THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: **J 1672 / 2016**

S B MOROENYANE **Applicant**

and

THE STATION COMMANDER OF THE SOUTH AFRICAN POLICE SERVICES - VANDERBIJLPARK **Respondent**

Heard: **18 August 2016**

Delivered: **26 August 2016**

Summary: **Interdict application – principles stated – application of principles to matter – issue of clear right, prejudice and alternative remedy considered**

Jurisdiction – Labour Court does have jurisdiction to consider urgent applications to intervene in the case of incomplete disciplinary proceedings – exceptional and compelling reasons however required – exceptional circumstances not shown

Disciplinary proceedings – delay in proceeding with disciplinary hearing – does not per se mean that disciplinary hearing unfair and unreasonable – waiver or manifest unfairness / unreasonableness needs to be shown

Disciplinary proceedings – delay in proceeding with disciplinary hearing – employer must provide proper explanation for delay – explanation provided

Alternative remedy – applicant raised issue of the delay and unfair disciplinary hearing before disciplinary chairperson – issue can therefore serve as basis for an unfair dismissal challenge in any bargaining council proceedings- alternative remedy available

Prejudice – real prejudice must be shown to justify relief – no material prejudice shown

Suspension – suspension shown to be unlawful – suspension uplifted.

JUDGMENT

SNYMAN, AJ

Introduction:

[1] From the outset, I am compelled to once again express my concerns about the continuing trend of the Labour Court being approached to intervene in disciplinary proceedings that are not yet completed, with objective of permanently scuppering these proceedings and thus avoid employees being disciplined in the first place. This kind of conduct must be discouraged. It subverts what is carefully crafted processes established pursuant to, and in the LRA itself, designed to deal with these very issues. To in effect bypass all of this must be the odd exception, and not the rule as it seems to have become. In *Gcaba v Minister for Safety and Security and Others*[1] the Court said:

> 'Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at

[1] (2010) 31 *ILJ* 296 (CC) at para 59.

> liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees. …'

The Labour Appeal Court has equally and consistently endorsed this very objective.[2]

[2] Litigants seeking to permanently interdict disciplinary proceedings from taking place need to be warned. The Labour Court will only entertain such applications is truly exceptional circumstances and if material irremediable prejudice or injustice is shown to exist. As a matter of principle, that which is provided for the processes under the LRA, in the normal course, must be allowed to run its course. As I said in *Zondo and Another v Uthukela District Municipality and Another*[3]:

> 'The first hurdle the applicants must successfully clear in this regard is to show that exceptional circumstances exist. The reason for this is that the Labour Court has been consistent in its approach that the court will only intervene in uncompleted disciplinary proceedings if such exceptional circumstances are shown to exist ….'

[3] And in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[4] the Court held:

> 'Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to A be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings …'

[4] With the above considerations in mind, I now proceed to determine this matter. This matter came before me as an urgent application by the applicant

---

[2] See *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union and Others* (2015) 36 ILJ 152 (LAC) at paras 30 and 32; *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 27.
[3] (2015) 36 *ILJ* 502 (LC) at para 38.
[4] (2010) 31 I*LJ* 112 (LC) at para 17.

in order to interdict a disciplinary hearing instituted against the applicant by her employer, the South African Police Services ('SAPS'). The interdict was sought on the basis of it being unfair and unreasonable to institute disciplinary proceedings against the applicant only in 2016, when the alleged misconduct occurred in 2014. The applicant further sought relief to the effect that her current unpaid suspension implemented on 18 May 2016 be uplifted, on the basis that it was unlawful for want of compliance with the SAPS disciplinary regulations. After hearing argument by both parties, and on 18 August 2016, I granted the following order:

'1. The non compliance with the Rules of Court in respect of process, service and time limits is condoned, and this matter is heard as one of urgency, only insofar as it concerns the issue of unlawful suspension.

