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Article

Implications of Conducting Adverse Hearing and Investigations While an Employee Faces Disciplinary and Criminal Cases: A Case Study in South Africa

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Abstract: The conducting of adverse hearings and investigations while an employee faces disciplinary and criminal cases, and its possible implicastions were examined in this study. The "Audi alteram partem" is applied interchangeably with procedural fairness when processing disciplinary or crime cases in adverse hearings or investigations. South African labour laws advocate for an employee to serve a 30-day notice when resigning for handover purposes, including activating other exiting processes by the employer and employee thereof. Qualitative research approach was adopted to gather relevant information for the study. Data with purpose of the study was gathered through observation and lived-experience, published court judgments, articles, and journals. The study results indicate that adverse hearings and investigations while an employee faces disciplinary and criminal cases can be conducted concurrently while taking into account section 35(3) of the Constitution of the Republic of South Africa. The discussed three labour laws in the Republic of South Africa require to be reviewed to manage employer-employee relationships regarding the resignation or termination of an employment contract while an employee is subjected to adverse hearings or investigations.

Keywords: Disciplinary, Criminal, Adverse hearing, Investigations, Labour laws, Resignation

1. Introduction

South Africa is a democratic country as citizens are governed by constitutional laws to promote fairness for any administrative action. Subsequently, employers or institutions are required to set and promote fair labour practices. Section 23(1) of the 1996 Constitution of the Republic of South Africa points out that each person has the right to be subjected to fair labour practices while section 33(1) stipulates that everybody has the right to be subjected to administrative action that is permissible, rational and procedural fairness and that any person whom his/her right has been violated during the administrative action or processes, such individuals has the right to be provided with reasons (The Constitutional Assembly of South Africa, 1996). Based on the foundation of these Constitutional rights, it is necessary to process adverse hearings or investigations for disciplinary or criminal cases taking into account administrative actions and procedural fairness. Notwithstanding that disciplinary proceedings are complex and require to be properly and thoroughly assessed when administering them. In South Africa, the employer-employee relationship is governed by three labour laws namely the Labour Relations Act 66 of 1995 (LRA) (South African Government, 1995), the Basic Conditions of Employment Act 75 of 1997 (BCEA) (South African Government, 1997), and the Employment Equity Act 55 of 1998 (EEA) (South African Government, 1998) including employer's internal policies and frameworks. The South African labour laws lack provisions that prevent an employee from resigning either by service notices or with immediate effect when faced with disciplinary, criminal or any other adverse hearing or investigations. According to the Labour Guide (S.a.), the LRA, the BCEA, and the EEA further lack provisions that empower employers to refuse and/ or not to effect or accept the employee's resignations while facing adverse hearings or investigations for disciplinary or criminal cases. There are conflicting labour court judgments on employers' and employees' contractual obligations over resignations with immediate effect pending the hearing or investigations. Equally, there are continuous conflicting statements on whether the employer can proceed with the adverse hearings or investigations against an employee who resigned immediately.

2. Research Background

Section 188 of the South African LRA stipulates that "an employee should not be dismissed without following a fair procedure and ensuring the procedural and substantive fairness of such a dismissal". Subsequently, Section 37(1) of the BCEA, 75 of 1997 states that "the employment contract between employer and employee can be terminated only when notice is provided".

The main reason for providing notice is to inform the employer about the actual date on which the employer-employee relationship comes to an end. The notice is mainly provided for handover purposes as well as for a smooth transition. The criminal proceedings supersede disciplinary, or any other adverse hearings or investigations or they are conducted concurrently. Whatever happens, the interpretation of section 188 of the LRA confirms that the disciplinary proceedings are key for the removal of any employee who commits an offence or misconduct against the employer. The amendments of the three South African labour laws as part of holding employees accountable for misconduct (infringement of employment laws) are faced with resistance from Labour Federations and Unions. The South African Federation Unions (SAFTA) argued at the National Economic Development and Labour Council (NEDLAC) during the discussion of imminent amendments to LRA that workers are not protected if the proposed amendments are effected and enacted as laws (Goba, 2024). SAFTU arguments derived from the proposed changes of sections of the LRA by NEDLAC which require employers not to convene disciplinary proceedings "before disciplining or dismissing" an employee who transgresses, but request an employee to provide reasons in writing as to why he/she must not be fired. Failure by an employee to do so, the proposed laws suggest that the employer can dismiss an employee without convoking disciplinary proceedings (Goba, 2024).

3. Materials and Methods

The qualitative research approach was adopted to understand the complexity of processing the employee's disciplinary, and criminal actions in adverse hearings or investigations concurrently in South Africa (Slavin, 2018). Data collection was conducted using a qualitative research approach based on the selection and analysis of study materials as well as understanding the study phenomena, decision-making processes, and the experience of individuals and organisations (Flick, 2013:7). Experience, observations, and documentary sources including court judgments, journals, articles, and publications were used to collect and analyse the data.

