SUSPENSION AS AN UNFAIR LABOUR PRACTICE

by

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DECLARATION

I, Hanli Share with student number 204002877, hereby declare that this treatise submitted for the requirement for the degree of LLM is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

___________________
Hanli Share
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SUMMARY

Suspension as a form of an unfair labour practice can be of two categories. There could be a situation where an employer suspends an employee as a disciplinary sanction after an employee has committed an act of misconduct. This is often referred to as a punitive suspension. An employer may also suspend an employee pending a disciplinary hearing. In this case the employee has not yet been found guilty because the investigation into the alleged misconduct is still on going. The employee may be suspended as a way of preventing him from interfering with the investigation process into the alleged misconduct. This form of suspension is often referred to as a preventative suspension. It is very important to note the distinction between the two forms of suspension because the processes that are followed when effecting them are different. Failure to acknowledge the difference might result in a situation where an employer might be effecting a preventative suspension but the consequences might be that of a punitive suspension and end-up being an unfair labour practice. Suspension is a disciplinary measure, and it is important to note that in the event that the employer elects to implement a suspension, its conduct must be disciplinary in nature and intent and should be corrective rather than punitive.

Unlike dismissals where the Code of Good Practice of the Labour Relations Act, No 66 of 1995 provides guidance on what constitutes procedural and substantive fairness, there are no guidelines on what constitutes procedural and substantive fairness when it comes to suspensions. This has resulted in a situation where suspension is treated as a minor aspect of disciplinary measures that is frequently abused as it is often on full remuneration. This, however, does not allow an employer to suspend employees at will, without merit and without following proper procedure. Suspension could have severe adverse effects on employees and often affects their reputation, goodwill, human dignity, self-esteem and the right to meaningful association and work. It is for this reason that suspension must be effected in a way that is procedurally and substantively fair.

Punitive suspension is implemented as a sanction and is often without pay and is a last resort prior to dismissal. Preventative suspension occurs prior to a disciplinary
hearing, with the aim of temporarily removing the employee from the workplace to enable the employer to conduct a proper investigation without interference. Unfortunately preventative suspensions are often abused by employers in that they protract over extended periods of time, making the preventative suspension punitive in nature, to the extent that the courts have been forced to intervene and lay down stringent requirements that must be met in order to prevent such abuse.

There are various requirements for suspension which range from the intention of the employer, the *audi alteram partem* rule, sufficient reasons prior to suspension to period of suspension.

Most employment relationships are governed by disciplinary codes or collective agreements, which often place limitations on the concept of suspension. Some codes provide for special leave at the option of the employee, which the employer often abuses instead of utilizing the preventative suspension option. This, however, is more often than not to suit a political agenda.

In the event of non-compliance by an employer, an employee is not left remediless. An unfair suspension constitutes an unfair labour practice and an employee has the right to refer such dispute to the relevant labour forums like the CCMA or the relevant bargaining council. Employees are cautioned not to refer their disputes to the Labour Court for final relief, but rather to only approach the courts for urgent interim relief, like interdicts.
CHAPTER 1
INTRODUCTION

The basis of the employment relationship is the contract of employment. On the face of it, it can be argued that the employment contract is entered into voluntarily and on an equal basis by the parties to the contract. However, in reality this is hardly ever the case. The employer, due to the resources at his disposal, is in a stronger bargaining position than the employee who is desperate for an income. Given that the employer reserves the right to discipline the employee for misconduct it is necessary that the possibility of the employer abusing disciplinary action is kept in check. It is for this very reason that labour legislation intervenes in the relationship in order to ensure fairness.

In the past the power play was exceptionally one-sided, leaning heavily towards the side of the employer, giving employers the monopoly to do whatever they please. This was allowed by the common law, which did not recognize the concept of fairness, but merely recognized a general duty of good faith. The courts recognized the inequity in the employment relationship and started developing the common law to align it with the values which our Constitution holds. The courts realized that a distinction has to be drawn between “lawfulness” and “fairness”. Simply because disciplinary action is lawful, does not necessarily make it fair, however, unlawful disciplinary action is most certainly unfair. The court held that the ultimate determinant is therefore fairness, and not lawfulness.¹

Over the years, that monopoly of the employer has been severely limited by the various judgments, and labour legislations that have been introduced in South Africa with the aim of creating a balancing act between the rights of employers and the rights of employees.

Without that tug of war between the rights of employers and employees, disciplinary measures would be futile, as employers will have the prerogative to institute discipline how and when they so choose. However, with the introduction of the

¹ NUMSA v Vetsak Co-operative Ltd & Others [1996] 6 BLLR 697 (A) at 460.
Labour Relations Act ("LRA")\(^2\) any form of disciplinary action has to meet certain minimum requirements. The LRA demands both substantive and procedural fairness in order to bring a form of equilibrium in the employment relationship.

The focus of this script is suspension which is governed by section 186(2) of the LRA. Section 186(2) gives effect to section 23 of the Constitution,\(^3\) which provides for the right to fair labour practices.

Suspension is a two-dimensional aspect in our labour law that has created much animosity and upheaval. There are two forms of suspension, one being preventative in nature and the other punitive. Preventative suspension occurs when an employee is removed from the workplace on a suspicion that he or she has committed some form of misconduct, in order for the employer to conduct a formal investigation relating to the alleged charges. Punitive suspension occurs where the employer has conducted the investigation, found sufficient grounds to proceed with a disciplinary hearing and the employee is found guilty. The employer may then elect a sanction that is appropriate in the circumstances. Punitive suspension could be such sanction but may only be applied in very extreme cases and only as a last resort prior to dismissal.

It is worth noting that when dealing with preventative suspension the employee is not necessarily disadvantaged because it has to be on full remuneration. The problem is that preventative suspension can easily be abused by the employer, often implemented in Provincial and Local Government to suit political agendas, often disguised under the ruse of "special leave".

The questions that arise are what the lawful requirements for both a preventative and punitive suspension as disciplinary measures are, and what the effect of collective agreements in Local and Provincial Governments is.

\(^2\) No 66 of 1995.
The purpose of this treatise is to highlight some of the various problems that employees encounter, not only so in the private sector, but especially also in the public sector, focusing on the local municipality and the public service.

Chapter 2 contains the general principle of what constitutes disciplinary action with the focus on the antagonistic relationship between the employer and the employee. Chapter 3 focuses on the difference between punitive and preventative suspension and also the lawful requirements of both forms of suspension. Chapter 4 contains and highlights the problems that the public sector employees face with the abuse of preventative suspensions. Chapter 5 sets out the relief in various forms in different forums that employees can or may consider when suspended unfairly and the requirements for each form of relief. The discussion is concluded in Chapter 6.
CHAPTER 2
PURPOSE OF DISCIPLINARY ACTION

2.1 INTRODUCTION

In order to understand the concept of suspension, especially where and how it fits into the employment relationship, it is of utmost importance to fully grasp the underlying concept of the antagonistic employment relationship, where the power occurred, how the law has influenced that power, and where the power lies today.

2.2 THE EMPLOYMENT RELATIONSHIP

In the past, the concept of an employment relationship was extremely one-sided, placing all the power in the court of the employer. This type of relationship is best described by Otto Kahn:4

“…the relation between an employer and an isolated employee is typically between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the ‘contract of employment’. The main object of labour law has always been, and … will always be a countervailing force to counteract the inequality of the bargaining power which is inherent in the employment relationship.”

Under the common law the employer has always had the right to discipline an employee in whatsoever manner it desired and it was always the employer’s unfettered prerogative to determine the severity of the sanction. This role of power was often abused to the detriment of the employee. However, with the introduction of the Labour Relations Act (“the LRA”)5 this one-side power has been levelled to a certain extent by the introduction of the element of fairness into the employment relationship, aimed at creating a level playing field for employers and employees.

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5 66 of 1995.
Even with the introduction of these labour laws, the employment relationship continues to be somewhat antagonistic. Employers and employees still attempt to meet each other in the middle, but in reality, each party has its own needs and will do whatever it takes to have those needs fulfilled. The employer has the need for productivity and profit, and the employee has the need for job security and an income.

Each party’s respective needs to add to the antagonism of the employment relationship and creates a gap of indifference. The Code of Good Practice (“the Code”)\(^6\) has been created in an attempt to close this gap of indifference and reach some form of middle ground in protecting both the rights of the employer and the employee. Even though the Code is in relation to dismissals, it does provide for disciplinary action prior to dismissal, as set out in clause 3 thereof.

In relation to disciplinary action prior to dismissal, the Code provides the following:\(^7\)

> “The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.”

The Code provides that all employers should aim to adopt a disciplinary code. The benefit of a disciplinary code is that the employee is fully aware of what is expected of him, and in the event that this expectation is defaulted on, the employer is fully aware of what action it can take against the employee to rectify the employee’s behaviour.

The rules created by an employer must create a level of certainty and unambiguity. Employees must be made fully aware of the employer’s rules and regulations in a manner that is simple to understand. For those employees who are illiterate, the rules and regulations must be explained. It is accepted, however, that some minor rules of the employer are so well established and common sense in a way, that it is

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\(^6\) Schedule 8: Code of Good Practice Dismissal.

\(^7\) Item 1(3) of the Code.
not necessary to communicate them to the employees. The employer must be consistent in the way it implements its disciplinary action against employees.\textsuperscript{8}

In the event that the employee steps out of line, or contravenes the employer’s disciplinary code, the employer should proceed to take disciplinary action against the employee with the aim of correcting the employee’s behaviour.\textsuperscript{9} This corrective approach is clear from the wording in clause 3.2 of the Code, which provides as follows:

“The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.”

