

SOUTH AFRICA / JUDGMENT

Mlungwana v Speaker: Eastern Cape Provincial Legislature (392/2008)

[2015] ZAECHC 11 (13 May 2015)

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COURT
Eastern Cape High Court, Bhisho

BEFORE
Stretch

CASE / FILE NUMBER
392/2008

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE LOCAL
DIVISION, BHISHO

CASE NO: 392/2008

In the matter between: LUVUYO
MLUNGWANA
Plaintiff
And
THE

SPEAKER: EASTERN
CAPE PROVINCIAL LEGISLATURE
Defendant

JUDGMENT

STRETCH J:

- [1] On 12 February 2001 the Eastern Cape provincial legislature (hereinafter referred to as “the employer”) approved the plaintiff’s appointment as its director of organisational development (presently known as the director of corporate services). According to the plaintiff his employment in this capacity commenced on 1 March 2001, and was confirmed upon his completion of 12 months’ probation. The salary scale and the benefits forming part of his employment package (“the salary package”) are not in dispute. It is furthermore

common cause that the plaintiff received his salary package up until the end of May 2006.

- [2] Thereafter the plaintiff was not paid.
- [3] The plaintiff instituted action against the defendant during May 2008 for payment of the sum of R1 667 516,00. It is alleged that this amount represents the plaintiff's unpaid salary package calculated from June 2006 up until the date of the issue of summons.
- [4] The plaintiff in his particulars of claim, does not aver that these services were terminated at any stage either by him or by his employer. He simply makes a bald allegation that he was not paid from June 2006 onwards, and alleges that this failure to pay is in wrongful and unlawful breach of the defendant's obligations to do so.
- [5] The defendant in his plea, admits that the plaintiff was appointed as claimed, but explains that his services were in fact terminated with effect from 31 May 2006, following a disciplinary enquiry which was held during the months of October and November 2005 ("the enquiry") relating to charges of misconduct and complaints of inefficiency.
- [6] The defendant alleges that the plaintiff was informed of this on 7 December 2005, and that he was advised of his rights to pursue an internal appeal ("the appeal"), which appeal it is common cause was lodged on 8 February 2006.
- [7] It is also not in dispute that prior to the scheduled date for the hearing of the appeal the plaintiff instituted review proceedings ("the review") in this court against the defendant, the executive management of the Eastern Cape provincial legislature ("the ECPL") and two others, wherein he sought the setting aside of his dismissal and subsequent reinstatement.
- [8] The defendant alleges in its plea that the plaintiff, in this review application, alleged that no appealable decision had been taken by the defendant, that any internal appeal would have been futile and that in any event, no right to an internal appeal was in existence, since the defendant, who was the person required to hear the appeal, was barred from doing so due to his involvement in the matter. In the premises, so the defendant alleges, the plaintiff had abandoned his appeal, causing the ECPL to notify him during May 2006 that the decision to dismiss him had now become operative, and that this culminated in the termination of his salary package at the end of May 2006.
- [9] The defendant further pleads that on 16 May 2008 the plaintiff withdrew his review application and tendered the respondents' costs.
- [10] The defendant accordingly pleads that the plaintiff's services were lawfully terminated on 31 May 2006.
- [11] Alternatively, the defendant pleads as follows:
 - a. that the ECPL was entitled to terminate the plaintiff's employment on one months' notice;

- b. that on 7 December 2005 the plaintiff was notified of his dismissal with immediate effect subject to his rights to an internal appeal;
 - c. that because the plaintiff had initially indicated his intention to pursue this appeal but thereafter abandoned it prior to its commencement, his employment only came to an end on 31 May 2006, which means that he had in effect been given in excess of one months' notice.
- [12] As a further alternative the defendant pleads that in consequence to the further notice afforded the plaintiff in May 2006, his employment lawfully came to an end by no later than 30 June 2006.
- [13] Finally, the defendant pleads that in the event of this court finding that the plaintiff's employment was not lawfully terminated, this court, in the exercise of its discretion, should refuse the plaintiff specific performance for the following reasons:
- a. that the plaintiff's conduct was such as to warrant his dismissal, and that any defects in his termination were of a procedural nature only;
 - b. that the defendant has not enjoyed the benefit of the plaintiff's services since December 2005;
 - c. that there has been an undue delay in the prosecution of the plaintiff's current action;
 - d. that the plaintiff's position has since been filled;
 - e. that the plaintiff had occupied a unique position with the defendant which required a close working relationship of the utmost good faith, which relationship has broken down irretrievably for various reasons including loss of confidence in the plaintiff due to his extended absence from the workplace;
 - f. that if the plaintiff was seriously relying on the allegations which he had set forth in his review application, he ought to have invoked the remedies provided for in the Labour Relations Act 66 of 1995 ("the LRA") which remedies he failed to pursue.
- [14] The plaintiff, in presenting his version of the *facta probanda* surrounding his dismissal for the first time in reply, has denied that the issue of one months' notice was a term of his contract with the employer. He alleges that his contract was only capable of lawful termination after a valid pre-dismissal hearing had been held and only after the defendant had complied with the relevant provisions of its disciplinary code ("the Code"), neither of which requisites had been complied with, and in any event, that no acceptable evidence had been presented at the enquiry to support a finding that the complaints against him were well founded. His appeal had accordingly been directed at the irregularity and the invalidity of the enquiry which had culminated in his dismissal.
- [15] Significantly, the plaintiff denies that his review application meant that he had abandoned his appeal. In support of this denial, the plaintiff contends that:

- a. His appeal had been lodged in compliance with the Code and that it recorded that he wanted this appeal to proceed, resulting in the defendant's instruction on 31 March 2006 that the appeal would in fact proceed on 20 April 2006.
- b. His review application was lodged on 10 April 2006 (before the date scheduled for his appeal) wherein he sought relief for the disciplinary proceedings to be reviewed and to be set aside and for the findings which had resulted in his dismissal to be declared unlawful, unconstitutional, void and without any legal force or effect.
- c. Notwithstanding the launching of his review application on 10 April, the legal representatives of the two parties had agreed on 19 April that the appeal would nevertheless proceed on 20 April, on which day the defendant "unilaterally, incorrectly and unlawfully" took the stance that the employer was not proceeding with the appeal on the ground that the plaintiff's

institution of the review application constituted an abandonment of his rights of appeal.

- d. The review application was simply an additional process available to the plaintiff for the purpose of asserting his rights, and that the appeal and the review were not mutually exclusive and could quite comfortably run concurrently, inasmuch as the appeal was not only restricted to a finding on the merits, but that he was also contractually entitled to a limited appeal in terms of paragraph H of chapter 5 of the Code which is binding on the parties inter se, and that this appeal procedure is not only still pending, but that the outcome thereof is a condition precedent to a lawful termination

in terms of the Code. Thus it is contended by the plaintiff that the defendant has in effect intercepted the finalisation of the disciplinary process by failing to afford him an appeal hearing as contemplated by the Code, which hearing would ultimately have determined whether he is guilty, and (if found guilty) the appropriate sanction which flows therefrom in terms of the Code.

- e. In addition, the plaintiff pleads in reply that the fact that he (at the time of issue of summons) had not worked for the defendant for two years was due to the defendant's intransigent stance that his contract of employment had been terminated, and that it is in any event immaterial that his position has since been filled.

[16] The defendant, in its rejoinder, pleads that insofar as the plaintiff has contended in his replication that he had a right to a pre-dismissal hearing in terms of his employment contract (which is denied), his claim is aimed at impugning the fairness of his dismissal, and as such falls to be determined in terms of the LRA, and that this court accordingly lacks jurisdiction to hear it.

[17] The defendant also denies that the employer had formally adopted the Code upon which the plaintiff relies, and contends that it was expressly excluded from the conditions of service applicable to the employees as from September 2002.

[18] In his surrejoinder the plaintiff reiterates that his claim is for specific performance based on a contract of employment which affords him the right to an appeal hearing and to be informed of the outcome thereof. Pending the conclusion of the appeal hearing, so it is contended, he remains an employee and is entitled to his salary package.

[19] In essence, this 13 page response to the defendant's four page rejoinder, is in my view what the plaintiff ought to have pleaded at the outset, as it sets out for the first time in these protracted pleadings a relatively clear and concise statement of the material facts upon which the plaintiff relies, with the degree of particularity one expects to see in particulars of claim and as required in terms of rule 18 of the uniform rules of this court ("the rules"). But more about this later.

[20] The plaintiff testified that he has been waiting for his appeal to be heard for the past eight years. When he was asked about what efforts he has made to expedite the appeal, he referred to paragraph 4 of his grounds of appeal, which reads as follows:

'I further record that because the disciplinary hearing, in my view, was not in terms of the code of conduct binding the staff of the Legislature, of which I am one, an appeal thereto does not arise and/or is premature and the "appeal" must neither be seen as my agreement or condonation that the disciplinary hearing was legal, constitutional and in line with fair administrative

procedures. I accordingly ask that the appeal be proceeded with in a manner that does not prejudice any of my legal rights including but not limited to bringing an application for review of the same in the courts of law, in my plan, within the next 10 working days or so.'

[21] In his affidavit supporting his review application and motivating why a High Court review is appropriate in these circumstances, the plaintiff says the following:

'A review is appropriate in this matter because:

1. An appeal to the 4th Respondent (the defendant in the matter before me) arises only if there is a finding and decision of the Secretariat or a properly

constituted body in terms of the code. There is none in this case and the outcome concerned is simply a no decision, in view of the illegality thereof and I am seriously prejudiced thereby...

2. The basis and core of my complaint (sic) is the illegality and fundamental irregularities of the proceedings embarked upon at the 4th Respondent and the 4th Respondent's appeal process is not suited to deal with that (my emphasis) as they focus on the outcomes of the disciplinary process and not with the illegality of the process itself...
3. The Speaker, as the authority entrusted to dealing with an appeal is, with respect, not qualified to deal with the illegalities and irregularities forming the core of my complaint – she being, with respect, merely a politician. The same is true of Mr Nkwinti ...