Judgments by the courts are made based on standardised practices, employee disciplinary and criminal cases in adverse hearings or investigations (Ames, Glenton & Lewin, 2019:2) considering the right of the accused person as stipulated in Section 35(3) of the 1996 Constitution of the Republic of South Africa. The interpretivism paradigm was employed to understand whether it is procedurally fair to carry out disciplinary proceedings against a transgressor on similar charges in criminal proceedings (Alharahsheh & Pius, 2020). The exploratory of carrying out disciplinary and criminal proceedings concurrently was applied through the interpretivism paradigm of court judgments, journals, articles and publications, researcher observations, and personal experience. The data were analysed to establish the workplace procedures, practices, and/ or approaches when employees resign immediately while they are subject to disciplinary actions, criminals, adverse hearings, or investigations. The following research questions regarding the complexity of conducting adverse hearings or investigations concurrently were raised. The first question was based on exploring the implications of conducting the adverse hearings or investigations concurrently? The study found that the disciplinary, criminal or any other adverse hearing or investigations could be run simultaneously, though, the purpose of 'double jeopardy' is to averts the application of several punishments against anyone who transgressed or contravene the law. In other words, the country can proceed with criminal proceedings while the employer institutes the disciplinary or any other adverse inquiry or investigations against the transgressor. This is confirmed in the matter of Ramthlakgwe vs Modimolle-Mookgopong Local Municipality and Another (JS562/23) [2023] ZALCJHB 190 whereby the court found the argument of employee's self-incriminatory as immaterial. Moreover, the court emphasises that the employer has the right to proceed with the disciplinary inquiry, whether the employer presses criminal charges against the employee before and/or after the disciplinary proceedings have occurred.

The second is whether an employee can resign or terminate an employment contract while being subject to disciplinary, criminal or any other adverse hearing or investigations? It was found that the employer can pursue criminal charges against an employee who resigns immediately. Such an employee must note that his/her right to present a defence against the press charges by the employer can be waived. Moreover, the three labour court laws present that the employer and employee "may still advance differing arguments based on the available jurisprudence" until such time the upper court "pronouncement on the correct and final legal position" on whether the employer's right to proceed with disciplinary, criminal or any other adverse hearings or investigations against an employee who transgressed and resigned with immediate effect can be exercised or waived.

The last question is whether an employee can be disciplined by an employer without being provided with an opportunity to present testimony (application of *'audi alteram partem'*) during the investigation process. The South African labour laws allow the

employee to testify during the disciplinary proceedings as the employee is not afforded this opportunity during the investigation process. Instead of employers dismissing these employees that could lead to unfair dismissal according to South African labour laws, most of the employees are afforded this opportunity (of stating their testimonies during the disciplinary proceedings) by employers when there is prima facie evidence gathered during the investigations. Using the published sources of information, the reliability and validity of the data were ensured in discussing the issues of double jeopardy interchangeably (Saunders, Lewis, & Thornhill, 2009).

4. Literature Review

4.1. Disciplinary Hearings

In the Fort Hare University assassinations case, when some of the 14 workers of the university were arrested to face criminal charges ranging from murder and attempted murder linked to the syndicate of tender corruption, they were summoned to disciplinary hearings (Ludidi, 2024). As a result, in criminal proceedings, individuals are subjected to disciplinary inquiries by their respective employers (Truter, 2024). The assertion confirms that different processes are conducted concurrently. In the Ramthlakgwe vs Modimolle-Mookgopong Local Municipality and Another Case (JS562/23) [2023] ZALCJHB 190 whereby the Johannesburg Labour Court was asked to clarify or contemplate "whether it would be fair for an employer to proceed with disciplinary action against an employee on charges that are the subject of criminal prosecution against the same employee", the court found that an argument about an employee's fear and self-incriminatory during the disciplinary hearings was immaterial; weighing the employer's right to proceed with disciplinary action, regardless of whether the employer pressed the criminal charges against the employee on or after the disciplinary proceedings has occurred (Miller Bosman Le Roux, 2023).

4.2. Right to Refuse to Testify

According to the DDDK Attorneys (2022), when an employee contravenes the employer's policy or policies, the employee is required to testify in the disciplinary proceedings or arbitration without potential prejudice or threat of 'recrimination' if such employee(s) testifies at the disciplinary or arbitration proceedings. In the case of Kaefer Energy Projects (Pty) Ltd v CCMA and Others (JA59/20) [2021] ZALAC 42, the Labour Appeal Court ruled that "there was also no threat of harm or risk of recrimination. Accordingly, the LAC found that the employee was guilty of insubordination as the refusal to obey an instruction has to be seen in a serious light and dismissal was warranted". The ruling of Labour Appeal Court indicates that "there are grounds where an employer can require an employee to testify, or instead face the risk of being insubordinate and potentially being dismissed" (DDDK Attorneys, 2022).