The conduct of an employer is only disciplinary action if such conduct is disciplinary both in nature and intent on part of the employer and is regarded as corrective, rather than punitive.\textsuperscript{10}

When it comes to dismissing employees, the LRA makes a distinction between the procedures to be followed and the reason for the dismissal. In order for a dismissal to pass muster, it has to be both procedurally and substantively fair.\textsuperscript{11}

In order to comply with any form of disciplinary action procedurally, there has to be an investigation, written charges and a hearing. The employee must be given sufficient notice to prepare for the hearing, and at the hearing the employee must be given a fair opportunity to present his or her defence and cross-examine any witness the employer presents. The rules of \textit{audi alteram partem} and natural justice therefore need to be complied with.\textsuperscript{12}

\textsuperscript{8} Item 3(1) of the Code.
\textsuperscript{10} \textit{Ibid}
\textsuperscript{11} Grogan \textit{Employment Rights} 136.
\textsuperscript{12} The Code, clause 4(1).
Substantively, there has to be fair reason for the sanction to be imposed. Fair reason will include whether the employee transgressed a rule, whether the employee was aware of the rule and whether the rule is reasonable.\textsuperscript{13}

An employer has various sanctions at his disposal depending on the seriousness of the offence which ranges from as minor as a warning, demotion, suspension and even as severe as dismissal. Whether or not the reason is serious enough to warrant the sanction imposed will depend on the nature of the employer’s disciplinary code.\textsuperscript{14}

2.3 CONCLUSION

Now that there is a proper understanding of the concept of disciplinary action, and the responsibility and power to enforce sanctions, the focus of this dissertation is on the effects of suspension as a form of disciplinary action which will be discussed in Chapter 3.

\textsuperscript{13} The Code, clause 6.
\textsuperscript{14} Grogan Employment Rights 136.
CHAPTER 3
SUSPENSION

3.1 INTRODUCTION

Suspension is used commonly in the employment context. However, in order to understand its application and consequences it is important to understand exactly what suspension is and what it entails. In this chapter, the focus will be on what suspension entails, especially looking at the different types of suspension and the consequences that they have for the employee and employer.

This chapter will also focus on the general requirements for a fair suspension and the consequences should any of the requirements not be met.

3.2 WHAT IS SUSPENSION?

The term “suspension” is used in labour law to describe a particular happening in which an employer temporarily refuses to accept the services of an employee, yet the employer does not terminate the employment relationship.\(^\text{15}\)

In the event of suspension, the employee is not rendering services, yet there is a positive duty on the employer to pay the employee the usual wage or remuneration package as per the common law contract of employment. It is only when the employer and employee have contracted, either by means of the original employment contract or by entering into a collective agreement which provides that the employer is not obliged to pay the employee the ordinary remuneration package in the case of suspension.\(^\text{16}\) In the absence of an agreement between the parties, the employee will likely succeed in proving breach of contract by the employer should the remuneration be unilaterally withheld.

\(^{15}\) Grogan *Employment Rights* 130.

\(^{16}\) 131.
In certain circumstances, the employee will be able to prove that the suspension is unfair as it adversely affects the right of that employee to remuneration or the employee’s right to professional development.\(^\text{17}\)

The agreement entered into between the employer and the employee will determine whether the employee has the right to work.\(^\text{18}\) The express words of the contract will be able to reveal the right, together with the type of employment and the amount and payment structure of the remuneration to which the employee is entitled to.\(^\text{19}\) Examples where suspension affects the employee’s right to work are where the status of an employee is affected and such status is crucial to the employee, where an employee is paid by commission, or where suspension would affect the ability of the employee to maintain or build up a certain level of expertise.\(^\text{20}\)

The two kinds of suspension, preventative, and punitive will be discussed in detail in this chapter.

Employees are protected against the unfairness of suspension as any unfairness constitutes an unfair labour practice. This is entrenched in legislation by section 186(2) of the LRA which provides as follows:

“Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving -

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.”

By including conduct relating to suspension as part of this section it is clear that the legislature recognized that in certain circumstances suspension may be fair.\(^\text{21}\) It is also clear that this section can be divided into separate parts, the one being “suspension”, and the other “any other disciplinary action”.\(^\text{22}\)

\(^{17}\) Van der Walt & Biggs “Aspects of unfair suspension at work” 2011 \textit{Obiter} 697 697 – 711.
\(^{18}\) 699.
\(^{19}\) Marbe v George Edwards Daly’s Theatre (1928) 1 KB 269 at 288.
\(^{20}\) Van der Walt & Biggs 2011 \textit{Obiter} 698 697 – 711.
\(^{21}\) Van der Walt & Biggs 2011 \textit{Obiter} 700 697 – 711.
\(^{22}\) Grogan \textit{Employment Rights} 131.
This reference to “any other disciplinary action” gives an indication that the legislature intended only dismissal to be a disciplinary sanction and not all the other forms available to employers in labour law currently.23

The courts have accepted in Koka v Director-General: Provincial Administration, North West Government24 that this provision in the LRA provides not only for punitive suspensions, but for preventative suspension as well. This view has subsequently also been imposed by the CCMA and Bargaining Councils are accepting jurisdiction in both these regards.

### 3.3 PUNITIVE SUSPENSION

Punitive suspension is a form of disciplinary action and is in effect a sanction short of dismissal.25 This form of suspension is given to an employee after a process of an investigation and a hearing, and the employer has elected suspension as a consequence of the employee’s misconduct, as a sanction after a finding of guilt.

As suspension without pay is a very harsh sanction to impose, often with severe possible consequences for the employee, it is advised that this type of sanction be imposed with great caution. However, despite the severity of the consequences, it is still acceptable as an alternative to dismissal.26

As this sanction is a sanction short of dismissal, the nature of the sanction indicates that the trust relationship between the employer and the employee has not broken down irretrievably and a continued relationship is not unbearable / as opposed to that of dismissal, where the employment relationship has broken down to such a state of disrepair that it cannot be fathomed that the parties can work together again in the future.

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23 131.
25 142.
Despite the severity of this sanction, one has to take into account the employment rate in South Africa and the struggles that individuals face in having to find employment. It cannot reasonably be expected of an employer merely to give a warning to an employee who is guilty of grave misconduct, or perhaps an employee who repeats a form of misconduct without feeling remorse knowing that he will simply receive a warning. Economically, it does not affect the employee at all and there is no motivation to rectify its conduct. However, where the sanction of suspension without pay is implemented, the employee is punished to the extent that he can feel the punishment in his purse strings. It allows the employer to discipline its employee for grave misconduct, but it still treasures the employment relationship for the good of both parties involved.

This type of suspension is generally only implemented on occasions where the employment contract, disciplinary code, collective agreement or legislation allows for it.

### 3.4 REQUIREMENTS FOR A FAIR PUNITIVE SUSPENSION

It is often unfair to allow an employer the sanction of unpaid suspension when it is not provided for in the employer’s disciplinary code. However, this absence does not bar an employer outright from relying on this type of sanction.

In the case of *County Fair Foods (Pty) Ltd*, punitive suspension was found to be permissible even though not specifically provided for in the employer’s disciplinary code.\(^{27}\) The court had this to say:\(^{28}\)

“The offer of suspension without pay is an extension of mercy. It is a merciful sanction because it avoids the harsh consequences associated with dismissal. Mercy, it has been said, is an indispensable attribute of justice.”

This principle was re-affirmed in *South African Breweries Ltd (Bear Division) v Woolfrey & Others*,\(^{29}\) where the Court held:

\(^{27}\) *County Fair Foods (Pty) Ltd v CCMA & Others* [1998] 6 BLLR 557 (LC) 589C-D.

\(^{28}\) Par 21-G.
“The imposition of suspension without pay as a disciplinary penalty is because the employee has committed some form of a disciplinary breach. An employer is entitled to take action against employees who misconduct themselves. Once the employer has decided that instead of terminating the contract of employment it will simply suspend it for a period it is not acting unlawfully.”

However, punitive suspension must still be implemented only in accordance with fair reason and fair procedure.\(^{30}\)

“For fair reason” refers to the substantive requirement for a fair punitive suspension, and requires that the employee must be guilty of the misconduct accused of, and the misconduct so proved must have been of a very serious nature. It would be safe to suggest that this type of sanction is imposed only as a last resort prior to dismissal. Similar factors which are considered for the sanction of dismissal should be considered for this sanction. These factors are set out in Item 3(5) of the Code:\(^{31}\)

“… [t]he employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job in the circumstances and the infringement itself.”

Section 2(1)(c) of the Schedule 7 of the LRA,\(^{32}\) is also applicable in this instance. It is understandable that this Act is silent on all disciplinary sanctions save for that of dismissal; however, the word that is conspicuous in this particular section is “unfair”.\(^{33}\) As the Act does not provide for any precise rules to determine fairness for any disciplinary action short of dismissal, the general principles relating to the sanction of dismissal in this Act will have to be applied in its general sense just as was done with the Code of Good Practice Dismissal.

These requirements can be summarized as follows:

a) The employer must have proved the misconduct:

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29 [1995] 5 BLLR 525 (LC) at par 12.
30 Leshomo & another v Clover SA (Pty) Ltd supra 117.
31 LRA, Schedule 8: Code of Good Practice Dismissal.
32 Recently amended.
Once the employer suspects the misconduct of the employee, it is important for the employer to lodge an investigation into the alleged misconduct and confirm with sufficient certainty that the employee actually committed the alleged offence. It is not sufficient for the employer to suspend an employee on a mere allegation or assumption of alleged misconduct.

b) The employee must have been aware that the misconduct was a breach of a disciplinary standard:

In the event that the employer, through its investigation finds that the employee had breached a workplace rule or policy, it has to be established whether the rule actually existed, whether it was actively being used and enforced in the workplace, and also whether the employee was aware, or should reasonably have been aware of this rule.

There are numerous occasions in which a workplace rule or policy has become disused due to the passage of time, alternatively becomes non-applicable due to the change in the workplace. Further, there is no point in an employer having a workplace rule or policy but this rule is only known by top management or the rule has never been communicated to the employees. In such a circumstance the employee would not be aware of the rule. However, certain rules are so clear and based on common sense that it is not required of the employer to communicate such rule, for instance, that employees may not steal, or employees may not assault once another in the workplace.

c) The suspension must be the appropriate sanction:

In the light of the nature of the misconduct, it has to be established that suspension without pay was the appropriate sanction to impose taking into consideration the various circumstances and factors set out in the LRA mentioned above.
If the misconduct complained of is of such a minor nature and insignificant, the employer should resort to a lesser form of sanction like a written warning instead of suspension without pay.

d) The penalty of punitive suspension must have been consistently applied in the workplace:

In order for the punitive suspension to be fair, the employer has an obligation to impose sanctions consistently. Therefore, other employees who have committed similar acts of misconduct must also have been punished with a similar sanction.

