



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C441/2023

In the matter between:

KWAZI CELANI ZWAKELE NDLOVU

Applicant

and

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

First Respondent

KAREN KLEINOT N.O.

Second Respondent

**MEC FOR THE WESTERN CAPE DEPARTMENT
OF HEALTH**

Third Respondent

Heard: 14 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 20 October 2025.

JUDGMENT

DE KOCK, AJIntroduction

- [1] This application comes before the court as an application to review the arbitration award issued by the second respondent (the commissioner) on 24 August 2023 in PHSDSBC case PSHS685-21/22. The applicant, Dr. Kwazi Celani Zwakele Ndlovu, challenges the commissioner's finding that his precautionary suspension was fair. The outcome of the award is that the applicant failed to prove that the third respondent (Department of Health or "DoH") committed an unfair labour practice regarding the applicant's precautionary suspension.
- [2] This application raises fundamental questions about the limits of precautionary suspension, the protection of constitutional rights in the employment context, the requirements of natural justice in disciplinary proceedings, and the mandatory obligation to pay "full pay" during suspension.

Relevant timeline regarding the precautionary suspension

- [3] During September 2020, Dr. Barday (Barday) filed a letter of complaint against the applicant (the date of the complaint is 24 August 2020). On 15 November 2020, the consultants working under the applicant lodged a collective grievance against the applicant. On 26 May 2021, the DoH conducted an internal investigation concerning the grievances. The subsequent investigation report formed the basis for the formulation of charges against the applicant.
- [4] On 13 August 2021, the applicant was issued with a notice of a disciplinary enquiry. Critically, and undisputedly, the DoH did not impose a precautionary suspension at this date despite the seriousness of the charges. On 19 August 2021, one day before the commencement of the disciplinary enquiry to be held on 20 August 2021, the applicant's attorneys sent a letter of demand to Barday demanding payment of R3.5 million for damages allegedly suffered by the applicant for the alleged defamatory remarks made by Barday.

- [5] On 19 August 2021, the consultants and Barday sent a letter to Dr. Bhavna Patel (Patel), the CEO of the hospital, and the Human Resources Department requesting a meeting to discuss their concerns about their emotional and physical safety at work, considering the upcoming disciplinary enquiry.
- [6] On 20 August 2021, the applicant was issued with a notice with intention of considering a precautionary suspension. On 21 August 2021, the applicant made representations to the notice of intention to consider a precautionary suspension. On 21 August 2021, each of the consultants lodged a complaint expressing feelings of intimidation and victimisation at the workplace following the letter of demand issued by the applicant's attorney.
- [7] On 25 August 2021, the applicant was issued with a notice of suspension from duty as a precautionary measure. On 17 September 2021, Ndlovu served a summons on Barday regarding a defamation claim, demanding damages of R400 000.00.
- [8] On 20 October 2021, Dr. Erica Jones (Jones), one of the consultants, sent an email to Rogini Pillay (Pillay), the initiator in the disciplinary enquiry, complaining that she felt threatened when the applicant made comments concerning "guns" on 18 September 2021. The date was referred to as 18 September 2020 in the award, but this date was incorrectly recorded. The date was 18 September 2021.
- [9] On 22 October 2021, the applicant requested that his suspension be reviewed and ended. On 28 October 2021, the DoH deferred the decision to terminate the suspension to the chairperson of the disciplinary enquiry. On 9 November 2021, the DoH requested an extension of the precautionary suspension. On 10 November 2021, the chairperson extended the suspension until the finalisation of the appeal. On 11 May 2022, the applicant was dismissed consequent upon finalisation of the disciplinary enquiry. On 3 June 2022, the appeal was dismissed.

- [10] During the entire ten-month suspension period (25 August 2021 to 11 May 2022), the applicant received his basic salary but was not paid his commuted overtime entitlement of R40,228.76 per month, resulting in a total withholding of R402,287.60.

The arbitration award

- [11] The commissioner finds firstly that it is common cause that the applicant was afforded the right to provide submissions to the DoH as to why the precautionary suspension should not be implemented. She finds that it is common cause that the charges were serious as they involved alleged intimidation, bullying and allegations of unfair discrimination and that item 7.2(a)(i) of Resolution 1/2003 was met.
- [12] The commissioner finds that the question that must be answered is whether the decision to implement a precautionary suspension after considering submissions on 25 August 2021 was for a fair reason and if it prejudiced the applicant. The commissioner finds further that the applicant continued to work from the date the grievances were lodged in November 2020 until the date of his suspension. She accepts that there was a tense and strained relationship though, nonetheless, the applicant was not perceived as a threat or jeopardy to the workplace given that he continued to work. According to the commissioner, up to that point, the applicant did not constitute a threat to the well-being and/or safety of the employees.
- [13] This finding by the commissioner is critical and dispositive. It puts into perspective the question that the commissioner had to answer in relation to the unfair labour practice dispute before her. The Court notes that there was no cross-review by the DoH, and as such the commissioner's finding in this regard must stand. The DoH is bound by this finding.

