



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C441/2023

In the matter between:

MEC FOR THE WESTERN CAPE DEPARTMENT

OF HEALTH

Applicant

and

KWAZI CELANI ZWAKELE NDLOVU

Respondent

In re:

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: On paper

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 2 February 2026.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This Court is seized with two applications arising from the judgment handed down on 20 October 2025. The first is an application by the MEC for the Western Cape Department of Health (the Department) for leave to appeal to the Labour Appeal Court against the order reviewing and setting aside the arbitration award. The second is a conditional cross-appeal by Dr Ndlovu against the quantum of compensation awarded.
- [2] In the judgment, this Court found that the commissioner's conclusion that Dr Ndlovu's precautionary suspension was fair was a decision that a reasonable decision-maker could not reach. The arbitration award was reviewed and set aside. The award was replaced with an order declaring the suspension an unfair labour practice, awarding compensation of R171,185.89 (one month's salary) for the unfair suspension and ordering payment of the withheld commuted overtime entitlement of R402,287.60 with interest.

The test for leave to appeal

- [3] Section 17(1)(a) of the Superior Courts Act¹ provides that leave to appeal may only be granted where the judge is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard.
- [4] The wording is deliberate. The legislature moved away from the earlier, more permissive formulation that focused on whether another court may come to a different conclusion. The current test requires that the judge be satisfied that the appeal would have a reasonable prospect of success, a higher threshold than mere arguability.
- [5] In *S v Smith*², the court explained that “reasonable prospects of success” means more than that the case is arguable. There must be a sound, rational basis for concluding that another court would come to a different conclusion.
- [6] In *Martin and East (Pty) Ltd v National Union of Mineworkers and Others*³, the Labour Appeal Court underscored the gate-keeping function of the Labour Court. It cautioned that disputes that raise no novel point of law and involve no misinterpretation of existing law should ordinarily end in the Labour Court and not be allowed to “reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.”

The Department’s application for leave to appeal

- [7] The Department advances numerous grounds of appeal. I shall address each in turn.

The commuted overtime entitlement

- [8] The Department’s primary ground concerns the award of R402,287.60 in withheld commuted overtime. The Department contends that this Court erred in

¹ Act 10 of 2013.

² 2012 (1) SACR 567 (SCA).

³ [2013] ZALAC 35; (2014) 35 ILJ 2399 (LAC).

finding that commuted overtime was an “entitlement” and that there was no evidence Dr Ndlovu would have worked the overtime. The Department relies on *Food & Allied Workers Union v Ceres Fruit Juices (Pty) Ltd*⁴ for the proposition that workers do not have the right to demand overtime, and on *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*⁵ for the proposition that overtime requires employer authorisation.

- [9] The Department further contends that commuted overtime was not included in Dr Ndlovu’s “All Inclusive Remuneration Package” of R1,728,807 per annum, as reflected in his Letter of Appointment. The Department points to the requirement in the Letter of Appointment that “a new commuted overtime agreement needs to be concluded between yourself and the Head of Institution according to the overtime needs identified.” The Department relies on clause 3 of the Commuted Overtime System Contract which provides that the contract is based on a uniform system of commuted overtime “for certain minimum hours worked, in excess of 40 hours per week.”
- [10] These contentions must be rejected.
- [11] The authorities relied upon by the Department concerned overtime worked by the hour, requiring authorisation for each occasion. Commuted overtime is fundamentally different in character. Commuted overtime is a system whereby an employee receives a fixed monthly payment for overtime work, regardless of the actual hours worked in any given month. Once a commuted overtime agreement is concluded and implemented, it constitutes a fixed contractual component of the employee’s remuneration.
- [12] Secondly, while the Letter of Appointment indicated that a separate commuted overtime agreement was required, the evidence before the commissioner established that such an agreement was in fact concluded. Dr Ndlovu’s salary slip, which formed part of the arbitration record, reflected “fixed overtime” at

⁴ (1996) 17 ILJ 1063 (C).

⁵ (2009) 30 ILJ 2875 (LAC).

R40,228.76 per month. This fixed payment was made consistently each month prior to the suspension. The existence of the commuted overtime agreement and its implementation was not disputed at the arbitration. The fact that the arrangement required a separate agreement does not detract from its contractual character once concluded.