It is understandable that every matter is different and the circumstances are unique. This would influence the sanction to be imposed. However, the employer should as far as reasonably possible treat like cases alike, and award similar sanctions respectively.

e) Hearing:

Suspension as a disciplinary sanction is imposed as a penalty short of dismissal and it would be detrimental to the employer to not follow fair procedure. As guidance, it would be advisable for all employers to consult the Code of Good Practice: Dismissal.34

“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”

34 LRA, Schedule 8: Clause 4(1) of the Code of Good Practice Dismissal.
In order to impose a penalty, there had to be an investigation to determine whether the employee was actually guilty of the misconduct as alleged. The employee should then be given a reasonable opportunity to make representations both before the finding of guilty, as well as after such finding in order to give mitigating circumstances relating to sanction.

Should the employer fail to comply with just one of the above requirements, it is at risk of being taken to the CCMA or relevant Bargaining Council for conduct relating to an unfair labour practice.

3.5 PREVENTATIVE SUSPENSION

Preventative suspension (otherwise known as a precautionary suspension) occurs where disciplinary charges are being investigated against an employee, and the employee is then suspended pending the investigation and the outcome of the disciplinary hearing.

This form of suspension is only reasonable should it be anticipated that the employee will interfere with the employer's investigation of the alleged misconduct, and commit the offence again, or in the event that the employee will intimidate witnesses who are to assist in the investigation or testify at the disciplinary hearing. In these circumstances it then becomes necessary to remove the employee temporarily from the workplace.

In the case of *Mogothle v Premier of the Northwest Province & Others* Van Niekerk J referred to Halton Cheadle’s publication in which the following was observed:

“[s]uspension is the employment equivalent of arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment.”

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Van Niekerk J’s interpretation of this requirement is that suspension should not be taken lightly, alternatively should not be resorted to too hastily. According to Cheadle, there is only one reasonable motive for suspension, and that is the apprehension that the employee will interfere with the investigation, intimidate witnesses, or repeat the misconduct in question.

The underlying principle for the concept of preventative suspension was accurately captured by Jaybhay AJ, as the “maintenance of the integrity and morale of the employer requires action to be taken”. His view can further be summarized as a necessary measure which is aimed at promoting orderly administration in the employer’s workplace which is necessary to be implemented without delay, both for the benefit of the employer and the employee subject to the requirements mentioned below.39

Jaybhay AJ went further and noted that the object which underlies the speedy investigation, without unreasonable delay, is to prevent the unnecessary disruption in the life of the employee, to minimize the anxiety and concern of the employee, to limit the possibility that the employee will not be allowed a fair hearing, and to resolve the dispute expeditiously.40

The courts have confirmed the above principle in the English Court of Appeal in the matter of Lewis v Heffer & Others41 in which the following was held:

“Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay, pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done, unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended.”

40 Par 18.
41 1978 (3) ALL ER 354 (CA).
It is imperative for the employer to ensure that this type of suspension is not punitive, as the allegation of misconduct has not yet been proved by the employer, as this is occurring prior to the disciplinary hearing. Preventative suspension has to be on full pay, unless the employer is contractually entitled to suspend the employee without pay. An instance where unpaid preventative suspensions are allowed is in the South African Police Service, where preventative suspensions are without remuneration by authority of their regulations. In such circumstances, the duty on the employer is even more onerous to finalize its suspension speedily and institute disciplinary action as a matter of urgency. In any other sector, preventative suspension without pay in anticipation of a disciplinary enquiry is unfair. It is further unlawful for the employer to withdraw the allowances to which the employee would generally be entitled to during the ordinary course of the employment relationship.

3.6 REQUIREMENTS FOR A FAIR PREVENTATIVE SUSPENSION

Every case of suspension will have to be decided on its own merits. Despite preventative suspension not being a sanction, it still has to be both procedurally and substantively fair. The starting point would be to consider the purpose of a preventative suspension.

The purpose of a pre-suspension hearing must be confined to establishing whether suspension is warranted, and on what terms. In the matter of Gradwell, the Labour Appeal Court pointed out the following: “procedural fairness depends in each case on the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it”. Therefore, the standard of procedural fairness may be “legitimately attenuated”.

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44 Joubert v Ground Crew (Pty) Ltd t/a First Catering SA (2009) 12 BALR 1284 (CCMA).
There are various factors which have bearing on the fairness of a particular suspension.

a) The intention of the employer:

The intention of the employer could be deduced from its motive. The employer’s motive will determine whether the suspension was implemented for its intended purpose. In the matter of *Sajid v Mahomed NO & Others*\(^{47}\) it was found that the employer’s motive was not honourable. The employee was the Imam and Khatib of the Grey Street Mosque, in Durban. He was effectively suspended on 24 October 1997.\(^ {48}\) A disciplinary enquiry was eventually convened on 29 January 1998, until December 1998 during which time the disciplinary enquiry sat occasionally from time to time during which the respondent amended and added charges against the applicant.\(^ {49}\)

At the Labour Court, on review of the Commissioner’s award, Judge Zondo pointed out that the employer failed to put any evidence before it that the employer had taken a decision to proceed with an enquiry which it effectively withdrew, and the only inference to be drawn from that conduct would be that it was never the employer’s intention in the first place to convene any form of inquiry into whether or not the employee was incompatible as it was initially alleged.\(^ {50}\) The result being that the suspension was actually seen as punitive and not preventative which made it substantially unfair.\(^ {51}\)

Furthermore, there must also be an objectively justifiable reason to deny the employee access to the workplace, for instance the employee has access to information necessary for the investigation and there is a possibility that the employee could destroy such information.\(^ {52}\)

\(^{47}\) (1999) *JOL* 5076 (LC).

\(^{48}\) At pg 6 par 10.

\(^{49}\) At pg 8 par 12.

\(^{50}\) Pg 31 par 71.

\(^{51}\) *Grogan Employment Rights* 132.

\(^{52}\) *Member of the Executive Council for Education, North West Provincial Government v Gradwell* supra.
b) The employer has to give reasons:

It is imperative for the employee to be given the details of his alleged misconduct, as well as the reasons for his intended suspension. In the recent matter of *Lebu* (1), the court confirmed that it was not sufficient for an employer to rely on a mere suspicion that the employee who had committed the alleged misconduct. That would not be sufficient and not hold water and would definitely not justify a preventative suspension. The court correctly held that, where an employer did not provide the employee with written reason prior to his suspension the employer was committing breach of contract. In *Lebu* (2) the court went further and noted that the “purpose” of removing an employee from the workplace, even temporarily and on full pay, had to be rational and reasonable, and had to be conveyed to the employee concerned with adequate particulars to enable the employee to compile sufficient detail to enable him/her to assemble the representations that he or she has been invited to make in an explicit way. This process of reasonableness cannot be rectified after the fact. This is discussed further in (d) below.

c) **Prima facie case:**

The employer must have established a *prima facie* case against the employee in order for any suspension to be fair. If the employer is unable to prove a *prima facie* case there is no reasonable basis for keeping the employee from fulfilling his duties.

A *prima facie* case would be established when the employer realizes that the employee did in fact commit some form of misconduct, and that, objectively speaking, there is a valid and sound reason to keep the employee away from

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56 *Marcus v Minister of Correctional Services & Others* (2005) 26 ILJ 745 (SE).
the workplace.\textsuperscript{57} It has to be kept in mind that this is not punitive as it is envisaging a hearing pending a disciplinary enquiry and the misconduct has not yet been proved.\textsuperscript{58}

d) \emph{Audi alteram partem} principle:

This has been a very intriguing topic in the courts in South Africa over the last few years, which has resulted in various conflicting judgments. These conflicting judgments ranged from employees not having a right to be heard,\textsuperscript{59} to having a right to be heard but that right is implied from the employment contract itself; alternatively that the right stems from administrative law in terms of section 158(1)(a).\textsuperscript{60}

It has been argued that a hearing prior to suspension amounts to duplication, as the whole purpose of preventative suspension is to allow an investigation into the seriousness of the alleged misconduct of the employee and allow the employer to prepare for a disciplinary hearing. However, the courts have held that an employee is entitled to be heard before being suspended.\textsuperscript{61}

The reason for this is due to the fact that the Labour Court has recognized that suspension has a detrimental impact on an employee’s reputation, advancement, job security and fulfilment. The effects of suspension will be discussed later on this chapter.

However, our courts have seemed all to get into one trend when considering an employee’s right to be heard. Molahlehi J opined as follows:\textsuperscript{62}

\begin{itemize}
  \item Van der Walt & Biggs 2011 \textit{Obiter} 701 697 – 711.
  \item \textit{Justisie and Swart & others v Minister of Education & Culture, House of Representatives & another} 1986 (3) SA 331 (C).
  \item Member of the Executive Council for Education, North West Provincial Government v Gradwell \textit{supra}.
  \item Muller v Chairman, Minister’s Council, House of Representatives (1991) 12 \textit{ILJ} 761 (C).
  \item \textit{SAPO Ltd v Jansen van Vuuren NO and others} [2008] 8 BLLR 798 (LC) par 37.
\end{itemize}
“There is, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words, unless circumstances dictate otherwise, the employer should offer an employee an opportunity to be heard before placing him or her on suspension.”

The judges of the Labour Appeal Court have followed this same route and have set the record straight relating to an employee’s right to a hearing prior to a precautionary suspension. They confirmed that this right arose from a right located within the provisions of the LRA. That right being the duty on employers not to subject employees to unfair labour practices. This right does therefore not arise from the Constitution, PAJA or as an implied term of the contract of employment as previously held by the Courts.63

When an employee was given sufficient time to make representations as to why he or she should not be suspended, it is safe to say that the audi principle has been complied with.64 What constitutes a “reasonable time” to make representations has also been criticized by the courts. In Biyase,65 the courts have determined that 7 days are a reasonable period. This time frame was also confirmed in Lebu (2).66

An employee should be notified of the suspension, the reasons for the suspension and the conditions of the suspension, as well as further be informed of details regarding payment, expectations from employee during period of suspension and duration of suspension.67

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63 Member of the Executive Council for Education, North West Provincial Government v Gradwell supra par 45.
64 Par 47.
67 Van der Walt & Biggs 2011 Obiter 705 697 – 711.
The length of the period of suspension:

A preventative suspension for an unreasonably long period of time constitutes an unfair labour practice. What is unreasonably long depends on the circumstances. Some may argue that it depends on how long the employer requires to finish the investigation. Generally speaking, 3 months appear to be reasonable, taking into consideration the time period provided for in most disciplinary codes.