2. The suspension of the applicant on effected on 18 May 2016 is declared to be unlawful and is set aside.

3. The applicant is to be paid her normal remuneration from 18 May 2016 to the date when the applicant resumes duties in terms of this order, insofar as it may have been unpaid.

4. The applicant's application to interdict the respondent from proceeding with the disciplinary hearing is dismissed.

5. There is no order as to costs.

6. Written reasons for this order will be handed down on 26 August 2016.'

This judgment now constitutes the written reasons in terms of paragraph 6 of the above order.

[5] Dealing shortly with the issue of the unlawful suspension, this issue was from the outset conceded by the respondent. The respondent conceded in

argument that the provisions of regulation 18[5] of the SAPS regulations was not followed in suspending the applicant. Mr Mthombeni, representing the respondents, indicated that the respondent would have no objection to an order being given uplifting such suspension. Where a suspension is unlawful, the Labour Court may intervene and set it aside. As I said in *Manamela Nnana Ida v Department of Co-Operative Governance, Human settlements and Traditional Affairs Limpopo Province and Another*[6]:

> 'A suspension would be unlawful in instances where the right or power of an employer to effect a suspension is prescribed by specific regulation and these regulations are not complied with by the employer. The unlawfulness is founded in the employer not complying with its own rules. This regulation (rules) can be done in the form of a disciplinary code and procedure, collective agreement, statutory provisions, or other regulatory provisions. This kind of regulation is prolific in the public service ….'

On this basis, I afforded the applicant the relief as set out in paragraphs 2 and 3 of my order above, and nothing needs to be further said about this, in essence being an agreed resolution.

[6] Turning then to the application by the applicant to interdict the disciplinary proceedings against her, and in addition to what I have already said above, I commence by stating that I am a firm believer in the general principle that this Court should not readily interfere in disciplinary proceedings being conducted in any employer, unless exceptional circumstances to justify this are shown to exist.[7] My views in this regard are informed by what the Labour Appeal Court has said in *Booysen v Minister of Safety and Security and Others*[8], where it was held that: '…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the

[5] Regulations 18(3), (4) and (5) prescribe a process that must first be followed before an employee can be suspended without pay for absenting himself or herself from disciplinary proceedings. This process, on the common cause facts, was not followed.
[6] [2013] ZALCJHB 225 dated 5 September 2013 at para 20. See also see *Nyathi v Special Investigating Unit* (2011) 32 *ILJ* 2991 (LC) ; *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC) ; *Lebu v Maquassi Hills Local Municipality and Others (2)* (2012) 33 ILJ 653 (LC).
[7] See *Utukhela District Municipality* (*supra*); *SAMWU obo Dlamini and 2 Others v Mogale City Local Municipality and Another* [2014] 12 BLLR 1236 (LC)
[8] (2011) 32 ILJ 112 (LAC) at para 54.

discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.' Similarly in *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[9] the Labour Appeal Court confirmed that these kinds of applications should only be entertained 'in extraordinary or compellingly urgent circumstances'.[10]

[7] The applicant is seeking final relief in motion proceedings. As such, any factual disputes between the parties must be determined on the basis of the judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[11] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[12] this test was summarized as thus: '… it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[8] Because the applicant is seeking a final interdict, the applicant must satisfy three essential requirements, being: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[13]

[9] I will now proceed to decide whether the applicant is entitled to the relief sought, based on all the aforesaid considerations.

---

[9] (2012) 33 *ILJ* 2033 (LAC).
[10] Id at para 46; see also *Food and Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2013) 34 *ILJ* 1171 (LC) at para 15.
[11] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 *ILJ* 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 26.
[12] 2009 (3) SA 187 (W) at para 19.
[13] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) para 2; *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (2013) 34 ILJ 3314 (LC) para 7.

The relevant background:

[10] The applicant has been employed by SAPS since 1995, and currently has the rank of Lieutenant Colonel. The applicant is currently deployed at SAPS Vanderbijlpark, and is serving as the relief commander for the Visible Policing section.

