

SOUTH AFRICA / JUDGMENT

Cibane and Another v Premier of the Province of Kwazulu-Natal and Another (D 518/2021) [2023] ZALCD 19; (2024) 45 ILJ 533 (LC) (17 November 2023)

[2023] ZALCD 19

COURT

Labour Court Durban

BEFORE

Whitcher

CASE / FILE NUMBER

D 518/2021

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FLYNOTES:

LABOUR – Public
service – Disciplinary
proceedings –
Applicants seeking an order quashing charges of misconduct on
grounds of unreasonable delay or waiver by conduct
– Given
serious nature of charges and their seniority, there is societal
interest in charges being aired – No
public entity may
renounce a right introduced not only for its own benefit, but in
the interests of the public – Waiver
not possible where
performance by state official is invested with any substantial
degree of public interest – Judicial
notice that widespread
corruption and institutional delays characterise our public
entities and some of those institutional
delays are caused by
corrupt decisions – Application dismissed.
IN
THE LABOUR COURT OF SOUTH AFRICA
(HELD
AT DURBAN)
Case
No: D 518/2021
Reportable/Not
Reportable

	In
the matter between:	ZIPHATHE MBONENI CIBANE First Applicant NONHLANHLA PAMELA HLONGWA Second Applicant and THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL First Respondent R.B.G. CHOUDREE SC N.O. Second Respondent
Heard:	16 August 2022
Delivered:	17 November 2023
Summary:	Disciplinary proceedings - delay in bringing charges – public service entities and the principle of waiver in disciplinary matters

JUDGMENT

WHITCHER J

Nature of the application

- [1] The applicants are employed as Senior Managers in the Office of the Premier for the Province of KwaZulu-Natal. The first applicant as Chief Financial Officer and the second applicant as a Director: Supply Chain Management.
- [2] This application is brought for an order quashing the charges of misconduct brought against the applicants on 28 July 2020 on the grounds of unreasonable delay and/or waiver by conduct and to review and set aside the decision of the second respondent (the chairperson of the disciplinary enquiry) not to quash the charges in an application that was brought before him for such relief.
- [3] The applicants submit that there was a delay of over three years in proffering the charges against them and on the facts this was an unreasonable delay. Moreover in July/August 2017 the then Premier and Director-General of the Office of the Premier led them to believe they were not going to be charged and by conduct waived the first respondent's right to pursue disciplinary proceedings against them.

[4] The first matter to decide is the first respondent's contentions that the first order prayed for is not competent because the matter was decided by the second respondent and the application discloses no exceptional circumstances justifying the intervention of the court in incomplete disciplinary proceedings.

[5] I see no reason to refuse the application on these grounds. As submitted by the applicants, the application before the second respondent

concerned the legal authority of the employer to bring disciplinary proceeding against them. It invoked the principle of legality and waiver. The question is accordingly a jurisdictional one, which means in turn that it is a matter to be decided on its merits by a court and not the person whose jurisdiction is placed in issue. Similarly, the question of whether the employer has waived its right to impose discipline for the alleged misconduct is a matter for a court to determine.[1]

[6] Finally, the application, if successful, will result in an order permanently staying the disciplinary proceedings.

The case submitted by the applicants

[7] The background facts submitted by the applicants are mostly common cause.[2]

[8] On 26 July 2017 the then Premier, Mr M Willies Mchunu requested the first applicant to meet him at his house in Durban. The Acting Director General at the Office of the Premier, Ms P D Khumalo and the second applicant were also present at the meeting.

[9] At the meeting the Premier informed the applicants that a forensic report (the report) had been presented to him earlier that week which implicated them in acts of alleged misconduct and recommended that disciplinary proceedings be brought against them.

[10] He told them that he had been asked to authorise the implementation of the recommendations in the report. He told them that he had not done so because he had concerns with regard to the report.

[11] Without informing them of the specific allegations in the report that implicated them, the Premier questioned them, heard their

explanations to his questions and informed them that he would advise them if steps would be taken against them. The first applicant informed the Premier that the persons who had compiled the report had not questioned him and had not given him an opportunity to provide explanations where he could. The Premier expressed serious concerns about this.