- [13] Thirdly, the Department's reliance on clause 3 of the Commuted Overtime System Contract is misplaced. That clause describes the basis on which commuted overtime rates are calculated, not a condition precedent to payment each month. The very nature of commuted overtime is that the employee receives a fixed payment irrespective of the actual hours worked in any particular month. The Department's argument that Dr Ndlovu did not work overtime during his suspension is therefore irrelevant. He could not work overtime precisely because he was suspended. The suspension deprived him of the opportunity to perform the work that would ordinarily attract the commuted overtime payment.
- [14] There is no reasonable prospect that the Labour Appeal Court would come to a different conclusion on this ground.

The compensation for reputational harm

- [15] The Department contends that this Court erred in awarding compensation for reputational damage in circumstances where Dr Ndlovu failed to expand on the reputational damages and no ordinary or expert evidence was given. The Department relies on *SA Football Association v Mangope*⁶ and *Kwazulu-Natal Tourism Authority v Wasa*⁷ for the proposition that an employee must prove actual damages.
- [16] These authorities are inapplicable. Both *SA Football Association v Mangope* and *Kwazulu-Natal Tourism Authority v Wasa* concerned claims for patrimonial loss arising from breach of contract under the Basic Conditions of Employment Act. In

⁶ (2013) 34 ILJ 311 (LAC).

⁷ (2016) 37 ILJ 2581 (LAC).

such claims, the employee must prove actual damages as a matter of delictual or contractual principle.

- [17] The present matter is fundamentally different. Dr Ndlovu claimed compensation for an unfair labour practice under section 186(2)(b) of the LRA. Compensation under section 194 of the LRA is not aimed at making good patrimonial loss. As the Labour Appeal Court explained in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*⁸, compensation under the LRA constitutes a solatium for the impairment of dignity, not compensation for proven financial loss.
- [18] The Department's reliance on *Media 24 v SA Taxi Securitisation (Pty) Ltd*⁹ and *Manuel v Economic Freedom Fighters and Others*¹⁰ is equally misplaced. Those cases concerned defamation claims for general damages under delictual principles, not statutory compensation for unfair labour practices.
- [19] This Court awarded one month's salary as compensation, which represents a modest solatium at the lower end of the permissible range of up to 12 months' remuneration. This Court expressly found that Dr Ndlovu "failed to expand on the reputational damage suffered" and took this into account in arriving at the quantum. The award was conservative and just and equitable in the circumstances. There is no reasonable prospect that the Labour Appeal Court would interfere with it.

The hearsay evidence and lack of cross-examination

- [20] The Department contends that this Court erred by considering the absence of witness testimony and characterising certain evidence as hearsay. The Department maintains that certain facts were "common cause" and that the suspension policy did not require oral evidence as a procedural requirement. The Department argues that Dr Ndlovu did not submit this as a ground of review and therefore the Court erred in entering the arena of the dispute.

⁸ (2015) 36 ILJ 2989 (LAC).

⁹ 2011 (5) SA 329 (SCA).

¹⁰ 2019 (5) SA 210 (GJ).

- [21] The Department further contends that oral evidence at the arbitration hearing could not have influenced the decision-maker at the time the suspension decision was taken. The Department argues that *ex post facto* oral evidence at an arbitration could not be used as a method of evaluating the fairness of the suspension decision because oral evidence was not given at the time when the decision was taken and therefore was not a factor that could have influenced the employer's decision.
- [22] These contentions fundamentally misunderstand the nature of the enquiry before the commissioner and this Court.
- [23] The question before the commissioner was not whether the employer followed the correct procedure in making the suspension decision. The question was whether the suspension was substantively fair. That question required an assessment of whether there was a genuine and reasonable basis for the alleged fears that justified the suspension. The arbitration hearing was precisely the forum in which the genuineness and reasonableness of those fears was to be tested.
- [24] The Department's *ex post facto* argument, if accepted, would render arbitration proceedings meaningless in suspension disputes. It would mean that an employer's decision to suspend could never be tested by hearing from the witnesses whose alleged fears formed the basis for that decision. The very purpose of the arbitration was to determine whether the suspension was fair. The failure to call witnesses whose subjective fears were the stated justification for the suspension was a material consideration in assessing whether those fears were genuine and whether the commissioner's acceptance of them was reasonable.
- [25] The facts that the Department characterises as common cause were the complaints themselves, not the truth of their contents. Whether the consultants genuinely feared intimidation, and whether that fear was reasonable, were contested issues that went to the heart of the dispute. The consultants' subjective

complaints of feeling “intimidated” were never tested in cross-examination. Dr Ndlovu was adamant throughout the arbitration proceedings that the witnesses be called to substantiate their alleged fears.