The review standard: *Sidumo* reasonableness test

[14] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,¹ the Constitutional Court held that “*the reasonableness standard should now suffuse section 145 of the LRA*”, and that the threshold test for the reasonableness of an award is: “*Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*”².

[15] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*³ the Court applied this reasonableness consideration as follows:

“... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[16] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application.

[17] In short, in order for the review to succeed, the error or failure must affect the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁴

[18] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties

¹ (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

² Id at para 110.

³ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

⁴ *Fidelity* at para 102.

before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁵

Legal framework: Precautionary suspension

[19] The legal framework governing precautionary suspension is contained in PSCBC Resolution No. 1 of 2003, Clause 7.2. Clause 7.2(a)(i) and (ii) provides:

"(a) The employer may suspend an employee on full pay or transfer the employee if: (i) the employee is alleged to have committed a serious offence; and (ii) the employer believes that the presence of an employee at the workplace might jeopardize the investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property."

[20] Clause 7.2(b) mandates: "A suspension of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay."

[21] In *MEC for Education, North West Provincial Government v Gradwell*⁶, the Labour Appeal Court established a two-stage test:

Stage 1: Are the charges objectively serious?

Stage 2: Is there *prima facie* reason to believe that the employee's continued presence will endanger the well-being or safety of persons?

Evaluation of grounds of review

⁵ See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

⁶ [2012] ZALAC 8; [2012] 8 BLLR 747 (LAC); (2012) 33 ILJ 2033 (LAC) at para 28.

The critical temporal sequence

- [22] In commencing the evaluation of the grounds of review, it is necessary to note that the fairness of the precautionary suspension of 25 August 2021 must be determined based on the letter of demand that was delivered to Barday on 19 August 2021. This is confirmed by the commissioner's own findings wherein she found that, whilst there was a tense and strained relationship prior to the letter of demand being delivered to Barday, the applicant's presence in the workplace did not constitute a threat to the well-being and/or safety of employees.
- [23] This finding is foreshadowed by the undisputed fact that, despite the complaint in September 2020 (letter dated 24 August 2020) and collective grievance in November 2020, the applicant continued working in the unit until 13 August 2021 when charges were brought against him, and thereafter until 25 August 2021, the date of his precautionary suspension.
- [24] The DoH cannot rely on the events preceding the delivery of the letter of demand on 19 August 2021 to justify the fairness of the applicant's precautionary suspension. The evidence presented during the arbitration proceedings regarding any fear of intimidation, victimisation, or bullying prior to the delivery of the letter of demand is therefore irrelevant to the review application.
- [25] The DoH is confined to the evidence presented regarding delivery of the letter of demand, and the impact thereof in substantiation of the fairness of the precautionary suspension of the applicant on 25 August 2021, as well as the evidence of events presented thereafter.

Background to delivery of letter of demand

- [26] The background to the letter of demand being delivered to Barday on 19 August 2021 is not disputed. This background was presented during the arbitration proceedings, and the commissioner was obligated to consider the background to delivery of the letter of demand in her determination of the fairness of the

applicant's precautionary suspension insofar as the letter of demand is concerned.

- [27] The origin of the letter of demand was the complaint by Barday submitted to the DoH in September 2020 wherein serious allegations were made against the applicant. It is not necessary for this court to determine the validity of these complaints for purposes of the review application save to state that it is common cause that the allegations are serious in nature. The allegations contained in the complaint were brought to the applicant's attention on 5 November 2020. According to the applicant's evidence, he advised the Head of HR, on 6 November 2020, that the letter is defamatory and very insulting to his character. The applicant advised that Barday should be given a platform where she can put forward evidence to corroborate these disturbing allegations. The applicant reserved his right to launch a complaint against Barday and HPCSA and to lay a charge of *crimen injuria* against Barday. The applicant followed up on 30 November 2020 regarding the investigation into allegations made by Barday.
- [28] The applicant lodged a grievance on 29 December 2020. However, the applicant's grievance was not resolved, and he exercised his right to refer an alleged unfair discrimination dispute to the CCMA on 15 April 2021. The applicant further, on 13 May 2021, instructed his attorneys to initiate civil proceedings for defamation against Barday and to represent him against the DoH in a discrimination claim in the Labour Court. The interactions between the applicant and his attorney, despite being legally privileged, were presented during the arbitration proceedings. The applicant waived his right to rely on such correspondence, despite its status of being legally privileged.
- [29] The DoH, on 13 August 2021, issued the applicant with charges emanating from the complaint of September 2020 and collective grievance of November 2020, and following an investigation that was conducted. There is no evidence that the applicant was aware of the charges before the date on which such charges were issued to him. It is common cause that the DoH did not see the need to issue the

applicant with a precautionary suspension on 13 August 2021, which confirms what is stated above that the events preceding delivery of the letter of demand is not relevant to the determination of the fairness of the precautionary suspension.

- [30] The letter of demand was delivered to Barday on 19 August 2021. Considering the disclosed email communications between the applicant and his attorney, especially during August 2021, there is no evidence that the applicant instructed his attorney to hold back on delivery of the letter of demand until 19 August 2021. Neither is there any evidence that the applicant instructed his attorney to deliver the letter of demand on 19 August 2021 specifically. The absence of any specific instruction in this regard is important given the allegation made that the purpose of the letter of demand was to intimidate Barday.

