



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1915/09

In the matter between:

**CHARLOTTE CONNIE MHLONGO**

**Applicant**

and

**SOUTH AFRICAN REVENUE SERVICE**

**Respondent**

**Heard: 1 July 2015**

**Delivered: 11 September 2015**

**Summary: Section 77(3) Basic Conditions of Employment Act, 75 of 1997 – jurisdiction – application for referral to oral evidence – application for postponement – whether or not policies and procedures incorporated as terms and conditions of contract of employment**

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**JUDGMENT**

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MALAN AJ:

## Introduction

- [1] The matter before me concerns an application in terms of s 77(3) read with s 77A(e) of the Basic Conditions of Employment Act, 75 of 1997 ('BCEA') in terms of which the applicant seeks an order declaring the decision by the respondent to suspend and subsequently dismiss her on 19 May 2009 to be unlawful.
- [2] In essence, the applicant in the first place contends that the respondent's disciplinary code and procedures form a material part of the terms and conditions of her contract of employment. In the second place, the applicant contends that the respondent breached such policies and procedure when it suspended her and then dismissed her without prior notice and without being afforded an opportunity to make representations. In the premises, the applicant seeks an order that she be reinstated with full retrospective effect.
- [3] On the other hand, I understand the respondent's basis of opposition to be as follows: Firstly, it denies that its disciplinary code and procedure form part of the terms and conditions of the applicant's contract of employment. On this basis, it argues that therefore, the applicant's claim, properly construed, relates to a right not to be unfairly dismissed as contemplated in terms of s 185 of the Labour Relations Act, 66 of 1995 ('LRA') and must therefore be adjudicated through the procedure prescribed in s 191 of the LRA. Consequently, the respondent argues that this Court lacks the jurisdiction necessary to determine this matter. The respondent has raised its challenge to the jurisdiction of this Court as a preliminary issue for determination.
- [4] At the commencement of the hearing of this matter, the applicant made application that the matter be referred to oral evidence. Following argument by both parties on this aspect, the application to refer the matter to oral evidence was dismissed. My reasons are set out hereunder.
- [5] Following the dismissal of the applicant's application to have the matter referred to oral evidence, the applicant brought an application, from the Bar, to have the matter postponed. After hearing argument by both parties, I dismissed the application for postponement. My reasons are set out hereunder.

- [6] During argument the applicant did not persist with her challenge to the authority of the deponent to the respondent's answering affidavit. As a result, this issue does not require determination.

Application for referral to oral evidence

- [7] This matter has a long history going back some six years. During July 2009 the applicant elected to approach this Court by way of application on the basis and for the relief as mentioned earlier hereinabove. I understand the applicant's application to have the matter referred to oral evidence to be premised on two main grounds. First, she contends that:

*"Material events have transpired since the initial application. This includes, among (sic) others, the acquittal of the applicant in a criminal court of law on the charges initiated by SARS".<sup>1</sup>*

- [8] Secondly, the applicant contends that:

*"15. In addition, the papers filed indicate at least two material disputes of fact, pertaining to:*

*15.1 Whether or not the applicant is suspended, or had reason to believe she was suspended, following the event of 31 March 2009; and*

*15.2 Whether or not the SARS (sic) disciplinary code of conduct is incorporated in the contract entered into between the parties."<sup>2</sup>*

*The applicant's acquittal*

- [9] In my view the applicant's reliance on her acquittal in a criminal court of law on the charges initiated against her by the State is misplaced. Save for her unsubstantiated allegation regarding her acquittal, no facts were placed before the Court to explain why and to what extent, if any, her acquittal is of any relevance to the issues which requires determination in this matter. In any event, I fail to appreciate how the acquittal can contribute to resolve the issues arising from the application before this Court.

<sup>1</sup> Affidavit in support of the interlocutory application for the referral to oral evidence: p 3, para 14.

<sup>2</sup> Affidavit in support of the interlocutory application for the referral to oral evidence: p 3, para 15.