Therefore, it is safe to assume that the period of suspension has to be reasonable and an employee may not be kept on suspension for an indefinite period of time. It doesn’t matter whether the suspension is on full pay or not.

Whether the period of suspension is reasonable will depend on case to case. The period of suspension will even be more unfavourable to the employer should the employer fails to adhere to the time limits set out in its own disciplinary code of conduct. The effect of non-compliance with disciplinary codes or collective agreements will be described more fully in chapter 4 below.

The courts have expressed that what can be accepted as “reasonable” for a period of suspension is the length an employer would need to conclude a proper investigation into the alleged misconduct of the employee, as the employee is entitled to a speedy and effective resolution of the dispute.

It can be submitted that any lengthy delay in finalizing the charges against the employee which results in an unreasonably extended suspension can be declared substantively unfair.

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68 Minister of Labour v General Public Service Sectoral Bargaining Council [2007] 5 BLLR 467 (LC).


71 Van der Walt & Biggs 2011 Obiter 704 697 – 711.
3.7 EFFECT OF SUSPENSIONS

In an unreported case of Setlhoane & Others v Department of Education North West Province & Others\(^{72}\) the Labour Court stated that the prejudice that an employee may suffer as a result of suspension is not limited to financial loss. One needs to consider the reason for the potential suspension, if there exists a suspicion of misconduct and various other aspects that materially affect the employee come into play, for instance the integrity and dignity of the employee.

In another matter the Supreme Court of Appeal found that the affects of suspension on employees are massive. For an employee, the crux is not productive work just as a key for survival but rather that taking part in productive work is a crucial part of a person’s human dignity as humans are social beings with the need of self-esteem and a sense of self-worth which is found by being accepted in society and being useful to others.\(^{73}\)

In SAPO Ltd v Jansen van Vuuren NO and Others,\(^{74}\) Molahlehi J, in addition to the sentiments expressed by some of his colleagues in earlier judgments, mentioned further aspects of suspension that affects the employee detrimentally and can be seen as the equivalent of an arrest. These are factors, such as reputation, advancement, job security and fulfilment.

It is important for employers to note that compensation that can be awarded to an employee is not limited to the 12-month ceiling stipulated in the LRA. The Labour Appeal Court has looked beyond that, at what is just and equitable in the circumstances, and awarded an employee non-patrimonial loss as well as legal fees which the employee incurred to protect its rights.\(^{75}\)

Therefore, the effects of suspension on the employee are numerous and far-reaching in consequences and employers should heed caution before suspending employees.

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\(^{73}\) Minister of Home Affairs v Watchenuka (2004) 1 All SA 21 (SCA) par 27.

\(^{74}\) [2008] 8 BLLR 798 (LC).

\(^{75}\) Minister of Justice and Constitutional Development and Another v Michael Malisa Thishonga (Case no: JA6/2007).
haphazardly. Labour legislation like the LRA and BCEA has been enacted to protect employees in trying circumstances such as malicious suspensions, and employers could find themselves being forced to compensate employees rather than discipline them as initially intended.

For the employer, especially in the instance of preventative suspension, it means the financial loss of remunerating the employee whilst at the same time not having the employee on site and benefitting from the services which such employee should be rendering. This was emphasized in the Ngwenya v Premier of Kwazulu Natal, where the court had this to declare:

“An employee cannot remain on suspension, which is a precautionary suspension, for an indefinite period of time and the State gladly pays the employee for doing nothing when it does not have money to pay those performing their duties...The applicant has received full benefits for nine months for doing nothing.”

3.8 CONCLUSION

From the above discussion it is apparent that suspension, whether preventative or punitive in nature, has significant implications for the employee, and the employer has to consider the consequences stemming from the contract between them, as well as possible unfair labour-practice referrals based on section 186(2) of the LRA.

Unless contractually agreed between the parties, an unpaid suspension will most definitely be breach of contract. Therefore, preventative suspension should always be on full pay. However, even paid suspension could be breach of contract if the employee has a contractual right to work.

In the event of punitive suspension, the employee’s consent should be obtained, and if refused unreasonably, dismissal will have to be considered by the employer.

For any suspension to be fair, it has to be substantively and procedurally fair.

76 [2001] 8 BLLR 924 (LC) par 42 and 43.
Substantive fairness focuses on the reason for the suspension. For preventative suspension, the decision to suspend has to be reasonable taking into consideration the nature of the misconduct and the influence the presence of the employee will have during the investigation. The reason cannot be a mere suspicion that the employee committed the alleged misconduct and has to be considered on a *prima facie* ground. For punitive suspension, the decision to suspend also depends on the nature of the misconduct, the seriousness of the offence and should only be considered as a lesser sanction to that of dismissal.

Procedural fairness largely turns around the right to be heard. For punitive suspension it is a sanction and is only imposed after a disciplinary enquiry. However, for preventative suspension, it is paramount that the employee be given an opportunity to make representations.

Lastly, employers should be cautious when considering suspension in any form; it could constitute an attack on an employee’s dignity and employers could expose themselves to an unfavourable award or judgment in favour of the employee, possibly paying up to the 12-month remuneration, non-patrimonial compensation as well as legal fees.
CHAPTER 4
THE EFFECT OF COLLECTIVE AGREEMENTS OR DISCIPLINARY CODES ON SUSPENSION AND DISCIPLINARY ACTION

4.1 INTRODUCTION

Some academic writers like Cheadle suggest that arbitrary suspensions and unreasonably extended periods of suspension could be cured by judicial scrutiny and a Code of Good Practice which provide a statutory obligation to conclude a disciplinary enquiry within a reasonable period of time.77

A collective agreement is entered into between employers and employees, trade unions and employers’ organizations for the purposes of collective bargaining. Various industries’ Collective Agreements or Disciplinary Codes deal specifically with suspension of employees under certain circumstances, and provide for limitations on various aspects affecting the suspension of employees.

These collective agreements dealing specifically with suspension are commonly found in various industries. However, more often than not these collective agreements are not adhered to, specifically when it relates to the time limitations provided for suspension and further disciplinary action.

The State as the largest employer in South Africa is the biggest culprit in this regard as employees regularly stand to endure unreasonably long suspensions pending disciplinary action (which are often backed by political agendas), in certain instances enduring for periods exceeding 2 years. For the various reasons stated in the preceding chapters, such suspensions affect the rights of employees adversely.

Alternatively, Government will place an employee on “special leave” which, for all intents and purposes, has been done subject to a politically driven motive and in any event, should have been a period of preventative suspension.

77 Cheadle “Regulated Flexibility: Revisiting the LRA and the BCEA” (2006) ILJ 663 par 74.
For the purposes of this chapter I shall be focussing on public servants and municipal employees and the respective disciplinary codes and procedures governing those sectors.

4.2 THE LOCAL MUNICIPALITY

This concept of Cheadle, as set out above, can be assumed, is exactly what the drafters had in mind when they drafted the South African Local Government Bargaining Council's Disciplinary Procedure and Code Collective Agreement (“SALGBC Disciplinary Code”).

Paragraph 14 of this SALGBC Disciplinary Code deals specifically with the suspension of an employee pending a disciplinary hearing and provides as follows:

“14.1 The Employer may suspend the Employee or utilise him temporarily in another capacity pending an investigation into alleged misconduct if the Municipal Manager or his authorized representative is of the opinion that it would be detrimental to the interest of the Employer if the Employee remains in active service.

14.6 The suspension or utilization in another capacity of the Employee shall be for a fixed term and pre-determined period and shall not exceed a period of three months.

14.7 Any suspension shall be on full remuneration.”

The local municipalities have a bad reputation pertaining to complying with their own collective agreement, specifically in relation to instituting disciplinary action timeously and suspending employees for considerable periods at a time.

The time period for the suspension ties in perfectly with the time limitation incorporated for instituting disciplinary action.

Paragraph 6.3 of the SALGBC Disciplinary Code provides as follows:

“The Employer shall proceed forthwith or as soon as reasonably possible with a Disciplinary Hearing but in any event not later than three (3) months

78 Concluded between the SALGBC, IMATU, and SAMWU and came into effect 1 July 2010.
from the date on which the Employer became aware of the alleged misconduct. Should the Employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant division of the SALGBC.”

The cases to site are numerous, however, I shall focus intently on the unreported matter of Roland Williams v the Nelson Mandela Bay Municipality. For years municipalities have evaded responsibility stipulated in the Collective Agreement when it comes to the unlawful protracted suspensions of its employees by failing to comply with the time periods agreed, and were never brought to task about their conduct. In the majority of cases where there has been a complaint by employees regarding to unfair conduct of the municipality, municipalities rely on the argument of it being a large organisation with numerous departments and employees and as a result, they require more time to comply with the time constraints set out in its own disciplinary code and collective agreement. In the majority of cases, suspension goes hand in hand with an overdue disciplinary hearing. However, in the above matter of Williams, the Commissioner decided that substance should trump form and decided to intervene.

As a brief background, Mr Williams, the employee, is the Chief Operating Officer, Communications Manager of the employer, the Nelson Mandela Bay Municipality. During the 2010 Soccer World Cup the employee was involved with the erection of certain advertising gantries. It is alleged by the employer that such gantries did not conform to building regulations and subsequent to their being erected, they had to be removed, with the employer facing possible lawsuits from the owners of such gantries for losses suffered.

The employee was suspended on 3 August 2012, more than two years after his alleged misconduct. On 5 November 2012 the employee’s suspension was unilaterally extended by the employer “until further notice”.

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79 SALGBC ECD111217, 2013.
81 Par 9 of the employee’s opposing affidavit.
On 14 November 2012 the employee received a notice to attend a disciplinary hearing scheduled to commence in December. The employee, however, demanded that the employer’s conduct was unlawful and demanded that the employer first proceed to bring an application for condonation at the SALGBC. The employer heeded the advice of the employee and filed an application for condonation on the 28th of November 2012, however, not before the employee lodged a referral at the SALGBC for an unfair labour practice.