[12] The impression the Premier conveyed, as represented by his words and conduct at the meeting, was that he was dissatisfied with the manner in which the investigation had been conducted and other procedural issues and would probably not implement the recommendation in the report that the applicants should be disciplined.

- [13] Ms Khumalo was replaced as Director General in the Office of the Premier in August 2017 by Dr Nohlanhla Mkhize.
- [14] The contents of the report were leaked and published in the media on 10 August.
- [15] After the leak of the report to the media, the first applicant was summoned to a meeting on 12 August 2017 by the Director General of the Office of the Premier, Dr Mkhize who questioned the first applicant and discussed the report with him. The first applicant explained to her that he had not been afforded an opportunity by the investigators to respond to allegations that were made against him. She agreed with him that that was wrong. [3] The firm impression the first applicant gained following his discussions with the Director General was that no steps would be taken him.
- [16] On 28 July 2020, the applicants were served with multiple charges of misconduct emanating from the report.
- [17] It is convenient to mention now that most of the charges concern alleged breaches of the Public Finance Management Act 1 of 1999 and the first respondent's Supply Chain Management policies and procedures. The applicants do not dispute this but contend that the nature of the charges is irrelevant in this application. As will be seen later, it is highly relevant.
- [18] Counsel for applicants submitted that the Premier and his department knew in July/August 2017 of the allegations of misconduct and the recommendations set out in the report. They knew that the applicants and the general public were aware of the existence of the report and its recommendations. They knew that they had the right to charge the applicants with misconduct. They also knew too that fairness required a prompt hearing so the applicants would then be in a much better position to locate evidence, identify witnesses and generally be in a position to defend themselves against the allegations and that delay would prejudice them in doing so. The representation made to the first applicant by what was said by the Premier and Director General coupled with their conduct in not doing anything to proceed with charging the applicants in the above context within a reasonable time constituted an election as a matter of law and a waiver by the Premier and his Department of its right to take disciplinary action against the applicants. It was not open to the Department or the Premier three years later to change the decision it had made and reverse its waiver.
- [19] Waiver is the legal act of abandoning a right on which one is entitled to rely and can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right.[4]
- [20] Further, the court in *Chamber of Mines of SA v National Union of Mineworkers & another* 1987 (1) SA 688 (A) held that:

'One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of

general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 786: "It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant. . . . He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place."

[21] Article 10 of the ILO Recommendation 166 also provides that an employer should be deemed to have waived its right to terminate the employment of a worker for misconduct if it has failed to do so within a reasonable period of time after it has knowledge of the misconduct[5].

[22] The applicants contend that quite apart from the waiver and election, the delay in charging them is unreasonable and accordingly in breach of the principle of legality entitling them as a matter of law to an order quashing the charges.

[23] In *Stokwe*[6] the Constitutional Court articulated the test to be used in a determination as to whether a delay is unreasonable to the extent of bringing about the final termination of disciplinary proceedings:

[70] ... the delay per se does not constitute unfairness, but rather as Sachs J put it in *Bothma*[7], albeit in the context of a delay in bringing a private prosecution:

"[T]he 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."[8]

[71] This also accords with the general principles of how delay impacts the fairness of disciplinary proceedings. The question whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter that can be determined on a case-by-case basis. There can be no hard and fast rules. Whether the delay would impact negatively on the fairness of disciplinary proceedings would thus depend on the facts of each case.

[72] In *Moroenyane*,[9] the Labour Court considered factors which this Court initially propounded in *Sanderson*[10] in the context of assessing delays in criminal prosecutions, and applied those factors to determine what constituted an unfair delay in the context of disciplinary proceedings. It held:

“(a) 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.

- (b) 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.
 - (c) 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.
 - (d) 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.
 - (e) 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.
 - (f) All the above considerations must be applied, not individually, but holistically.’
- [24] The applicants contend that their case passes the test set out in *Stokwe*. The delay is unreasonable because there is no adequate explanation for such a lengthy delay that will cause prejudice when the Premier and the Department were in a position to move in August 2017 but chose not to do so. The prejudice is the prejudice that

inevitably and naturally flows from a long delay on an accused employee’s ability to defend his or herself in recollecting the events, securing witnesses and documentation. This is particularly pertinent given that the events to which the charges relate go back to the period 2013 to 2016.

