REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

CASE NO: 84052/17

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

08/10/2021
DATE

SIGNATURE

In the matter between:

PROF STEWARD MATOANE MOTHATA	Applicant
and	
TSHWANE UNIVERSITY OF TECHNOLOGY	1st Respondent
COUNCIL OF TSHWANE UNIVERSITY OF TECHNOLOGY	2nd Respondent
VICE CHANCELLOR AND PRINCIPAL PROF LOURENS VAN STADEN N.O	3rd Respondent
TOKISO	4th Respondent
ADVOCATE ZARINA WALELE N.O	5th Respondent
MINISTER OF HIGH EDUCATION	6th Respondent

J U D G M E N T

Judgment handed down: This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 08 October 2021.

MNGQIBISA-THUSI, J:

[1] There are two applications before this court. In the first application the applicant seeks condonation for the late filing of his replying affidavit and his non-compliance with the respondents' Rule 30A Notice.

[2] In the second application ("the main application"), the applicant, Professor Steward Matoane Mothata, seeks the following relief:

2.1 an order declaring that based on the dispute between the parties, in terms of the applicant's fixed-term contract of employment with the first respondent, the first respondent's decision to dismiss the applicant from its employ after only subjecting him to an internal disciplinary hearing, instead of referring the dispute to independent final and binding arbitration in terms of section 188A of the Labour Relations Act 66 of 1995 ("the LRA") constituted a material breach and repudiation of the applicant's fixed-term contract of employment;

2.2 an order declaring that the first respondent's failure to refer its dispute with the applicant exclusively to independent final and binding arbitration in terms of section 188A of the LRA

constituted a material breach and repudiation of the applicant's fixed-term contract of employment;

2.3 an order declaring that the applicant's fixed-term contract of employment was unlawfully terminated by the first respondent and that the applicant is entitled to all emoluments and benefits he would have received in terms of his fixed-term of employment contract should the contract not have been terminated unlawfully;

2.4 an order directing the first respondent to pay to the applicant the balance of his fixed-term employment as contractual damages for the breach of contract in the amount of R766,393.60 (Seven Hundred and Sixty Six Thousand Three Hundred and Ninety Three rand and Sixty Cents), being an amount equal to four months' remuneration;

2.5 an order for costs on an attorney and own client scale in the event of opposition.

[3] In the main application no relief is sought against the second to sixth respondents. The application is opposed by the first, second and third respondents (hereinafter referred to as "the respondents").

Condonation application

[4] On 11 December 2017 the applicant launched these proceedings.

[5] After the respondents served the applicant with their answering affidavit on 14 March 2018, it was expected, in terms of the Rules, for the applicant to file his replying affidavit on 29 March 2018. The applicant failed to do so. The replying affidavit was only served on the respondents' attorneys of record on 13 August 2018 without condonation being sought for the late filing of the replying affidavit. The applicant also failed to respond to the respondents' Rule 30A notice.

[6] The respondents are opposed to condonation being granted.

[7] In its application for condonation the applicant relies in the main on the negligence of his previous attorneys and due to lack of funds to pay his attorneys.

[8] In *Melanie v Santam Insurance Company Limited*[1] the court stated that in exercising its discretion whether or not to grant condonation, the court has to take into account:

(i) the degree of lateness or non-compliance;

(ii) the explanation thereof;

(iii) the prospects of success;

(iv) the importance of the case;

(v) the respondent's interest in the finality of the matter.

[9] Having read the papers filed of record and having considered submissions made by counsel, I am of the view that, even though the applicant's replying affidavit was filed after an inordinately long delay,

[1] 1962 (4) SA 531 (A) at 532 C-F.

condonation should be granted in the interests of justice and due to the fact that the respondents will not suffer any prejudice if the replying affidavit is admitted.

[10] On 13 December 2011 the applicant and the first respondent, Tshwane University of Technology, entered into a written fixed-term contract of employment in terms of which the applicant was appointed as a Registrar, Post-level 2. The contract was to endure for a period of 5 years (from 1 February 2012 to 31 January 2017).

[11] On 1 February 2016 the first respondent served the applicant with a notice to attend an internal disciplinary hearing. The charge sheet served on the applicant reads, in part, as follows:

> "You, Professor Steward Matoane Mothata with staff number XXXXX in the employ of the Tshwane University of Technology (TUT) are hereby charged with serious allegations of misconduct, said misconduct being of such a nature that should you be found guilty on any or all of the charges proffered against you, same will be argued by the employer to warrant your dismissal".

[12] On 5 September 2016 the chairperson of the disciplinary hearing, found the applicant guilty on all charges and on 19 September 2016 imposed dismissal as a sanction.