The employee alleged that the employer was, or reasonably should have been, aware of his alleged misconduct in 2010, alternatively, should have become aware of his alleged misconduct after the employer had Internal Audit and Risk Management do an investigation, whose report it received in July 2012.82

In the unreported ruling of Commissioner N Sesani,83 the SALGBC, despite the vagueness on the part of the employer by not alleging when it gave Internal Audit and Risk Management the instruction to proceed with an investigation, granted the employer the condonation it sought and made the following ruling:

“The employer is directed to communicate the new date, time and venue for the disciplinary hearing to the respondent within 30 days from the receipt of this ruling.”

The employer duly notified the employee on the 25th of March 2013 of its intention to proceed with the disciplinary hearing on the 30th of April 2013. The employer at least considered the warning underlying the condonation ruling. However, such consideration was short-lived. On the 24th of April 2013 the employer notified the employee that the disciplinary hearing so set down will be indefinitely postponed.84 All the while the employee remained on suspension.

By June 2013, the employer had made no effort to reconvene the disciplinary hearing, resulting in the employee’s unfair and unlawful suspension to carry on indefinitely.

82 Par 11 of employee’s opposing affidavit.
83 Dated 26 February 2013.
84 Par 18 of employee’s application to have disciplinary proceedings dismissed.
The employee elected to approach the SALGBC once again, this time with an application to uplift his unlawful suspension, and have the disciplinary proceedings dismissed.\textsuperscript{85}

The employee alleged that the employer made a mockery out of the condonation ruling, of which the purpose was that, the disciplinary hearing commence without further undue delays.\textsuperscript{86} The employee continued and claimed that it could not have been the intention of the Commissioner to grant condonation, however demand speedy resolution from there on; for that to be hollow ruling with little or no effect, and claimed that substance should trump form.\textsuperscript{87}

The employee claimed that employer was in breach of the condonation ruling as it failed to reconvene timeously the disciplinary hearing as provided for in the ruling, this despite the fact that condonation was granted on a previous occasion condoning the employer's dilatory conduct. As a result the employee sought an order declaring that the employer should not be allowed to proceed with the disciplinary hearing against him in its totality and that his unlawful suspension should be uplifted.\textsuperscript{88}

Commissioner Koorts from the SALGBC applied his mind to the relief that the employee was seeking and found that, by granting condonation for the employer in the first instance and requesting the employer to institute disciplinary action within a 30-day period, clearly indicated that the employer should commence with the hearing without further undue delay. Commissioner Koorts held further that it was evident that the employer's intention was \textit{mala fide} and its intention was to extend and delay the suspension of the employee and the protracted disciplinary proceedings even further than had already been done, and that such conduct on the part of the employer was unfair and unacceptable.

Commissioner Koorts ruled the following:\textsuperscript{89}

\begin{itemize}
\item Application to Uplift Suspension and Set Aside Disciplinary Proceedings, dated 3 June 2013.
\item Par 22.
\item Par 25.
\item Par 36 and 37.
\item SALGBC Ruling, Commissioner R Koorts, dated 16 July 2013.
\end{itemize}
“The respondent must conclude the disciplinary hearing of the Applicant and provide the applicant with the outcome of the disciplinary hearing by not later than 15 August 2013.

If the respondent fails to conclude the applicant’s disciplinary hearing and provide the applicant with the outcome of the disciplinary hearing before 15 August 2013

- The disciplinary proceedings instituted by the respondent against the applicant are dismissed and the respondent may not proceed with the disciplinary proceedings against the applicant based on the same alleged misconduct.

- The suspension of the applicant must be uplifted with immediate effect.”

In giving his ruling, Commissioner Koorts did not close the door completely on the employer’s wish to proceed with further disciplinary action against the employee. Instead, he gave the employer a reasonable opportunity to conclude the disciplinary proceedings, and only in the event that the employer failed to conclude the hearing and provide an outcome within that period would the employer be barred from continuing with disciplinary action in its entirety. He did, however, find that the suspension of the employee was unlawful and uplifted it with immediate effect.

It is refreshing to see that employees stand up against their employers and fight for their rights of fair labour practices. Numerous employees elect to ride the wave of receiving remuneration whilst not having to lift a finger to earn those enormous monthly salaries, all of course at the tax payers’ expense.

The SALGBC Collective agreement is merely looked at as a guideline instead of a collective agreement which is valid and binding on the parties.

Another matter where the Commissioner decided to strictly apply the provisions of the SALGBC Collective Agreement, is the matter of *IMATU obo Pakkiri v Ethekwini Municipality (Parks & Culture)*, where Commissioner Ndaba held that where an employee was suspended on 21 December 2006, is

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90 (2009) JOL 24349 (SALGBC).
further suspended indefinitely on 3 April 2007 and was eventually dismissed on 11 November 2008 was unfair. The Commissioner emphasised that the SALGBC collective agreement envisages a situation that where an employee is suspended in order for the employer to conduct an investigation into the alleged misconduct of the employee, that the employer will complete his investigation and the hearing within the stipulated three month time period. Should it not be able to do that, the employer should ensure that the employee’s suspension is uplifted.91 The employer was accordingly found guilty of an unfair labour practice.

The cases mentioned above are merely a minor percentage of the annual unfair suspension cases referred to the SALGBC every year. It is clear that there is a very unfavourable trend developing in Local Government, the trend of suspending an employee should they not suit a political party’s agenda. This often results in employees being placed on suspension for period exceeding two years.

4.3 THE PUBLIC SERVICE

The Public Service Co-Ordinating Bargaining Council (“PSCBC”) first concluded a Collective Agreement governing the disciplinary proceedings within the public sector in 1999.92 Subsequent to this, amendments were made to the Disciplinary Code and any disciplinary action has to be implemented subject to the Disciplinary Code and Procedures for the Public Service (“the Public Service Disciplinary Code”).93

The provision in this Public Service Disciplinary Code regulating preventative suspension is situated at Clause 7.2 which provides the following:

“7.2 Precautionary Suspension

a) The employer may suspend an employee on full pay or transfer the employee if:

91 Par 39.
92 Resolution No 2 of 1999.
93 Resolution No 1 of 2003.
The employee is alleged to have committed a serious offence; and

the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property.

b) A suspension of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.

c) If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.

The Public Service Disciplinary Code appears to be clear and precise with its terms as the word “must” in clause 7(2)(c) clearly resembles a peremptory provision which should not allow an employer discretion. This provision, if read in its peremptory form requires an employer, who has suspended an employee for alleged misconduct, to investigate and conduct a disciplinary hearing within a month to 60 days.

However, despite its peremptory nature, the courts have interpreted this clause differently and it appears that even the Labour Court is divided on this very issue.

In the matter of Minister of Labour v General Public Service Sectoral Bargaining Council,94 the court was faced with a suspension which did not meet the necessary requirements as set out in the Public Service Disciplinary Code. The employee was the Assistant Director: Information Technology and was suspended for various charges which were serious in nature. Two years later his suspension was uplifted by agreement and he was allowed to resume his duties. After a period of two months back from his previous lengthy suspension, the employee was suspended once again, however this time for other allegations consisting of fraud and corruption. The employee then having had enough, referred a dispute to the PSCBC contending that his suspension had exceeded the period provided for in the Public Service Disciplinary Code, was indefinite and in clear contradiction of what is stipulated in the Code. The employee ultimately argued that his suspension constituted an unfair labour practice.

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94 [2007] 5 BLLR 467 (LC).
As the suspension of the employee did exceed the period stipulated in the Public Service Disciplinary Code, that being a period of 60 days, the Arbitrator had to interpret the provision and apply it to the facts at hand. The Arbitrator found that no exceptional circumstances were provided by the employer as to why the suspension exceeded the 60-day provision and accordingly found the suspension unfair.95

The employer took the arbitrator’s decision on review. Judge Francis interpreted clause 7(2)(c) to mean that once an employee was suspended the employer had no alternative but to hold a disciplinary hearing within a month or 60 days. And only if the matter is seriously complex does the disciplinary chairperson have discretion to postpone the hearing. A suspension therefore cannot extend beyond 60 days without a disciplinary hearing being held in order for the employer to place factors before the disciplinary chairperson motivating a postponement and for the disciplinary chairperson to exercise his discretion in this regard.96

In considering whether or not the employer committed an unfair labour practice by allowing the employee to continue on a protracted suspension, Judge Francis referred to the case of Ngwenya v Premier of Kwazulu Natal.97 Judge Francis agreed with Judge Ngcamu’s decision and correctly upheld the arbitrator’s view that the employer committed an unfair labour practice by exceeding the period of 60 days.98

In Ngwenya, the court was faced with a very unusual set of circumstances. The employee was the highest ranking employee in the Department of Works. He was suspended in July 2000 which suspension was a precautionary measure only as he was suspended in terms of clause 7.2 of their Disciplinary Code awaiting investigation and ultimately a disciplinary hearing. The employee was not afforded any hearing before his precautionary suspension.99

95 Par 4 and 5.
96 Par 11.
97 [2001] 8 BLLR 924 (LC).
98 Par 13.
99 Par 3.
The employee was on suspension for approximately 6 months without any indication by the employer of a disciplinary hearing. As the period of 30 days, as stipulated in the Public Service Disciplinary Code had lapsed, the employee queried the suspension and eventually referred a dispute.\textsuperscript{100}

At the conciliation, a settlement agreement was entered into, the material terms of which provided that the employee's suspension was uplifted and he could resume his duties the next day.\textsuperscript{101}

Instead of honourably instituting the settlement agreement which allowed the employee to return to work, the Premier suspended the employee again for the exact same allegations and circumstances for which he was suspended previously, and which unlawful suspension was resolved by means of the settlement agreement. Once again, the employee was not given the courtesy of a hearing prior to his second suspension.\textsuperscript{102}

The employee was left with no other alternative but to apply for urgent relief to the Labour Court to enforce the settlement agreement. Even though the employer argued that the employee should have referred the dispute to the bargaining council, Judge Ngcamu sided with the employee and found that the employer's conduct in suspending the employee was not only unfair, but also bordered on fraud with an intent to play a merry-go-round with the employee, which would deny the courts their aim for justice and a speedy resolution of labour disputes.\textsuperscript{103}

The crux of \textit{Ngwenya}, specifically relating to the aspect of preventative suspensions, is that where a Code provides that when an employee is suspended, a disciplinary hearing must be held within a month, it is unfair for an employer not to do so. An employee, who is kept indefinitely on suspension, even if the employee is paid during that period of suspension, is unfair.\textsuperscript{104} This much was confirmed by the \textit{Israel

\textsuperscript{100} Par 3. \\
\textsuperscript{101} Par 4. \\
\textsuperscript{102} Par 5. \\
\textsuperscript{103} Par 30. \\
\textsuperscript{104} Par 44.
Judgment,\footnote{Israel v Department of Correctional Services (2009) 6 BALR 540 (GPSSBC).} in which it was held that where a Code provides that a disciplinary hearing has to be convened within a certain time period there is a positive duty on the employer to ensure that it happens within the prescribed time limitations.