[10] Secondly, the test applied in criminal cases is different to that applied in civil cases, such as the matter at hand.

[11] Consequently, this ground must fail.

*Material disputes of fact*

[12] In *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) at para 13 the Court held as follows:

*'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'*

[13] The fact that a dispute exists between the parties regarding the applicant's suspension and whether or not she had reason to believe that she was suspended was clearly evident even prior to the applicant launching this application.

[14] As early as 19 June 2009 (on the applicant's own version), when the applicant received a letter terminating her services on the basis of abscondment, the

applicant was well aware, or at least ought to have been well aware, that there is a dispute about the reasons for absence from work. The letter of 19 June 2009, together with the letter of 19 May 2009 (which was attached to the letter of 19 June 2009), stated in no uncertain terms that the respondent is of the view that the applicant had been absent from work without permission. Consequently, it was apparent at that stage already that the respondent does not share the applicant's view that she had been placed on suspension at the time of her arrest.

- [15] At the very least from this moment onwards, it was then foreseeable that there would be a dispute of fact insofar as the alleged suspension is concerned. The aforesaid notwithstanding, the applicant elected to approach this Court by way of the motion proceedings. It was open to the applicant to proceed by way of action in this Court. However, she did not.
- [16] When the respondent delivered its answering affidavit during October 2009, it was again evident that there was a dispute relating to the applicant's suspension.
- [17] In addition, the applicant's belated approach to have the matter referred to oral evidence is inconsistent with her approach when she had no difficulty in obtaining a judgment against the respondent in the absence of the respondent in circumstances where the respondent had already filed an answering affidavit.
- [18] The aforesaid notwithstanding, on 23 June 2015, a few days before the hearing of this matter, the applicant for the first time in a letter to the respondent's attorneys raised the issue that they would require the dispute aforementioned to be referred to oral evidence. No reasonable or acceptable explanation has been offered for this delay. The applicant then, at the proverbial eleventh hour on the day on which the matter was set down to be argued, launched an interlocutory application to have the matter referred to oral evidence. This is unacceptable given the circumstances.
- [19] I do not consider this issue to be a material dispute that cannot and should not be resolved on the papers as they stand in the light of the circumstances set out above and in so far as it may be necessary.
- [20] In so far as the second basis of the applicant's application to refer the dispute to oral evidence is concerned, I do not agree that the question whether or not the respondent's disciplinary code of conduct is incorporated in the applicant's contract

of employment is an issue that cannot also be resolved on the papers as they stand. The dispute is simply this, whether or not the applicant had a contractual right to a hearing prior to her suspension and dismissal and if so, whether or not the respondent had breached such contractual term or condition. I can see no reason why this issue cannot be properly determined with reference to the pleadings and the relevant documentary evidence.

- [21] For these reasons the application to have these disputes referred to oral evidence was dismissed.

#### Postponement

- [22] Immediately after the application to have the matter referred to oral evidence was dismissed, Mr Mastenbroek, counsel who appeared on behalf of the applicant, brought an application, from the Bar, for postponement of the matter.

- [23] No substantive application was brought nor was any notice given to the respondent that such an application would be brought. Mr Mastenbroek provided five grounds in support of the application for postponement. These grounds were the following:

- 23.1. He contended that the applicant's interest would be best served if he as counsel is given the opportunity to redraft heads of argument given the lapse of time;
- 23.2. He required more time to "*make sense of the papers*" and address the Court in a more informed manner with proper new heads of argument;
- 23.3. He had time constraints insofar as his preparation for the matter was concerned;
- 23.4. Because the application for referral to oral evidence was dismissed;
- 23.5. He wished to make reference in supplementary heads of argument to the subsequent events namely the acquittal of the applicant in the criminal court.