[11] On 5 February 2016, the applicant was presented with a notice to attend a disciplinary hearing in terms of Regulation 12(3) of the SAPS disciplinary regulations, in which several disciplinary charges were proffered against her. For the purposes of this application, it is not necessary to set out the detailed particulars of these charges. Suffice it to say, the applicant is accused of not following proper and proscribed procedures and/or gross negligence with regard to the manner in which she dealt with state property. The disciplinary hearing was scheduled to take place on 25 February 2016.

[12] It was common cause that the events giving rise to the charges against the applicant took place in 2014, and in particular on 27 July 2014. It appears that the applicant irregularly handed certain goods to one Brian Bezuidenhout ('Bezuidenhout'), which are now lost. Pursuant to these events, written statements were procured in August 2014, but unfortunately, and at the time, no disciplinary proceedings followed.

[13] The respondent sought to offer an explanation for the delay in only instituting disciplinary proceedings in 2016. It contended that it was considered prudent to first recover the goods from Bezuidenhout, for the purposes of using the same as exhibits in the envisaged disciplinary proceedings. The respondent sought to explain that it attempted to track down Bezuidenhout, who has resigned from his previous employment and had relocated to somewhere in Cape Town.

[14] The respondent further explains that whilst the investigation was still ongoing (presumably also the attempts to find Bezuidenhout), the applicant lodged a grievance against Samuel Manala ('Manala'), the station commander at SAPS Vanderbijlpark. The grievance included the issues of alleged misconduct

referred to above. Manala decided to first wait for the outcome of the grievance before pursing disciplinary action.

[15] The grievance outcome came to hand at the end of May 2015. Part of the outcome was that the disciplinary proceedings against the applicant should be proceeded with, and finalized. Manala explains that he then sought to source a presiding officer for the disciplinary hearing. This presiding officer had to be of a higher rank than the applicant, who was, as stated, a lieutenant colonel. The availability of such personnel was scarce.

[16] Ultimately, the services of a presiding officer was secured, and a disciplinary officer appointed to resume the matter. The applicant was then presented with the charge sheet as aforesaid.

[17] At the disciplinary hearing on 25 February 2016, the applicant requested a postponement so that she could 'sort out' her documents. The hearing was postponed to 14 March 2016.

[18] On 14 March 2016, when the hearing resumed, the applicant raised an objection *in limine*. This objection *in limine* was based on the same case now presented in the proceedings before me, being that because of the delay from August 2014 until February 2016, it would be unreasonable and unfair to proceed with the disciplinary hearing. The applicant described the delay as 'nearly' two years. This is an exaggeration, as the delay is some 18 months.

[19] The applicant contends that the respondent did not seek to explain the delay in the disciplinary hearing, and actually conceded that an unreasonable delay existed. The respondent, in its answering affidavit, disputes this. Manala states that he actually testified in the disciplinary hearing on 14 March 2016, where he provided an explanation for the delay. Based on *Plascon Evans*, the version of the respondent stands.

[20] The chairperson, after considering the objection *in limine*, decided that the disciplinary hearing nonetheless proceed. This was conveyed to the applicant in the same resumed disciplinary proceedings on 14 March 2016. The applicant then brought application that the disciplinary proceedings be

presided over by an independent arbitrator from the Safety and Security Sectoral Bargaining Council, in terms of Regulation 14(3). This required consent from the respondent. By agreement, the disciplinary hearing was postponed to 30 March 2016 for the purposes of the respondent deciding whether to grant such consent.

[21] The hearing reconvened on 30 March 2016. The applicant was informed that the request for consent for an arbitrator from the bargaining council to be appointed as chairperson had not yet been finalized. The hearing was postponed first to 20 April 2016, and then to 11 May 2016, for this process to be concluded.

[22] When the hearing reconvened on 11 May 2016, the applicant was informed that the respondent had declined to give consent for the appointment of an arbitrator as chairperson, and the applicant was informed the hearing would proceed. The hearing was then postponed to 18 May 2016 to commence on the merits.