4.3. Application of Double Jeopardy

It is questionable if the employer can consider the issue of double jeopardy when conducting both the disciplinary and criminal proceedings against an employee(s), Mezei (2013) emphasised the laws that prevent double jeopardy are not new to the independent institutions of the state in the Republic of South Africa such as Labour /Employee Relations, Special Tribunal, Labour and Ordinary Courss which are created by the government or state to deal with disciplinary, civil and criminal matters between the state and citizens and/or the legal fraternity. Mezei (2013) further emphasised that this assertion was also reflected in the "*Old Testament, ancient Greece, the Talmud and Roman Empire*". In the argument regarding the philosophy behind the application of 'double jeopardy', Mezei (2013) highlighted the importance of this rule including its renown and recognition throughout the world. The philosophy simply is translated that "it is prohibited to apply procedures twice". For the question of whether the adverse hearings or investigations for disciplinary and criminal cases can be conducted concurrently for the same act including whether the perpetrator of such acts can be punished twice, the South African Labour Court had judgment of Ramthlakgwe vs Modimolle-Mookgopong Local Municipality and Another (2023). The Court argued that the employer can commence or proceed with the process of instituting the disciplinary action against an employee who transgressed including pursuing the criminal charges simultaneously, before or after the commencement of disciplinary proceedings. However, Mezei (2013) highlighted that although the philosophy behind the application of 'double jeopardy' is to further avert "the possibility of establishing the accused party's criminal liability one more time for the same act, regardless of whether the accused was acquitted or convicted in the first procedure, or if the procedure was terminated for some formal reason". Considering Mezei's assertion, the National Prosecuting Authority (NPA) cannot make use of strategy, for instance, the strategy of withholding certain key of evidence presented during the disciplinary proceedings for criminal proceedings.

Coffey (2008:138–139) stated that the purpose of this principle is to avert the application of multiple punishments (in the form of civil recovery, disciplinary and criminal proceedings) against an employee who is charged and disciplined on similar misconduct

or transgression. Furthermore, the right of the accused in terms of Section 35(3) of the 1996 Constitution of the Republic of South Africa must be considered when applying the principle (common law) of 'double jeopardy'. It is important to consider the right of the accused in this principle since this right of the accused has been recognised by various Constitutional countries such as India, Canada, South Africa, the United States of America, New Zealand, etc..

In South Africa, Section 35(3) of the 1996 Constitution of the Republic of South Africa simply stipulates that an accused person has the following right to be trialed fairly (The Constitutional Assembly of South Africa, 1996):

- To be presumed innocent, to remain silent, and not to testify during the proceedings;
- Not to be compelled to give self-incriminating evidence;
- Not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

However, VDT Attorneys Inc (2023) suggests that Section 35(3) of the 1996 Constitution of the Republic of South Africa aims to protect the accused person from being compelled to aid the state with the prosecution of criminal charges instituted and/ or pursued against such accused. This is translated that an employee has transgression against the employer's laws; thus, such transgression must be resolved on a '*balance of probabilities*' during the disciplinary proceedings and '*beyond reasonable doubt*' during the criminal proceedings. In other words, the assertion signifies that it is more difficult to prove a transgressor's guilt of a criminal offence during the criminal proceedings than during the disciplinary proceedings. This is because "the employee's evidence in the disciplinary hearing, even if self-incriminatory, is not automatically admissible in the criminal trial and the accused has the right to object to the State when bringing up the evidence that was mentioned during the disciplinary". This implies that the country must gather and bring its credible evidence separately from that of the accused self-incriminated during the disciplinary proceedings (VDT Attorneys Inc, 2023).

However, Mezei (2013) cautioned that "this general requirement is not without limitations". On the other hand, this lawful rule does not avert the possibility that a certain person(s) may be held responsible for a certain behaviour(s) based on further circumstances, which are different from the criminal process. This indicates that criminal proceedings can unfold against any employee(s) following a disciplinary action. Equally, the legal principle is not in conflicts with the '*philosophy of the principal*' in that when the criminal proceedings are concluded, the prejudiced victim can institute a civil case or claim against the wrongdoer according to (Mezei, 2013).