The Labour Court appears to be divided on this point of whether an employer may still proceed with disciplinary action should it have failed to institute action within the 60-day period. As per Ngwenya and Isreal above, the Labour Court appears to say no. In terms of that interpretation an employer will be barred from instituting disciplinary action after the 60-day period if the suspension was not properly extended by a disciplinary chairperson after a proper hearing.

However, another interpretation has arisen in the Labour Courts. This is apparent from the Labour Court decision of \textit{Mapulane v Madibeng Local Municipality and Another}.\footnote{[2010] 6 BLLR 672 (LC).} Judge Bhoola was faced with an urgent application brought by the employee uplifting his suspension and to resume his duties as a section 56 Manager of the employer. The employee was placed on special leave by the employer on 4 August 2009 which decision was set aside by the Labour Court on 7 August 2009. The employee was again suspended on 13 August 2009 after which the employee once again brought an application to the Labour Court. The Labour Court ordered that the employee might resume his duties on 25 August 2009. On 30 October 2009 the employee was again suspended for the third time, which suspension was extended by the employer on 7 December 2009. When the employee wanted to resume his duties on 7 January 2010 he was refused access as the employer alleged that he was still on suspension.\footnote{Par 3 to 10.}

Bhoola J had to decide firstly, whether the suspension of the employee ended by taking into consideration clause 17.4 of the collective agreement read together with clause 16.3 of the employee’s contract of employment, and secondly whether the second respondent extended the suspension of the employee and whether it had the authority to do so.\footnote{Par 14.}
The contentious paragraph causing controversy was the following:\textsuperscript{109}

“In the light of the fact that this disciplinary hearing has commenced within the 60 day period contemplated in paragraph 17.4 of the employee’s contract of employment (Annexure A to this notice), the employee’s suspension has not been terminated and the employee is not entitled to return for duty as envisaged in the aforementioned paragraph.”

The next issue to be decided by Bhoola J was whether the employee’s suspension had lapsed or ended. The employee’s contract of employment specifically provides for preventative suspension. The employment contract goes one step further and stipulates the following at clause 17.4:\textsuperscript{110}

“Furthermore if the employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) days, provided that the chairperson of the hearing may extend such period failing which the suspension shall terminate and the employee shall return to full duty.”

The employee in this matter contended that the rule of interpretation that should be applied is the words’ ordinary meaning, and as a result, as the 60-day period is peremptory, his suspension was unlawful.\textsuperscript{111}

When faced to decide whether the employer might proceed with the disciplinary action despite exceeding the 60-day period, the employer turned to Pillay J’s observation in \textit{Jonker v Okahhlamba Municipality and Others},\textsuperscript{112} where she found the following:

“... the procedure and time limits are a commitment to deal with the discipline expeditiously and they serve as a guide as to how this can be accomplished. To hold that the procedure and the time limits are written in stone and immutable must necessarily imply that the first respondent elected to abandon or waive its wide powers of discipline, which the law requires it to exercise in a reasonable manner. Why the first respondent would contract away such substantial rights in favour of the applicant is unfathomable. The waiver or abandonment by the first respondent cannot

\textsuperscript{109} Par 15.
\textsuperscript{110} Par 20.
\textsuperscript{111} Par 22.
\textsuperscript{112} [2005] 6 BLLR 564 (LC) par 20.
necessarily or reasonably be inferred from the contract. Neither the terms of the contract nor the conduct of the first respondent’s representatives amounts to an unequivocal waiver of the right to discipline the applicant.”

Bhoola J does not specifically deal with the issue about whether an employer can continue with disciplinary action despite exceeding the 60 day period. He, however, does find that, should a hearing have commenced, and it is postponed, it suffices that a hearing was held and the employer would pass muster in that regard.113

In the matter of Lovejoy Malambo & Another,114 Landman J found that an employer who had failed to institute disciplinary action within the stipulated 60-day period might be barred from proceeding forthwith with the charges against the employee.

Judge Molahlehi thinks otherwise as becomes clear in Lekabe v Minister, Department of Justice and Constitutional Development.115 Molahlehi J was also faced with yet another aspect of these protracted suspensions pending disciplinary action. In this case the employee brought an application in the Labour Court claiming that because the employer failed to institute a hearing within the 60-day period as provided for the Public Service Disciplinary Code, the employer waives its right to discipline the employee and tacitly revoked its right to proceed and that it was barred from proceeding with disciplinary action. Therefore the suspension should be revoked. In other words, that the employer’s right to disciplinary action had prescribed.

Molahlehi J disagreed with the employee and held that 7(2)(c) dealt with the suspension of an employee, not the disciplinary action that followed that precautionary suspension, and nothing in that clause indicated that the employer would lose its right to discipline should it fail to do so. At most the employee’s suspension fell away unless the chairperson extended that period.116

113 Par 30.
114 Lovejoy Malambo & Another v Head of Department: North West Department of Agriculture, Conservation & Environment & Another, unreported, CA1202/60.
116 Par 17.
Molahlehi J went further and interpreted the meaning of clause 7(2)(c) to address the mischief between parties as stated by van Niekerk J in *Mogothle v Member of the Executive Council for Agriculture, Conservation & the Environmental & Another (sic)*, where the following was held:\(^{117}\)

“...regard suspicion as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worst still, to view suspicion as a convenient mechanism to marginalise an employee who has fallen from the favour.”

The purpose of this section is therefore to address the abuse of employers using protracted suspensions as a means to marginalize employees who have fallen out of the employers favour and to limit the detrimental impact and prejudice employees suffer to their reputation, advancement, job security and fulfilment that are caused by these protracted suspensions.\(^{118}\)

Despite Molahlehi J not approving of the employee’s interpretation regarding the employer’s right to proceed further with disciplinary action, he did find that the suspension exceeding the 60-day period was unlawful and should be uplifted as all investigations by the employer should have been completed at that stage.\(^{119}\)

As seen above, the Labour Courts have had different interpretations with regards to the lawfulness of suspensions exceeding the 60-day period as stipulated in Clause 7(2)(c), and the continuation of a disciplinary hearing following the provision. Unfortunately the Supreme Court of Appeal has not yet decided on this very factor. It would be in the interest of justice that it does so shortly, not only for the benefit of employee’s, but also for the taxpayers of South Africa who are in fact paying for these extended periods of suspension.

I respectfully disagree with the Labour Court’s decision in Mapulane and Lekabe. It could not have been the intention of the drafters of the Public Service Disciplinary Code that an employer can simply bring about a preliminary hearing, extend the employee’s suspension and then not take any positive steps to bring the disciplinary

\(^{117}\) Unreported, J2622/08.

\(^{118}\) Lekabe, par 21.

\(^{119}\) Par 21.
action to any form of finality. As there is no other clause in the Public Service Disciplinary Code dealing with a restriction in this regard, the door is clearly left open for the employer to abuse. It cannot be said that such conduct is fair under the circumstances, and employees are being subjected to unfair treatment. There have been numerous decisions by the Labour Courts setting out the detriment to employees, should a disciplinary hearing be held more than 2 years after the event. The one obvious detriment is the loss of finer details no longer in your memory, the other is the lack of availability of witnesses. The detrimental impact on employees obviously stretches much farther than these two, but for the sake of repetition will not be discussed here in any detail.

4.4 THE EFFECT OF PROTRACTED SUSPENSIONS OF SOUTH AFRICA AS A WHOLE

It has long been the complaint of citizens of South Africa that they are paying exceptional taxes and that such hard earned money is poorly spent by Government.

When Government officials are suspended, months, if not years at a time, such conduct can be called nothing short of gross fruitless, wasteful and irregular expenditure.

During these extended periods of suspension, during which not only the employee on suspension has to be paid his full remuneration as well as other benefits, but another individual has to be paid to fulfil the duties which the employee is barred from fulfilling until the disciplinary hearing has been finalized and the outcome provided. The expenditure on the State is accordingly usually double for every position subject to such suspensions.

More often than not, no reasonable explanation can be given by the State as to why an employee is facing extended periods of suspension. The general explanation is that the investigation is not concluded, or alternatively that there are no suitable dates available for a meeting between the parties. The only inference that can be drawn under the circumstances is that the majority of these suspensions are politically driven hence no logical explanation can be provided.
In 2012 the Public Service Commission (“PCS”), whose purpose is to encourage and develop an effective public service, conducted research after noticing the large number of employees on suspension, the length of the suspension periods and probable costs that must be associated with those suspensions. What the PCS found was astounding. In the financial year 2010/2011 a total number of 1559 employees in national departments were placed on precautionary suspension. The costs to the State for those employees so suspended amounted to R51.2 million.

This very sore point was perfectly captured by Judge Ngcamu AJA in the matter of 

Ngwenya in which he stated the following:

“An employee cannot remain on suspension, which is a precautionary measure, for an indefinite period of time and the State gladly pays the employee for doing nothing. I am surprised that the State is willing and able to pay people for doing nothing when it does not have money to pay those performing their duties. If the suspension remains indefinitely and without legitimate reason, the employee is entitled to approach the court for the upliftment of the suspension and order the State to allow the employee to resume his duties until such time that the enquiry is held. In my view, that is not only in the interests of the employee but also in the public interest.”

It is time that the South African Government stands up to this abuse of power, and political officials abusing the process to aid their own political agenda, to the expense of employees who have fallen out of favour. The only method to curb these unacceptable practices will be the introduction of personal liability of corrupt officials and their political agendas.

4.5 THE VALIDITY OF “SPECIAL LEAVE”

For years Local Government has been suspending employees under the guise of granting them “special leave”, either pending a disciplinary hearing or for punitive reasons.

