



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: 2025-110771

In the matter between:

MNIKELWA NXELE

Applicant

and

**THE NATIONAL COMMISSIONER: DEPARTMENT
OF CORRECTIONAL SERVICES**

Respondent

Heard: 15 July 2025

Delivered: 3 December 2025

This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 3 December 2025.

JUDGMENT

PRINSLOO, J

Background facts

- [1] There is a lengthy history relating to the suspension of the Applicant, but the factual background, relevant for purposes of this judgment, is common cause.
- [2] The Applicant is employed by the Department of Correctional Services (the department) as the regional commissioner of correctional services for

KwaZulu-Natal. He was placed on precautionary suspension on 9 May 2025 on allegations of corruption, misrepresentation and procurement irregularities. The suspension was based on the Respondent's consideration of the seriousness of the allegations and the fact that the Applicant's presence at work may jeopardise the investigation and endanger the well-being of witnesses.

- [3] The provisions of the SMS Handbook apply to the Applicant, and clause 2.7 of Chapter 7 thereof provides for precautionary suspension or transfer. Clause 2.7(2)(c) provides that if a member *'is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement.'*
- [4] The Applicant's case is that the 60-day period within which the disciplinary enquiry ought to have been held had expired by 8 July 2025. No disciplinary enquiry was held within the prescribed period, and he reported for duty on 9 July 2025. Upon reporting for duty, the Respondent issued a letter informing him that his suspension had not lapsed and that he remained suspended until after the conclusion of the disciplinary hearing, which commenced on 8 July 2025.
- [5] The Applicant submitted that there was no disciplinary hearing which had commenced on 8 July 2025, but that there was merely a meeting where the department's representative had informed the chairperson that the notice and charges were served on the Applicant on 30 June 2025, that the bundle was delivered on 2 July 2025 and that the department would need 10 days to lead the evidence of eight witnesses.
- [6] The Respondent's case, on the other hand, is that the disciplinary hearing had commenced on 8 July 2025, but that the Applicant raised objections *in limine* which had to be dealt with in accordance with the timeframes provided by the chairperson. Furthermore, the Respondent's case is that the 60-day period (as per clause 2.7(2)(c) of the SMS Handbook) would only lapse on 4 August

2025, and as such, the Applicant's suspension remains lawful and he is not entitled to the relief he seeks.

The relief sought

- [7] The Applicant seeks an order to declare that the precautionary suspension imposed by the Respondent has lapsed and expired on 8 July 2025 on account of the failure to hold a disciplinary hearing within 60 days from the date of his suspension, and that the Respondent be ordered to allow the Applicant to resume his duties without any unlawful interference.
- [8] The Applicant must make out his case in the founding papers, and the essential averments to support the Applicant's cause of action must appear in the founding affidavit.
- [9] In seeking declaratory relief, the Applicant seeks the declaration of a legal right or status. The difficulty with the Applicant's pleaded case is that he addressed the requirements for an interdict, which find no application in an application for a declarator. However, I am alive to the fact that the Applicant drafted his own papers, and this application will be considered on that basis.
- [10] The principles governing the exercise of a court's discretion to grant declaratory relief are the same as those governing the grant of such relief in the High Court.¹
- [11] Two questions have to be answered when considering an application for declaratory relief. In *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others*², the Supreme Court of Appeal confirmed its dictum in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*³, with reference to the powers of the High Courts to grant declaratory relief, namely that:

¹ *Mantzaris v University of Durban-Westville & others* [2000] 10 BLLR 1203 (LC) at para 6.2.

² [2023] JOL 59417 (SCA) at para 8.

³ 2005 (6) SA 205 (SCA) at para 16.

‘Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an “existing, future or contingent right or obligation” and nothing more is required (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F). In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer JA, with reference to a section worded in identical terms, said at 32:

“The question whether or not an order should be made under this section has to be examined in two stages. First the court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”

Analysis

- [12] The first question is whether the Applicant has an interest in any existing, future or contingent right. Put differently, does the Applicant have the right to return to work once his precautionary suspension period has lapsed, without a disciplinary hearing being held or the chairperson of the disciplinary hearing extending the period of suspension? The question which leaps out is whether the prescribed suspension period has indeed lapsed, and in considering this question, I must consider how the 60-day period is to be calculated.
- [13] As already alluded to, the Applicant’s case is that the 60-day suspension period, calculated from 9 May 2025, had expired by 8 July 2025, and the Respondent’s case is that it only lapsed on 4 August 2025.
- [14] Clause 2.7(2)(c) of the SMS Handbook is central to this dispute in that it provides that in the event of precautionary suspension, a disciplinary hearing must be held within 60 days. The SMS Handbook provides no definition of a ‘day’ in relation to clause 2.7(2)(c) or any of its other provisions.

