Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C955/2015

In the matter between:

THABO PITSI MABULA **Applicant**

and

KNYSNA MUNICIPALITY **Respondent**

Date of Set Down: 18 August 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 24 August 2023.

Summary: (Application to dismissal a referral of a claim under the Protected Disclosure Act – Application to reinstate the claim – Referral deemed lapsed – Inordinately long and unjustified delay – Sufficient reason to refuse reinstatement – Interest of Justice – Prospects of success slight and even if successful unlikely to result in anything more than a token award – Applicant's interests in having case heard and prospect of success must be balanced against prejudice to Respondent of being able to properly conduct its case after so long)

JUDGMENT

LAGRANGE J

Introduction

[1] This matter involves two consolidated applications: one to dismiss the applicant's main application (alternatively to declare that it has been archived, and the other (in response to the application to dismiss) to retrieve the main application from the archives.

Chronology

[2] On 23 July 2015, the applicant, Mr T Mabula, the Manager: Environmental Management at the respondent municipality ('the municipality') referred a dispute relating to an alleged unfair labour practice concerning an alleged contravention of the Protected Disclosures Act 26 of 2000 ('the PDA'), to the South African Local Government Bargaining Council. The dispute was conciliated on 26 August 2015 and the certificate of outcome was issued on 23 September 2015.

[3] The applicant referred the unfair labour practice dispute to this court on 4 March 2016. The referral was in the form of a notice of application seeking certain relief, supported by a statement of case which was signed before a commissioner on the last page, even though the statement of case was not drafted in the form of an affidavit. The relief Mr Mabula sought in the notice of application was:

3.1 to have certain alleged disclosures he made declared protected disclosures under the PDA;

3.2 to declare the decision of the respondent to institute disciplinary proceedings against him on 27 November 2014 declared unlawful, invalid and unconstitutional;

3.3 to declare the decision of the council on 28 August 2015 concerning his case be declared invalid, unlawful and unconstitutional, and

3.4 ordering the municipality to find him alternative employment in another organ of state outside the Western Province on the same terms and conditions in terms of section 4 (3) of the PDA, or alternatively, he be paid 12 months remuneration as compensation for an unfair labour practice in terms of section 194 (4) of the Labour Relations Act, 66 of 1995 ('the LRA').

[4] In terms of s 191(13)(b) read with s 191(5)(b) of the LRA he should have referred his dispute by 22 December 2015. Accordingly, it was filed just over two months' out of time. The referral was not accompanied by an application for condonation. In fact, it seems he had attempted to refer it in December but the referral was defective in some respects.

[5] The municipality raised the issue of the late referral in its response to the statement of case, which it filed on 15 April 2016, for which it simultaneously applied for condonation for filing it late. In its statement of response, the municipality raised the failure of the applicant to apply for condonation of his referral. He then filed his condonation application for the late filing of his referral on 11 May 2016. Simultaneously, he also appears to have re-filed his original referral, but this time omitted the notice of motion and only filed the statement of case. Nevertheless, he still signed the last page of the statement as if it were an affidavit.

[6] The condonation application was in the form of a notice of application attached to which was a single page statement headed 'Reasons for Late Filing', which Mr Mabula signed. He ought to have filed a sworn affidavit in support of his condonation application.

[7] Owing to the defects in the applicant's condonation application, on 13 May 2016, the respondent filed a notice of an irregular step calling on the applicant to remove the causes of its complaint. The notice set out in unequivocal terms what the applicant needed to do to rectify his defective condonation application. However, Mr Mabula never attempted to rectify his defective condonation application after receiving that notice.

[8] It must be mentioned that Mr Mabula resigned from the municipality at the end of 2016 and after a period of 18 months unemployment, commenced working for another municipality in North West Province where he currently

works. Before he resigned he instituted more than one matter in the High Court against the municipality.

[9] From mid-June until August 2020 the municipality sent Mr Mabula a number of letters noting his failure to enrol his matter and called on him to withdraw his case. He only replied on 7 December 2020. He claimed that ill health had prevented him taking any further steps since the alleged occurence of the occupational detriment of taking steps to discipline him. He advised that he anticipated being able to enrol the matter in March 2021, if his health permitted. He rejected the request to withdraw the referral.