[23] According to the respondent, and on 18 May 2016, the applicant attended the hearing. She applied for a postponement, on the basis of her alleged medical condition at the time, and then left the hearing. The applicant contends that she was not at the hearing on 18 May 2016, but once again, on the basis of *Plascon Evans*, the respondent's version must be accepted.

[24] The applicant was suspended without pay on 18 May 2016 because she left the hearing, but considering the basis on which this issue has been resolved, which I have dealt with above, there is no need to dwell on this, or the lawfulness of this conduct, any further. Suffice it to say that the applicant presented a medical certificate booking her off work until 30 May 2016.

[25] The disciplinary enquiry was reconvened for 25 July 2016. The applicant raised preliminary issues. The hearing was then finally postponed to 12 August 2016.

[26] The applicant then brought the current application on 1 August 2016, on an urgent basis, seeking the final relief as set out above.

Urgency:

[27] I intend to first deal with the issue of urgency. I must say that I have difficulties with the issue of urgency in this matter.

[28] The applicant is obliged to properly make out a case for urgency in her founding affidavit. The applicant has dismally failed to do so. In fact, the applicant seems to have approached the Court on the basis of some or other entitlement to be urgently heard, because of what she describes as 'flagrant' unfairness and flouting of the respondent's disciplinary regulations, towards her. This, even if so, does not establish urgency. The applicant needed to explain why she did not immediately bring an urgent application upon being informed of the chairperson's ruling on the *in limine* issue raised by her (the same issue as now being raised) on 14 March 2016 already.

[29] Urgent applications are governed by Rule 8. In considering Rule 8, the Court in *Jiba*[14] said:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[30] What must an applicant who seeks to make out a case of urgency show? In *Mojaki v Ngaka Modiri Molema District Municipality and Others*[15] the Court referred with approval to the following *dictum* from the judgment in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*:[16]

[14] (*supra*) at para 18. See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).
[15] (2015) 36 ILJ 1331 (LC) at para 17.
[16] [2012] JOL 28244 (GSJ) at para 6.

> '…. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[31] Where an applicant seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established.[17] In *Tshwaedi v Greater Louis Trichardt Transitional Council*[18] the Court said:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ….'

[32] Urgency must not be self created. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.[19] The longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* the Court held:

> '… if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency.'

[33] As I have said above, the applicant's attempt to establish urgency in the founding affidavit are appalling. The period between 14 March and 1 August 2016 remains unexplained as to application was not immediately brought,

[17] [2002] JOL 9452 (LC) at para 8.
[18] [2000] 4 BLLR 469 (LC) at para 11.
[19] See *University of the Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) at para 15.

which is a significant period where it comes to consideration of issues of urgency. Urgency in this matter is clearly self created. As I said in *Zondo and another v Uthukela District Municipality and Another*[20], which I believe equally applies in casu:

> '… I believe that a far more plausible inference is that the applicants waited until the last minute, so to speak, before the date the disciplinary hearing was scheduled to resume, in order for the application to scupper the commencement of that hearing. …'

[34] Ordinarily, the applicant's application should have been struck from the roll for these reasons alone. This being said, I consider it far more important that the disciplinary proceedings against the applicant be finalised as soon as possible, considering the delays that have already taken place. A pending application, which will still exist if the matter is struck from the roll, may serve as basis to substantiate a further delay the disciplinary proceedings by either party, which would undesirable. I shall follow the following approach, which I also applied in *Uthukela District Municipality*[21]:

> '… I further point out that both parties have had the opportunity to state their respective cases fully in the pleadings, and it is in the interest of justice that this issue now be finally determined. I thus conclude that for these reasons given, I shall proceed to determine this matter as one of urgency.'

A clear right:

[35] As touched on above, the case of the applicant where it comes to a clear right is firmly grounded in the delay of some 18 months from when the alleged misconduct was committed, and until the disciplinary proceedings were ultimately instituted. A secondary case was the fact that it has taken longer than 60 days to finalize the disciplinary proceedings, once it had been instituted.