Ground of review 1: The initial suspension (25 August 2021) was unfair

A. Mischaracterisation of Evidence: The “almost a year” error

- [31] The commissioner finds that the applicant waited almost a year to get advice from his legal team to take the matter forward. This finding is factually incorrect and forms the foundation for the commissioner’s unreasonable conclusion that the letter of demand was intended to intimidate.

- [32] The facts are as follows:

- a. Barday made her complaint in September 2020 (letter dated 24 August 2020).
- b. The applicant was made aware of the complaint on 5 November 2020.
- c. The applicant immediately filed an internal grievance.
- d. When the internal grievance was unsuccessful in April 2021, the applicant referred a discrimination dispute to the CCMA.

- e. At the same time (May 2021) the applicant approached his attorney to consider pursuing a claim for defamation.

[33] The applicant did not wait passively from 5 November 2020. Barday's allegations were not left unattended. It was a live issue ever since the complaint was brought to the applicant's attention on 5 November 2020, and he exercised his rights by first trying to resolve the issue internally through established procedures.

[34] The applicant's actions in this regard ought to be commended and he should not be penalised for his attempt to resolve the matter internally before initiating civil action. Yet the commissioner found that he waited almost a year to get advice. The communication between the applicant and his attorneys between May and August 2021 regarding the defamation claim are indicative of the applicant's active pursuit of the matter. This is supported by the transcribed record and the documentary record of the arbitration hearing, which reveal the following:

- a. The applicant started the civil claim proceedings on 13 May 2021 when he contacted his attorneys and there were continuous communications up to 11 June 2021.
- b. On 28 June 2021 the applicant's attorneys sent instructions to counsel.
- c. On 15 July 2021 the applicant gently follows up on the defamation claim summons.
- d. On 21 July 2021 the applicant again follows up regarding the defamation summons and when told that counsel has not yet responded, he asked whether the attorneys could proceed with the summons on their own or whether he should proceed on his own. The attorneys responded that they can proceed on the applicant's instructions.
- e. On 5 August 2021 the applicant again follows up as to the status of the civil matter summons. The attorneys responded that they are busy

finalising the letter of demand and summons and that they will revert with the draft ASAP.

- f. On 16 August 2021 a draft letter was provided to the applicant for review and comments.
- g. On 19 August 2021 the applicant approves the letter and the letter is served.

[35] The commissioner's finding in this regard cannot be found to have been reasonable. She failed to appreciate that the applicant had exhausted internal processes before approaching an attorney, and that the actual timeline from approaching the applicant's attorney on 13 May 2021 to service of the letter on 19 August was some three months, not almost a year. The applicant provided a detailed account of what happened from 13 May 2021 and how he continuously followed up with his attorneys regarding the civil summons. This is a material error that undermines the foundation of her reasoning.

[36] The DoH argues that even if the applicant instructed his attorneys in May 2021, it is the effect of the service of the letter of demand that matters and not the intent. The Court disagrees with these submissions. On the evidence before the commissioner, the applicant explained in some detail that the service of the letter of demand was driven by the pace of legal process and interactions with his attorneys. The evidence before the commissioner does not support a conclusion that the applicant delayed serving the letter of demand until one day before the start of the hearing with the intention to intimidate Barday or any of the consultants for that matter.

[37] The question that must be asked in this regard is why the suspension was triggered. It was based on the issuance of the letter of demand on 19 August 2021. The next question is whether the applicant pre-planned the date of service of the letter of demand with the intention to intimidate. The answer is provided by the history of communications with the applicant's attorneys from May to August

2021. No reasonable decision-maker, presented with the evidence presented of the interactions between the applicant and his attorneys could have arrived at the conclusion that the applicant's intention was to intimidate witnesses and that the service of the letter of demand was pre-planned and delayed for maximum effect on intimidation.

[38] Insofar as the DoH argued that it the effect of the issuance of the letter of demand that matters, this issue will be addressed below.

B. The prescription motivation: another factual error

[39] The commissioner finds further that the applicant argued that the letter of demand had to be served on 19 August 2021 to avoid prescription, and that this argument is flawed and stands to be rejected. Nowhere in the transcribed record can it be found that the applicant gave such evidence, or that he argued prescription as the reason for delivery of the letter of demand on 19 August 2021. The transcribed evidence shows the applicant explicitly explaining the timing through counsel's pace, not prescription concerns.

[40] It is necessary to refer to the applicant's evidence regarding prescription to show that it was never his evidence that the letter of demand had to be served on 19 August 2021 to avoid prescription. The following is the extract from his evidence regarding prescription during cross-examination:

"RESPONDENT REPRESENTATIVE: Exactly. so, would they not have had a reasonable apprehension that because the one witness was being sued for Three point five million rand because they were also going to give evidence and they would also be sued in the amount of Three point five million rand. Their names were mentioned in the charges, the witnesses...

