive. In that case Mr Langston who was an employee of Chrysler(s) and employed as a welder in a car assembly plant, resigned from his union. He resigned because he was opposed to the union's closed shop policy at the plant. The other workers

objected to working with him and the union threatened the employer that if he was allowed to work at the plant they would embark on an industrial action. As a result of that threat the employer (Chryslers) suspended Mr Langston with pay. Being unhappy with what was happening to him Mr Langston filed a complaint with the National Industrial Relations Court. He filed the complaint himself and stated the following:

> *"I am refused access to my normal job of work at my normal place of employment by the threats made by the respondent and his associates that if the management allow the non-unionist Mr J Langston access to his job of work, they will withdraw their labour from the factory of Chrysler United Kingdom Ltd, Royton, Coventry."*

[29] The matter came before Lord Denning MR who four years later also considered the *Lewis* matter. In the *Langston* matter Lord Denning MR seating with Tepheson LJ and Cairns LJ, dealt in detail with the right to work of Mr Langston in the face of the suspension. The respective observations made by the Learned Judges are quoted at length below for the simple reason that they are apposite the issue at hand in this matter. In this respect Lord Denning had this to say:

> *"In the second place, counsel for Chryslers suggested that there was no evidence of breach of contract. This was based on the fact that Chryslers had not dismissed Mr Langston. They had only suspended him from work. And they had paid him full wages. So it was said there was no breach of contract. In this regard we were referred to Collier v Sunday Referee*

Publishing Co Ltd [1940] 4 ALL ER 234 at 236, [1940] 2 KB 647 at 650) where Asquith J said:

> *"It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out."*

Asquith J went on to refer to two cases where a commercial traveller and a salesman—

> *"were held to have no legal complaint so long as the salary continued to be paid, notwithstanding that, owing to the action of their respective employers, they were left with nothing to do. The employer was not bound to provide work to enable the employee [as the phrase goes] to "keep his hand in", avoid the reproach of idleness, or even make a profit out of travelling allowances."*

[30] The Learned Judge then observed as follows in relation to what was said in the two cases referred to above by Asquith J:

> *"That was said 33 years ago. Things have altered much since then. We have repeatedly said in this court that a man has a right to work, which the courts will protect. See Nagle v Feilden and Hill v C A Parsons & Co Ltd. I would not wish to express any decided view, but simply state the argument which could be put forward for Mr Langston. In these days an employer, when employing a skilled man, is bound to provide him with work. By which I mean that the man should be given the opportunity of*

doing his work when it is available and he is ready and willing to do it. A skilled man takes a pride in his work. He does not do it merely to earn money. He does it so as to make his contribution to the well-being of all. He does it so as to keep himself busy, and not idle. To use his skill, and to improve it. To have the satisfaction which comes of a task well done.

To my mind, therefore, it is arguable that in these days a man has, by reason of an implication in the contract, a right to work. That is, he has a right to have the opportunity of doing his work when it is there to be done. If this be correct, then if any person knowingly induces the employer to turn the man away—and thus deprive him of the opportunity of doing his work—then that person induces the employer to break his contract. It is nonetheless a breach, even though the employer pays the man his full wages. So also when fellow workers threaten to walk out unless a man is turned off the job, they threaten to induce a breach of contract. At any rate, the man who is suspended has a case for saying that they have induced or threatened to induce the employer to break the contract of employment."

[31] Cairns LJ in agreeing with Lord Denning MR had the following to say:

". . . but there have been great developments in the attitude of the legislature and the courts to contracts of service since 1901. There is no recent decision of this court, and no decision at all of the House of Lords, to the effect that a contract such as Mr Langston had with Chryslers gives him no right to attend normally at his place of work. Unless it is clear

beyond argument that he has no such right, he ought not to be shut out from setting up his case."

[32] Tepheson LJ also in agreement with Lord Denning said:

". . . that he has a right to work out any notice which he may be given, that it is his employer's duty to allow him to exercise that right by providing him with work, and that by continuing to suspend him on full pay, as they are doing, they are in breach of their contract of employment with him."

[33] It is thus clear that the *Koka* judgment is not authority for the proposition that this Court did not have jurisdiction to entertain this matter and also the English authority relied on therein is distinguishable on the facts of this case. There is clear authority in English law that depending on the facts of the circumstances of a given case a person should be given a hearing before an adverse decision can be taken against such a person.

[34] The proposition that the *audi rule* is part of our law including labour law was enunciated by Zondo AJP, as he then was in *Modise v Steve's Spar Blackheath 20 ILLR 337,* when he said:

"[15] The audi rule is part of the rules of natural justice which are deeply entrenched in our law. In essence the audi rule calls for the hearing of the other party's side of the story before a decision can be taken which may prejudicially affect such party's rights or interests or property."