- [15] This Court considered the purpose of precautionary suspension and clause 2.7 of the SMS Handbook and found that, in essence, it was to address the mischief of prolonged suspension and the use of suspension for purposes other than it was intended to. In *Mogothle v Premier of the North West Province*⁴, the Court observed ‘...the trend apparent in this court in which employers tend to regard suspension as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worse still, to view suspension as a convenient mechanism to marginalize an employee who has fallen from favour.’ In *SA Post Office v Jansen van Vuuren NO and Others*⁵, the court highlighted the detrimental impact of suspension on employees in that it prejudices their reputation, advancement, job security and fulfilment.
- [16] In *Lekabe v Minister: Department of Justice and Constitutional Development*⁶ (*Lekabe*), the court echoed the aforementioned sentiments and held that:
- ‘The purpose of clause 2.7(2)(c), as I see it, is to address the problem of protracted suspensions which demoralize and unfairly prejudice the suspended employee. It would appear that the mischief which the parties sought to address with the provisions of clause 2.7 was to deal with what Van Niekerk J in *Mogothle v Premier of the North West Province* regarded as the tendency by certain employers to ...’
- [17] In *Lekabe*, the court emphasised that the intention of clause 2.7(2)(c) of the SMS Handbook was to deal with the abuse of power by the employer through the use of suspension and to curb the power of employers in the public service from using protracted suspension as a means of marginalising employees.
- [18] Numerous judgments in this Court dealt with disputes around the expiry of the prescribed 60-day suspension period. None of the judgments expressly considered the question as to how the period was to be calculated, and it seems that the judgments proceeded on the basis that there was general

⁴ (2009) 30 ILJ 605 (LC) at para 39.

⁵ (2008) 29 ILJ 2793 (LC).

⁶ (2009) 30 ILJ 2444 (LC) at para 18.

acceptance that the 60 days in clause 2.7(2)(c) were to be calculated as ordinary calendar days, which included weekends and public holidays.

[19] *In casu*, this Court is faced with the express question: how are the 60 days in clause 2.7(2)(c) of the SMS Handbook to be calculated?

[20] The courts have considered the meaning of a 'day' in instances where this has not been defined in the relevant statute. In the absence of a definition, the issue has been whether the interpretation as defined in the Interpretation Act⁷ would apply – put differently: should Saturdays, Sundays and public holidays be included in the calculation, or only the days that the employee was expected to work?

[21] The Constitutional Court provided the answer in *Molefe Jonas Mamasedi v Chief of the SANDF and others*⁸ (*Mamasedi*) as follows:

[42] In *Mogapi* the judgment of the High Court does not reveal whether Mr Mogapi did disclose the basis for his submission that Saturdays, Sundays and public holidays were excluded from the period of 30 days in s 59(3). So, we do not know whether it was that on those days Mr Mogapi was not obliged to work, as is the case in the present case. To the extent that Mr Mogapi may not have disclosed the basis for his submission that Saturdays, Sundays and public holidays were to be excluded from the 30 days in s 59(3), the High Court was correct to rely on s 4 of the Interpretation Act to conclude that Saturdays, Sundays and public holidays were included. In the present case the High Court relied on *Mogapi* to support its decision that the period of 30 days in s 59(3) includes both the days on which the employee was obliged to work and those on which he is not obliged to work.

[43] I, therefore, conclude that the reference to 30 days in s 59(3) is a reference only to the days on which the member is obliged to be on official duty. Weekends and public holidays cannot be included in calculating the 30 days if such days are not days on which the member is obliged to be on official duty. Of course, if weekends and

⁷ Act 33 of 1957.

⁸ (2024) 45 ILJ 2475 (CC).

public holidays are days on which the member is obliged to be on official duty, then those days would be counted in determining whether a member was absent from official duty without his or her commanding officer's permission for a period exceeding 30 days.

[44] The interpretation of 30 days advanced by the respondents would, if accepted, result in members of the Regular Force being dismissed for not being on duty on a day they were not obliged to be on duty. This would happen, for example, if a member was away from work without permission for 28 days if you do not count three other days on which he or she was not at work but was not obliged to be at work. He or she would have exceeded the 30 days on that approach by one because two of the days which would be counted would be days on which he or she was not obliged to work. That is the interpretation that says the reference to 30 days in s 59(3) is a reference to calendar days irrespective of whether or not the member was obliged to work on those days or on some of those days. This interpretation does not promote the spirit, purport and objects of the Bill of Rights. The interpretation I have adopted in this judgment promotes the spirit, purport and objects of the Bill of Rights.'