[20] (2015) 36 ILJ 502 (LC) at para 18.
[21] Id at para 18.

[36] The consideration of this issue must have as its point of departure the actual disciplinary regulations of SAPS.[22] Regulation 4 provides that the regulations are based on a number of principles, one of which is '(b) discipline must be applied in a prompt, fair, consistent and progressive manner'. The conducting of disciplinary proceedings are then dealt with in regulation 14, which *inter alia* records: '(15) A disciplinary hearing must as far as practically possible, be finalised within sixty (60) calendar days'. I accept that these provisions themselves tend to indicate that the regulations have as an imperative the speedy and expeditious finalization of any disciplinary proceedings against SAPS employees. But this not mean that delays in disciplinary proceedings would per se extinguish these proceedings. SAPS must always have the opportunity to explain such delays, where it exists, and whether an explanation is sufficient is dependent on the particular facts. Further, there may well be particular considerations of justice having to be done, and be seen to be done, that could serve to save the day even where an undue delay exists.

[37] SAPS, as public service entity and employer, has certain constitutional obligations, which must always be considered when the possibility of intervening in disciplinary proceedings arises in this Court. Care must be taken when a course of action is decided on, even where irregularities in the conduct of discipline indeed exist, not to infringe on these constitutional imperatives. In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[23] the Court said:

> 'Section 195 provides for a number of important values to guide decision makers in the context of public sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in s 195(1)*(f)* and *(g)* and the requirement of a high standard of professional ethics in s 195(1)*(a)*. ….'

[22] These regulations were issued under section 24(1) of the South African Police Services Act 68 of 1995, on 3 July 2006.
[23] (2014) 35 ILJ 613 (CC) at para 35.

[38] In deciding whether a delay could possibly serve to render the institution or continuation of disciplinary proceedings unreasonable and unfair, guidance in be found in referring to the issue of a stay in criminal proceedings due to an undue delay in such proceedings. In *Bothma v Els and Others*[24] the Court considered the question of a permanent stay of a private prosecution due to a delay in the bringing of the prosecution. Sachs J said:[25]

> '…. the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay , but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.'

In then considering whether a delay would taint overall substantive fairness, Sachs J referred with approval[26] to the following *dictum* from the judgment in *Sanderson v Attorney-General, Eastern Cape*[27]:

> '…. The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker v Wingo* is that there is a `balancing test' in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused.'

Sachs J then added the following:[28]

> 'A word of caution: these four factors should not be dealt with as though they constitute a definitive check list. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. ….'

The learned judge finally concluded:[29]

---

[24] 2010 (2) SA 622 (CC).
[25] Id at para 35.
[26] Id at para 36.
[27] 1998 (2) SA 38 (CC) at para 25.
[28] Id at para 37.

> 'To the list …. must be added a further factor, one not considered by the High Court. I refer to the nature of the offence. …. Without placing the specific nature of the offence in the scales, the balancing exercise is itself unbalanced.'

[39] If one applies these considerations in *Sanderson* to delayed disciplinary proceedings, what has to be considered, in deciding whether the delay is unreasonable to the extent of bringing about the final termination of the proceedings, is the length of the delay, the explanation justifying the delay being inexcusable or not, the assertion of a right to a speedy hearing by the employee, the issue of prejudice, and finally the nature of the alleged offence. This approach was indeed adopted by the SCA in *Cassimjee v Minister of Finance*[30] where the Court said:

> 'There are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and, third, the defendant must be seriously prejudiced thereby. Ultimately, the enquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefor and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to use in order to bring the action expeditiously to trial.'