APPLICANT: I think we are going to run in circles. I think the point of the matter, I had reason to want to pursue justice against Zunaid, whether my pursuit for justice is justified as act of intimidation I will leave that to the Commissioner and goes up to the Labour Court or the Constitutional Court

or wherever to decide whether one seeking recourse for the civil role justifies as intimidation to someone else. To me that wrong. I may be wrong.

Maybe the Labour Court will finalise otherwise but we need clarity on this. I think we quit as a court case to get clarity as to if a person he has been defamed, that person impart from instituting civil action until this Disciplinary Hearing is concluded. So, we should sit on their hands even if we have had processes okay. I have building up to sue this person, now the Disciplinary Hearing, no I must not sue, I must wait two years for the Disciplinary Hearing to conclude before I can continue even if it means prescription to a case, because if I am caught by logic that I have waited until this whole process... we are two years now. So that means we have waited until my claim against Zunaid prescribes. I do not know. It is either I am not allowed at all to fight for my dignity. Why? I am an African and an African is not entitled to dignity or should I wait until this whole process which has two, three years to conclude. I do not know which one. I think maybe the Constitutional Court to clarify for us about these things that you are not allowed to seek civil remedy if you feel your dignity has been..."

[41] The commissioner clearly got the applicant's evidence wrong in her finding. The applicant at no stage testified that the letter of demand had to be served on 19 August 2021 due to a fear of prescription. The applicant asked a crucial question whether he should wait for the completion of the disciplinary hearing before initiating civil summons, by which time the claim might have prescribed. To read into this evidence, as the commissioner did, that the letter had to be served on 19 August 2021 to avoid prescription is simply incorrect and not supported by the evidence.

[42] This is a crucial consideration given the commissioner's primary finding that the letter of demand was delivered to intimidate Barday and the witnesses. The applicant's evidence during the arbitration proceedings was clear as to the

reason why nothing was done until May 2021, and of interactions between him and his attorney from May to August 2021.

- [43] The commissioner constructed an argument regarding the prescription motivation that the applicant never advanced and then used it to justify her findings. This constitutes an error as referred to in *Herholdt* as it is a finding entirely unsupported by any evidence advanced by the applicant.
- [44] Based on the aforesaid, it was the applicant's evidence that he always intended to pursue his rights and that there was no intent to intimidate the witnesses. The timing was explained by the applicant in his evidence.

C. Reasons given for suspension cannot serve a precautionary purpose

- [45] The reason relied on for the applicant's suspension, i.e., the issuing of the letter of demand and the alleged intent to intimidate, poses a fundamental legal problem. The alleged misconduct was the issuance of a civil letter of demand for defamation against Barday. This is a separate legal process external to the workplace, occurring in the Courts, and wholly independent of the applicant's workplace presence. The Court notes that external conduct may in appropriate cases endanger the well-being of employees in a workplace. However, the Court does not believe that issuance of a letter of demand on Barday for defamation was sufficient to conclude that the letter of demand endangered the well-being of the consultants and Barday based on the evidence presented to the commissioner and the fact that the witnesses were not called to substantiate their alleged fears.
- [46] Clause 7.2(a)(ii) requires suspension only if presence at the workplace might "endanger the well-being or safety of persons". The question to be asked then is: How does the applicant's workplace presence cause or perpetuate external civil litigation? The answer is clearly that it does not. The defamation claim was already commenced by issuance of the letter of demand. The claim for damages continues independently of the applicant's employment status, and it does not

depend on his physical presence at the workplace. The civil action is further not affected by his suspension – the civil claim will continue whether the applicant is suspended or not.

- [47] Suspension therefore cannot be justified as a precautionary measure to prevent litigation. The disconnection here is absolute. Suspension from the workplace does not prevent, reduce, or address civil litigation occurring in the Courts, or processes leading to such litigation such as issuance of a letter of demand. This Court cannot accept a finding that issuing of a letter of demand was meant to influence Barday to abandon her complaints or to pressure her during the hearing, especially given the fact that the applicant already approached his attorney in May 2021. In fact, the applicant made it clear from 30 November 2020 that he intended initiating civil action, but that he wanted to give Barday a platform first (internally) to prove her allegations.
- [48] In a nutshell, therefore, a precautionary suspension under clause 7.2 is justified only to prevent workplace-based harm. Once a precautionary suspension concerns a matter entirely external to the workplace, such as instituting civil action for defamation and damages, the suspension cannot be said to be precautionary, and it becomes an arbitrary and irrational decision to suspend simply because of a letter of demand served. Such suspension appears to this Court to be more punitive than being precautionary.
- [49] Whether the issuing of the letter of demand had the effect of inducing fear in the consultants needs further scrutiny. If the consultants believed that their grievances are true and can be corroborated, why would the fact that Barday was sued for making very serious allegations against the applicant discourage them from giving evidence? The consultants in any event failed to present evidence during the arbitration proceedings despite the applicant's insistence that they be called for their evidence to be tested in cross-examination.
- [50] By suspending the applicant, the continuance of the civil action would not, and did not cease. Neither would the precautionary suspension prohibit any civil

against any of the consultants if they were to make allegations against the applicant, which he believed were untrue and defamed him. By suspending the applicant, the civil proceedings were not stopped and Barday continued to give evidence notwithstanding the civil action that was instituted. The delivery of a letter of demand, therefore, could not have created an unsafe working environment.