[26] As to the contention that this Court entered the arena by considering matters not raised as grounds of review, the Department’s reliance on *National Education Health & Allied Workers Union v McGladdery NO and Others*¹¹ and *National Commissioner of the SA Police Service v Potterill NO and Others*¹² is misplaced. Those authorities concern the question whether a review applicant can raise new grounds of review not pleaded in the founding papers. They do not address the review court’s power to consider the entire record when assessing reasonableness.

[27] In *Herholdt v Nedbank Ltd*¹³, the Labour Appeal Court confirmed that the reasonableness enquiry “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.” This Court was not raising new grounds of review; it was assessing whether the commissioner’s conclusion could be sustained as reasonable in light of the entire record.

[28] There is no reasonable prospect of success on this ground.

The finding that suspension interfered with constitutional rights

[29] The Department contends that this Court erred in finding that the suspension interfered with Dr Ndlovu’s right to sue for civil damages. The Department argues that in fact and law, the suspension did not interfere with his right to pursue civil proceedings. The Department points out that the civil claim continued regardless of the suspension and that the conditions of suspension did not prevent Dr Ndlovu from pursuing his claim.

¹¹ (2012) 33 ILJ 1236 (LC).

¹² (2003) 24 ILJ 1984 (LC).

¹³ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

[30] This argument misses the point. This Court did not find that the suspension physically prevented Dr Ndlovu from pursuing his civil claim. The finding was that the stated purpose of the suspension, namely, to protect witnesses from alleged intimidation arising from the letter of demand, could not justify a precautionary suspension because the exercise of a constitutional right to access courts cannot form the basis for adverse employment action. The question was not whether he could still sue, but whether suing (or the prospect of suing) could constitute a legitimate ground for suspension.

[31] The Department further contends that this Court erred because Dr Ndlovu did not submit this as a ground of review. For the reasons set out above regarding the *Sidumo* reasonableness enquiry, this contention is rejected.

[32] There is no reasonable prospect of success on this ground.

The commissioner's finding on the reason for suspension

[33] The Department contends that this Court erred with its finding that the commissioner held that the only reason for the initial suspension was that a letter of demand was delivered. The Department argues that the commissioner's finding was that the timing of the letter of demand, not the mere fact of its delivery, was done intentionally to intimidate the witnesses. The Department points to the documentary evidence showing that the timing had the effect of intimidating and interfering with the witnesses.

[34] This Court accepts that the commissioner's focus was on the timing of the letter of demand rather than the fact of its delivery. However, this does not assist the Department. Whether framed as the delivery of the letter or its timing, the essential question remains whether instituting civil proceedings, or taking steps in furtherance thereof, can constitute a legitimate basis for precautionary suspension. For the reasons set out in the judgment, it cannot.

[35] There is no reasonable prospect of success on this ground.