[40] In the employment law context, the approach in dealing with whether disciplinary proceedings should be ended on the basis of a delay is firmly founded in considerations of fairness. The former Industrial Court dealt with a

---

[29] Id at para 38.
[30] 2014 (3) SA 198 (SCA) at para 11.

delay in the conduct of a disciplinary hearing in the judgment of *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria*[31] and said:

> 'Fairness, however, dictates that disciplinary steps must be taken promptly. Both the staff regulations and the recognition agreement echo the need for prompt action as all time-limits must be adhered to strictly and time-limits are provided for in paras 5.2.5 and 5.3.1. In *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC) one of the guide-lines for a fair hearing was a right to have the hearing take place 'timeously'. In Brassey & others *The New Labour Law* it is said that the enquiry must be held promptly. Article 10 of ILO Recommendation 166 suggests that:
> 'The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.''

[41] The current Labour Court followed suit, in the judgments of *Department of Public Works, Roads and Transport v Motshoso and Others*[32] and *Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[33] where the Labour Court referred with approval to the judgment in *Stadsraad van Pretoria*. I cannot find any fault with such an approach, in principle, provided that it is always subject to the kind of considerations as set out in the judgments of *Sanderson* and *Cassimjee*.

[42] In summary, I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion, of disciplinary proceedings, can *per se* lead to a conclusion of unreasonableness and unfairness. A disciplinary hearing cannot be directed to be aborted just because there is a long delay. More is needed. What must always be considered, in deciding whether to finish off disciplinary proceedings because of an undue delay, is the following:

[31] (1992) 13 *ILJ* 1563 (IC) at 1659A-C.
[32] [2005] 10 BLLR 957 (LC).
[33] (2002) 23 ILJ 157 (LC) at paras 4 and 13.

42.1 The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.

42.2 The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.

42.3 It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.

42.4 Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.

42.5 The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

42.6 All the above considerations must be applied, not individually, but holistically.

[43] In addition to what I have dealt with above, there may well be, depending on circumstances, another basis where an undue delay can serve to scupper the institution or continuation of disciplinary proceedings. This is founded, as said in *Stadsraad van Pretoria*, on the principle of waiver. This kind of case would be an assertion that because of the delay, it has to be inferred that that

employer has waived its right to take disciplinary action against the employee. To succeed with such a case, the employee would have the duty to satisfy all the legal requirements relating to waiver. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[34] the Court held:

> **'….** Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.
>
> So waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right. ….'

[44] Waiver has a further nuance. In *Greathead v SA Commercial Catering and Allied Workers Union*[35] the Court said that: **'**…. The appellant could not have considered abandoning his rights if he (and his legal advisers) had not appreciated it'. This same approach was followed by the Labour Court in *EHCWAWU Obo Tshabalala and Others v M & P Bodies CC*[36] where it was held that: **'**It is also trite that before a waiver can be upheld, it must be demonstrated that the person who is alleged to have waived his or her right knew that he or she was waiving her right ….'. Finally in this respect, it cannot just be assumed there was a possible waiver, considering the following *dictum* in *Ullman Bros Ltd v Kroonstad Produce Co*[37]: '…. A waiver is not presumed, but must be clearly established by the party who relies on it. ….'. As to what constitutes 'clear establishment', the Court in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*[38] referred with approval to the following extract from the judgment of De Villiers CJ, in *Smith v Momberg* (12 SC 295):

> 'Under certain circumstances a renunciation of rights may be implied from the conduct of the person entitled to them, but his conduct must be such as to

[34] (2015) 36 ILJ 363 (CC) at paras 60 – 61.
[35] (2001) 22 ILJ 595 (SCA) at para 17.
[36] (1999) 20 ILJ 1787 (LC) at para 26.
[37] 1923 AD 449 at 454.
[38] 1915 AD 1.

leave no reasonable doubt in the mind that he not only knew what his rights were, but intended to surrender them.'

[45] Having set out the applicable legal principles to be considered when deciding this matter, I will turn back to the facts, and the case of the applicant. The first difficulty with the applicant's case is that the applicant approached this matter primarily on the basis that the delay of some two years is excessive and that this *per se* renders the disciplinary proceedings instituted in February 2016 to be unreasonable and unfair. Based on what I have discussed, *supra*, this approach is wrong. The length of the delay is but one of factors to be considered. Further, and because of the wrong approach adopted by the applicant, the applicant did not address any of the other issues that need to be considered when deciding whether to abort the disciplinary proceedings. Considering that the applicant should make out a case in this regard, which she did not do, this in itself should be fatal to this application.

