

New twist to the right to make representations against precautionary suspension

Precautionary suspension – representations – fair reason

The Constitutional Court's judgment in *Long v SAB (Pty) Ltd* (2019) 40 ILJ 965 (CC) ("*Long*") is often cited in unfair suspension disputes. In *Long*, the Constitutional Court ruled that an employee generally does not suffer material prejudice as a result of a precautionary suspension, even if they were denied an opportunity to make representations before the suspension.

But does the same position apply if a contract of employment, collective agreement, or employer policy prescribes particular suspension procedures? The Labour Court's decision in *Bombela Operating Company (Pty) Ltd v Itumeleng Lehlokwa* (JR 589/2021) [2025] ZALCJHB 297 (11 July 2025) is instructive in this regard.

Itumeleng Lehlokwa ("Lehlokwa") was employed by Bombela Operating Company (Pty) Ltd as a train driver. He was placed on precautionary suspension without being given an opportunity to make pre-suspension representations. This was despite a provision in the company's Disciplinary Code that "the employee should be given an opportunity to make representations ... prior to the decision being taken to suspend the employee".

Lehlokwa referred an unfair labour practice dispute to the CCMA, challenging the fairness of his suspension. At the CCMA, the company argued *Long* superseded the Disciplinary Code. The arbitrator, however, disagreed. He found that the Lehlokwa was entitled to a pre-suspension hearing in terms of the Disciplinary Code. The arbitrator thus concluded that the suspension was unfair and awarded one month's compensation.

The company reviewed the arbitration award in the Labour Court. It contended that the Disciplinary Code was an internal policy guideline which was not binding on the company, and that, in terms of the *Long* decision, there is no requirement to afford an employee a pre-suspension hearing. The company further argued that Lehlokwa failed to express any desire to make pre-suspension representations. In the circumstances, the company argued that he was not denied an opportunity to be heard as he did not seek a hearing.

The Labour Court held that the precautionary suspension was fair and therefore set aside the arbitration award. Lagrange J reasoned that the finding in *Long* did not allow an employer to disregard its own disciplinary code or applicable collective agreement, if it specifically provided for a pre-hearing suspension. However, since Lehlokwa did not seek to make any representations against his suspension, he was not actually denied an opportunity to exercise his rights under the Disciplinary Code. Because the company did not positively refuse to entertain any representations, the conclusion that the company acted unfairly was unsustainable.

Lagrange J further clarified that *Long* established that a precautionary suspension is generally justified during an investigation. The Constitutional Court has thus curtailed the scope for challenging whether a precautionary suspension is reasonably necessary for a proper investigation to take place, or whether, for example, the investigation may be hampered if the employee returned to work.

Accordingly, it would appear from the judgment in *Bombela* that where the employer's internal policies or a collective agreement specifically provides an employee with the right to make representations prior to a precautionary suspension, it will not be fair to disregard that provision

when an employee seeks to make representations. The Constitutional Court's judgment in *Long* does not supersede specific provisions permitting representations.

Prinoleen Naidoo, Director
E-mail: prinoleen@cth.co.za

Siphesihle Sibiya, Associate
E-mail: siphesihle@cth.co.za

www.cth.co.za