While employees' rights are protected in terms of Section 23(1) of the 1996 Constitution of the Republic of South Africa which encourages fair labour practices, Tshikovhi and Odeku (2013:813) highlighted the underlying reason for the application of the 'double jeopardy' during the labour dispute(s) (the disagreement between the employee(s) and employer concerning the application of workplace prescripts) to ensure that the disciplinary hearing is completed and whatever the outcomes in respect of the conclusion of disciplinary proceedings should be binding to all the parties involved (the employee(s) and employer). Besides, the employer disciplinary code of conduct allows the appeal tribunal by a senior person than the Chairperson of the disciplinary hearing either to increases or decreases the sanction of the appeal against the aggrieved employee(s). Consequently, Tshikovhi and Odeku (2013:818) suggested that the appeal tribunal could base its verdict on the previous ruling and/ or new facts (evidence that has come forth) presented to increase or decrease the previous sanction, obviously guided by the disciplinary code of the employer if it does permit for such action. Considering double jeopardy in workplace misconduct, Tshikovhi and Odeku (2013:814) cited case laws regarding whether the employee can be charged twice for the same offence. They emphasised that if an employee is not found guilty during the disciplinary proceedings, and/ or a minimal penalty is imposed by the Chairperson rather than expulsion; such an employee cannot be subjected to the secondary disciplinary hearing of similar misconducts. This is because an expulsion in such conditions would every time be viewed as unfair or not morally just. Therefore, employers or institutions must allows a single process to unfold against an implicated employee to affirm his/her right to procedural fairness when the adverse hearings or investigations on disciplinary or criminal cases take place.

4.4. Processes to Be Followed When An Implicated Employee(s) Refused to Testify

If an employee [implicated person(s)], refuses to testify, the Department of Public Service and Administration (S.a.:9) developed a guide in which the Department advises the relevant government department(s) to proceed with the disciplinary proceeding wherein an appropriate warning should be issued against such employee. Govender (2022) made reference to the Labour Appeal Court (LAC) matter of Kaefer Energy Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others by arguing that before an employee is found guilty of defiance from taking part in the disciplinary proceeding, the relevant employer is advised to determine and consider the following:

- Whether the employee has committed misconduct by refusing to carry out a lawful instruction provided to him/ her to testify in the disciplinary proceedings;
- Whether the employee was provided with the fair, reasonable and lawful instruction to testify during the disciplinary proceeding(s);
- Whether there was an opportunity for an employee to execute the instruction given to him/her to testify in the disciplinary proceeding(s);
- Whether an employee had a lawful or reasonable explanation for him/her to refuse to execute the instruction to testify during the disciplinary proceeding(s).

The arguments of LAC were informed by Section 5(3) of the LRA which stipulates that no employee or person may be discriminated when declining to participate in any proceedings (in the case of this study, disciplinary proceedings) in respect of LRA. Thus, the employer cannot instruct the employee to act against his/her will by testifying or suffer harm from the disciplinary proceeding (Govender, 2022).

4.5. Resignation of Employee Pending Disciplinary Hearings

The lack of provisions within the three South African labour laws (the LRA, BCEA, and EEA) to prevent employees from resigning or termination of employer and employee's contract (employment contract) pending disciplinary, criminal, adverse hearings, or investigations against the employee who has transgressed contributes towards the continuous recurrence of these types of resignations in the South African labour market. Schedule 8 of the LRA highlights three (3) grounds in which the termination of employment can be recognised by the laws and legal principles applicable within the Republic of South Africa. These grounds are "the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business".

Despite Section 37(1) of the BCEA with provisions in which employment contracts can be terminated, most of the employees resign with immediate effect and avoid disciplinary, criminal, adverse hearings, or investigations against them. The employees continue to disregard these conditions of termination as they frequently resign with immediate effect without notice being served as stated in the BCEA.

Subject to section 38 of the BCEA, Section 37(1) stipulates that "a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than;

- One week if the employee has been employed for four weeks or less;
- Two weeks if the employee has been employed for more than four weeks but not more than one year;
- Four weeks if the employee has been employed for one year or more: or is a farm worker or domestic worker who has been employed for more than four weeks".

While Section 37(2) of the Act states that "a collective agreement may permit a notice period shorter than that required by subsection (1)". A shorter period can only be agreed to by the employer if the employee has valid reasons for not being able to serve the required notice period.

For the question of whether an employee can resign or terminate an employment contract while facing a disciplinary hearing, the Labour Guide (S.a.) emphasises that the labour laws in South Africa allow the employee to resign at any time including that somehow such resignation does not breach employment's contract. The Labour Guide further argues that "there are no hard and fast rules laid down in labour legislation regulating such matters. The LRA, the BCEA and EEA have no provisions that prevents an employee from resigning when faced with disciplinary action, and similarly the Acts contains no provision giving employers the power to refuse to accept a resignation".

However, WorkNest (S.a.) suggested that the employer can proceed with the disciplinary proceedings against an employee who transgresses and resigns on the eve of disciplinary, criminal, adverse hearings, or investigations after the employee has given a notice to resign. If the employee is found to have committed serious misconduct (fraud, corruption, disobedience or insubordination, theft, etc.) through adverse hearings or investigations, the employer can dismiss the employee without notice. The dismissal by the employer supersedes the tendered resignation by the employee and such verdict is recorded as dismissal for gross misconduct instead of resignation. Dube (2020) argued that there is a shift in the jurisprudence when pronouncing employers' and employees's contractual obligations over resignations with immediate effect pending adverse hearings or investigations for disciplinary and criminal cases. Dube (2020) referred to two (2) Labour Court matters of "Vodacom (Pty) Ltd v Motsa and Another (J 74/16) [2016] ZALCJHB 53" and "Coetzee v Zeitz Mocaa Foundation Trust and Another (C517/2018) [2018] ZALCCT 20" whereby these two courts concluded that that the employer is entitled to activate the contractual obligations of serving a one month notice while processing the adverse hearings or investigations for disciplinary and criminal cases.

More importantly, these two courts hold the view that when an employee resigns with immediate effect without a 30 days' notice, the employer is not bound to accept the resignation while holding the employee to the contract, and alternatively, obtain the court order "for specific performance requiring the employee to serve the period of notice". As a result, the employer can exercise its right to hold the employee accountable for adverse hearings or investigations for disciplinary and criminal cases during the period of the employee's notice (Dube, 2020).

However, WorkNest (S.a.) argued that it is mostly unlikely for the employer to proceed with the disciplinary proceedings when an employee resigns immediately pending adverse hearings or investigations for disciplinary and criminal cases; irrespective of whether the evidence secured suggests that an act of misconduct was committed by an employee. Notwithstanding that, any evidence gathered during the adverse hearings or investigations for disciplinary and criminal cases needs to be retained by the employer as this is required for defence if the resigned employee registers a dispute with established institutions such as the General Public Service Sector Bargaining Council (GPSSBC), Tribunal or CCMA, etc. for unfair labour practices which resulted in his/her resignation. The WorkNet (S.a.) arguments are in line with the views of the Labour Appeal Court (LAC) in the matter of "Standard Bank of South Africa Limited v Chiloane (JA 85/18) [2020] ZALAC 58" whereby the court held the view that once the employee tender resignation stating with immediate effect, the employer and employee's relationship comes to an end. As a result, the employer's right to hold an employee on contractual obligations which requires the employee to serve a notice is waived. The court ruled as follows:

"In the circumstances, where a contract prescribes a period of notice the party withdrawing from the contractor or resigning is obliged to give notice for the period prescribed in the contract. The contract and the reciprocal obligations contained in it only terminate or take effect when the specified period runs out. Alternatively, absent a contractual term the parties are bound to the notice period provided in the BCEA".

In "Naidoo and Another v Standard Bank SA Ltd and Another (J1177/19) [2019] ZALCJHB 168", the court pronounced that the employer's right to proceed with disciplinary proceedings against an employee who committed an offence and resign with immediate effect is waived "unless that employer had taken the step of approaching the court for an order for specific performance against the employee who had tendered a resignation with immediate effect". Based on Dube's (2020) analysis of these four labour court cases, as things stand, the employer and employee "may still advance differing arguments based on the available jurisprudence" until such time the upper court pronounce "on the correct and final legal position" on employer's rights over employee's resignations pending adverse hearings or investigations for disciplinary and criminal cases.

Even so, an employee must note that resigning pending disciplinary or any other adverse hearings does not "look better on the employee's record", as the employee's record is recorded for future employment reference with the details of the disciplinary (held in the absence of employee who resigned with immediate effect), or any other adverse hearings or investigations (Labour Guide, S.a.). As an employee resigns with immediate effect pending disciplinary or any other adverse hearings or investigations of very serious misconduct such as corruption, fraud, disobedience or insubordination, theft, etc., Labour Guide (S.a.) emphasises that the employee must bear in mind that the employer can still pursue criminal charges since the employer is entitled to do so. This serves as further punitive action instituted by the employer against an employee who transgressed and resigned immediately while faced with disciplinary or any other adverse hearings or investigations.

On the other hand, the employee who resigns on the eve of adverse hearings or investigations for disciplinary and criminal cases against the employee must note that the right to present a defence against the press charges is waived. When such right is waived, the employee cannot approach the Commission for Conciliation, Mediation and Arbitration (CCMA) and declare a dispute of unfair dismissal or labour practice against the employer. Moreover, the employee can view his/her resignation as an admission of guilt and/ or perhaps the employer to proceed with the adverse hearings or investigations for disciplinary and criminal cases in the absence of the employee (Labour Guide, S.a.). Besides, from the evidence gathered during the investigations and presented before the employer by investigators, the Labour Guide (S.a.) further states that the employee can be deemed guilty by the employer. If such evidence is referred to the disciplinary proceedings, the Chairperson of the disciplinary proceedings can also conclude with a similar verdict of guilty. This is because the employer is fully entitled (regardless of whether the employee has resigned with immediate effect) to proceed with the adverse hearings or investigations for disciplinary and criminal cases. More importantly, the employee must note that "when they tend a letter of resignation, it is not a resignation that terminates the contract immediately upon handing the resignation letter to the employer". This is because, procedurally, the employee is required to serve the employer with at least a one-month notice during the resignation or termination of employment's contract.

4.6. Failure by SAPS and NPA to Investigate Criminal Matters Referred by Other Organ of State

As stated in the National Development Plan, Omar (2015) highlighted that the South African Police Service (SAPS) must be responsive to varied communities including policing attitudes that are fair and accountable when dealing with various crimes. More

importantly, the SAPS management and leadership must identify and remove impediments to the reported corruption, fraud, theft, and other economic crimes by other government departments and country institutions. Omar (2015) further emphasised that active citizens and public servants in Anti-Corruption forums are important for the eradication of corruption, fraud, theft, and other economic crimes across the spheres of government and arms of state. Such materialisation requires regular consultations, collaboration, and evidence and/ or information-sharing between the SAPS and forensic investigators within the country. Moreover, the conduct of SAPS members requires them to be assessed and/ or subjected to constant, independent assessment and oversight. This helps to regain public trust and determine police authority over criminals including strengthening accountability.

During the Portfolio Committee on Police meeting, it was revealed that the Detective section of the SAPS performed poorly in dealing with the investigations of crimes (Nhleko, 2015). Most cases referred to SAPS with corroborated evidence by Forensic Investigations Units in the government and investigative institutions such as the Special Investigating Unit (SIU) remain unresolved. This is because the SAPS Detective section as well as the Directorate for Priority Crime Investigation (DPCI) fail to finalise these opened cases. Several referred cases remain under investigation for many years and later withdrawn citing lack of evidence. This led to the growing and continuous public sentiment that most of the government institutions are rotten to the core (corrupt).

Subsequently, Nhleko (2015) emphasised that failure by the Detective section to resolve cases referred to by the organ of states leads to negativity and public perception of the capability of the police to perform their mandate of fighting crime, corruption, economic crimes and other crimes in South Africa. Nhleko proposed a thorough assessment to be conducted to determine the real cause of the poor performance and case backlog by the SAPS Detective section. By doing so, the public and stakeholders would have a better understanding of delay in resolving fraud and corruption cases earlier than anticipated by the SAPS Detective section. Nonetheless, Principle 20 in the United Nations Report of the Independent Expert, Muntingh and Dereymaeker (2013:8) emphasised that the country must deal with impunity by "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished".

Section 4(1)(d) of the Special Investigating Units and Special Tribunals Act 74 of 1996 as amended stipulates that the SIU must refer any matter to the National Prosecuting Authority (NPA) in terms of their institutional functions as quickly as possible in respect of the evidence gathered that points to the feasible commission of a crime (South African Government, 1996). The NPA in return refers the matter to the Directorate for Priority Crime Investigations (DPCI) for case registration purposes (opening of a docket) as well as attaining admissible evidence, e.g. bank statements for court purposes and for the NPA to make a final decision on whether to prosecute or not in terms of the signed Memorandum of Understanding (MoU) between the parties (SIU and NPA). This is because section 17B(a) of the South African Police Service Amendment Act 57 of 2008 as amended mandates the DPCI "to prevent, combat and investigate National Priority Offences, in particular, serious organised crime, serious commercial crime and serious corruption.*"* (South African Government, 2008).

The researcher's lived experience is that of most cases referred to the SAPS with massively detailed reports and supportive evidence are not investigated further by the DPCI (commonly known as the Hawks) which is the only institution mandated to investigate organised crimes, economic crimes, and priority crimes within the South African territory.

5. Conclusions and Recommendations

In the matter of Ramthlakgwe vs Modimolle-Mookgopong Local Municipality and another (JS562/23) [2023] ZALCJHB 190) and Kaefer Energy Projects (Pty) Ltd v CCMA and Others (JA59/20) [2021] ZALAC 42, it was affirmed that the employer can proceed with the disciplinary or any other adverse hearings or investigations while pursuing criminal charges against a transgressed employee. Employees makes use of the lack of provisions within the three South African labour laws, namely the LRA, BCEA, and EEA to prevent them from resigning while facing disciplinary hearings. The amendment of these labour laws by Parliament as part to strengthen them may be faced with resistance from Labour Federations and Unions citing that the workers would not be protected. However, the notion by Labour Federations and Unions that when these three (3) South African labour laws are amended, workers will not be protected is misconception (fallacy) as the amendments aim to close on leakages and abuse of labour /employee relations processes by unions and employees during the adverse hearings or investigations for disciplinary and criminal cases. Law experts emphasise that the issue of double jeopardy and punitive justice shall always be considered when an implicated and accused person is brought to the hearings or courts. In most instances, they refer to prosecutorial purposes whereby common law principles dictate that an accused person cannot be subject to recurrent prosecution for the same offences without producing new convincing evidence**.**

As a result, to remove the red tape and allow the employer to deal with very serious misconduct such as fraud, corruption, theft, misappropriation of assets and funds, leaking of confidential information, insubordination, or disobedience at the workplace in South Africa, the amendments of three South African labour laws (LRA, BCEA, and EEA) by the Department of Employment

and Labour is recommended to address these evolving realities within the labour marker in South Africa. The amendments of these three labour laws must restrict the immediate resignations of employees while they are subject to adverse hearings or investigations for disciplinary and criminal cases. These can enhance consequence management in the organ of state as well as prevent the rising number of resignations by employees who are faced with adverse hearings or investigations for disciplinary and criminal cases. Considering that the amendments of these three South African labour laws could face possible resistance from Labour Federations and Unions, however, the strengthening of these laws is necessary to hold employees who infringe employment laws accountable including effecting consequence management. As part of strengthening accountability and improving consequence management, Labour Federations and Unions must endorse these amendments and not oppose them to defend violators and/ or protect the job security of their members who behave inappropriately in the workplace. This is why the amendments to these labour laws will strengthen accountability, ensure consequence management, and minimise future potential misconduct by other employees.

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References

1. Alharahsheh, H.H., & Pius, A. (2020). A review of key paradigms: Positivism VS interpretivism. *Global Academic Journal of Humanities and Social Sciences*, *2*(3), 39–43.
2. Ames, H., Glenton, C., & Lewin, S. (2019). Purposive sampling in a qualitative evidence synthesis: A worked example from a synthesis on parental perceptions of vaccination communication. *BMC Medical Research Methodology*, *19*, 1–9.
3. Coetzee v Zeitz Mocaa Foundation Trust and Another (C517/2018) [2018] ZALCCT 20. (2018). 39 ILJ 2529 (LC). Available online: https://www.saflii.org/za/cases/ZALCCT/2018/20.html (accessed on June 14, 2018).
4. Coffey, G. (2008). The constitutional status of the double jeopardy principle. *Dublin University Law Journal*, *30* (1), 138–165.
5. Department of Public Service and Administration. (S.a.). Guide on Disciplinary and Incapacity Matters. Available online: https://www.dpsa.gov.za/dpsa2g/documents/nlr/NLR_Guide1.pdf (accessed on July 01 2024).
6. Dube, S. (2020). Does resigning in the face of disciplinary action 'let you off the hook'? Available online: https://bowmanslaw.com/insights/does-resigning-in-the-face-of-disciplinary-action-let-you-off-the-hook/ (accessed on February 11, 2024).
7. Flick, U. (2013). *Qualitative Data Collection*. London, UK: Sage Publications, Inc.
8. Goba, T. (2024). SAFTU against proposed labour law changes making it easier to dismiss workers. Available online: https://www.ewn.co.za/2024/10/23/saftu-against-proposed-labour-law-changes-making-it-easier-to-dismiss-workers (accessed on October 24, 2024).
9. Govender, C. (2022). Can Employees Who Refuse To Testify At Disciplinary Proceedings Be Dismissed For Insubordination? *Labour SEESA*. Available online: https://blog.seesa.co.za/index.php/2022/03/04/can-employees-who-refuse-to-testify-at-disciplinary-proceedings-be-dismissed-for-insubordination/ (accessed on July 01, 2024).
10. Kaefer Energy Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA59/20) [2021] ZALAC 42. (2022). [2022] 43 ILJ 125 (LAC); [2022] 2 BLLR 166 (LAC). Available online: https://www.saflii.org/za/cases/ZALAC/2021/42.html (accessed on October 26 2021).
11. Labour Guide. (S.a.). Resignations and Disciplinary Hearings. Available at: https://labourguide.co.za/misconduct/resignations-and-disciplinary-hearings (accessed on October 16, 2024).
12. Ludidi, V. (2024). Fort Hare murders – ex-SAPS member, 14 suspended university workers arrested. *Daily Maverick*. Available online: https://www.dailymaverick.co.za/article/2024-04-01-fort-hare-murders-ex-saps-member-14-suspended-university-workers-arrested/ (accessed on: April 03, 2024).
13. Mezei, P. (2013). Not Twice for the Same: Double Jeopardy Protections Against Multiple Punishments: A Comparative Analysis of the Origins, Historical Development and Modern Application of the Ne Bis In Idem Principle. In *Fair Trial and Judicial Independence: Hungarian Perspectives*, pp. 197–219.Berlin/Heidelberg, Germany: Springer International Publishing.
14. Miller Bosman Le Roux. (2023). Do criminal charges trump a disciplinary hearing? *Miller Bosman Le Roux Attorneys*. Available online: https://www.mblh.co.za/OurInsights/ArticleDetail.aspx?Title=Do-criminal-charges-trump-a-disciplinary-hearing?#:~:text=In%20the%20recent%20case%20of,of%20criminal%20prosecution%20against%20the (accessed on April 03, 2024).
15. Muntingh, L. & Dereymaeker, G. (2013). *Understanding Impunity in the South African Law Enforcement Agencies*. University of the Western Cape, Cape Town, South Africa: Community Law Centre.

