Employment Law

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SOUTH AFRICA

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EMPLOYMENT LAW ALERT

Can an employee ever say that the right to discipline has prescribed?

As the law on prescription is relatively well settled, it is not a point an employer would expect to face as a defence in a disciplinary process. Also, there is a line of authority in the Labour Court which deals with the effect of the delays in disciplinary proceedings.

The Labour Court was, however, recently called upon to consider this question in *Public Investment Corporation v More and Others* (J2121/22) (16 April 2025) and made it abundantly clear that disciplinary proceedings are not subject to prescription.

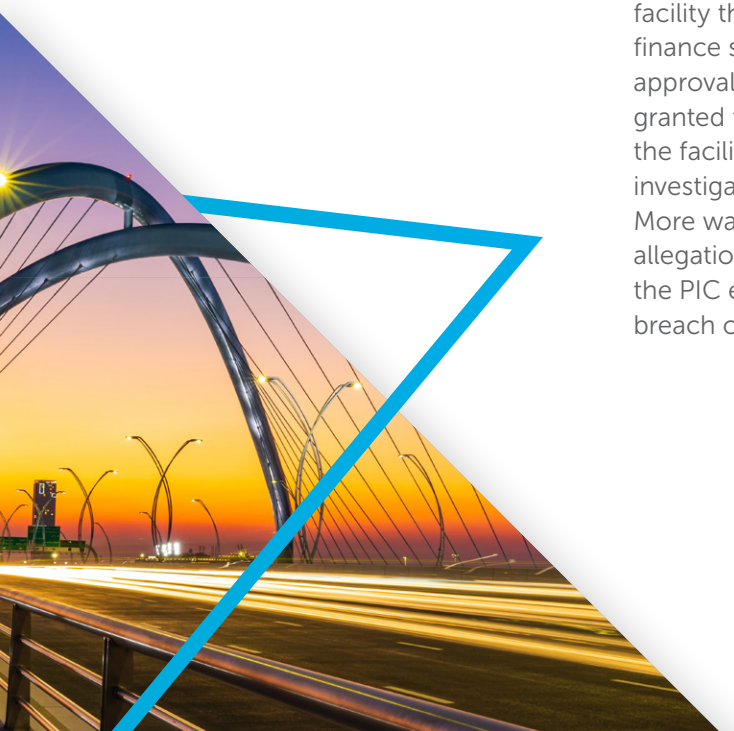
Background facts

Ms More was formerly employed by the Public Investment Corporation (PIC) as its CFO. In 2014, VBS Mutual Bank (VBS) applied to the PIC for a R350 million revolving credit facility that was to be utilised solely for VBS' contract finance scheme. Following a series of meetings and internal approval processes, More "*recommended*" that VBS be granted the relevant credit facility and on 30 June 2015, the facility agreements were entered into. Pursuant to an investigation into the VBS transaction and on 26 June 2020, More was charged with misconduct. The nub of the allegations against her was that she recommended that the PIC enter into the revolving credit facility agreement in breach of internal approval terms.

In a finding dated 16 June 2021, the chairperson of More's hearing dismissed various objections that she had raised against the disciplinary proceedings (namely, prescription, waiver and undue delay), and found her guilty of misconduct. The chairperson's recommended sanction was that More be issued with a final written warning, valid for a year. However, the PIC's board rejected the recommended sanction. As a result, More was dismissed on 8 October 2021 and was paid *in lieu* of three months' notice.

More than referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). During the arbitration, More challenged her dismissal on several grounds, including that the charges had "*prescribed*" under the Prescription Act 68 of 1969 (Act). The CCMA agreed, finding the disciplinary charges and subsequent dismissal "*incompetent*" due to prescription, and ordered reinstatement with backpay.

The PIC took the arbitration award on review to the Labour Court. The legal issue was whether the Act, which sets time limits for the enforcement of debts, applies to an employer's right to discipline employees for misconduct. The CCMA reasoned that More's duty to render services was a "*debt*" under the Act, and that the PIC's delay in instituting disciplinary action (more than three years after the alleged misconduct took place) meant that the claim had prescribed.