[13] Consequent to the decision to dismiss him, the applicant referred the dispute relating to his dismissal to the CCMA. On 8 November 2016 a conciliation hearing was held and the dispute was not resolved. The

applicant thereafter referred the matter for arbitration. However, even though the arbitration hearing was scheduled for 15 May 2017, on 12 May 2017 the applicant withdrew his referral to arbitration and subsequently launched these proceedings.

[14] In the answering affidavit the respondents have raised the following points *in limine*:

13.1 that in view of the existence of material disputes of fact, the applicant should not have proceeded by way of motion proceedings; and

13.2 that the applicant has waived his right to an independent final and binding arbitration and has acquiesced to the procedure followed.

[15] With regard to the issues in dispute, clause 19 of the contract is relevant and it reads as follows:

> "19. PRIVATE PRE-DISMISSAL ARBITRATION
>
> 19.1 If the University, in writing, alleges misconduct or incapacity against the employee and alleges that such misconduct or incapacity warrants dismissal, then the employee may give written and signed consent to dismissal or failing that shall be deemed to dispute the allegations.
>
> 19.2 The dispute may then be referred exclusively to independent final and binding arbitration.
>
> 19.3 The arbitration hearing shall satisfy all the requirements of a fair pre-dismissal hearing under the Labour Relations Act No 66 of 1995, as amended.

19.4 The arbitrator shall determine what action, if any, should be taken against the employee based on the criteria of fairness contained in the Labour Relations Act No 66 of 1995, as amended".

[16] The disputes of fact raised by the respondents centre around the interpretation of clause 19 of the agreement, in particular as to whether the first respondent had a discretion, having contemplated dismissal as a sanction option, to call the applicant to an internal disciplinary hearing instead of referring the matter to independent final and binding arbitration. I am, however, of the view that the disputes of fact raised by the respondents are not of such a nature that they cannot be resolved on the papers filed.

[17] Secondly, with regard to waiver and acquiescence what needs to be determined is whether the respondents are correct that, in view of the applicant having consented to participate in the internal disciplinary hearing, he acquiesced to the process followed and waived his right to an independent final and binding hearing.

[18] It is the respondents' contention that the applicant has waived his right to an independent final and binding arbitration and by participating in the internal hearing, acquiesced to the process followed, particularly as the applicant, once the sanction of dismissal was imposed, referred the dispute to conciliation and thereafter to arbitration.

[19] It was submitted on behalf of the respondents that at the start of the applicant's disciplinary hearing, the parties had agreed on the continuation of the internal disciplinary hearing after the chairperson had explained to all the parties the three different processes[2] that could be followed. Further that once the applicant was found guilty, his legal representatives had made submissions in mitigation of the sentence to be imposed.

[20] Further in its answering affidavit the respondents contend that the applicant acquiesced to the internal disciplinary hearing as he intended retaining his right to refer any dispute with regard to the outcome of the hearing to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). It was argued that the applicant did in fact, as alluded to in paragraph 12 above, refer the dispute to the CCMA for conciliation and arbitration. It was argued that, by participating in the internal disciplinary hearing where he was assisted by his legal representatives, the applicant had acquiesced to the process adopted and waived his right to have the dispute referred to independent final and binding arbitration.

[21] The applicant denies having waived his right to an independent final and binding arbitration. Inasmuch as the applicant concedes to the right of the first respondent to have instituted an internal disciplinary

[2] Namely, an internal disciplinary hearing chaired by an independent person, an inquiry in terms of s 188A of the Labour Relations Act 66 of 1995 ("the LRA") and arbitration in terms of the Arbitration Act 42 of 1965.

hearing, it is the applicant's contention that at such proceedings, dismissal was not an option available as a sanction, in light of the provisions of clause 19 of the agreement which provided that in the event an employee refuses to sign the prescribed consent form for his/her dismissal, the dispute must be referred to arbitration. It was argued that the sanction of a dismissal lay exclusively within the purview of a duly appointed independent arbitrator.

[22] It was further submitted on behalf of the applicant that as an employee, the applicant could not choose the form of disciplinary hearing he is called to. If the first respondent was of the view that the misconduct warrants a dismissal, the first respondent waived its right to dismiss the applicant by calling him to an internal hearing.

[23] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[3] the court described waiver as:

"[81] … Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown

[3] CCT 97/07 [2009] ZACC 6.

that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish."

[24] Even though the applicant participated in the internal disciplinary hearing, I am not satisfied that his participation amounted to an unequivocal intention to abandon his right to a referral of the dispute to independent final and binding arbitration, in view of his subsequent conduct of referring the matter to the CCMA. As correctly pointed out by counsel for the applicant, the first respondent's breach of the agreement only occurred when the chairperson of the disciplinary hearing imposed the sanction of a dismissal. I find the applicant's explanation of his participation in the internal disciplinary hearing plausible as he had not anticipated that the sanction of a dismissal would be imposed since such sanction was not within the purview of the powers of the chairperson of the disciplinary hearing in view of the provisions of clause 19 of the agreement. I am therefore of the view that the respondents have not made out a case that the applicant has, by participating in the internal disciplinary hearing, waived his right to an independent final and binding arbitration and that he has acquiesced to the procedure followed.

[25] In the alternative, it was submitted on behalf of the applicant that even though the applicant participated in the internal disciplinary hearing, he did not waive his right to an independent final and binding arbitration in

that the agreement contained a non-variation clause[4]. It is the applicant's contention that the parties in varying the agreement with regard to the process to be followed did so orally and not in terms of the formalities set out in the variation clause which prescribes that any variation of the agreement has to be in writing.

[26] It is the respondents' contention that the applicant's reliance on the non-variation clause is an attempt to benefit from a procedural misstep, which if corrected will not result in a different outcome from the one reached by the chairman of the internal disciplinary hearing.

[27] In *SA Sentrale Ko-op Graanmaatskappy Bpk v* Shifren[5]*,* the Appellate Division upheld the validity and enforceability of a non-variation clause by holding that there is no reason why parties to a contract containing a non-variation clause cannot be held bound by it. The court went further to hold that the reason to upholding variation clauses is to avoid disputes arising in proving oral agreements the parties might have reached. In *Van As v Du Preez*[6] the court concluded that:

> "A rose by any other name smells just as sweet. An oral variation masquerading as or in the guise of waiver remains for present purposes what it truly is, or at least it follows the same fate. To hold otherwise would be to render nugatory the principle of the effectiveness of contractual entrenchment as laid down in *Shifren's case."*

[4] Clause 24.1 of the contract reads as follows: "No alteration, cancellation, variation of or addition to this agreement shall be of any force or effect unless reduced to writing and signed by the parties of their duly authorised signatories."
[5] 1964 (4) SA 760 (A).
[6] 1981 (3) SA 760 (TPD) at 765F-G.

[28] Taking into account the principle laid down in the *Shifren* decision (above) on the enforceability of a non-variation clause, I am of the view that the alleged agreement between the parties to proceed with the internal disciplinary hearing where dismissal was contemplated, is of no force and effect since it was not in writing.

[29] It is common cause that the first respondent is entitled to institute an internal disciplinary hearing against the applicant in terms of the first respondent's applicable Rules and Policies. Further, it is common cause that after the decision to dismiss the applicant was taken, he did refer the dispute to the CCMA on the ground that he was unfairly dismissed. This does not however, prevent the applicant from pursuing any right he might have had under the common law[7]. In this matter, the applicant's cause of action is based on the ground that the first respondent, by dismissing him through an internal disciplinary hearing, had breached the agreement in acting contrary to the provisions of clause 19 of the agreement.

[30] The issue to be determined is whether, by holding an internal disciplinary hearing and imposing dismissal as a sanction, the first respondent breached the agreement.

[31] It is the applicant's contention that the word 'may' in clause 19.2 does not confer a discretion on the first respondent whether or not to refer the dispute to independent final and binding arbitration where the

[7] See *Fedlife Assurance Limited v Wolfaardt* 2002 (1) SA 49 (SCA).

dismissal of the applicant is contemplated, in the event that he is found guilty of serious misconduct justifying a dismissal.

[32] On behalf of the respondents it was submitted that clause 19 by the use of the word 'may' does not indicate that the dispute must be referred to pre-dismissal arbitration and that the applicant could not be dismissed. It is the respondents' contention that the clause vests the first respondent with the discretion, with the consent of the applicant, to have the dispute dealt with through private pre-dismissal arbitration.

[33] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8] the court, in relation to the interpretation of, inter alia, contracts, said the following:

> "[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the

[8] 2012 (4) SA 593 (SCA).

> material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

[34] Taking into account what was said in the *Endumeni* matter (*supra*) with regard to the interpretation of contracts, I am of the view that, as correctly pointed out by counsel for the applicant, that the correct interpretation of clause 19.2 of the agreement is to take into account the language of the clause in context and have regard to the purpose of the provision and the background to the preparation and production of the agreement.

[35] It is common cause that the agreement was prepared at the time the applicant was appointed and for the purpose of regulating the relationship between the first respondent and the applicant, and in particular, how to deal with the situation when the first respondent alleges some misconduct or incapacity on the part of the applicant which could qualify for a dismissal. As correctly pointed out by counsel for the applicant, the clause 19.2 read in context means that in the

event of an alleged misconduct and/or incapacity on the part of the applicant, and dismissal as a sanction is contemplated, and in the event of the applicant not signing a consent form as envisaged in sub-clause 19.1, the first respondent is obliged to refer the dispute to independent final and binding arbitration. Further, the hearing has to be in accordance with the requirements of a fair hearing.

[36] I am of the view that the interpretation of clause 19 of the contract as contended for by the applicant is correct in that the option of a dismissal as a sanction is only available if the dispute was referred to independent final and binding arbitration in the event of the applicant not consenting to a dismissal being a sanction option if found guilty of a misconduct. No discretion is given to the first respondent to dismiss the applicant through the process of an internal disciplinary hearing. I am satisfied that the first respondent breached the terms of the contract by dismissing the applicant through an internal disciplinary hearing.

[37] Having found that the first respondent is in breach of the agreement, relief options open to the applicant is either specific performance or damages. However, due to the fact that the applicant's fixed-term agreement expired on 31 January 2017, specific performance is not an option, hence the applicant is claiming damages. The applicant is claiming damages in the sum of R 766,393.60, representing the amount he would have earned for the remainder of his contract had he had not been dismissed.

[38] In *Meyers v Abrahamsom*[9] the court stated that:

> "The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him of the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment."

[39] There is an obligation on the applicant to prove its damages. In seeking to quantify the damages he is claiming, the applicant has attached to his papers a copy of his last payslip. The amount claimed represents the amount the applicant would have received for the remaining months of his contract.

[40] It is the respondents' contention that the applicant has failed to prove the damages he is claiming.

[41] The damages the applicant is claiming are based on breach the first respondent committed in failing to follow the prescribed procedure in the event that the dismissal of the applicant is contemplated.

[42] In *South African Football Association v Mangope*[10] the court stated that:

> "[39] …. Non-compliance with procedural provisions in a contract of employment ordinarily will ground a claim for unfair dismissal in terms of the LRA, even where there is a justifiable substantive reason for

[9] 1952(3) SA 121(C) at 127E.
[10]

dismissal; but at common law a procedural breach will be of no contractual consequence unless it results in damages, particularly where there has been a material breach or repudiation by the employee entitling the employer to cancel. In the law of contract there must be a causal nexus between the breach (procedural or otherwise) and the actual damages suffered. A contractant must prove that the damage for which he is claiming compensation has been factually caused by the breach. This involves a comparison between the position prevailing after the breach and the position that would have obtained if the breach had not occurred. Accordingly, if the respondent's contract is found to have been lawfully terminated on account of his repudiation of the warranty of competence, he would have suffered no contractual damages arising from the procedural breaches. As I have just explained, he may have been entitled to compensation (not damages) in terms of the LRA for a procedurally unfair dismissal, but then he needed to refer an unfair dismissal dispute to the CCMA in terms of section 191 of the LRA.

[40] It follows that the principal enquiry before the Labour Court ought to have been whether the respondent had repudiated or breached the contract by reason of his alleged incompetence. The learned judge *a quo* correctly refused to refer the matter to oral evidence on the grounds that no real dispute of fact had arisen on the papers. However, he held that the appellant had repudiated the contract by failing to follow the evaluation procedure in clause 5 and that such entitled the respondent to damages in the amount of R1,777 000. His reasoning, with respect, is unsustainable for the reasons just discussed. The procedural flaws alone may not directly have resulted in damages and would have been immaterial from a contractual perspective if it was established on the evidence before court that the respondent had not performed satisfactorily in terms of the contract. The court thus erred by not determining on the papers whether the respondent had breached or repudiated the warranty of competence in a manner justifying lawful termination by the appellant."

[43] Even though the applicant's dismissal was achieved through a process which is in breach of the provisions of the agreement, taking into account that the chairperson of the internal disciplinary hearing regarded the applicant's misconduct to be so serious as to warrant dismissal, I am of the view that the applicant has proven that, based on the breach of a procedural step contained in the agreement, he suffered any damages. In submissions made on behalf of the applicant, there is no substantive dispute that the misconduct the applicant was charged with warranted a dismissal. I am therefore of the view that the procedural breach of the contract by the first respondent does not justify damages being paid to the applicant. I am satisfied that under the circumstances, the applicant has not made out a case of the damages he might have suffered.

[44] In the result the following order is made:

> 'The application is dismissed with costs, including the wasted costs occasioned by the postponement of 16 May 2019.'

N P MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 15 October 2019
Date of judgment:08 October 2021

Appearances

For applicant: Adv M Ndziba (instructed by Mashobane Attorneys)

For respondents: Adv C Goosen (instructed by Welman and Bloem Inc)