IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 83484/2017

(1) REPORTABLE: **NO/~~YES~~**
(2) OF INTEREST TO OTHER JUDGES: **NO/~~YES~~**
(3) REVISED. **~~NO~~/YES**

14 SEPTEMBER 2021
DATE SIGNATURE

In the matter between:

PROF. LULAMA MAKHUBELA	**Applicant**
And	
TSHWANE UNIVERSITY OF TECHNOLOGY	**First Respondent**
COUNCIL	**Second Respondent**
VICE CHANCELLOR AND PRINCIPAL	
PROF. LOURENS VAN STADEN N.O.	**Third Respondent**
TOKISO	**Fourth Respondent**
ADVOCATE KENNY MOSIME	**Fifth Respondent**
MINISTER OF HIGHER EDUCATION	**Sixth Respondent**

JUDGMENT

MAKHOBA J

1. The applicant was employed by the first respondent on a 5 (five) year fixed term contract which started on the 1st July 2013 and was supposed to end on the 30th June 2018.

2. On the 8th June 2015 disciplinary proceedings commenced against the applicant the fifth respondent presented himself as a duly appointed panellist of the fourth respondent. On or about 29th August 2016 the fifth respondent found the applicant guilty of misconduct. On the 14th September 2016 she was summarily dismissed. Subsequently the first respondent on the 16th September 2016 served her with a notice of dismissal.

3. On the 3th February 2017 the applicant approached the fourth respondent and had a meeting with its CEO Ms Tanya Venter to enquire as to whether or not the disciplinary hearing against her was conducted as a pre-dismissal arbitration as contemplated in terms of section 188 A of the Labour Relations Act. She received a letter from Ms Tanya Venter that the fifth respondent's ruling and sanction was not an arbitration award but was an outcome of an internal disciplinary hearing.

CONDONATION

4. The first issue between the parties is the application for condonation of the late filing of the replying affidavit by the applicant. This application is opposed by the respondents.

5. The applicant was supposed to deliver her replying affidavit within 10 (ten) days upon receipt of the respondents answering affidavit on the 2nd March 2018. The applicant was supposed to serve the replying affidavit by no later than 16 March 2018. However, the replying affidavit was served on the respondent's attorney of record on the 13th August 2018.

6. In advancing her reasons why she did not file a replying affidavit, applicant in her replying affidavit[1] says that as a lay person she was not aware that she was required to deliver a replying affidavit within a stipulated time and she simply assumed that her attorney will do that.

7. On the 26th March 2018 the mandate to her attorney was terminated and she instructed her current legal representative she only became aware of the duty to file a replying affidavit on the 20th June 2018. In conclusion she says the real cause of the delay in delivering her replying affidavit was due to economic hardship she encountered in raising the fund to pay her legal representative[2].

THE LAW

8. The use of the word "may" in Rule 27(1) denotes that the court has a discretion to grant or not to grant condonation. In *United Plant Hire (Pty) v Hills and Others*[3] Holmes, JA said: *"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in administration of justice".*

[1] Replying affidavit paragraph 25-27
[2] Replying affidavit par 31
[3] 1976 (1) SA 717 (A) at 720 E- F

9. Courts have held that where non-compliance with the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be[4].

10. In *Siber v Ozen Wholesalers (Pty) Ltd*[5] Schreiner , JA said: *"It is enough for present purposes to say that the defendant must at least furnish an explanation of his late filing sufficiently to enable the court to understand how it came about and to assess his conduct an motives".*

11. Rule 27 (1) of the Uniform Rules of Court requires that "good cause" or "sufficient cause" must be demonstrated before condonation can be granted.

    In *Cairns Executors v Van Gaarn*[6] the court noted that the expression "sufficient cause" seemed to be used in a wider sense, "as covering any cause sufficient to justify the Court in granting relief from the operation of the earlier rule."

12. In *Smith NO v Brummer NO and Another* [7]Brink , J considered and summarised the factors which the court must consider in determine whether or not condonation should be granted. These, in short, are:

    1. whether a reasonable explanation has been given for the neglect;
    2. whether the application is *bona fide* and not brought with the intention to delay the other party's claim;
    3. if there is absence of reckless or wilful neglect of the Court Rules;
    4. whether or not applicant's case is ill founded;
    5. if, where there is prejudice, such cannot be compensated with a proper costs order.

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[4] See Diaries v Sheriff, Magistrate's Court, Wynberg and another 1998 (3) SA 34 at 41 A-D
[5] 1954 (2) SA 345 (A) at 353
[6] 1912 (AD) at 186
[7] 1954 (3) SA 352 at 358 A

13. In *Van Wyk v Unitas Hospital and Another(Open Democratic Advice Centre as amicus curia)*[8] the court said:
"*The court then dealt with its displeasure where litigants do not comply with the time limits or directions setting out the time-limits. Courts are also unhappy with litigants dumping their matters with their attorney and failing to make the necessary follow-ups. Courts have expressed their unhappiness where s litigant blames his attorney without demonstrating that he or she is not to blame for the ineptitude or remissness of his or her attorney.*"[9]

14. The applicant blames her erstwhile attorney for her mishap and financial constraint. However, she is not illiterate, the time that elapsed before the replying affidavit was filed is inordinate and needed proper, acceptable and sufficient explanation. The explanation furnished by the applicant in my view has not been fully and sufficiently motivated.

15. Applying the law to the facts of this case, it becomes abundantly clear that the application should fail. The application for condonation is dismissed with costs.

THE MAIN ISSUE

16. The applicant seeks a declaration of a material breach of fixed term contract of employment.

17. An order for specific performance by re-instating the applicant into her position as deputy vice-chancellor of research and innovation, on the same terms and conditions of employment that existed immediately prior to the termination of her fixed-term of employment contract.

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[8] 2008 (2) SA 472

[9] (See *Saloojee and Another NN.O v Minister of Community Development 1965 2 SA 135 at 141D-H; and Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 6 SA 1 (SCA) at p9 [12]. Mulaudzi v Old Mutual life insurance Co (South Africa) Ltd and Others, National director of Public Prosecutions and another v Mulaudzi 2017 (6) (SCA)*

18. Alternatively ordering the first respondent to pay contractual damages in the amount of R 4781 372.04 (including bonuses) equivalent to 21 (twenty-one) months' salary.

19. The applicant contends that the internal disciplinary hearing which led to the dismissal of the applicant was not in compliance with the provisions of the fixed-term contract of employment with specific reference to clause 19 (nineteen) of the contract.

20. Whereas the respondents submit that clause 19(nineteen) of the employment contract refers to private pre-dismissal of arbitration as opposed to section 188 A arbitration.

21. Furthermore, respondents contend that the applicant waived any alleged rights and or entitlement or arbitration process by fully and wilfully participating in the disciplinary proceedings that led to the dismissal of the applicant.

22. In addition, the respondents contend that the applicant cannot claim damages without pleading the damages actually suffered.

23. Moreover, the respondents submit that the wording of clause 19 (nineteen) to "private" arbitration and makes no reference to section 188 A of the Labour Relations Act. Counsel for respondents contends in his heads of arguments[10] that clause 19 does not state that in the absence of s section 188 A pre-dismissal arbitration the applicant could not be dismissed.

24. The respondents plead in their case that the applicant waived and in the absence of any clause relating to the prohibition of the waiver of any rights flowing from the contract, that right can be waived.

25. Counsel submit further that by applying the Plascon-Evans principle, the respondents have established that the applicant through her conduct and that of her legal representative acquiesced to the disciplinary process ad waived any right to final and binding private arbitration.

[10] Heads of argument page 28 par 6-14

THE LAW

26. Section 188 A of the Labour Relations Act 60 of 1995 allows for what is referred to as a pre-dismissal arbitration when an employee and employer under certain circumstances, approach a duly authorised body such as the commission for conciliation mediation and arbitration (CCMA) and request an arbitrator to preside.

27. Clause 19 of the applicant's contract of employment reads as follows:

*"**19. PRIVATE PRE-DISMISSAL OF 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 66 of 1995, as amended"

28. The interpretation of the agreement between the parties is a question of law. The law regarding interpretation has been stated by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [11] *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

[11] 2012 (4) SA 593 (SCA) at par 8

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 material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed. in 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 unbusiness-like 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 business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross 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 provision and the background to the preparation and production of the document."

29. In my view it will be taking it too far to say that the applicant and the respondents had the application of section 188 A in their contract in mind when they agreed on the clause 19 of the contract.

30. I say so because in clause 19 there is no mention of section 188A but the heading of section 19 reads as follows "PRIVATE PRE-DISMISSAL OF ARBITRATION". The Oxford English Dictionary 7th Edition gives the meaning of private as follows "for or belonging to a particular person or group only". I therefore disagree with counsel for the applicant in her heads of argument[12] when she argues that section 188 A finds application in this matter before me. In my view it is a wrong interpretation of the contract to say that section 188 A finds application in this matter. I cannot read words into the contract that I think they should have been in the contract that will be a misdirection on my part.

[12] Applicant's supplementary heads of argument pages 1-7

31. In my respectful view clause 19.2 indeed is discretionary and not peremptory as provided by counsel for the applicant[13].

32. The respondents pleaded a point in limine under the heading of "waiver and acquiesced[14]", the respondents submitted that the applicant waived any right to an independent final and binding arbitration. It is further submitted that applicant's legal representative, agreed to the process adopted by the fifth respondent. Different disciplinary processes, including an arbitration in terms of the Arbitration Act, No 42 of 1965, an enquiry in terms of section 188 A of the Labour Relations Act were all explained to the applicant during the enquiry in question.

33. The respondents answering affidavits states that the parties agreed that the status of the process would be that of an internal disciplinary hearing and applicant wanted to retain the right to the CCMA if she was not satisfied with the outcome of the disciplinary process.[15]

34. The applicant was well represented during the disciplinary enquiry. The submissions by the respondent in their answering affidavit that different processes were explained to the applicant are not in dispute by counsel for the applicant during her submissions to this court.

35. I therefore accept that the process adopted by the respondents was properly explained to the applicant and she waived any entitlement to an independent final and binding arbitration[16].

36. Applying the law to the facts of this case, it becomes abundantly clear that the application must fail.

37. The following order is therefore made:

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[13] Respondents heads of argument paragraph 6.17- 6.20 page 29

[14] Answering affidavit paragraph 4.1- 4.6

[15] Answering affidavit paragraph 4.1- 4.6

[16] See Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA) paragraph 15- 18; Bekaszaku properties (Pty) Ltd v Pam Golding Properties (Pty) 1996 (2) SA 537 (C) at paragraph 543 A 544 D see also Van AS v Du Preez [1981] 4 ALL SA 402 (T) on non-variation clause.

37.1 The application is dismissed.

37.2 Applicant is ordered to pay the costs of the application.

D MAKHOBA

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the appellant:	**Advocate Kedibone Molema**
Instructed by:	**Kedibone Molema Attorneyd**
For the respondents	
(first second and third):	**Advocate Goosen**
Instructed by:	**Welman & Bloem Inc**
Date heard:	**11 August 2021**
Date of Judgment:	**14 September 2021**