[35] The *Dladla* matter, in my view, does not support the proposition that the Court does not have jurisdiction to entertain an application brought on an urgent basis to interdict suspension of an employee. The Court in that matter entertained the application but declined to interfere because in the exercise of its discretion it found that the matter was not urgent. As concerning the merits of the matter it would appear from the reading of the judgment that the Court in arriving at its decision as it did was largely influenced also by the facts and circumstances of the matter. The contention that that judgment stands for the proposition that the *audi rule* does not apply in suspension cases is in my view incorrect. That judgment must in my view be understood in the context of what Moshoana AJ, as he then was, observed when he said:

> *"[38] In the resolution of 11 February 2008, the applicant was afforded a right to be heard. This was after the decision the decision though. Of importance is the fact that the purpose of the representation to be made on 21 February 2008, is to consider whether suspension should continue. This clearly evinces open mind to be persuaded otherwise.*
>
> *[39] In our law, audi alteram partem can still be observed after the prejudicial decision."*

[36] Similarly, the case of *Mosiane v Tlokwe City Council [2009] 8 BLLR 772 (LC),* does not advance the contention of the respondents that another Court may reasonably come to a different conclusion regarding assumption of jurisdiction on an urgent basis. The facts and the circumstances of that case, which I believe

had a strong influence on the decision, are different to those of the present case. The distinguishing features of that case appear in the middle of paragraph [11] where Francis J, summarized the facts as follows:

> *"[11] ... The fact that the respondent purportedly gave him an opportunity to respond to the allegations and that he has failed to do so is also a matter of public record. Accordingly, to the relevant public at large, it is now considered that he has no answer to the allegations made against him . . ."*

[37] It should also be noted that the Court in that case whilst refusing to intervene because of lack of urgency, did accept that suspension may have caused some damage to the reputation of the applicant.

[38] In the light of the above authorities there is no doubt in my mind that there is no reasonable possibility that any other Court in South Africa may come to the conclusion that the *audi rule* does not apply in suspension cases.

[39] Turning to the facts of the present case, as I understand it, the challenge of the unlawfulness of the suspension is not based on the issue of whether the third respondent had the power to suspend but on the denial of the *audi rule* which this Court found was part of our law and in the circumstances of this case the respondents ought to have afforded the applicants those rights.

The issue of the remedy

[40] In paragraph (m) of the grounds for leave to appeal the respondents contends that this Court was wrong in coming to the conclusion that the remedy in Section 186 (2) (b) of the LRA was not sufficient. This ground is linked to the

jurisdiction one. I have already indicated earlier that this issue turns around the relief that the applicants sought. The contention of the respondents would probably have been sustainable had the applicants formulated their claims on the similar basis as that in the *Koka* matter, i.e. seeking to have their suspension declared an unfair labour practice. The applicants in this matter as stated above sought their relief on the basis that their suspensions were illegal for failure to comply with the *audi rule.*

The issue of granting a final order

[41] In terms of ground (n)(i) of the grounds for leave to appeal the respondents contended that this Court ought not to have granted the applicants a final interdict. This ground is unsustainable because the respondents seem to have again misunderstood the relief which the applicants sought from the Court. Firstly the Court was not asked to issue an interdict. It was common cause that the applicants sought a final determination of their claims. This was also confirmed by Mr Vally representing all the respondents at that stage. In this regard he submitted that in order to succeed the applicants had to satisfy the requirements of a final order as set out in *Setlogelo v Setlogelo 1914 AD 221.*

[42] In any event even if it was not common cause that the applicants were seeking a final declaratory order, the legal requirements for such an order as set out in the case of *Moslemany v Uniliver PLC & another [2005] JOL 18257 (LC),* would have, in my view, been satisfied. The primary requirements are:

> *"(a) the claimant has an interest in an existing, future or contingent right or obligation; and*

(b) there are interested parties on whom the order will be binding; and

(c) there are causes arising in the sense of legal proceedings arising; or

(d) no consequential relief is sought, there are sufficient connecting factors between the court and the matter before it; or

(e) consequential relief is sought, the court is satisfied that its order can effectively be enforced."

Conclusion

[43] The application for leave to appeal to the Labour Appeal Court stands to be dismissed for reasons set out above. This Court in exercising its discretion which it did after considering the evidence presented on respective papers of the parties came to the conclusion that the facts and circumstances of this case warranted intervention on an urgent basis.

[44] The authorities relied upon by the respondents in support of their case do not support the propositions that this Court lacked jurisdiction because the alternative remedy for the applicants lies in the unfair labour practice. The applicants sought to have their suspensions declared unlawful and not unfair.

[45] The respondents failed to comply with the rules of natural justice in that the applicants were suspended without being given a hearing before a decision that would deny them the right to their work and undermine their dignity was taken.

[46] I am accordingly not persuaded that there are prospects that another Court in considering the matter may come to a different conclusion to the one reached by myself.

[47] In the light of this conclusion, I do not deem it necessary to deal with Mr Mweli's application.

[48] Considering the conclusion reached with regard to the application for leave to appeal, there are no compelling reasons that an order as to cost should be made with regard to Mr Mweli's application. However, I see no reason why in law and fairness costs should not follow the results with regard to the application for leave to appeal.

[49] In the premises the following order is made:

(i) The application for leave to appeal to the Labour Appeal Court is dismissed.

(ii) The respondents are to pay the costs of the application for leave to appeal, the one paying the other to be absolved.

(iii) Mr Mweli's application for a compliance and contempt of Court order is struck off the roll with no order as to costs

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Molahlehi J

Date of Hearing : 17th November 2009

Date of Judgment : 26th November 2009

Appearances

For the 1st, 2nd &

3rd: Applicants : Mr Moshoana of Mohlaba & Moshoana Inc

For the 4th		
Applicant	:	Mr W Scholtz of Jansen Incorporated
For the 1st		
Respondent	:	Adv MG Hitge
Instructed by	:	The State Attorney (Mafikeng)
For the 2nd & 3rd		
Respondents	:	Adv B Vally with Adv A Mosam
Instructed by	:	The State Attorney (Mafikeng)