[24] A party seeking an indulgence must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised.<sup>3</sup> Naturally, the Court is entrusted with a discretion as to whether to grant or refuse the indulgence.<sup>4</sup> The court is then required to exercise a judicial discretion in determining such indulgence sought.<sup>5</sup>

[25] It is apposite to refer to the judgment in *Carephone (Pty) Ltd v Marcus NO and Others*<sup>6</sup> where the court held as follows:

*'In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice....'*<sup>7</sup>

[26] The general principles applicable to postponements was aptly summarized in the judgment of *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society*<sup>8</sup>, where it was held as follows by Jajbhay J, and which can equally be applied in this instance:

*'[44] In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:*

(a) *The trial judge has a discretion as to whether an application for postponement should be granted or refused. (R v Zackey 1945 AD 505; Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (Nm).)*

(b) *That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey; Myburgh Transport; Joshua v Joshua 1961 (1) SA 455 (G) at 457D.)*

<sup>3</sup> Centirugo AG v Firestone (SA) Ltd 1969 (3) SA 318 (T) at 320E.

<sup>4</sup> Isaacs and Others v University of the Western Cape 1974 (2) SA 409 (C) at 411H.

<sup>5</sup> National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others (2013) 34 ILJ 945 (LC) at para 59.

<sup>6</sup> 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425 (LAC) at para 54.

<sup>7</sup> (Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398/9).

<sup>8</sup> (2000) 21 ILJ 386 (LC) at para 44.

- (c) *The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles. (Prinsloo v Saaiman 1984 (2) SA 56 (O); Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A).)*
- (d) *An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made. (Myburgh Transport; Greyvenstein v Neethling 1952 (1) SA 463 (C).)*
- (e) *The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.*
- (f) *'Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised.' What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein & Van Winsen, The Civil Practice of Superior Court in SA (3 ed) at 453; Myburgh Transport.)*
- (g) *'The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.'*
- (h) *Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its direction might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defence in the action, as the case may be. (Van*

*Dyk v Conradie & another 1963 (2) SA 413 (C); Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E); Myburgh Transport.)'*

- [27] Also see *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*<sup>9</sup> where these legal principles were restated.
- [28] In *SA Transport and Allied Workers Union on behalf of Members v Comwezi Security*<sup>10</sup> the Court confirmed that an application for postponement will only be granted in exceptional and unforeseen circumstances.
- [29] Although the applicant relied on five grounds in support of the application for postponement, there are essentially only two grounds. The one relates to time constraints in preparing for the matter and drafting supplementary heads of argument, the other to the dismissal of the application for oral evidence.
- [30] As already mentioned, the matter has a long history going back as far as May 2009. It was first argued in this Court when default judgment was obtained against the respondent during June 2010. It was again argued during 2012 when the applicant successfully opposed an application for rescission by the respondent of the default judgment. The matter then proceeded on appeal to the Labour Appeal Court during November 2014, where the appeal was upheld and the matter remitted to this Court during March 2015. The application was not made timeously. No evidence was placed before the Court why the applicant was not in a position, at the time it came before me, to present argument and still wanted to deliver supplementary heads of argument and continue with preparation. Any subsequent events such as the acquittal of the applicant in the criminal court can in any event not be placed before the Court by simply mentioning it in supplementary heads of argument. That is not the appropriate way to deal with new evidence. In any event, as I have already held earlier in this judgment, these facts are irrelevant for deciding the issues before me.
- [31] I have already dealt with the reasons for dismissing the application to refer the disputes contended for by the applicant to oral evidence. I am not convinced that the dismissal of the application constitutes a reasonable and justifiable basis to postpone the entire matter. It would serve no purpose and offend the spirit of the LRA to resolve disputes as expeditiously as possible.

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<sup>9</sup> 2007 (5) SA 620 (CC).

<sup>10</sup> (2012) 33 ILJ 727 (LC).