[46] I will however nonetheless, based on the evidence before me, consider all the requirements I have set out above. I accept the delay is lengthy, and thus needs to be properly explained. The respondent has offered an explanation. This explanation is based, in simple terms, on the existence of a continuing investigation, intervening grievance proceedings, and the availability of a chairperson of sufficient seniority, considering the applicant's level of seniority. It is not the best explanation in the world. I do think SAPS could have done more, and quicker. But what SARS offered as an explanation is not inexcusable.

[47] It is clear to me that from the outset in 2014, the applicant was aware of the fact that she was being investigated and accused (albeit not yet in the context of formal disciplinary proceedings) of misconduct. The applicant has not provided me with any evidence or indication as to what she did herself to expedite the proceedings or assert her entitlement to a speedy hearing.

[48] The applicant's case on the issue of prejudice is similarly sparse. As stated, she must show material prejudice. The high water mark of the applicant's case in this regard is that SAPS is intent on dismissing her, that to challenge

her dismissal could take up to five years, and her career and finances will suffer as a result. These kind of contentions cannot serve to establish material prejudice as required. In fact, these kind of statements could be raised by virtually every employee facing possible disciplinary proceedings, and dismissal. There exists no particular injustice that would manifest itself, and which cannot be fully cured by an appropriate bargaining council award if the applicant is successful in challenging her dismissal should she be dismissed. Also, the applicant's contention that to resolve the matter could take five years is a gross exaggeration of what is the normal course in such matters. No material prejudice has been shown to exist.

[49] Finally, and as to the nature of the offence, it appears to be sufficiently serious, especially considering the seniority of the applicant's position, so as to justify proper ventilation of the misconduct in disciplinary proceedings, in line with the duty that rests on SAPS as public service entity and employer.

[50] Considering all of the above, holistically, I believe the balance, in conducting the balancing exercise, tips in favour of the respondent, and in favour of the continuation of the disciplinary proceedings. I do not believe circumstances are such that the applicant will not be in a position to mount a proper defence to the case against her in the disciplinary proceedings. I consider that SAPS was always of the intention to pursue the disciplinary proceedings against the applicant to finality as soon as possible, but that the kind of institutional delays and challenges often found in SAPS in these kind of matters simply put brakes on it. There is no particular injustice to the applicant standing in the way of the disciplinary proceedings against her. It would not be unfair to have the disciplinary hearing proceed to finality. I am thus not satisfied that the applicant has established a clear right to the relief sought, and her application must fail as a result.

[51] What must also be considered is the fact that the disciplinary proceedings have not been concluded in 60 days as intimated by the regulations. In my view, nothing turns on this, because this time limit is not a rigid provision. This is evident from the phrase 'as far as practically possible' in the regulations, where referring to the 60 day time limit. In this regard, what stood in the way

of the completion of the disciplinary hearing, once instituted, was the conduct of the applicant herself. The first delay occurred because she wanted a postponement to get her documents in order. The second delay was caused because she asked for consent for an external arbitrator to be appointed as chairperson. The third delay was caused by her medical condition. These delays pretty much account for the entire period from institution of the proceedings until the resumption of the disciplinary hearing on 26 July 2016. I am convinced that the applicant simply cannot rely on any of the delays in this regard to establish unreasonableness, considering she was the author thereof. Equally, the applicant has not established a clear right in this respect.

[52] This then only leaves waiver. In argument, Mr Nysschens, for the applicant, conceded that the applicant never pleaded or made out a case for waiver. That has to be the end of the matter insofar as it concerns waiver. In *Sleith Davis Ltd v Gibb*[39] the Court said:

> 'It is a well-known rule of law's that waiver must be specially pleaded, and that the facts which constitute such waiver must be clearly set out in the pleadings, so as to enable the other party to know exactly what case he has to meet, and to enable him to prepare his defence to that case. Where waiver has not been pleaded, the Court cannot enquire into that question.'