Can an employee ever say that the right to discipline has prescribed?

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The Labour Court's finding

The PIC correctly argued that disciplinary action is not a claim for a "*debt*" as contemplated by the Act, and that the Act is intended for civil litigation, not internal employment processes.

The Labour Court found that while the Act has been found to apply to certain claims under the Labour Relations Act 66 of 1995 (for example, claims for reinstatement, re-employment, or compensation after unfair dismissal), these are claims which arise after dismissal through formal legal processes. Crucially, the Labour Court found that because internal disciplinary hearings do not constitute litigation and do not involve the enforcement of a "*debt*" as contemplated by the Act, a disciplinary hearing cannot be subject to the Act's time limits for prescription of a claim. A disciplinary hearing is an exercise of the employer's prerogative to manage workplace conduct and does not constitute a claim for payment, delivery of goods, or services (i.e. a debt).

Importantly, while the Labour Court confirmed that the Act does not bar employers from instituting disciplinary action after three years, it cautioned that an excessive delay can still render a dismissal procedurally unfair, or in some cases, amount to a waiver of the right to discipline. This is consistent with the existing line of cases on delays in instituting disciplinary action. So, employers must ensure that disciplinary action is taken as soon as possible after an incident of misconduct takes place or once the relevant misconduct comes to their attention (whichever takes place first).

Ultimately the CCMA award was set aside.

Imraan Mahomed and Lee Masuku

EMPLOYMENT LAW ALERT

Can there be defamation when accusations against an employee cross the line?

Khanyiwe, an employee of the King Sabata Dalindyebo Municipality (Municipality), was accused by her supervisor (in the presence of other people) of stealing municipal plastic refuse bags and selling them to a hardware store. The allegations stemmed from an internal investigation following the discovery of municipal-branded bags being resold in local businesses. Khanyiwe was charged with misconduct, including theft.

Aggrieved by the accusation, Khanyiwe alleged that the accusations were defamatory. She alleged that the Municipality attempted to bring false disciplinary charges of theft against her, which came to nought. She then sued for defamation, seeking damages of R600,000.

The Municipality admitted to accusing Khanyiwe of theft but denied that the statements made were defamatory and that it was made in the presence of third parties. The Municipality's case was that the accusation was made in the context of an internal investigation, which led to disciplinary action against Khanyiwe. During the investigation, a supervisor who had since passed away owned up to the theft. Khanyiwe admitted to assisting the supervisor with selling the plastic refuse bags to a local business and apologised *"saying that she was sorry for putting herself in such a situation"*.

Khanyiwe's version, however, was that she was taken to the cleaning department where she met a senior official of the Municipality and two other employees. The official accused her of theft in the presence of the two other employees. She denied the allegations. She also testified that she had not stolen the plastic refuse bags.

The Municipality argued the senior official did not say that Khanyiwe was a thief. It submitted that the act of conveying the nature of a complaint by an employer to an employee does not constitute a defamatory act, and that even if it did, it was not wrongful. If it were considered wrongful, employers would be discouraged from informing employees about allegations of misconduct.

The court held that it was undisputed that the senior official was doing his job when investigating the allegations of theft. The publication could therefore only have been made in a formal meeting. The utterances were accordingly made on a qualified privileged occasion, in which the senior official was doing his job, in confronting Khanyiwe with allegations of theft.

This constituted a qualified privileged occasion and reiterated that where statements are made in the discharge of a duty or exercise of a legitimate interest, the law presumes that the speaker lacked the intent to defame.

Importantly, the court stressed that the senior official acted within the scope of his duties, and there was no evidence that the accusations were made maliciously or outside of proper workplace channels, and the claim of defamation was accordingly dismissed.

Can there be defamation when accusations against an employee cross the line?

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Conclusion

This case underscores that not every workplace accusation, even if damaging to an employee's reputation, will amount to defamation. Where an employer acts within the bounds of internal processes, and statements are made in a responsible and in a formal context, the defence of qualified privilege would apply.

Employers should still proceed with caution: privilege can be lost if accusations are made recklessly, to the wrong audience, or without factual basis. However, legitimate disciplinary action, even if it involves serious allegations, is protected.

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