[22] In *Member of the Executive Council: Department of Education, KZN and another v Cumaio and a related matter*⁹ (*Cumaio*), the Labour Appeal Court considered the interpretation of '14 consecutive days' as provided for in section 14(1) Employment of Educators Act¹⁰ and held that:

'In the present instance, the calculation of the 14-day period referred to in section 14(1)(a) was thus to be done by accounting not for calendar days, but only for those days on which the employee was obliged to be at work. It follows that the 14-day period on which the Department relied to invoke section 14(1)(a) had not yet expired on 29 November 2017, calculated as it was as calendar days. In short, the Department's calculation of the *dies* was incorrect. 14 consecutive days from 15 November 2017, correctly calculated, had not expired by 29 November 2017 and the Department's reliance on section 14(1)(a) was thus premature.'

⁹ [2024] 12 BLLR 1249 (LAC) at para 15.

¹⁰ Act 76 of 1998.

[23] In *Mokoena v West Rand District Municipality and others*¹¹ (*Mokoena*), the Court was faced with a matter where the municipality terminated the municipal manager's fixed-term contract for lack of compliance with the 60-day time frame for completing a performance agreement in terms of section 57(2)(a)(i) of the Systems Act¹². The municipality's case was that it effected an *ex lege* termination when a statutory time frame was not complied with. The court held:

'[35] The contract of employment required the applicant to work Mondays to Fridays, and the BCEA prohibits employers from requiring employees to work on public holidays except whether the parties have agreed. The contract of employment does not make any provision for such an agreement. In my view, the interpretation in *Mamasedi*, although decided on a wording slightly different to the wording in *casu*, must be adopted. In *Cumaio*, despite the section referring to "consecutive" days, the LAC adopted the *Mamasedi* interpretation and held that these are consecutive days that the employee is required to be at work.

[36] The Systems Act made reference to days, not *calendar* days, not weeks and not months. If these days were to be inclusive of days other than the days that the applicant was required to be at work, the Systems Act would have expressly stated so or would have qualified this by stating that "*calendar days*" instead of "*days*" or referred to the period in weeks or months. I see no reason why this Court should deviate from the interpretation adopted in the above judgments. Therefore, the 60 days must be counted to exclude Saturdays, Sundays and public holidays, which are days that the applicant was not contracted or required to be at work.'

[24] In *casu*, there is no reason to deviate from the interpretation of 'day' as adopted in *Mamasedi*, *Cumaio* and *Mokoena*. The SMS Handbook provides no definition of a 'day' in relation to clause 2.7(2)(c) or any of its other provisions – it merely provides for a period of 60 days.

¹¹ (2025) 46 ILJ 2681 (LC).

¹² Local Government: Municipal Systems Act 32 of 2000.

- [25] It is undisputed that the Applicant is contractually required to report for duty, Mondays to Fridays, excluding weekends and public holidays, unless expressly requested to work on weekends or public holidays. It follows that a reference to 60 days in the SMS Handbook refers only to the days on which the Applicant is obliged to be on official duty. Weekends and public holidays cannot be included in calculating the 60 days if such days are not days on which he was obliged to be on official duty.
- [26] Calculating the 60 working days from the date the Applicant was suspended, being 9 May 2025, the said period only expired on 4 August 2025. The Applicant remained suspended in terms of the provisions of the SMS Handbook until 4 August 2025, and as such, this application was premature.
- [27] The Applicant failed to show that he has the right to return to work prior to the expiry of his 60-day precautionary suspension period, and he is not entitled to the declaratory relief he seeks.
- [28] I already alluded to the intention of clause 2.7(2)(c) of the SMS Handbook *supra*, and I emphasise that the prescribed time period is to curb the power of employers in the public service from using protracted suspension as a means of harassing, embarrassing or marginalising employees. Where a suspension process is abused or protracted, an employee has remedies, and an intervention would be justified. That is, however, not the case where the prescribed period has not expired or where the process is not abused.

Costs

- [29] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.
- [30] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*,¹³ the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to

¹³ (2018) 39 ILJ 523 (CC) at para 24.

have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[31] This is a case where the Court must strike a balance, and in my view, the interest of justice would be best served by making no order as to cost.

[32] In the premises, I make the following order:

Order

1. The application is dismissed with no order as to cost.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr R Mataka from Morathi & Mataka Attorneys

For the Respondent: Mr P Maserumule from Maserumule Attorneys

LABOUR COURT