[53] For all the above reasons, I find that the applicant has failed to establish a clear right to the relief sought. For this reason alone, the application must fail.

Alternative remedy and prejudice

[54] Even though it is strictly speaking not necessary to do so, considering the applicant has failed to establish a clear right, I will nonetheless for the sake of completeness also touch on the requirements of prejudice and the absence of a suitable alternative remedy, the applicant has to satisfy.

---

[39] 1928 SWA 37 at 39. See also *Collen v Rietfontein Engineering Works* [1948] 1 All SA 414 (A) at 435; *Martin v De Kock* [1948] 2 All SA 545 (A) at 556; *CEPPWAWU and Another v Le-Sel Research (Pty) Ltd* [2009] 5 BLLR 421 (LC) at para 25; *Rockliffe v Mincom (Pty) Ltd* (2008) 29 ILJ 399 (LC) at para 27

[55] The simple fact is that the disciplinary hearing has not yet even started on the merits thereof, and the applicant can still fully ventilate her case at the hearing. There is simply no compelling reason or consideration of fairness why the hearing cannot proceed to finality, especially considering that should the hearing result in the dismissal of the applicant, as she suggests has been pre-determined, then she would still have the right to a complete hearing *de novo* before a bargaining council arbitrator.[40] Further, the applicant, because bargaining council proceedings are *de novo* proceedings, can even raise the same *in limine* point relating to the delay for determination in such arbitration proceedings.

[56] The applicant thus has two alternative remedies at her disposal. The first is participation in the disciplinary proceedings. If the disciplinary proceedings have an outcome not palatable to the applicant, the applicant can challenge this by way of the dispute resolution processes prescribed by the LRA, culminating in bargaining council arbitration. In *Carolissen v City of Cape Town and Others*[41] the court said that:

> '…. the employee can clearly attain justice by other means. He can raise his complaint about undue delay at the disciplinary hearing. He will in any event have the opportunity to state his case at that hearing. Should he be dissatisfied with the outcome, he can follow the prescribed dispute-resolution process as set out in the Labour Relations Act. He has not established a clear right for an interdict. Any harm that he may suffer is not irreparable and he has an alternative remedy.'

This reasoning equally applies in the current matter.

[57] I have already touched on the issue of prejudice above. There are no compelling considerations of injustice that will result if the disciplinary hearing is allowed to continue. Also, and because arbitration on the merits is conducted *de novo*, this would completely mitigates any prejudice the applicant may suffer in the course of the conduct of the disciplinary hearing.[42]

---

[40] See *Uthukela District Municipality* (*supra*) at para 39.
[41] (2014) 35 *ILJ* 677 (LC) para 27.
[42] *Uthukela District Municipality* (*supra*) at para 44.

[58] The applicant, all considered, has thus not shown sufficient prejudice, or considerations of unfairness, to justify intervention at this stage. Further, the applicant has appropriate alternative remedies available to her. The other requirements for final relief have therefore equally not been satisfied by the applicant, and the application must fail on this basis as well.

[59] This then only leaves the issue of costs. Whilst it may be said that the applicant was not successful in interdicting the disciplinary hearing from continuing, the applicant was successful in her case relating to unlawful suspension. Both parties have thus enjoyed some measure of success. I also consider that the parties having an ongoing relationship, with further proceedings between them to follow. In terms of the broad discretion I have with regards to costs, in terms of Section 162 of the LRA, I believe this is a situation where no costs order ought to be made.

[60] It is for all the reasons set out above that I made the order that I did, as reflected in paragraph 4 of this judgment, *supra*.

_____

Snyman, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Mr J Nysschens of Johan Nysschens Attorneys
On behalf of the Respondent:	Adv Mthombeni
Instructed by:	The State Attorney