The exhaustion of internal processes and the “almost a year” finding

- [36] The Department contends that this Court erred with its conclusion that the commissioner failed to consider that Dr Ndlovu had exhausted his internal processes before approaching his attorney. The Department argues that the exhaustion of internal processes was irrelevant to the essential issue before the commissioner, which was whether the timing of the service of the letter of demand one day before the commencement of the disciplinary enquiry was done to intimidate the witnesses.
- [37] The Department further contends that the commissioner was factually correct with the time period of “almost a year” given that Dr Ndlovu received a copy of the Letter of Demand on 5 November 2020 and the Letter of Demand was delivered on 19 August 2021, a period of approximately nine months.
- [38] This Court accepts that the period from November 2020 to August 2021 is approximately nine months, which could fairly be characterised as “almost a year.” However, the significance of the commissioner’s comment was the implication that Dr Ndlovu had inexplicably delayed instituting civil proceedings and then suspiciously served the letter of demand on the eve of the disciplinary enquiry. The evidence demonstrated that the timing was driven by the ordinary pace of legal process. Dr Ndlovu first exhausted internal processes, then approached an attorney in May 2021, whereafter the normal course of attorney-client engagement, document preparation, and service followed. The commissioner’s characterisation suggested strategic delay when the evidence showed ordinary legal process.
- [39] The exhaustion of internal processes was relevant because it explained the timeline and negated the inference of strategic timing. The commissioner’s failure to consider this context contributed to her unreasonable conclusion that the timing was calculated to intimidate.
- [40] There is no reasonable prospect of success on this ground.

The finding that the suspension outlived its stated purpose

- [41] The Department contends that this Court erred with its finding that the suspension continued after the witnesses had testified and therefore the concern of intimidation during testimony no longer existed. The Department argues that on the common cause facts, Dr Zibiya Barday was giving evidence at the time when the suspension was extended. The Department relies on the evidence that “Pillay reiterated during her evidence that the charges were serious, and the witnesses were still in the process of testifying” and the commissioner’s finding that “the witnesses were still in the process of testifying.”
- [42] This Court accepts that at the time of the extension of the suspension in November 2021, some witnesses may still have been in the process of testifying. However, this does not detract from the finding that the suspension ultimately continued well beyond the completion of testimony. Dr Ndlovu was dismissed on 11 May 2022, and his appeal was dismissed on 3 June 2022. The suspension continued throughout this period.
- [43] More fundamentally, the stated purpose of the suspension was to protect witnesses from intimidation. Once the witnesses had completed their testimony, that purpose could no longer be served. The continuation of the suspension beyond that point required independent justification, which was not established. Even if the extension in November 2021 could be justified on the basis that testimony was ongoing, the subsequent continuation of the suspension could not.
- [44] There is no reasonable prospect of success on this ground.

The finding of insufficient evidence for the extension

- [45] The Department contends that this Court erred with its conclusion that there was insufficient evidence for the commissioner to conclude that the extension of the precautionary suspension was fair. The Department argues that the concerns expressed by the consultants could not have been taken into account because they were not called as witnesses and therefore were not cross-examined, and

that this Court had already rejected the commissioner's findings in respect of the initial suspension.

[46] This argument is internally contradictory. The Department cannot simultaneously argue that the concerns of the consultants justified the extension while complaining that this Court considered the absence of testimony from those consultants. If the concerns justified the extension, they were required to be tested. They were not.

[47] There is no reasonable prospect of success on this ground.

The prescription evidence

[48] The Department contends that this Court misinterpreted Dr Ndlovu's evidence regarding prescription. The Department argues that the quoted evidence shows Dr Ndlovu relied on the fear of prescription to justify the timing of the letter of demand, and that the sum total of his evidence was that he was compelled to serve the letter when he did because he could not wait until the disciplinary hearing was finalised.

[49] This contention must be rejected. As this Court found in the judgment, nowhere in the transcribed record did Dr Ndlovu testify that the letter of demand had to be served on 19 August 2021 due to prescription. The passage relied upon by the Department was a rhetorical question posed during cross-examination about whether an employee should be barred from instituting civil proceedings during a disciplinary hearing even if doing so means their claim prescribes. It was not an assertion that prescription dictated the timing of the letter of demand.

[50] The commissioner, and now the Department, have read into Dr Ndlovu's evidence an argument he never advanced. His actual evidence, supported by the documentary record of communications with his attorneys from May to August 2021, was that the timing was driven by the pace of legal process, not prescription concerns. This Court's finding that the commissioner constructed an argument about prescription that the applicant never made was correct and

supported by the record. There is no reasonable prospect of success on this ground.