[10] Mr Mabula never made good on his intention to enrol his matter in March 2020. During the first half of 2021, there was some further communication between the parties. On 15 June 2021, the municipality rejected his latest settlement proposal of payment of R 0,5 million and called on him to withdraw the case, failing it would enrol it. It appears that at this stage, the municipality was unaware the referral had lapsed. Mr Mabula replied at some length on 21 June 2021 confirming he wanted to proceed with the case but stated that he was not doing so because: he did not have sufficient funds; he was located more than 1000km away in another province, which made it difficult for him to pursue the matter on his own; he was suffering from long term depression and was on medication, and that owing to “some events that have occurred since 2015, I have been living in fear of your clients and those associated with them.”

[11] Despite the correspondence in 2020 and 2021, no further court process was filed for more than five years, until in September 2021 the municipality applied to have the referral dismissed. Mr Mabula opposed this application and on 7 October 2021, Mr Mabula applied for condonation of his failure to prosecute his case timeously, the retrieval of his referral from the archives, and an order compelling the convening of a pre-trial conference. The application was opposed.

The nature of the applications before the court.

Archiving of the referral

[12] Mr Mabula's application to resurrect his case and the municipalities' application to dismiss the referral are two sides of the same coin, except that the archival status of the original referral was a matter of some uncertainty for both parties. Consequently, the municipality wanted the referral dismissed or, alternatively, a declarator that it was deemed dismissed under Clause 16 of the Labour Court Practice manual, whereas Mr Mabula wanted the matter removed from the archives, but in argument he strongly contended that it could not be deemed withdrawn, contrary to what the municipality argued.

[13] Much of the argument in court was consumed with the archival status of the referral. At the time there were conflicting authorities on when a matter could be deemed archived under clause 16 of the Labour Court Practice Manual, which states:

> "**16. Archiving files**
>
> 16.1 In spite of any other provision in this manual, the registrar will archive a file in the following circumstances:
>
> • in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;
>
> • in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and
>
> • when a party fails to comply with a direction issued by a judge within the stipulated time In spite of any other provision in this manual, the registrar will archive a file in the following circumstances:
>
> 16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed."

(emphasis added)

[14] In the Labour Court decisions handed down by a variety of judges in *JB Marks Local Municipality v SALGBC and Others*[1],*November & others v Burma Plant Hire*[2], *Sauls v National Bargaining Council for the Chemistry Industry and Others* [3], and in the Labour Appeal Court decision in *Macsteel Trading Wadeville v Francois van der Merwe NO & others*[4] the common theme in those decisions, either in express terms or implicitly, was that the mere lapse of the time periods in the Practice Manual was sufficient to activate the deeming provision. By contrast, in the Labour Court decisions *Lebelo and Others v The City of Johannesburg* [5],*MEC: Department of Health Eastern Cape Province v PHSDSBC and Others* [6] and *SG Bulk, A Division of Supergroup Africa (Pty) Ltd v Khumalo and Another* [7], all decisions of the same judge, the view was taken that in order for archiving to occur more than the elapse of the relevant time periods was required: the registrar was required to act for archiving to occur.

[15] All of these decisions preceded the Labour Appeal Court judgements in *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch & others*[8] and *South*

[1] (JR543/2018) [2021] ZALCJHB 252 (25 August 2021) at para 25

[2] (2020) 41 *ILJ* 1177 (LC)

[3] (C315/2019) [2021] ZALCCT 87 (4 November 2021). See also *Ramadie and Another v Department of Health and Others* (JR1346/2016) [2020] ZALCJHB 141 (11 August 2020) at para 39; *Gema v National Commissioner of South African Police Service and Others* (D1972/18) [2021] ZALCD 65 (5 October 2021); *Matsha and Others v Public Health and Social Development Sectoral Bargaining Council and Others* (2019) 40 *ILJ* 2565 (LC) at para 23; *Mbinyashe v Metal and Engineering Industries Bargaining Council and Others* (C 1163/2018) [2021] ZALCCT 1 (25 February 2021)

[4] (2019) 40 *ILJ* 798 (LAC)

[5] (J2055/14) [2022] ZALCJHB 92 (17 March 2022)

[6] (PR187/16) [2020] ZALCPE 4 (7 February 2020)

[7] (J63/20) [2021] ZALCJHB 416 (13 May 2021)

[8] (2022) 43 ILJ 2727 (LAC)

African Police Services v Coericius and others[9]. At the time this matter was heard, neither of these judgements had been handed down yet.