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120 Established pursuant to s 196 of the Constitution.
122 Norton 2013 1695.
123 Par 41 and 42.
However, in the recent judgement of *Heyneke v Umhlatuze Municipality*, Judge Pillay drew a line in the sand. The employee was the Municipal Manager who was approached by the Chief Whip instructing him to go on a period of special leave, to which the employee agreed, provided that the special leave is for a short period. After a highly conflicting council meeting, a resolution was passed. The employee was not charged immediately, and it was resolutely held by the Council that the special leave had nothing to do with the charges against him.

The employee alleged that the special leave was unlawful because the Municipality was abusing the special leave as if it were a preventative suspension, and that it was in breach of his conditions of employment. The Labour Court had to determine whether the special leave which was imposed on the employee was lawful.

Special leave is provided for in Regulation 15 of the Local Government Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006. It provides as follows:

> “The employer may grant the employee special leave with or without pay for a reasonable number of days with approval in terms of the relevant special leave policy of the municipality.”

The words “with approval” clearly indicate that special leave is a privilege which can be granted at the request of the employee, not to be imposed upon by the employer. What is further important to note is that the drafters clearly meant this special leave to be for a very limited duration of time in that it provides for a “reasonable number of days”, not a period of time and especially not an extended period of time.

The Municipality’s Policy on special leave provides the following at clause 12.5:

> “Special leave may be granted to an employee under exceptional circumstances for any purposes not provided for in this policy and for such period and such conditions as the council may prescribe by resolution.”

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125 Par 25.
126 Par 29.
It is therefore clear that the council had the authority to prescribe the conditions of the special leave but not the special leave itself. Judge Pillay interpreted the exceptional circumstances under which a council may approve special leave to be for the benefit of the employee and the circumstances have to be exceptional.

In the event that special leave is imposed by the Municipality on an employee, the only inference that can be drawn is that the employer is imposing a suspension under the guise of special leave in order to avoid the employee referring an unfair labour practice to the relevant Bargaining Council, as provided for by the LRA. In order for the Municipality to prove that the special leave was fair and lawful it had to show that the special leave was not imposed on the employee, was at all times at the insistence of the employee, with his consent and that exceptional circumstances existed, that it was rational, reasonable and in the public interest. It is clear that the onus on the employer is a very stringent one.

The court weighed up the various reasons provided by the employer for the reasons the employee was put on special leave and found that the council failed to apply its mind and that the special leave was imposed in bad faith and with an ulterior motive. Despite the employer’s allegations that placing the employee on special leave had nothing to do with the charges of alleged misconduct which ensued months later, it was found by the court not to hold water, and that the evidence before it established beyond a doubt a link between placing the employee on special leave, the investigation and the charges.

Not only are the employee’s rights and reputation being adversely affected, but a Municipality’s conduct in such circumstances detrimentally affects the public at large.

127 Par 31.
128 Par 32.
129 Par 33.
130 Par 34.
131 Par 88.
132 Par 90.
and amounts to an unacceptable waste of the taxpayer’s money and the resources of the State. In this regard the Court noted the following:\textsuperscript{133}

“No municipality, acting reasonably, in the public interest, can put an employee on special leave on full pay for a long time, not even if such employee agrees. Such an agreement is against public interest and public policy, for it can never be public policy to waste resources. Paying for services that are not rendered is wasteful.”

Judge Pillay agrees that this practice of protracted suspensions is a sign of weak procedures and shows that management is incapable of diagnosing problems and find efficient solutions within the 60 days that are provided in the collective agreement. He is quite adamant that such practice cannot continue.\textsuperscript{134}

On the grounds mentioned above, together with various others that were not applicable for this paper the court found that the special leave was unlawful as the employee’s contract, read with legislation and policy on special leave, did not allow for the employer to impose leave on the employee.\textsuperscript{135}

\section*{4.6 CONCLUSION}

It is clear that, despite the existence of a disciplinary code or collective agreement that governs the employment relationship in the public sector or municipalities, generally the heads of the Government divisions do not take these codes into consideration, but alternatively, purposefully ignore them to aid and forward their own political agenda.

Unfortunately, the political agendas in the local municipalities are rife and the effect on the community and the consequences that follow in general are severe and far-reaching. The wastage of funds that are used to aid these politically driven agendas are unacceptable and become apparent in the maladministration of these entities.

\textsuperscript{133} Par 93.
\textsuperscript{134} Par 95.
\textsuperscript{135} Par 130.
The disciplinary codes and collective agreements are there for a purpose, to protect both the employer and the employee.

State organs need to shape up and follow these codes; they are not mere guidelines to be ignored at whim, they are peremptory rules that create the cornerstone of the relationship between the employer and the employee.

The State should take note of *Mabilo*¹³⁶ in which Jajbhay AJ correctly captured the criteria for judging the fairness of a suspension pending disciplinary action, that where the integrity and morale of the employer require that action be taken without undue delay. In the event that a preventative suspension is necessary for orderly administration, the rights of the employee still have to be considered, and the employee has the right to a speedy and effective resolution of the dispute. In the event that the employer fails to finalize the process timeously it will be considered an abuse of the process.¹³⁷

Employers further have to avoid protracted preventative suspensions in that it could be seen as having a disciplinary effect, preventing an employer from imposing a sanction after a disciplinary hearing. This principle was confirmed in *CEIWU obo Khumalo v SHM Engineering CC*.¹³⁸ It was held in this matter that where a suspension is unreasonably long, especially without pay, an employee can be unfairly prejudiced and result in a punitive effect in itself.

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¹³⁶ Supra.
¹³⁷ Par 17.
CHAPTER 5
FORUMS AND RELIEF

5.1 INTRODUCTION

Suspension is commonly used by employers against employees in an unlawful manner and often, to the severe detriment of the employee. As indicated in previous chapters, suspension could have severe adverse effects on employees which range from damage to reputation to economic hardships.

If the employee feels aggrieved regarding the substantive or procedural aspects of his suspension, the employee is not remediless.

In this chapter I shall be addressing where and how employees can vent their grievances when faced with such potentially unfair suspensions.

5.2 COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

An unfair suspension constitutes an unfair labour practice in terms of section 186(2) of the LRA. Therefore, the employee is entitled to refer a dispute to the CCMA or the applicable Bargaining Council for conciliation and arbitration within the stipulated time period as set out in section 191(1) of the LRA.

The most appropriate way to establish properly the lawfulness and fairness of a suspension would be by means of a referral to the CCMA or bargaining council for conciliation or arbitration. A declaration of unlawfulness will not be appropriate in motion court proceedings and often better accomplished at arbitration. However, should compelling circumstances exist and should the suspension carry a reasonably apprehension of irreparable harm for the employee, the appropriate remedy could only be an order for urgent interim relief pending the outcome of the unfair labour practice proceedings in the CCMA or Bargaining Council.

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139 Act No 66 of 1995.
140 Member of Executive Council for Education, North West Provincial Government v Gradwell supra par 46.
5.3 THE LABOUR COURT

5.3.1 URGENT INTERDICT

The Labour Court has the power to grant urgent interdictory relief in terms of the Labour Court Rules. However, it will not do so without acceptable motive, and in order for an applicant to be afforded urgent interdictory relief, the applicant will have to prove and overcome various elements:

The first hurdle which an applicant will have to prove is that of urgency. An applicant cannot merely allege urgency without substantiating its allegations.

What constitutes urgency in an application is not specifically set out in the Labour Court Rules, and it is therefore accepted that the grounds of urgency as set out the Rules of the High Court would be applicable.

These grounds of urgency can be summarized as follows:

"a) either a clear right or the right which is, although open to some doubt, *prima facie* established, is being infringed (or that the threat of such infringement exists);
b) there is a well-grounded apprehension that the applicant will suffer irreparable harm if the urgent relief is not granted;
c) the applicant has no other satisfactory remedy; and
d) the balance of convenience favours the applicant."

Grounds of urgency are best described by Kroon J in the case of *Caledon Street Restaurant CC v D’Alveira*, in which he noted the following:

"The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether the greater or lesser degree of relaxation of the Rules and the ordinary practice of the Court is merited and must in all respects responsibly strike a balance between the

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141 Rule 8 of the Labour Court Rules.
142 (1998) JOL 1832 (SE) par 3.
duty to obey Rule 6(5)(a) and the entitlement to deviate therefrom, bearing
in mind that that entitlement and the extent thereof are dependent upon and
are thus limited by the urgency which prevails. The degree of relaxation of
the Rules should not be greater than the exigencies of the case demand
and it need hardly be added these exigencies must appear from the
papers."

Kroon J went on further and stated, on a more practical level:

"[i]t will follow that there must be a marked degree of urgency before it is
justifiable not use form 2A. It may be that the time elements involved or
other circumstances justify dispensing with all prior notice the respondent.
In such a case form 2 will suffice, subject to that exception it appears that
all requirements of urgency can be met by using form 2A with shortened
time periods, or by another adaptation of the form for example advance
nomination of a date for the hearing of the matter, or omitting notice to the
Registrar accompanied by changed wording where necessary. Adjustments
not abandonment of form 2A is the method."

Therefore, unless an applicant can prove that the relief sought is genuinely urgent, it
would be safer to apply in ordinary course of events and give regular notice as set
out of the Labour Court Rules.

According to Tlaletsi JA in the Labour Appeal Court, the Labour Court may in the
exercise of the powers provided in section 158(1) interdict any conduct by the
employer that is found to be unfair, and that includes disciplinary action.¹⁴³ Tlaletsi
JA warned that such decisions are not mandatory, the Judge has a discretion and
each matter has a different set of facts. Furthermore, the list of factors that would
contribute to whether or not a Judge should intervene are not exhaustive, but
primarily one would look at whether the failure to intervene would lead to a grave
injustice and whether justice could be attained by other means, for example a referral
to the CCMA or Bargaining Council.¹⁴⁴

The Labour Court has refused to intervene in disciplinary proceedings either because
the applicants were not able to satisfy the requirement of a prima facie right, or the
facts of the matter simply did not give rise to the “exceptional circumstances” in which
the Labour Court could intervene.