Synopsis of relevant factual matrix

- [32] The applicant was employed as the Manager: Legislative Interpretation at the respondent from 1 February 2005 until the termination of her employment on 19 May 2009. The applicant contends that on 31 March 2009, whilst at work, she was approached by an inspector, Nkosi, a member of the South African Police Services. It is common cause that Inspector Nkosi was in the company of Mr Andrew Seshoka, an employee of the respondent.
- [33] It is further common cause that Inspector Nkosi informed the applicant that charges had been laid against her by the respondent and arrested her on allegations of corruption. Her motor vehicle as well as her cell phone was confiscated at the time of her arrest.
- [34] The applicant contends further that Mr Seshoka took her two cell phones and laptop as well as her access card and also informed her that she has been suspended from her employment with the respondent with immediate effect. The respondent denies the aforesaid.
- [35] Shortly after the above, the applicant consulted with her attorneys of record who addressed a letter to the respondent on 20 April 2009 demanding a written confirmation about her suspension and the conditions thereof.
- [36] The respondent contends that it made several unsuccessful attempts to contact the applicant with a view of having her return to work. It sent letters to the applicant on 8 May 2009 as well as 19 May 2009, calling upon her to return to work and report for duty. The respondent further states that the foregoing two letters were written in compliance with its internal HR policy: Timely Reporting of Unexpected Absences. The respondent contends that the aforementioned attempts to make contact with the applicant was to request that she returned to work with a view of making arrangements for her to attend a proper disciplinary hearing in line with the respondent's disciplinary code and procedure.
- [37] On 15 June 2009, the respondent received a further letter from the applicant's attorneys. In this letter they request a reply to their letter dated 20 April 2009 as

well as enquiring from the respondent why the applicant had not received her salary for the month. On 19 June 2009, the respondent in a letter (incorrectly dated 10 December 2008) advised the applicant's attorneys that her services had been terminate with effect 19 May 2009 for failing to report for duty.

- [38] The applicant denies that she received these letters from the respondent.
- [39] The applicant contends that the respondent's disciplinary code and procedure and the policy on timely reporting and unexpected absences have been incorporated into and form part of her contract of employment. On the basis aforementioned, the applicant contends further that these policies and procedures aforementioned *"attained contractual status and as a result [are] binding between [her] and the respondent"*.
- [40] Paragraph 10.2 of the respondent's disciplinary code and procedure provides as follows:
- "No employee may be dismissed, demoted or suspended without pay for misconduct, without being granted a formal disciplinary hearing as contemplated in this disciplinary code and procedure unless the holding of a disciplinary hearing is made impossible by the employee by failing to attend hearing for no valid reason, or the employee indicating clearly and unequivocally that he/she is not prepared to participate in the disciplinary hearing."*
- [41] The respondent denies that its disciplinary code and procedure and the policy on timely reporting or unexpected absences form part of the terms and conditions of the applicant's contract of employment or ascertained contractual status. In his regard the respondent states that the applicant's employment contract makes no reference to the incorporation of the disciplinary code. The respondent further states that it made numerous attempts to contact the applicant to no avail with the view of arranging a date for the hearing of the disciplinary enquiry. It states that the applicant's disappearance and failure to contact the respondent after she was arrested for corruption, made it impossible for the respondent to convene a disciplinary hearing. It states that it was denied the opportunity to conduct a formal disciplinary hearing as a result of the applicant's desertion and failure to return to work.

- [42] It is on the basis aforementioned that the applicant argues that the respondent deviated from the provisions of the disciplinary code and procedures and thus breach the terms and conditions of her contract of employment by failing to afford her the benefit of a disciplinary hearing prior to her suspension and subsequent dismissal. Consequently, so the applicant argues, the respondent's decision to suspend her and subsequently dismiss her on 19 May 2009 was unlawful.
- [43] The respondent denies that it was obliged to serve the respondent with a notice of her suspension or to afford her any hearing prior to the alleged suspension because it denies that the applicant was in fact suspended. It states that it followed its procedure laid down in the disciplinary code and procedure when the applicant made contact with her impossible and her failure to advise it of her whereabouts.
- [44] The respondent contends that the applicant was dismissed for having absconded and/or deserted. Her dismissal was effected in line with the respondent's policy which provides that absence from work for a period of five consecutive days will be deemed as abscondment, thus resulting in the termination of employment. Following termination of her employment and in line with the respondent's abscondment policy, it advised the applicant of her right to lodge an appeal against her dismissal. However, the applicant failed to exercise her right of appeal and elected to launch this application.