[16] In *Tradex* the LAC followed the approach taken in the majority of Labour Court decisions. It held that the deeming provisions of the practice manual automatically attributed archival status to a case and that the administrative action of the registrar was not required, nor could the registrar undo the effect of the deeming provision[10], such as by enrolling a review application for hearing despite it being deemed withdrawn, which is what happened in that case.

[17] In Mr Mabula's case, the last process he filed before he filed a notice of opposition to the municipality's dismissal application on 7 October 2021, was on 11 May 2016, when he filed his defective condonation application for the late filing of his referral. Accordingly, by 12 November 2016 his referral was deemed withdrawn in terms of clause 16.1 of the Practice Manual. He took no steps to prosecute his claim for a period of virtually five years.

The applications to reinstate and dismiss the referral

[18] With the benefit of hindsight, the application to dismiss the referral was unnecessary in the light of *Tradex*, but obviously at the time it was launched in September 2021, the law on when a matter was deemed archived was not yet settled. As it turns out, there was no extant referral to dismiss because it was deemed withdrawn in November 2016. Nevertheless, as Mr Mabula did launch his application to reinstate the referral in October 2021 that application must be dealt with.

[19] In *Tradex*, the LAC said the following about applications to reinstate referrals or applications that were deemed withdrawn:

> " [16] Clause 16.2 does not specifically state that in an application for the retrieval of the file, a party who brings that application must show good cause why the file must be retrieved from the archive. It however states in no uncertain terms that the provisions of rule 7 will apply in an application

[9] [2023] 1 BLLR 28 (LAC)

[10] At paragraphs [11] and [12].

brought under the clause 16.2. Clause 11.2.7 applicable to rule 7 and rule 7A applications requires that a party who applies for a file to be removed from the archive must show good cause why the file must be removed from the archive. Furthermore, an applicant who applies for a file that has been archived for failure to comply with an order by a judge to file a pretrial minute, to be removed from archives, has to show good cause why such a file should be removed from the archives. There is therefore no doubt that showing good cause is a requirement for a file to be removed or retrieved from the archives in terms of clause 16.2.

[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.' "

[20] It hardly needs to be said that the period of delay of approximately five years, on Mr Mabula's part, is extraordinarily excessive. Such exceptional inertia demands a particularly good explanation. All he had to do was either to enrol the condonation application for hearing or convene a pre-trial conference in the six months after filing his condonation application, before the deeming provision kicked in. However, after doing that he did nothing to pursue the matter until the municipality acted.

[21] Mr Mabula's explanation for this very long delay is two-fold. Essentially, he claims to have been suffering from depression and anxiety since 2015. It is only in his replying affidavit that he provides any specifics of his medication, though the details of prescriptions or medical aid accounts which he purported to annex to his replying affidavit were not attached. Secondly, he claims he was in fear of his life in view of various events and

the deaths of persons in other municipalities whom he claims or believed were whistle blowers.

[22] In support of his fear of the consequences if he pursued the matter, he cited the alleged killing of an alleged whistle blower in the North West Province during 2009 and the story of an employee working for Bloemfontein Water in 2014. He goes on to cite a number of other individuals working for a variety of government departments whom he alleges have been killed after blowing the whistle. He claims to have been living in fear of his life and that it had a powerful emotional impact on him, to the extent that he felt the only way through it was to "lay low and survive for as long as I could." He claimed not to be afraid of the municipality but of the "construction mafia in Knysna". He averred that "The fact that there are people who have been killed in this country for exposing corruption made me freeze for more than 5 years." In addition, he cites being approached by a councillor, Mr V Waxa, in 2015 who showed interest in his cases and 'offered him protection'. He also visited Mr Mabula at his home after he resigned from the municipality in 2016. Another councillor, Mr V Moloisi, contacted him asking if he had found alternative employment and what his intentions were regarding his case. He advised him he was intending to prosecute it but was laying low for the time being. A month after obtaining employment in the North West in 2018 he heard that Mr Moloisi had been assassinated and, later, that Mr Waxa was convicted of his murder. This added to his fear and he believed that Waxa had approached him to see if there was anything else he wished to disclose. He still feared for his life and it was only because his hand was forced by the application to dismiss his referral that he had applied to reinstate his matter.

