

Disciplinary action: Can excessive delays taint procedural fairness?

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On 25 January 2016, and after a delay of approximately three and half years in instituting the disciplinary hearing, Major General S.L. Mapyane, who was employed by the South African Police Service (SAPS) was dismissed for misconduct in respect of five charges of fraudulent travel claims for the period between August 2010 to July 2012. It was alleged that he claimed disbursements for official trips as if he had used his own private vehicles, when in fact, he had travelled in official SAPS vehicles. The five charges were similar, save for the dates and incidents when the contraventions supposedly occurred.



Image source: Narith Thongphasuk – [123RF.com](#)

Mapyane approached the Safety and Security Sectoral Bargaining Council to challenge the procedural and substantive fairness of his dismissal. On procedural fairness, he contended that the SAPS flouted the South African Police Discipline Regulations, 2006 (Discipline Regulations), which required that the SAPS promptly institute disciplinary action. He further contended that the contravention of the Discipline Regulations tainted the overall substantive fairness of his dismissal. That being the case, Mapyane argued that the charges were vitiated by delay and ought to have been quashed.

The arbitrator found that Mapyane was trial prejudiced due to the excessive and unexplained delay and that the first three charges were vitiated by this delay. However, Mapyane's dismissal based on the fourth and fifth charges was found to be procedurally and substantively fair.

Aggrieved by this outcome, Mapyane approached the Labour Court seeking to review and set aside the arbitration award. In *Mapyane v South African Police Service & Others* (24 November 2023), Mapyane contended that, having found that the delay in instituting the disciplinary hearing was unreasonable, the arbitrator's conclusion that his dismissal on charges four and five was fair, was irrational.

Impact of the delay

Mapyane alleged that the arbitrator failed to appreciate the negative impact of the delay, being lapses in witnesses' memory with time, the passing of his main witness in respect of charge four, and difficulties in securing evidence to refute the allegations. This, he alleged, rendered his dismissal procedurally unfair, and also vitiated the decision to dismiss him (Excessive Delay argument).

He further alleged that the arbitrator committed irregularities in the manner in which he evaluated the evidence. In particular, Mapyane argued that the arbitrator had failed to evaluate the inherent probabilities in the versions that were before him and relied solely on credibility findings, which ultimately resulted in an unreasonable outcome (Inherent Probabilities argument).

On the Excessive Delay argument, the Labour Court considered the decision of the Constitutional Court in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others*, which endorsed the application of various criminal factors in labour law matters when considering the delay in instituting or finalising disciplinary proceedings.

These factors include the length of, and explanation for, the delay, whether the employee has taken steps to assert her/his right to a speedy process, any material prejudice to the employee caused by the delay and the nature of the alleged offence. In *Stokwe*, the Constitutional Court observed that the delay had a concrete impact on the employee's disciplinary process and on her personally as she had to contend with an uncertain future, and this factor was found to have had a negative impact on the procedural fairness of the disciplinary hearing.



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Labour Court ruling

Based on this authority, the Labour Court found that the arbitrator failed to interrogate the effect of the excessive delay on the fairness of the procedure. Further, the arbitrator misconceived the nature of the enquiry by relying on *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and others*. As a public authority, the SAPS was enjoined to observe the procedure set out in the Disciplinary Regulations and promptly attend to the disciplinary action. Therefore, the Labour Court found the three-and-a-half-year delay to have tainted the fairness of the procedure.

On whether this delay vitiated the sanction of dismissal, based on a waiver on the SAPS' part to take disciplinary action against Mapyane, the Labour Court found that there was no evidence to support this. The Court found that Mapyane had been criminally charged for the same offence and the SAPS had engagements with the investigating officers who were

investigating the disciplinary allegations. Accordingly, he could not have harboured any expectation that SAPS had waived its right to discipline him due to the delay.

In respect of the Inherent Probabilities argument, the Labour Court found the argument to be flawed, on the basis that the arbitrator made several findings of fact wherein he interrogated the versions and rejected Mapyane's version in respect of the two charges of fraud.

Role and responsibilities

In considering the appropriateness of the sanction of dismissal, the Labour Court held that Mapyane, as a Major General heading the serious organised crime unit, was expected to act in good faith and protect the interest of the SAPS as a custodian of discipline.

Moreover, the Labour Court held that honesty and integrity are integral requirements of all positions within national law enforcement agencies such as the SAPS, and if not upheld, the credibility of these institutions and the confidence of the public in them would be undermined. In this regard, the Labour Court upheld the arbitrator's findings in respect of substantive fairness.

Ultimately, having found the review to be successful only in relation to procedural unfairness, the Labour Court ordered compensation equivalent to three months' salary as at the time of Mapyane's dismissal.

Importance of the case

Although decided in the context of a public sector employment relationship, this judgment is important for all employers as it highlights one of the objectives of the Labour Relations Act, to promote expedient resolution of labour disputes.

In this regard, employers are reminded to take prompt disciplinary action against employees in cases of misconduct. While excessive and unreasonable delays may not automatically vitiate a dismissal or impair the substance of the case against an employee, such delays may taint procedural fairness.

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