#### The respondent's challenge to the Court's jurisdiction

- [45] As mentioned earlier, the respondent denies that its disciplinary code and procedure form part of the terms and conditions of the applicant's contract of employment. It argues that therefore, the applicant's claim, properly construed, relates to a right not to be unfairly dismissed as contemplated in terms of the LRA.
- [46] For the reasons that follow, I am not convinced that the respondent's disciplinary code and procedure form part of the terms and conditions of the applicant's contract of employment.
- [47] The disciplinary code and procedure is in the form of a collective agreement concluded between the respondent and two unions, namely the Public Servants Association of South Africa and National Education Health and Allied Workers

Union. Nowhere in the collective agreement does it state that the provisions of the collective agreement are incorporated into or form part of the terms and conditions of any of the employees' (as defined in the collective agreement) contracts of employment or any alike reference that could sustain such conclusion. Similarly, nowhere in the applicant's contract of employment is any reference made to this collective agreement, or more importantly, that the provisions of the collective agreement are incorporated and form part of the terms and conditions of her contract of employment.

[48] The applicant has not pleaded that these provisions are implied terms and conditions of her contract of employment. The applicant has simply pleaded that the disciplinary code and procedure and abscondment policy have been incorporated into and are part of her contract of employment. In her replying affidavit, and in response to the respondent's challenge to the alleged incorporation of the code and procedure, the applicant merely states that: *"the disciplinary code and procedure and the [abscondment policy] apply to all the employees of the respondent including myself and as a result, constitute terms and conditions of my contract of employment"* No basis has been provided to sustain these conclusions. On this premise alone, the applicant's application ought to fail.

[49] In *SAMSA v McKenzie*<sup>11</sup> the Court dealt with an allegation that a contractual claim arose because the contract of employment was subject to the condition that it could not be terminated without just cause. The Court held that where no support for the pleaded term is to be found in the written contract, the allegation that the pleaded term was expressly agreed can be rejected.<sup>12</sup> The Court held that:

*"in the present case, the issue is whether Mr McKenzie's contract contains a term implied by law as pleaded by him. That is a question within the court's jurisdiction and in my view the answer is that it does not"*<sup>13</sup>

[50] In *Lamprecht and Another v McNeillie*,<sup>14</sup> it was held that:

<sup>11</sup> (2010) 3 All SA 1 (SCA).

<sup>12</sup> *SAMSA v McKenzie* (2010) 3 All SA 1 (SCA).

<sup>13</sup> *SAMSA v McKenzie* (2010) 3 All SA 1 (SCA) para 58.

<sup>14</sup> *Lamprecht and another v McNeillie* 1994 (3) SA 665 (A).

*“in order for the employee to succeed, ... he had to prove a contract (express or tacit) containing a provision (also express or tacit) incorporating the rules of natural justice”*

- [51] In *Transman (Pty) Ltd v Dick*,<sup>15</sup> the Court considered whether the employee had *“made out a case for a contractual pre-dismissal hearing”* and concluded as follows:

*“In the present case the duty was on the employee not only to plead a contractual claim but also to prove the facts from which the contended tacit term could be inferred. This, the employee has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment. In fact he has failed to plead the terms of the employment agreement between himself and the employer. Therefore he has not satisfied the requirements of the test for importing terms into a contract. Accordingly the court below erred in assuming that his employment contract was ‘subject to an implied term that he would be afforded a fair hearing before he was dismissed’. It follows that the appeal must succeed.”<sup>16</sup>*

- [52] Therefore, unless the alleged contractual right is apparent *ex facie* the contract of employment, the alleged existence of such right must be rejected. In the matter before me, there is no such right apparent from the applicant's contract of employment.