¹⁴³ Booysen v The Minister of Safety and Security & Others [2011] 1 BLLR (LAC) par 47.
¹⁴⁴ Par 54.
Courts are often reluctant to intervene in disciplinary proceedings, which would include those of unfair precautionary suspensions. The reason for this reluctance being that it is generally undesirable for the Labour Court to intervene in uncompleted proceedings. If the Labour Court, on a regular basis, intervened in disciplinary proceedings, it would effectively undermine the statutory dispute-resolution system and eventually lead to the complete frustration of the point of quick and speedy resolution of labour disputes. Employees should therefore carefully consider before approaching the courts if they have other remedies available to them.

One of the main aspects that affect an employee to the extent to approach the courts, and which goes to the heart of the employment relationship, is that of remuneration. The withholding of remuneration during a preventative suspension, one would assume, would warrant sufficient grounds for an urgent interdict where an applicant could apply for an urgent mandamus to prevent the employer from continuing with its unlawful conduct. A suspension without pay constitutes a breach of contract and can cause severe economic hardships to an employee who is suddenly stranded without an income. However, up until a few years ago the Labour Courts did not consider the mere loss of income sufficient for “urgent relief”.

In Veary, the only ground of urgency raised by the Applicant was the loss of income, and Judge Pillay found that this in itself was not a sufficient ground of urgency. Judge Pillay went further to say that he could challenge his unfair suspension as an unfair labour practice and therefore had a sufficient alternative remedy.

The court will not grant urgent interdictory relief for loss of reputation or stigmatization as these are general factors which distinguish an employee’s case of suspension from any other disciplinary conduct such as dismissal. However, in severe cases the judges have been inclined to consider urgent relief. This is clear from the case of Muller v Chairman, Minister’s Council: House of Representatives in which Judge

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147 Thompson “Interdicting Suspension and the Disciplinary Enquiry: The role of the Labour Court” (2012).
148 (1992) (2) SA 508 (CP) at 523 (B).
Howie stated that the implications of being deprived of one’s remuneration are often very obvious. One is being refused entry to work to pursue the career one chose, that refusal is clear to one’s peers and the rest of the community and that respect is often not protected and often underestimated in other cases.

Over the years one notes a change in the court’s interpretation of the above provisions. In 2008 in the matter of Harley v Bacarac Trading 39 (Pty) Ltd, Judge Van Niekerk held that when an employer has withheld an employee’s remuneration during the course of a preventative suspension, that it is unlawful, and that an employee was entitled to seek the court’s relief on an urgent basis.

The withholding of remuneration is not the only ground on which an employee can rely in order to succeed with an urgent interdict. An employee is entitled to urgent interdictory relief where he has not been given a proper opportunity to be heard before being suspended or when the suspension of the employee is blatantly not substantively fair. The fairness of a suspension is set out in Chapter 3 above, however, employees are warned that the substantive fairness of a suspension is often not easily established through motion court proceedings and a referral to the CCMA or Bargaining Council might be more suited.

5.3.2 BREACH OF CONTRACT

By withholding remuneration during preventative suspension, the employer is acting unlawfully and is, amongst other things, committing a breach of contract. In such circumstances an employee will act completely within his rights to approach the Labour Court in order to sue the employer for damages suffered as a result of breach of contract by the employer and the employer’s unlawful conduct. The employee can also approach the Labour Court for urgent relief as discussed in 5.2.1 above.

It has to be noted however that every matter is different and has to be decided on its own merits and the terms of the contract of employment will determine whether

150 Thompson “Interdicting Suspension and the Disciplinary Enquiry: The role of the Labour Court”.
withholding remuneration during preventative suspension amounts to breach of contract.

5.4 HIGH COURT

As indicated in paragraph 5.2.2, an employee can approach the Labour Court to sue an employer for breach of contract in the event that the employer withholds the remuneration to which an employee is entitled to. However, this form of relief can also be sought from the High Court.

The High Court has concurrent jurisdiction with the Labour Court in relation to any violation relating to employment and emanating from labour relations. More specifically, Nugent JA has confirmed that an employee’s claim, relating to the enforcement of an employment contract, can be adjudicated successfully in the High Court and employees are not bound to the Labour Court in this regard.

This view was also confirmed by the Labour Court in the recent judgment of SAMWU obo Mathabela v Dr JS Moroka Local Municipality, where it was held that there are major difficulties associated with the challenges that employees face when they are associated with disciplinary proceedings and suspensions through the mechanisms which have been provided by the LRA and therefore it appears to be appropriate and more convenient to take on employers on the grounds of unlawfulness in terms of the contract of employment which will be done in the High Court, rather than the principle of fairness in the Labour Court.

5.5 ADMINISTRATIVE REMEDY

Apart from the unfair labour practice route and the urgent interdictory route, public servant employees have attempted to declare a suspension by Government an

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153 Makhanya v University of Zululand (2009) 4 All SA 146 (SCA).
administrative act and wanted to rely on remedies afforded in Promotion of Administrative Justice Act,\textsuperscript{155} rather the remedies mentioned above.

However, these attempts were finally put to bed in the matter of \textit{SAPU & Another v National Commissioner of the South African Police Service & Another},\textsuperscript{156} where it was held that suspension is an employment or labour-relations matter and does not amount to an administrative act purely because the employer is part of a tier of Government.

This concept was confirmed by the Constitutional Court. As a result of Constitutional Court cases like \textit{Fredericks}\textsuperscript{157} and \textit{Chirwa},\textsuperscript{158} together with other preceding jurisprudence of the Supreme Court of Appeal as well as other courts, the concept of what constitutes administrative action resulted in various differences in opinion and the Constitutional Court elected to provide clarity as to the disputes between public sector employees and their employers.\textsuperscript{159} In \textit{Gcaba} the question before the court was whether the decision not to appoint Mr Gcaba constituted administrative action and thus was subject to administrative review (in the High Court) or whether Mr Gcaba should have followed the procedures provided for in the LRA. In considering this question, the Constitutional Court turned to \textit{Fredericks} and \textit{Chirwa} in an attempt to see whether the judgments could be reconciled. In \textit{Chirwa} it was held that the decision to terminate Chirwa’s services did not amount to administrative action and consequently that the High Court did not have jurisdiction to determine the dispute. In \textit{Fredericks} the applicants complained of a violation of their rights to equality and just administrative action arising out of the failure to consider their applications for voluntary retrenchment. Important to note that in \textit{Fredericks}, the applicants did not complain about their violation of their right to fair labour practices or any rights under the LRA. The Constitutional Court in \textit{Gcaba} held that \textit{Fredericks} and \textit{Chirwa} is distinguishable on the basis of how their respective cases were pleaded.\textsuperscript{160} The court effectively held that the consequence of the finding that the conduct behind

\textsuperscript{155} 3 of 2000.
\textsuperscript{156} [2006] 1 BLLR 42 (LC).
\textsuperscript{157} \textit{Fredericks and Others v MEC for Education and Training, Eastern Cape and Others} [2002] 2 BLLR 113 (CC).
\textsuperscript{158} \textit{Chirwa v Transnet and Others} [2008] 2 BLLR 97 (CC).
\textsuperscript{159} \textit{Gcaba v Minister of Safety and Security and Others} 2010 (1) SA 238 (CC) par 4.
\textsuperscript{160} Par 75.
employment grievances is not administrative action and that it substantially reduces the problems associated with parallel systems of law, and that if possible, the appropriate mechanisms in dealing with such disputes are those provided for by the LRA.\textsuperscript{161} Chirwa’s view was accordingly consolidated in \textit{Gcaba}.

### 5.6 CONCLUSION

Employees, when faced with an unfair suspension must refer an unfair labour practice dispute to the CCMA or the appropriate Bargaining Council. This, however, does not mean that, where an employee is faced with imminent harm relating to their suspension, that he/she must wait out the time periods that often accompany a referral to the forums mentioned above, (which often can be up to 3 months for an arbitration date). When faced with urgent circumstances, for example the unlawful withholding of an employee’s remuneration during a preventative suspension, the employee has every right to approach the Labour Court (or the High Court in certain circumstances) on an urgent basis and seek an urgent interdict or declaratory order. However, employees must be able to prove urgency in the ordinary course of events and employees should not approach the courts should they have alternative remedies to which they could, and maybe should, have turned to.

\textsuperscript{161} Laubscher “Jurisdiction: Gcaba v Minister for Safety and Security and Others” 2009 \textit{De Rebus}. 
CHAPTER 6
CONCLUSION

During the past largely antagonistic relationship between employer and employee, the employee more often than not, suffered at the hands of the employer. However, with the introduction of new labour legislation and recent case law, the employee is increasingly protected. Employers are motivated to implement disciplinary codes which will govern the employment relationship and are effectively better for employers and employees. Such disciplinary codes aim to motivate employers to comply with disciplinary measures such as preventative and punitive suspensions both procedurally and substantively.

Both punitive and preventative suspensions are largely governed by either contracts of employment, disciplinary codes or collective agreements. It is very seldom, however, that these documents set out rules that govern the procedural as well as substantive aspects of such a suspension which often lead to none being followed and employees being left vulnerable and aggrieved by the employer’s conduct.

It is a pity that our legislation does not summarize these procedural and substantive requirements for suspension in our labour legislation in any particular details like section 189 summarizes procedural and substantive requirements for retrenchments. This lack of conformity leads to abuse and negligence by employers, to the detriment of employees. This, however, does not indicate that the LRA does not provide any form of guidance in regard to the aspect of suspension. The procedural and substantive fairness requirements as provided Code of Good Practice Dismissal should apply and be used as a guideline, taking into account that suspension is an alternative to dismissal.

Throughout this script I merely skimmed the surface of a number of suspension-related cases that are referred to the labour forums and courts, which clearly indicate that suspension is a major concern in our employment society.
In the public and local government sectors with the State as the employer, preventative suspensions are being abused to suit the agenda of the employer, which are often political agendas, to the severe detriment of the employees. This has led to major abuse of public funds paid by the taxpayer, a practice which has to stop. The only way in which this practice will stop is when the State implements a personal liability policy for those managers or ministers who abuse this aspect of employment law.

It is anticipated that, should the requirements for a fair suspension be legislated like section 189, it will lead to more employers being aware of its requirements and promote compliance with the requirements.

The substantial social and personal implications that relate to a suspension are numerous and far-reaching. Most employees are prejudiced, not only psychologically, but the stigma attached to a suspension also casts a dim light on possible future employment prospects. It is therefore against this background that suspension must be preceded by a fair process.
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