16. Naidoo and Another v Standard Bank SA Ltd and Another (J1177/19) [2019] ZALCJHB 168. (2019). [2019] 9 BLLR 934 (LC); [2019] 40 ILJ 2589 (LC). 24 May 2019. Available Online: https://www.saflii.org/za/cases/ZALCJHB/2019/168.html (accessed on April 03, 2024).
17. Nhleko, N. (2015). SAPS matters: Ministerial briefing. In: Beukman, F. 2015. APS & Civilian Secretariat matters, in presence of Minister and Deputy: White Paper on Policing, proposed new organisational structure, Legal Expenditure briefing, TETRA project follow ups; Critical Infrastructure Bill rejected. *Parliamentary Monitoring Group (PMG)*, 18 November 2015. Available online: https://pmg.org.za/committee-meeting/21851/ (accessed on June 22, 2024).
18. Omar, B. (2015). Civilian Secretariat for Police: Draft White Paper on Policing. Available online: https://pmg.org.za/committee-meeting/21851/ (accessed on June 22, 2024).
19. Ramthlakgwe v Modimolle-Mookgopong Local Municipality and Another (JS562/23). (2023). ZALCJHB 190. Available online: https://www.saflii.org/za/cases/ZALCJHB/2023/190.html (accessed on April 01, 2024).
20. Saunders, M., Lewis, P., & Thornhill, A. (2009). *Research Methods for Business Students*, 8th ed.; Harlow, UK: Pearson Education.
21. Slavin, T.M. (2018). How to Write an Introduction for a Qualitative Research Study. *Leaf Group Ltd*, 27 June 2018. Available online: https://www.theclassroom.com/write-introduction-qualitative-research-study-4608.html (accessed on March 04, 2024).
22. South African Government (1995). Labour Relations Act 66 of 1995. Available online: https://www.gov.za/documents/labour-relations-act (accessed on March 04, 2024).
23. South African Government. (1996). Special Investigating Units and Special Tribunals Act 74 of 1996 as amended. Available online: https://www.gov.za/documents/special-investigating-units-and-special-tribunals-act (accessed on March 04, 2024).
24. South African Government. (1997). Basic Conditions of Employment Act 75 of 1997. Available online: https://www.gov.za/documents/basic-conditions-employment-act (accessed on March 04, 2024).
25. South African Government. (1998). Employment Equity Act 55 of 1998. Available online: https://static.pmg.org.za/docs/2000/appendices/000229EEASummary.htm (accessed on March 04, 2024).
26. South African Government. (2008). South African Police Service Amendment Act 57 of 2008 as amended. Available online: https://www.gov.za/documents/south-african-police-service-amendment-act-1 (accessed on March 04, 2024).
27. The Constitutional Assembly of South Africa. (1996). The Constitution of the Republic of South Africa, Act 108 of 1996, as adopted by the Constitutional Assembly on 08 May 1996. ISBN 978-0-621-39063-6. Available online: https://www.saflii.org/za/legis/num_act/cotrosa1996423/ (accessed on March 04, 2024).
28. Tshikovhi, R.H., & Odeku, K.O. (2013). Double Jeopardy for Misconduct and Increase of Sanction at the Appeal Court: Unfair Labour Practice Revisited. *Mediterranean Journal os Social Sciences*, *4*, 611–620.
29. Truter, J. (2024). Disciplinary and Criminal Proceedings. *Labourwise*, 25 January. Available online:https://www.dailymaverick.co.za/article/2024-04-01-fort-hare-murders-ex-saps-member-14-suspended-university-workers-arrested/ (accessed on March 04, 2024).
30. VDT Attorneys Inc. (2023). Do criminal charges trump a disciplinary hearing? *VDT Attorneys Inc*, 30 November 2023. Available online: https://vdt.co.za/labour-court/do-criminal-charges-trump-a-disciplinary-hearing/ (accessed on April 01, 2024).
31. Vodacom (Pty) Ltd v Motsa and Another (J 74/16) [2016] ZALCJHB 53. (2016). [2016] (3) SA 116 (LC); [2016] 5 BLLR 523 (LC); [2016] 37 ILJ 1241 (LC). 9 February 2016. Available online: https://www.saflii.org/za/cases/ZALCJHB/2016/53.html (accessed on April 01, 2024).
32. WorkNest. (S.a.). What happens if an employee resigns during the disciplinary process? Available online: https://worknest.com/blog/resignation-disciplinary-process/ (accessed on October 27, 2024).