- [51] The precautionary suspension did not assist Barday, or the consultants, to create a safe working environment, as the civil matter, and further potential claims against any of the consultants, if necessary, would continue regardless of the suspension.

D. The constitutional right to sue

- [52] This Court finds that the commissioner's conclusion that suspending the applicant was necessary to create a safe working environment is not a reasonable conclusion to reach based on the evidence. The applicant had the right to defend his name and to ensure that he was not defamed (it is not relevant for purpose of the unfair labour practice dispute to determine the merits of such a claim for damages). Once the serious allegations were made, the applicant had the right to pursue civil action to defend his good name, which he did by first following internal procedures and then to engage with his attorneys in May 2021 when the internal process could not be resolved in April 2021.

- [53] This Court must address the legal question that underpins the DoH's defence, which is what constitutes endangerment to the well-being of persons under clause 7.2(a)(ii). The DoH's position is that subjective feelings of intimidation, once reported, constitute endangerment. If one is to apply the DoH's interpretation, and understanding of endangerment, which is that if employees report feeling intimidated, the workplace is *ipso facto* endangered. This will be so regardless whether the employees' subjective feelings are tested, grounded in evidence, or being rational.

- [54] This Court must reject this argument. The issue of endangerment to well-being requires more than a collective expression of discomfort and feeling intimidated. It requires a reasonable and properly assessed risk to the physical or psychological safety of persons. This Court notes that the requirement has been stated to be “*prima facie* reason to believe”. In this Court’s view the requirement of *prima facie* reason to believe is not met by relying on untested, subjective feelings of employees who were never called to testify. When does such a risk exist? In this Court the DoH must establish that there is credible evidence of a past or threatened harmful act or pattern of conduct; that the evidence has been tested through cross-examination; that there is a logical nexus between the alleged harmful conduct and a foreseeable future harm; and that the risk is imminent or ongoing.
- [55] In this Court’s view workplace tension does not constitute endangerment without evidence satisfying these criteria. A clause 7.2 suspension is an extraordinary measure requiring extraordinary justification and not mere discomfort. The DoH based its case in the review application on untested, hearsay complaints. The witnesses were not called and as such no cross-examination occurred despite the applicant requesting that witnesses be called to substantiate their allegations. The commissioner could not reasonably rely on the clear subjective opinions of a group of people who were not called to explain how the applicant’s letter of demand intimidated them or endangered their well-being in the workplace.
- [56] The applicant’s right to pursue a claim for defamation cannot be held to be subordinate to the DoH’s right to ensure a safe working environment. The civil claim and the disciplinary process are two separate processes, and the applicant has the right to pursue a civil claim notwithstanding disciplinary action having been taken against him. The intention to lodge a civil claim started in May 2021 after the applicant’s grievance came to nought. The applicant was exercising his

constitutional right of access to Courts (section 34 of the Constitution⁷) and his right to dignity (section 10 of the Constitution).

- [57] The commissioner's finding that the letter of demand was served to intimidate witnesses, and in specific Barday, is a decision that a reasonable decision-maker could not reach. This is especially so given the applicant's actions since 30 November 2020 advising of his intention to institute civil action, the internal process, and his frequent interactions with his attorney since May 2021. In the absence of linking the issuing of a letter of demand to the alleged intention to intimidate, the precautionary suspension based on the letter of demand became irrational and arbitrary, and to a certain extent even punitive. The suspension interfered with the applicant's constitutional rights to access to courts and to sue for damages arising from an attack to his dignity.
- [58] In the Court's view, not much turns on the demand of payment of R3.5 million in the letter of demand, which according to the applicant is his assessment of the damage suffered as a direct result of the allegations made against him. The amount is based on two years of his salary and losses suffered. A person is entitled to claim any amount from someone who allegedly defamed them, and the quantum to be awarded, if defamation is proved, will ultimately be left for the relevant Court to decide. The applicant further explained why the amount in the summons issued was reduced to R400,000.00, which was to enable him to pursue the claim through the Magistrate Court rather than the High Court. This decision was made to speed up the litigation process, which would be quicker through the Magistrate Court than the High Court.

E. Suspension as retaliation

- [59] The most striking fact in this case is that the DoH did not suspend the applicant from the date that Barday's complaint was received in September 2020, during the applicant's grievance, and during the period of the investigation. Neither did the DoH suspend the applicant when he referred a dispute to the CCMA – for

⁷ Constitution of the Republic of South Africa, 1996.

obvious reasons – and neither did they suspend the applicant on 13 August 2021 when the charges were formulated and served on the applicant.

[60] As found already, it is the letter of demand that formed the basis of the suspension. Although this Court cannot find that the DoH's precautionary suspension constituted retaliation in response to the applicant's exercise of his constitutional right to sue, it did have the effect of infringing on the applicant's constitutional rights to access to Courts and to initiate civil action to protect his dignity. The Court notes that the consultants sent a letter on 19 August 2021 regarding the applicant's presence, which appears to have been done prior to the issuance of the letter of demand. However, the DoH already assessed the applicant's continued presence in the workplace since Barday's letter of complaint in September 2020 and the collective grievance in November 2020 and found that the applicant's presence in the workplace was not a threat to the well-being of Barday and the consultants.

[61] This prior non-threat assessment was undisputed and remains binding on the DoH and therefore cannot be overridden by subsequent complaints made by the consultants on 19 August 2021.

F. Hearsay evidence and lack of cross-examination

[62] This Court notes that the DoH did not call Barday, or any of the consultants who submitted the collective grievance, to testify during the arbitration proceedings. Their so-called fear of intimidation constitutes hearsay evidence in the absence of their evidence. It is not sufficient to rely on letters written by them when their fear of intimidation cannot be challenged in cross-examination. The Court notes that the applicant was adamant that the witnesses be called during the arbitration proceedings for their alleged fear to be tested in cross-examination.

[63] Had the consultants been called as witnesses, the commissioner would have had the opportunity to determine whether there was indeed an agenda against the applicant, and whether their alleged fears were well-founded. As already found,

the applicant's suspension had no effect on the continuation of the civil claim against Barday, and neither would the applicant's suspension stop him from suing the consultants, which he in any event never did.

- [64] It is clear that the applicant's concerns were with the serious allegations made by Barday which, according to him, were slanderous, baseless and without merit.

G. Prejudice to the applicant

- [65] The commissioner finds that, since the applicant was paid throughout his suspension, the prejudice to him was ameliorated. This is not a reasonable conclusion to reach based on the evidence presented.

- [66] The applicant testified that he lost a quarter of his salary each month for the duration of his suspension. This was not disputed during the arbitration proceedings. The applicant was therefore clearly prejudiced as a result of his suspension, which lasted for 10 months. The applicant's total losses for not receiving the agreed overtime payments were an amount of R402,287.60. This constitutes substantial prejudice to the applicant over and above the humiliation of actually having been suspended from his workplace. The issue of the agreed overtime will be further addressed below.

H. Conclusion on initial suspension

- [67] Insofar as the commissioner finds that the imposition of the precautionary suspension on 25 August 2021 was fair, such decision is one that a reasonable decision-maker could not reach. The commissioner misconceived the nature of the enquiry, and she drew incorrect conclusions from the applicant's evidence. The commissioner:

- a. Failed to consider that the applicant first exhausted internal processes before approaching an attorney in May 2021.
- b. Arrived at the unreasonable conclusion that the delivery of the letter of demand was questionable and cannot be coincidental.

- c. Concluded it was done with intent to intimidate, unsupported by the evidence.
- d. Failed to appreciate that the applicant had the right to institute a civil claim based on very serious allegations made against him.
- e. Unreasonably concluded that the precautionary suspension was necessary to create a safe working environment.

[68] The only reason for the suspension is the fact that a letter of demand was delivered. The suspension appears to be more of a punitive than a precautionary suspension in response to the applicant exercising his right to initiate civil proceedings to protect his good name and integrity, and to sue for damages.

[69] This Court cannot find or endorse the commissioner's finding that, because an employee institutes civil action against a fellow employee who defames them, this is a sufficient reason to suspend them. Neither can this Court endorse a finding that the institution of civil action, under circumstances such as in this case, must be delayed pending finalisation of disciplinary proceedings to avoid a perception of harm or a reluctance of employees to testify during a disciplinary hearing. Neither can this Court endorse a finding wherein an employee is penalised for first exhausting internal established procedures to address serious allegations made against them.

[70] A simple example is where an employee is criminally charged for theft. The fact that there is a criminal case in process does not prohibit an employer from pursuing a disciplinary hearing. These are two different processes arising from the same facts. The employee cannot rely on their right not to incriminate when there is a disciplinary hearing. The employer is not obliged to wait for the outcome of the criminal case. The same principles apply in this case. These are two different legal proceedings, and both processes can run concurrently.

[71] This Court can also not endorse a finding which clearly impacts on the applicant's right to institute civil proceedings to protect his good name only to be

penalised, as a result thereof, by being suspended and in the process losing a quarter of his monthly salary for a period of 10 months.

Ground 2: The extension of suspension was also unfair

[72] Having concluded that the precautionary suspension of 25 August 2021 was unfair, this does not automatically lead to a conclusion that the extension of the suspension was unfair unless the extension was based on the same reasons than that of the initial suspension. However, there were other reasons advanced for the extension, which reasons must be considered by this Court.

[73] An employee may engage in further conduct during their initial suspension which may justify the extension of a suspension. It is therefore necessary to analyse what the reasons were for the extension of the suspension.

A. The precautionary purpose was exhausted

[74] A precautionary suspension can only be justified as long as the precautionary purpose remained to be served. Once the precautionary purpose has been achieved or exhausted, there is no legal justification for continued precautionary suspension under clause 7.2 of resolution 1/2003.

[75] The fact that the suspension continued after the witnesses had testified is fatal to the DOH's case. If the concern was intimidation during testimony, that concern was no longer relevant once testimony had concluded. The extension cannot be characterised as precautionary when it outlived its own stated purpose.

B. The stated reasons for the extension

[76] The commissioner notes that the new reasons for extension were *inter alia* the interest of the employees, the interest of the applicant, and a reasonable and objective apprehension that there is a real possibility of the misconduct being repeated.

[77] Pillay reiterated during her evidence that the charges were serious, and witnesses were still in the process of testifying. Also, as per Pillay's evidence, it

emerged during the disciplinary hearing that the relationships were breaking down primarily because of the applicant's cross-examination. The commissioner finds that, as the witnesses were still in the process of testifying, as well as the fact that the relationships had deteriorated further, provided an amplification to the foundation to extend the precautionary suspension based on the initial reason, which was a reasonable apprehension of jeopardy to the well-being of the witnesses.

C. The reasons are insufficient and unsupported

[78] The commissioner's findings in this regard must be rejected as an unreasonable conclusion given that this Court already found the initial suspension to have been unfair. The evidence that the consultants expressed concern about the applicant returning to work and requesting a meeting with the CEO to address this cannot be relied on as the consultants were not called as witnesses to explain the concern. They could also not be cross-examined for their so-called concern to be tested. This Court finds that there was insufficient evidence for the commissioner to conclude that the extension of the precautionary suspension was fair.

D. Cross-examination cannot be grounds for suspension

[79] The commissioner finds that the process of cross-examination, referencing the disciplinary hearing, is stressful for witnesses and given the subject matter of the allegations, it is probable that this situation added to the deterioration of relationships. The commissioner finds further that the break-down of the working relationships and the impact of this on employee well-being is a reasonable concern for further intimidation, as summons had been issued on 18 September 2021, provided a reasonable foundation for the decision to extend the precautionary suspension to the finalisation of the appeal. This is a decision that a reasonable decision-maker could not reach. By exercising his right to cross-examine witnesses, the applicant appeared to be penalised for having exercised his right to test the veracity of the witnesses' evidence.

- [80] The question must be asked: Was the applicant required to refrain from cross-examining the witnesses and test their evidence to avoid an allegation that the working relationship had deteriorated? Surely this cannot be used as a ground for extending what was already an unfair suspension.
- [81] Cross-examination is a fundamental right in adversarial proceedings. It tests the credibility of witnesses and the veracity of witnesses' evidence; it challenges the witnesses and tests their evidence; it may cause discomfort; and is designed to expose weaknesses in their evidence and inconsistencies. It is not fair for an employer to suspend someone, or to extend an already unfair suspension, because of legitimate cross-examination having been done by the applicant. To do so amounts to penalising the cross-examiner for the exercise of a fundamental procedural right. This Court further finds it unacceptable that because the cross-examination was done by the applicant and not through a third party, such as an attorney, this was a reason for the working relationship to deteriorate.
- [82] In a nutshell, a chairperson cannot transform a procedural right to cross-examine witnesses into grounds for the extension of a suspension, and neither can a commissioner reasonably accept same as fair reason for extending a precautionary suspension.

E. The hearsay allegation ("gun comment")

- [83] There is no evidence whatsoever of any physical intimidation of anyone, save for an allegation by Dr Erica Jones (Jones) regarding "guns". Jones was not called as a witness during the arbitration proceedings, and her allegation could not be tested in cross-examination. The applicant vehemently denied the allegation and in the absence of Jones being called as a witness, her allegation was hearsay evidence. This issue needs no further explanation, as despite the parties referring to the comment in the heads of argument, the commissioner, correctly so, did not place any reliance on this hearsay evidence.

F. Conclusion on extension

- [84] This Court finds that the commissioner's finding that the extension was fair is one that a reasonable decision-maker could not reach. The extension was based, at least in part, on the initial unfair suspension. The new reasons advanced were not properly substantiated and the extension penalised the applicant for exercising his right to cross-examine witnesses. The extension further relied on an untested allegation.

Ground 3: Non-payment of the commuted overtime

A. Legal requirement

- [85] The issue of the commuted overtime payment was already referred to above. It is, however, necessary for this Court to provide full reasons why the commissioner's failure to order that the non-payment of overtime was an unfair labour practice was one that a reasonable decision-maker could not reach.
- [86] Clause 7.2(b) requires that an employee placed on precautionary suspension be suspended on full pay. This language is unambiguous and is directive to the DoH. Full pay encompasses all contractual remuneration components to which an employee is entitled such as basic salary, allowances, bonuses and, as in this case, agreed commuted overtime payments paid monthly.
- [87] The commuted overtime was a contractual entitlement. In fact, the applicant's pay slip records it as fixed overtime. The applicant is therefore entitled to commuted overtime at R40,228.76 per month. This was an entitlement vested before the applicant's suspension and not discretionary or conditionally on actually working the overtime hours.

B. Undisputed facts

- [88] On the evidence before the commissioner, it was undisputed that the monthly agreed commuted overtime entitlement was R40,228.76 per month. The suspension period was for 10 months, and the total amount of agreed commuted

overtime withheld during 10 months' suspension was R402,287.60. The applicant's undisputed evidence was that he lost a quarter of his salary each month for the duration of his suspension.