[23] The municipality rightly criticizes the nature of the evidence advanced by Mr Mabula to explain five years of inaction on his claim. Firstly, he does not mention when any of the incidents of alleged attacks on whistle blowers were made, which can be tied to the inculcation of fear on his part, or when his knowledge of such events deterred him from taking further steps.

[24] Where he does relate the event of an assassination of the councillor Moloisi, that event only took place about a month before he started working in the North West in mid-2018. However, Moloisi's death only occurred at a point where he had already done nothing to advance his case for more than two years. Further, it is his own surmise that links Mr Moloisi's death to the anything related to the disclosure he had originally made. Though proximity to the individuals involved might well have been generally disconcerting in view of what happened later, in neither Mr Waxa nor Mr Moloisi's case can their conduct be considered threatening to him in any way. Even on his own account, it seems, if anything, they might have been more interested in obtaining more information from him about alleged wrongdoing than having any interest in silencing him.

[25] It is also pertinent that there is no evidence of a single threat made to Mr Mabula, indirectly or directly, anonymously or otherwise, to persuade him not proceed with his claim. Significantly, he also provides no reason to believe that there is anything more he would have to say in the form of disclosures in the course of prosecuting his case beyond those allegations he had already made. Those allegations had already been well publicized in the local press at the time. Accordingly, it is difficult to see how he would be placing himself in danger by proceeding with his case.

[26] In so saying, I do not mean to suggest that deciding to be a whistleblower in South Africa is something anyone would choose to do without giving it a second thought. There are indeed risks and those risks can be life threatening in certain circumstances. However, the general existence of such risks is not sufficient to justify complete paralysis in prosecuting a case, particularly where any supposed 'sting' of any allegation of impropriety has already been publicized. There was not a piece of evidence of anything concrete pertaining to himself to suggest that the fears he claims to have had, did indeed materialise as palpable risks at any stage after the disclosure.

[27] An additional consideration, relating to his claim that he was too medically incapacitated to galvanise himself to pursue the matter, is that in 2016 when one might reasonably suppose his vulnerability to any danger arising

from his disclosure would have been greater, and when he claims he was already suffering from depression and anxiety, he was still able to initiate at least two other cases of high court litigation. Further, he was also able to take on a new job in 2018. It is hard to understand how he was able to deal with moving to another province and assuming new work responsibilities yet was simultaneously incapacitated when it came to taking steps to continue with the litigation he had embarked on. He also was able to correspond with the municipality about the matter when he chose too, and to do so coherently, and at some length if necessary, as evidenced by his letter of 21 June 2021.

[28] Without disputing that he was genuinely suffering from depression and anxiety, on his own account he was being medicated for his condition. I think the court can take cognizance of the fact that depression and anxiety affects a significant portion of the population, but if treated, many persons are still able to function and perform their ordinary responsibilities at work and in their domestic lives. In the absence of expert medical opinion that might explain the anomaly between Mr Mabula's ability to function in certain respects and his alleged inability to do so in others, there is simply no basis before the court to accept that his illness incapacitated him to the extent he claims for the duration of the five year period.

[29] In conclusion, I am satisfied that the very extensive delay is not satisfactorily explained on the generalized grounds advanced by Mr Mabula. Given the length of the delay and the wholly inadequate explanation I am inclined to dismiss his application on this basis alone.

[30] Notwithstanding these fundamental considerations, do the interests of justice and fairness require a different conclusion? It is common cause that Mr Mabula was a member of the tender Bid Evaluation Committee ('the BEC'). His superior, Mr Maughan-Brown, was a member of the Bid Adjudication Committee ('the BAC'). At a meeting of departmental heads, his superior, allegedly made comments questioning the ability of the BEC, which Mr Mabula felt undermined the integrity of the BEC. He claims his superior was very unsettled when he told him of the BEC recommendation about which tenderer should get a particular contract. His superior

indicated the recommended contractor would result in no service delivery and he stated his intention to approach the Director: Supply Chain Management prior to the meeting of the BAC, which was due to make a final decision on awarding the contract. Mr Mabula phoned Mr Maughan-Brown after the departmental heads meeting and expressed his concern about what the latter had said at the meeting, which suggested he was going to try and influence the supply chain manager to change the recommendation of the BEC. Maughan-Brown dismissed his claims and criticized him for phoning him.

[31] On 17 November 2014, Mr Mabula then filed a report of alleged financial misconduct against Mr Maughan-Brown, which he addressed to the Accounting Officer, the Executive Mayor, the Speaker of Council and the Provincial Treasury. He forwarded his complaint to members of the BEC and the supply chain manager. He also resigned from the BEC. In his covering letter he stated he was well aware of the possible victimization which might follow his report but quoted former President Nelson Mandela's statement that one must be prepared "to die for an idea that lives than live for an idea that dies."

[32] Mr Maughan-Brown wrote to the Municipal Manager disputing that any of Mr Mabula's allegations against him could amount to financial misconduct as defined in section 171 of the Local Government: Municipal Finance Management Act of 2003, irrespective whether or not they were true. He agreed he had expressed the view that the situation, in which only one tenderer had been recommended by the BEC in circumstances where the other had been significantly cheaper and had previously successfully completed a contract, 'was a mess'. It was a matter of concern that it would also be known that the cheaper tenderer was not included because the tender bids were public knowledge.

[33] When Mr Mabula's report was tabled at a council meeting on 27 November, a majority of the council decided that there was 'no reasonable indication of financial misconduct', and that a disciplinary inquiry be entered into 'regarding the conduct' of Mr Mabula.

[34] At its meeting on 29 January 2015, the council amended the resolution, rescinding the part referring to initiating a disciplinary enquiry, and substituting it with a decision that an 'investigation' into his conduct should be undertaken "with the exception of any conduct that is protected in term of Regulation 18 of the Regulations on Financial Misconduct and Criminal Proceedings, 2014[11]." Matters dragged from that point onwards but at a meeting on 27 August 2015, a recommendation was adopted that no disciplinary action be taken against Mr Mabula. The motivation for not proceeding, in short was that the whole situation could have been avoided even though Mr Mabula could be criticized for not handling the matter in a more measured manner. He was not the only person involved whose behaviour was criticized in these terms.

[35] Mr Mabula claims because he allegedly made a protected disclosure on 17 November 2014 he was subject to an occupational detriment from the date of the initial council resolution in November 2014 to take disciplinary action against him until the resolution in August 2015 deciding no disciplinary action should be taken against him.

[36] Mr Mabula claims to have made the disclosure under Regulation 3(1)(a) and (b) of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings[12], though he mistakenly refers to it as section 3(1)(a) and (b) of the PDA. Financial misconduct is defined in sections 171 and 172 of the Local Government: Municipal Finance Management Act 56 OF 2003 ('the MFMA'), insofar at it relates to acts of misconduct by officials other than accounting officers or chief financial officers of municipalities, the misconduct in question is defined as follows:

---

[11] This is a reference to Regulation 18 of Municipal Regulations On Financial Misconduct Procedures And Criminal Proceedings (No R 430, gg 37669 dated 30 May 2014) which states:

> "Protection of officials reporting allegations of financial misconduct and financial offence
>
> 18. The Protected Disclosures Act 2000 (Act No. 26 of 2000) applies to an official who makes a report or disclosure against a political office-bearer, a member of the board or an official who is alleged to have committed financial misconduct or a financial offence."

[12] See fn 11 above.

"171 (3) A senior manager or other official of a municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79, commits an act of financial misconduct if that senior manager or official deliberately or negligently-

(a) fails to carry out the delegated duty;

(b) contravenes or fails to comply with a condition of the delegated power or duty;

(c) makes an unauthorised, irregular or fruitless and wasteful expenditure; or

(d) provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection (1) (d).[13]"

(emphasis added)

[37] It is noted that none of the allegations Mr Mabula levelled against Mr Maughan-Brown on 17 November 2014 related to financial misconduct as defined in s 171(3) of the MFMA. However, in his report he claimed that Mr Maughan-Brown had contravened section 118 of the MFMA because he disregarded the separation of duties between the BEC and BAC which undermined internal controls and constituted an interference in the supply chain management system amounting to an offence in terms of s 173(5)(e) of the MFMA read with 2014 MFMA regulations. S 173(5)(e) refers to contraventions of other provisions of the MFMA, including s 118 which *inter alia* prohibits interference in the supply chain management system of a municipality.