- [53] In *McKenzie* the Court also specifically dealt with the judgments of *Old Mutual Life Assurance Co SA Ltd v Gumbi*<sup>17</sup> and *Boxer superstores Mthatha v Mbenya*.<sup>18</sup> which decisions are relied upon by applicant and are said to have the effect of imputing into contracts of employment a right to a fair hearing prior to dismissal.<sup>19</sup>

- [54] In relation to the *Gumbi* judgment, was not called upon to decide in what circumstances an employee had a right to a pre-dismissal hearing. The sole dispute there was the ambit of that right, and in particular, whether the failure by the employee to take the opportunity to be heard had the result that the employer had

<sup>15</sup> 2009 (4) SA 22 (SCA).

<sup>16</sup> *Transman (Pty) Ltd v Dick* 2009 (4) SA 22 (SCA) para 30.

<sup>17</sup> 2007 (5) SA 552 (SCA).

<sup>18</sup> 2007 (5) SA 450 (SCA).

<sup>19</sup> (2010) 3 All SA 1 (SCA) at para 38; Applicant's heads of argument, para 6.6.

failed to fulfil its contractual obligation. The entitlement to such a hearing was not in dispute nor were any of the points considered in this case raised.

- [55] I am in agreement with counsel for the respondent that in relation to *Boxer Stores*, which in turn relied on *Gumbi*, the Court held that the finding in *Gumbi*, which is relied upon in *Boxer Stores* was obiter and its repetition in *Boxes Superstores* does not take the matter any further. Whether the contract relied upon by the employee indeed entitled her to a hearing was accordingly not an issue before the Court, and was not necessary for its decision.
- [56] The applicant's reliance *in casu* on the judgment of *Murray v Minister of Defence*<sup>20</sup> to assert a contractual right to a fair hearing is misplaced. The *Murray*'s judgment relates employees in the Navy who are expressly excluded from the operation of the LRA.
- [57] Returning to the collective agreement at the centre of this application and having regard to the objectives of the collective agreement (clause 3), they do not support the conclusion that a single one of the objectives of the collective agreement was to make the provisions thereof terms and conditions of the employees' contracts of employment. The fact that its scope and application (clause 5) states that "*This disciplinary Code and Procedure applies to all Employees in the Bargaining Unit*" does not take the matter any further, nor does it make them terms and conditions of the contract of employment. It does not have the effect of elevating practices and procedures to terms and conditions of contracts of employment.
- [58] In conclusion, it is clear, at least in my mind, that the real issue that the applicant disputes is the fairness of her suspension and dismissal. This much is also evident if regard is had to her founding affidavit where she states in paragraph 7.1 that she was *unfairly suspended*." Therefore, I find that when properly construed, the applicant's dispute in this matter relates to a right not to be unfairly suspended and dismissed, as contemplated in s 185 of the LRA. The remedies for a breach of that right are contained in s 194 and must be adjudicated through procedures prescribed

in s 191 of the LRA. The right relied upon is entirely statutory in origin and content and gives rise to no contractual obligation.<sup>21</sup>

### Costs

[59] In terms of the provisions of ss 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. Given the circumstances of this specific case, I deem it just and equitable to make no order as to costs.

### Order

[60] In the premises I make the following order:

1. The application is dismissed
2. There is no order as to costs.

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L M Malan, AJ

Acting Judge of the  
Labour Court of South Africa

### APPEARANCES:

For the applicant:

Advocate Mastenbroek

Instructed by Mpoyani Ledwaba Incorporated

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<sup>21</sup> SAMSA v McKenzie (2010) 3 All SA 1 (SCA) at para 9, 16, 21

For the respondent:

Advocate Kutumela

Instructed by Hogan Lovells

LABOUR COURT