The defamation claim, and workplace connection

- [51] The Department contends that this Court erred when it made a finding that the civil action for defamation was a separate process wholly independent of Dr Ndlovu's workplace presence and therefore could not serve as a reason for precautionary suspension. The Department argues that the defamation claim was based on Dr Barday's letter of complaint regarding her oppressive working conditions under Dr Ndlovu, and that even though the proceedings were initiated in the civil courts, the matter remained intrinsically causally connected to the workplace.
- [52] This Court accepts that the defamation claim arose from statements made in the workplace context. However, this does not alter the analysis. The question is not whether the defamation claim has a factual connection to the workplace. The question is whether the institution of civil proceedings can justify a precautionary suspension.
- [53] Precautionary suspension is intended to protect the integrity of an investigation or disciplinary process, or to protect persons in the workplace from harm. It is not intended to shield potential defendants in civil litigation from the consequences of their statements. If an employee believes that a colleague has defamed them, they are entitled to pursue civil remedies. The employer cannot suspend the aggrieved employee to protect the alleged defamer from the civil consequences of their statements.
- [54] The causal connection to the workplace does not convert a civil claim into a workplace matter that can justify precautionary suspension. Many civil claims between employees will have a workplace connection. That does not mean that the pursuit of such claims can be punished or deterred through the mechanism of precautionary suspension.

[55] There is no reasonable prospect of success on this ground.

Conclusion on the Department's application

[56] Having considered all the grounds of appeal, this Court is not persuaded that there is a reasonable prospect of success on appeal. The judgment applied the correct legal principles and reached conclusions that were supported by the evidence. The authorities relied upon by the Department are distinguishable and do not advance its case. The Department's grounds amount to disagreement with the factual findings of this Court rather than the identification of appealable errors.

[57] Nor is there any other compelling reason why the appeal should be heard. The judgment does not conflict with any other authority. The principles governing precautionary suspension, the requirements of clause 7.2 of Resolution 1/2003, the nature of commuted overtime, and the constitutional right of access to courts are well established and do not require appellate guidance.

Dr Ndlovu's conditional cross-appeal

The procedural objection

[58] The Department contends that Dr Ndlovu's cross-appeal should be struck for failure to file a formal Notice of Application for Leave to Cross-Appeal. This Court declines to dispose of the cross-appeal on procedural grounds. Dr Ndlovu appeared in person throughout these proceedings. His conditional notice of cross-appeal and supporting submissions adequately articulate his grounds and the relief sought. In the interests of substantive justice, this Court will address the cross-appeal on its merits.

The merits of the cross-appeal

[59] Dr Ndlovu seeks leave to cross-appeal against the award of one month's salary as compensation for the unfair suspension, contending that this is inadequate

given the 10-month duration of the suspension and the reputational harm suffered. He relies on the principles in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* and points to his testimony where he described the humiliation and prejudice he suffered.

- [60] This Court has considered the evidence relied upon by Dr Ndlovu. The statements in his testimony and email correspondence constitute assertions of harm rather than independent evidence of actual reputational damage. As the Department correctly observed, the “shame” described by Dr Ndlovu related primarily to the disciplinary enquiry he was attending rather than the suspension itself. No corroborating evidence was placed before the commissioner demonstrating actual prejudice to his professional standing beyond his own assertions.
- [61] Importantly, Dr Ndlovu was paid his basic salary throughout the suspension. Following this judgment, he will receive the full commuted overtime that was withheld, amounting to R402,287.60 with interest. He has therefore suffered no actual monetary loss arising from the suspension. In these circumstances, the award of one month’s salary as compensation for the non-patrimonial harm associated with an unfair labour practice is just and equitable.
- [62] The cases cited by Dr Ndlovu are distinguishable. In the present matter, Dr Ndlovu received his basic salary and will receive full overtime recovery.
- [63] There is no reasonable prospect that the Labour Appeal Court would find the compensation award to be inadequate in the circumstances. The cross-appeal is accordingly refused.

Costs

- [64] Section 162 of the LRA provides that this Court may make orders for costs according to the requirements of law and fairness. Both applications have been unsuccessful. However, Dr Ndlovu appeared in person, and the Department’s

position, while ultimately unsuccessful, was not wholly unreasonable. In these circumstances, no order as to costs is warranted.

Order

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

1. The application by the MEC for the Western Cape Department of Health for leave to appeal is refused.
2. Dr Ndlovu's conditional cross-appeal against the quantum of compensation is refused.
3. There is no order as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa