IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1812/2016

In the matter between:

GOITSEMANG HUMA **Applicant**

and

COUNCIL FOR SCIENTIFIC AND INDUSTRIAL RESEARCH **First Respondent**

MINISTER OF SCIENCE AND TECHNOLOGY **Second Respondent**

Heard: 8 February 2018
Delivered: 24 April 2018

Summary: Application for specific performance of clause in disciplinary code; disciplinary code incorporated by reference into employment contract; whether delay in responding to proposal regarding independent chairperson amounted to waiver of rights by the applicant.

JUDGMENT

RABKIN-NAICKER. J

[1] This application has been brought in terms of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA) and is framed as an application for specific performance after the first respondent (the Council) denied the applicant the opportunity to appeal against her dismissal consistent with its Disciplinary Code. The second respondent abides by the decision of this Court.

[2] The applicant seeks that this Court make an order in the following terms:

> "1. To declare the decision taken by the Chairperson of the Board of the First Respondent not to afford the Applicant the right to appeal her dismissal by the First Respondent as arbitrary, irrational and unlawful and set it aside;
> 2. To order the First Respondent to initiate the appeal proceedings to hear the Applicant's appeal application to be presided over by an external chairperson who is to be duly appointed by the Chairperson of the Pretoria Chairperson of Advocates.
> 3. To order the First Respondent to allow the Applicant to exhaust all the internal remedies before approaching any competent tribunal or the Labour Court to challenge her dismissal.
> 4. To order the First Respondent to reinstate the Applicant albeit suspended in her position as the Group Executive: Human Resources with full employment benefits back-dating the said benefits from the date of dismissal pending the finalisation of the appeal;
> 5. To order the First Respondent to reinstate and reinvest as from the date of dismissal, all the full pension benefits of the Applicant in the CSIR pension scheme pending the finalisation of the appeal;

[1] Act 75 of 1997.

6. To order the reversal of R492 399.52 paid on the 12th April 2016 to the Applicant by the First respondent following the conclusion of the disciplinary process."

[3] The applicant started her employment as Group Executive: Human Resources on a fixed term appointment from 1 May 2915 to 30 April 2020. She was given notification of a disciplinary hearing for misconduct on 23 January 2016. She was found guilty of the charges by the disciplinary committee on 3 March 2016 and it recommended the sanction of dismissal to the Council's Board. Board Chairman, Professor Majozi accepted the recommendation and a sanction of dismissal was confirmed. The applicant was paid 3 months' salary in *lieu* of notice.

[4] The founding affidavits makes a number of averments relating to procedural defects in the disciplinary process. This Court will make no findings in relation to these. The applicant filed an appeal against her dismissal on 18 April 2016. She received a letter from Professor Majozi on 28 April 2016 which read as follows:

> "I acknowledge receipt of your notice of appeal and thank you for the same.
>
> As you are aware, in terms of the disciplinary code, I as chairman of the board have to deal with your appeal. However, due to the fact that I appointed the disciplinary committee which presided over your enquiry, in the interest of fairness it may not be deemed appropriate for the Board or any member thereof to deal with the appeal.
>
> The only reasonable option left is, therefore, to appoint an external third party to preside over your appeal subject to your agreement.
>
> Kindly indicate if you are agreeable to the external third party appointed by me to preside over your appeal, failing which, you are advised to exercise your right to refer a dispute about the fairness or otherwise, of your dismissal."

[5] The applicant responded to this letter on 24 June 2016. She apprises the Court of the various reasons for her delay including that she was out of the country in

the United States during two weeks in May and problems she had communicating with her erstwhile attorney who left his firm also in May 2016.

[6] A letter from Professor Majozi dated 29 June 2016 addressed to the applicant's attorneys reads in material part as follows:

> "……my letter to your client was dated 21 April 2016, a period of two months and a few days ago.
>
> At this stage, the option that was offered to client to appoint an independent third party to preside over the appeal has lapsed give the lapse of time between our letter and your purported response.
>
> As you are aware, in the interests of fairness to both parties, matters of this (sic) must be resolved speedily and expeditiously or at least within a reasonable time.
>
> Accordingly your client's failure to exercise the option that was given to her in my letter of 21 April 2016 within reasonable time was accepted as her rejection of the offer and the matter was closed as such.
>
> As indicated in my letter dated 21 April 2016, your client had to (sic) option to either accept the offer extended to her failing which, refer the dispute to the CCMA. For the purposes of referring the dispute to the CCMA, your client had to option to do so within 30 days of the decision to terminate her employment…."

[7] The disciplinary code is annexed to the founding papers and clause 2 of the document reads as follows: *"this document forms part of these Conditions of Service dated 1 April 2002, which applies to all employees and to each case where discipline must be applied."* The applicant's contract of employment in clause 6 thereof reads as follows:

> "6.1 The Parties specifically agree that save as amended hereby, the CSIR Conditions of Service shall apply to the Group Executive. A copy of the said Conditions of Services is attached hereto and marked Annexure "A".

> 6.2 In the event of any conflict between the provisions of this agreement and the provisions as contained in the CSIR Conditions of Service, the provisions as contained in this agreement shall prevail."

[8] It is accepted, in view of the above, that the disciplinary code is incorporated by reference into applicant's contract of employment and this Court has jurisdiction in terms of section 77(3) of the Labour Relations Act[2] (LRA) to hear the application.. The disciplinary code which binds the applicant and the Council deals with an employee's right to appeal for a review of a disciplinary sanction. Clause 13.4 of the disciplinary code reads as follows:

> "An employee who wishes to refer any dispute arising from a decision of a Disciplinary Committee to the Council for Conciliation, Mediation and Arbitration (CCMA) or to either a competent Labour Court or High Court by invoking the provisions of the Labour Relations Act, 1995), as amended, shall only be able to do so after all the CSIR's internal remedies and /or procedures have been exhausted."

[9] It is averred by the applicant that the sole intention in bringing this application is to seek specific performance of the terms of contract relating to internal remedies. It is submitted on her behalf that the terms of the provisions of the Council's disciplinary code, Clause 13.4 have not been complied with and that the Council took a unilateral decision to close the door to an internal appeal.

[10] For the Council it was submitted that the applicant is only entitled to an order for specific performance in the event of a breach of contract by the Council. However, it submits that it is clear that it was impossible for the Council to comply with the provisions of Clause 13 because Professor Majozi and any other persons who potentially could have entertained the appeal were involved in some or other way, in the decision resulting in the applicant's dismissal. The Council is therefore not in a position to give effect to the provisions of Clause 13 of the disciplinary code and procedure for reasons of impossibility.

[2] Act 66 of 1995 as amended.

[11] In order to consider whether this argument has any merit, it is necessary to consider the provisions of Clause 13 as a whole:

> "13. Review of Hearing
>
> 13.1 An employee who has been disciplined in terms of the CSIR Conditions of Service has the right to Appeal for Review to the President and/or any Member of the Executive Board as approved by the President or in the case of a Member of the Management Board to the Chairperson of the Board against the conviction and the penalty, within 10 (ten) working days of receipt of notice of such penalty.
>
> 13.2 The Appeal referred to in Sub-paragraph 13.1 above shall be noted in writing with the Industrial Relations Manager of the CSIR and will clearly and concisely set forth the grounds of Appeal and whether the verdict and the penalty, or only the penalty, is appealed against.
>
> 13.3 The President and/or any Member of the Executive Management Board as approved by the President shall request the Chairperson of the Disciplinary Committee to furnish written reasons for the Committee's decision, which reasons shall be furnished within 10 (ten) working days from such request.
>
> 13.4 An employee who wishes to refer any dispute arising from a decision of a Disciplinary Committee to the Council for Conciliation, Mediation and Arbitration (CCMA) or to either a competent Labour Court or High Court by invoking the provisions of the Labour Relations Act, 1995 (Act No 66 of 1995), as amended, shall only be able to do so after all the CSIR's internal remedies and/or procedures have been exhausted."

[12] Clause 13(1) clearly provides for an appeal to be made to the Chairperson of the Board where a Management Board Member is the employee seeking to appeal a sanction. It does not however set out how the Chairperson of the Board shall process an appeal. The Chairperson is not mentioned in Clause 13.3 which sets

out the *dies* for written reasons to be sent by the Disciplinary Committee to the President and/ or any member of the Management Board.

[13] It is the Court's view that it cannot be said that it was impossible for the Council to act in terms of Clause 13. In fact that is precisely what the Chairperson, Professor Majozi did. He received the appeal and wrote to the applicant regarding the appointment of an external chairperson to hear it. Clause 13 does not proscribe how the Chairperson is to organise the process of an appeal by a Management Board Member.

[14] The applicant received a proposal regarding an external chairperson and was asked to: *"Kindly indicate if you are agreeable to the external third party appointed by me to preside over your appeal, failing which, you are advised to exercise your right to refer a dispute about the fairness or otherwise, of your dismissal."* This invitation clearly indicates that a failure to agree will result in the internal appeal process being exhausted.

[15] The answering affidavit in this application states that given the lengthy period that it took the applicant to reply to the offer, and in view of the need for speedy resolution of disputes *"Applicant no longer has any right to enforce finalisation of the internal appeal, that she waived her rights in this regard, and that due to her undue delay the Honourable Court should not come to her assistance."*

[16] The requirements for waiver were summarised per Kroon J in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* [3] as follows:

> "[81] The conclusion reached in para [79] above is in accordance with common-law principles regarding waiver of rights. 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

[3] 2009 (4) SA 529 (CC).

> proved; not only must the acts allegedly constituting the waiver 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 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." [Footnotes omitted.]

[17] On the common cause facts in this case, the applicant noted an appeal against the sanction of dismissal and she did not refer her dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 30 days of her dismissal. A referral to the CCMA would have been conduct indicating her waiver of the right to pursue the appeal she had noted and conduct plainly inconsistent with her right to enforce it. What she did, was to unduly delay in accepting the proposal to appoint an external chairperson to hear the appeal. The question is therefore whether this amounted to a tacit waiver of her right to an internal appeal.

[18] In *Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality* [4] the Supreme Court of Appeal (SCA) held that whether a contracting party's delay in exercising its right to cancel (or resile from) a contract amounts to a waiver of that right depends on the reasonableness of the delay in the circumstances. If, however, the contract in question contains a non-waiver clause, the issue of the reasonableness of the delay is rendered irrelevant[5].

[19] The applicant's contract of employment is annexed to the answering affidavit. It specifically incorporates the Council's Conditions of Service. It also includes a non-waiver clause:

> "13.2 No relaxation or indulgence which either the CSIR or the Group Executive may show to the other, as the case may be, shall I any way prejudice or be deemed to be a waiver of her rights hereunder, nor shall

[4] 2011 (2) SA 525 (SCA).
[5] At oparas [24] – [26] at 534F – 535F..

> such relaxation or indulgence preclude or stop the CSIR or the Group Executive, as the case may be, from exercising its rights in terms of this agreement in respect of any further breach."

[20] The waiver defence must fail for this reason and I note that it was not pursued in the heads of argument for the Council. An effort was submit that the applicant had acquiesced in not having an internal appeal. The conduct of the applicant in the Courts view cannot be considered as falling within the doctrine of peremption:

> "The rule with regard to peremption is well settled, and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it." [6]

[21] I agree with the submissions on behalf of the Council that there is no basis on the papers before me to order most of the prayers sought in the notice of motion. However I do find that the applicant has made out a case for an order of specific performance. Both parties asked for costs to be awarded and I consider that in this particular matter it is in accordance with law and equity to award costs to the successful party. I therefore make the following order:

Order

1. The First Respondent is ordered to continue internal appeal proceedings in terms of Clause 13 of the Disciplinary Code and Procedure.

2. The First Respondent is to pay the costs

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H. Rabkin-Naicker

[6] As referred to in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC) (2017 (2) BCLR 241 at para 26.

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	S Sethene
Instructed by:	Mashala Komane Mesaekela Attorneys
For Respondent:	GL van der Westhuizen
Instructed by:	Macrobert Inc