C. Application of the review test

- [89] This ground of review is not subject to the deferential *Sidumo* standard in the same way that discretionary judgments are. The question is not whether the commissioner exercised discretion reasonably, but whether the commissioner complied with a legal requirement as contained in clause 7.2(b) and in accordance with the contractual entitlement to such commuted overtime.
- [90] Clause 7.2(b) is not permissive, it is directive. It does not state the employee may be suspended on reduced pay or the employee may be suspended with contractually agreed commuted overtime being withheld at the employer's discretion. It states unambiguously that suspension shall be on full pay.
- [91] The language does not admit a reasonable interpretation allowing the withholding of contractual remuneration components (agreed monthly commuted overtime payments in existence before the suspension). The language is clear and admits only one interpretation.
- [92] In any event, even if the initial suspension and the extension thereof were justified, such justification does not operate as a license to breach the obligation to suspend on full pay. The requirement to determine whether the suspension is justified and fair and the requirement that any suspension must be on full pay are independent from each other. A suspension may be held to have been fair but the failure to suspend on full pay will still result in an unfair labour practice and a commissioner is not only entitled but in fact obliged to grant appropriate relief to an employee whose suspension was not on full pay, as part of the referred unfair labour practice dispute.

D. Conclusion on overtime

- [93] The commissioner erred in failing to award the commuted overtime withheld during the suspension. This ground is independent to the fairness of the suspension itself. A suspension can be unjustified and still involve non-payment of full pay, which is a separate breach that must be corrected as part of an unfair labour practice dispute.
- [94] The commissioner failed to apply the statutory obligation to consider the claim for commuted overtime as an unfair labour practice and her failure amounts to a reviewable irregularity on this ground alone.

Overall findings in relation to the review application

- [95] This Court finds that the grounds of review, as addressed above, must be upheld and that the commissioner's findings are findings that are not supported by the evidence presented to her. The commissioner's findings are findings that a reasonable decision-maker could not reach, and the award is therefore reviewable on the reasonableness tests as per *Sidumo and Herholdt*.

Compensation for unfair labour practice

- [96] This Court already found that the applicant is entitled to the contractual, agreed commuted overtime payments withheld for the duration of the precautionary suspension. The Court must also consider whether the applicant is entitled to compensation as a result of the unfair labour practice regarding the unfair precautionary suspension.
- [97] The Court considered whether the issue of compensation should be referred back to the bargaining council for a determination or whether the Court is in a position to decide on the issue of compensation based on the evidence placed before this Court. In the Court's view, there is sufficient evidence before this Court to decide the issue and to avoid yet a further delay in referring the matter back to the bargaining council.

- [98] The applicant seeks 10 months' compensation for his unfair suspension. The Court finds this to be extremely excessive given that the applicant was paid his basic salary for the duration of the precautionary suspension, and that this Court is ordering the DoH to pay the withheld commuted overtime payment. The applicant, following this Court's finding on the agreed commuted overtime, suffered no actual, monetary losses.
- [99] This Court, however, finds that while the applicant might well have suffered reputational harm because of his unfair suspension, the circumstances, which include that the applicant was paid his basic salary and will receive a full overtime recovery, do not warrant the claimed 10 months' salary as compensation.
- [100] The applicant failed to expand on the reputational damage suffered other than that the DoH committed an unfair labour practice and to make the statement that he suffered reputational damage. It is this Court's view that awarding compensation of one month's salary is sufficient compensation in response to the DoH having committed an unfair labour practice regarding the applicant's suspension.

Costs

- [101] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁸ when it comes to the issue of costs in employment disputes.
- [102] Although this application has been successful, the DOH's position was not wholly unreasonable and the applicant appeared in person, which militates against a costs award. It is therefore not necessary for this Court to consider the issue of costs any further.

⁸ (2018) 39 ILJ 523 (CC).

[103] In the premises, the following order is made:

Order

1. The application for the arbitration award to be reviewed and set aside is granted. The award is replaced with the following order:
 - 1.1. The third respondent committed an unfair labour practice by imposing an unfair precautionary suspension on 25 August 2021, as well as extending the suspension.
 - 1.2. In relation to the unfair suspension, the third respondent is ordered to pay:
 - 1.2.1 Compensation in the amount of R171,185.89, which is equal to one month's salary, for the unfair suspension and the consequential reputational damage.
 - 1.3. In relation to the withholding of full pay during the suspension:
 - 1.3.1 The withheld commuted overtime entitlement of R402,287.60, with interests calculated at the prescribed rate in terms of the Prescribed Rate of Interest Act⁹ as applicable to each date the agreed overtime was due and payable (from August 2021 to May 2022).
 - 1.4. All amounts must be paid within 15 days from the date of this judgment.
 - 1.5. There is no order as to costs.



⁹ Act 55 of 1975, as amended.

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

In person

For the Third Respondent:

Adv. Nyman SC

Instructed by:

State Attorney

LABOUR COURT