The case submitted by the first respondent

- [25] The first respondent’s case in essence is that the alleged representation made by the Premier is irrelevant since it is only the head of department, namely the Director General as administrative head and accounting officer of the Office of the Premier, not the Premier as the political head of the Office, who is the authority tasked to deal with and make decisions regarding disciplinary matters. In any event, on the applicants’ own version of events, construed sensibly, the conduct of the Director General, and even the Premier, was not plainly inconsistent with an intention to enforce their duty to discipline the applicants. Their conduct could not have left no reasonable doubt in the mind of the applicants that the Department intended to surrender its duty to discipline the applicants.[11]

- [26] Moreover, the applicants were criminally charged in July/August 2017 and the matter was also referred to the respondent's Cluster Audit and Risk Committee in late August 2017, the latter fact known to the first applicant at the time, thus rendering any expectation and impression the applicants may have harboured from their meetings with the Premier and Director General of no consequence.
- [27] As to whether the delay is unreasonable to the extent of bringing about the final termination of the disciplinary proceedings, the charges against the applicants have extreme importance to the public interest as they involve mismanagement of public funds and thus cannot be ignored; the delay was not three years because the Director General received the report only in August 2018; the Department provided a reasonable explanation for the delay and the applicants did not prove that they will suffer real and material prejudice in conducting their defence on account of the delay.

Analysis

- [28] I agree with the applicants that the first respondent's claim that the Director General received the report only in August

2018 falls to be rejected. The claim is based on a vague statement that the Director General received "the sanitised" report in August 2018. We are not told what constituted the "sanitised" report and whether it differed from the report that was in the possession of the Premier and Director-General in July/August 2017. Moreover, the claim is in direct conflict with earlier affidavits from the first respondent which set the time period as August 2017. It is further in conflict with undisputed documentary evidence. According to a minute from the Treasury and an extract from the Cluster Audit and Risk Committee, the report was formally "tabled to the Department on 29 August 2017."

- [29] I also accept that there is no adequate explanation for the delay. This is because it is based firstly on the rejected claim that the employer received the report only in August 2018 and secondly on the irrational excuses that the Department first needed to investigate the leak of the report to the media and thereafter secure counsel's opinion on the way forward on the findings of the report which in fact had already set out the way forward. Even if one accepts the Department needed to do all this first, it boggles the mind that it took over one and half years to do so.
- [30] However, I have come to the conclusion that, despite the long delay of three years and the inadequate explanation for same, this case does not qualify for a permanent stay of the disciplinary proceedings.
- [31] The judgments in Moroenyane and in turn Stokwe drew from the constitutional court judgment by Sachs J in Bothma v Els and Others[12]. It needs emphasize that in Bothma Sachs J highlighted the importance of the nature of the offence in the balancing enquiry and endorsed the approach that a court should be slow to grant a permanent stay where the accused has been charge with a serious offence and there is a societal interest in the

perpetrator being brought to book for same.[13] Sachs J also expressed the view that delay-induced trial prejudice must be insurmountable trial prejudice, but also that trial prejudice is a matter for the trial court to deal with.

[32] The applicants face serious misconduct, basically multiple breaches of the Public Finance Management Act and the first respondent's Supply Chain Management policies. Given the nature of the charges and the seniority of the applicants, there is a societal interest in the charges being aired in a disciplinary process.

[33] There is further no evidence from the applicants that the delay will cause them insurmountable trial prejudice. The first respondent

pointed out that the charges and evidence are primarily documentary based. I have taken note that prior to the application(s) for the charges to be quashed, the disciplinary enquiry in fact sat on multiple occasions and each session concerned the discovery of voluminous documents to the applicants. They were also furnished with the report itself in a different process.

[34] To my mind, all these factors weigh against a finding that the delay is not unreasonable to the extent of bringing about a final termination of the disciplinary proceedings.

[35] As to the issue of waiver, I agree with the first respondent's submissions regarding the applicants' alleged impressions.

[36] But, more importantly and decisively, there is eminent authority that no public entity may renounce a right introduced not only for its own benefit, but in the interests of the public as well; waiver is not possible where performance by a state official is invested with any substantial degree of public interest; and no public entity can renounce a right which its duty to the public.[14]

[37] SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A) at 49G-H articulated the point as follows: "...a provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved.

[38] As pointed out in Moerenyane, public service entities have 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[15] 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).'

[39] To my mind, the right to discipline in the context of charges which concern multiple breaches of the Public Finance Management Act and Supply Chain Management policies by senior public employees is not just for the benefit of the employer but also in the interests of the public as well. Therefore, if the Premier and/or Director General purported to waive this right, they had no right to do so in the absence of proper grounds (such as an opinion from a proper authority that the case against the applicants have poor prospects of success).

[40] The above principle is reinforced when one takes judicial notice of the fact that widespread corruption and institutional delays

characterise our public entities and some of those institutional delays are caused by corrupt decisions.

[41] Finally, as to the issue of election, the case authority relied on by the applicants, Chamber of Mines, went further and stated:

The above statement of the principle may require amplification in the following respect indicated by Spencer Bower, *Estoppel by Representation* (1923), para 244 at pp 224/5-

"It is not quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke's phraseology: quod semel in electionibus placuit amplius displicere non potest, as if mere mutability were for its own sake alone banned and penalized by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another... "

[42] I have already found that the decision to charge the applicants finds no injustice.

[43] Finally, it follows from my findings that the ruling made by the second respondent was correct.

[44] In the result, I make the following order:

Order:

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

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Advocate M Pillemer SC,
instructed by Purdon & Munsamy Attorneys

For the First Respondent: Advocate N Govender and Advocate H Singh,
instructed by the State Attorney, KwaZulu-Natal

[1] See: *Jako-Wutu v Ntabankulu Local Municipality & others*

[2016] ZALCPE 1 at para 16: ‘Whilst on this point, the municipality’s argument that the applicant should have taken

the in limine ruling of the chairperson of the disciplinary enquiry on review can also be addressed. Essentially, the chairperson’s ruling on whether the enquiry should proceed or not was an issue he was duty bound to consider. It was also correct for the applicant to first raise the issue in the forum whose authority is being challenged, thereby avoiding

premature recourse to the courts. However, the kind of ruling under attack is never anything more than a provisional view on the jurisdictional question, even though it does affect the subsequent course of the proceedings in that forum. As a matter of law, the determination of legal authority to act, unless specifically provided for otherwise in statute, is a matter for this court or another high court to determine and is determined on an objective basis quite independently of what the functionary in that forum decided. Whether the application to determine the issue takes the form of a review of the forum’s jurisdictional ruling or whether it is simply to set aside that forum’s deliberations as null and void for want of legality is a choice of approach open to the litigant, but the outcome will be decided on the same factual and legal basis.’

[2] The applicants meticulously demonstrated that the answering affidavit puts up no genuine and meaningful disputes of fact.

[3] The first respondent admits the meeting but denies the rest of the allegation. However, the answering affidavit is deposed to by Dlomo who has no personal knowledge of the events and the confirmatory affidavit does not deal directly with the allegations.

[4] *NUMSA v Intervolve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at paras 60-61.

[5] *R166 ILO Termination of Employment Recommendation*, 1982 (No. 166). Referred to by the Constitutional Court in *Stokwe supra*.

[6] *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* (2019) 40 ILJ 773 (CC).

[7] 2010

(2) SA 622 (CC).

[8] 2010

(2) SA 622 (CC) at para 35.

[9] Moroenyane v Station Commander of the South African Police Services [2016] ZALCJHB 330]

[10] Sanderson v Attorney-General, Eastern Cape 1998

(2) SA 38 (CC) at para 25.

[11] Smith v Momberg (12 SC 295) held that the holder of the right's conduct "must be such as to leave no reasonable doubt in the mind that he...intended to surrender them".

[12] 2010

(2) SA 622 (CC).

[13] See: Bothma at para [28] and [38].

[14] Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Die Direkteur-Generaal: Handel en Nywerheid and another

[1997] ZASCA 6; [1997] 2 ALL SA 321(A).

[15]

(2014) 35 ILJ 613 (CC) at para 35.

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