[38] Irrespective of the truth of the allegations made in his report on 17 November 2014, it is conceivable those allegations would describe a

[13] S 171(1)(d) states:

"171 (1) The accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently-

…

(d) provides incorrect or misleading information in any document which in terms of a requirement of this Act must be-

(i) submitted to the mayor or the council of the municipality, or to the Auditor-General, the National Treasury or other organ of state; or

(ii) made public."

disclosure of a criminal offence being committed, which falls within the definition of a disclosure. It also appears that by referring the report to the Accounting Officer of the municipality who is the municipal manager the referral would qualify as a disclosure to his employer under s 6(1)(b) of the PDA, assuming there was no procedure for making disclosures laid down by the municipality.

[39] The next question is whether Mr Mabula has made out a case that he was subjected to an occupational detriment assuming he can establish having made a protected disclosure under s 6(1)(b) of the PDA on the basis discussed above. There are two elements that must be established: whether he was 'subjected to any disciplinary action' and, if so, that such disciplinary action was on account of, or partly on account of having made the disclosure.

[40] Apart from the decision taken on 27 November 2014 that 'the disciplinary enquiry be entered into regarding the conduct of Jonathan Mabula', he was never actually charged with any misconduct, nor was he suspended pending a disciplinary enquiry. He claims he was told that the enquiry would be convened as a result of his disclosure and would begin in the first week of December 2014, but this diid not happen. Secondly, by the end of January 2015, the municipal council had changed the institution of a disciplinary enquiry into an investigation of his conduct and exclude any investigation into conduct relating to his report of alleged financial misconduct. From that point onwards there was no disciplinary enquiry even pending.

[41] In a Labour Appeal Court judgement in *Department of International Relations and Cooperation v Laubscher and others*[14] the court had to consider the meaning of the phrase 'disciplinary action short of dismissal' in the definition of an unfair labour practice in s 186(2)(b) of the LRA. Amongst other things, the LAC endorsed the approach of the Labour Court in *Special Investigating Unit v Commission for Conciliation, Mediation and Arbitration and Others*[15] to the effect that the institution of

[14] [2023] 1 BLLR 1 (LAC)

[15] (JR509/2014) [2017] ZALCJHB 127 (21 April 2017)

an investigation against an employee did not constitute disciplinary action, let alone disciplinary action short of dismissal[16]. Following that approach, from the end of January 2015, at worst, Mr Mabula's conduct, excluding his report of alleged financial misconduct, was simply under investigation and was not subject to disciplinary action. In the end nothing adverse came of the investigation and no disciplinary action was instituted. At the very best for his claim, there was a period between the decision in November 2014 and its amendment in January 2015 that a disciplinary enquiry would be convened, but it never was convened and he was not even charged.

[42] Looked at from the perspective of his own pleadings and affidavits, it does not appear to me that he is likely to succeed in showing that the mere decision to institute disciplinary action for misconduct which was not even described in the council decision of 27 November 2014, and which was subsequently altered to a decision to conduct an investigation, amounted to an occupational detriment, which was on account of, or partly on account of making the report of financial misconduct rather than for the way he behaved in the departmental heads meeting. Moreover, even if he could establish that the pending enquiry on unspecified charges which was never initiated amounted to subjecting him to disciplinary action, the fact that it resulted in no suspension or charges and was replaced by a mere investigation a couple of months later, suggests that any compensation he might obtain, is likely to be of a token nature, at best.

[43] Against this must be balanced the prejudice to the municipality of having to run a case more than seven years after the events of 2014 giving rise to Mr Mabula's complaint, in circumstances where a key witness Mr Maughan-Brown has long since emigrated and others have left. Balancing the relative prejudice facing the parties, I am persuaded it would not be in the interests of justice to resuscitate Mr Mabula's claim after he dragged his heels for so long.

[16] *Laubscher* at paragraph 24.

[44] Accordingly, even if the reinstatement application should not be granted because of the excessive unjustified delay, the interest of justice do not warrant it either.

Order

[1] The application to reinstate the Applicant's referral is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	Advocate P Kantor
For the Respondent	Advocate C Bosch instructed by Harker Attorneys Inc