4. The unlawfulness complained of and which necessitated this review application undermined the very internal or domestic disciplinary procedures.
5. The rules of natural justice were not observed from the onset and all subsequent processes are tainted thereby.
6. The irregularity and injustice has been persisted upon to the final stages as even now the 3rd and 4th Respondent ... are forcing me to an 'appeal' to be chaired by a person who is not the Speaker of the Legislature – the appeal authority – but a member of the executive arm of government. This is despite my having refused (my emphasis), through my attorney, that suggestion when Mr. Pretorius, an attorney instructed by the 4th Respondent made such a proposal ...
7. A review to the above Honourable Court is fitting also because ... the appeal authority (the Speaker of the Legislature), upon receipt of my reasons and grounds of appeal, is not going to attend thereto (my emphasis) ... In essence that leaves me with no other authority to appeal to, even if an appeal was the appropriate step. Further and of importance in view of section 7(2) of PAJA, is whether or not I have internal remedy available or to exhaust before I approach the above Honourable Court. In view of the above and what is relevant to this issue as said below, I believe I have no internal remedy in terms of the empowering provision (my emphasis).
8. At any rate the core of my complaint, the illegality of the proceedings and results thereof, will not be dealt with in the 'appeal' as I am ordered to confine myself ... to the merits of the convictions and sanction of disciplinary hearing chairperson and not the illegality thereof, let alone that an appeal is not appropriate where the very procedure is in issue and would be premature in the present circumstances as the legality or otherwise of the dismissal and all that relates to it must first be determined (my emphasis).'

[22] In my view the relevant correspondence is of particular significance in this matter:

- a. On 17 March 2006 the employer's secretary wrote a letter to the plaintiff's attorneys referring to the plaintiff's "upcoming" appeal and in particular to his reference to unfair procedures in his grounds of appeal (the relevant extract is set forth at paragraph 21 of this judgment). In this letter, the writer makes it clear that not only would the decision to dismiss the plaintiff be suspended pending the outcome of his appeal, but that the appeal hearing itself would be an appeal in the "wide sense" and that the plaintiff would be afforded "ample opportunity" to address any representations which he believed he was not permitted to make at the enquiry. The letter furthermore assures the plaintiff that the appeal hearing would be chaired by an independent person and not by the Speaker, that in order for the plaintiff to be given "the fullest opportunity to be heard" oral representations would be received (which is normally not permitted), and that the employer had

no objection to the plaintiff being legally represented at the appeal hearing. The letter furthermore specifies that the hearing would commence on 11 April and continue to finalisation on 20 April 2006 if necessary.

- b. On 27 March 2006 the employer's attorneys wrote a reminder to the plaintiff reiterating the employer's intention to proceed with the appeal on 11 April and requesting an urgent response to the previous correspondence.
- c. This letter is followed up by a second reminder on 31 March 2006, followed by a response from the plaintiff's attorneys which reads as follows:

'Our client will be lodging his review application before the end of next week. It will be noted on the points raised therein, that [the] appeal process should be held in abeyance until such time as the court has made its ruling on the review application (my emphasis). However, should your client be of the view that he requires both processes to run concurrently or simultaneously, which we believe to be highly unlikely, we suggest that both parties arrange a mutually convenient date, which will suit all counsels

(sic) involved, because your suggested dates are not convenient to our counsels.'

- d. On the same day the employer's attorneys replied indicating that the appeal hearing must proceed as the matter had "dragged on for several months" and that imminent finalisation thereof was a priority. The employer was however prepared to commence with the hearing on 20 April and not on 11 April as initially indicated. This letter was followed up with a reminder on 4 April 2006, and a further letter on 13 April enclosing certain information which the plaintiff had requested for purposes of the appeal hearing.
- e. On 18 April 2006 the employer's attorneys acknowledged receipt of the plaintiff's review application, and wrote as follows:

'1. We are in receipt of your client's review application.

- 2. The telephone conversation between the writer and your Mr Lesele on 13 April 2006 refers.
- 3. We confirm that your client's stance is that he will not proceed with the appeal for the reasons stated in the review application (my emphasis).
- 4. We are constrained to point out the following by way of comment on certain matters raised by your client in the review papers (and without attempting to deal therewith exhaustively, our client's rights being fully reserved in this regard):

4.1 It is not correct that our client's letter dated 17 March 2006 sought to limit your client to an appeal as to the "outcome of the disciplinary process" as alleged by your client in paragraph 30.2 of his affidavit. For the record, your client is free to raise on appeal any irregularity which he contends occurred in the disciplinary proceedings (whether it be of a substantive or procedural nature) (my emphasis).

4.2 It is our client's stance that your client's appeal was noted late. Our client is nevertheless willing, for purposes of the appeal hearing, to abandon its stance that your client requires condonation and will accordingly allow the appeal to proceed without the necessity for your client to apply for condonation.

4.3 Our client denies that any of the reasons advanced by your client for electing not to proceed with the appeal is valid.'

f. On 20 April 2006 the plaintiff's attorneys wrote to the employer's attorneys stating the following:

'We confirm that your Mr Pretorius advised that you and your client have reviewed your position regarding proceeding with the appeal today and are therefore no longer proceeding with the appeal hearing since you hold the view that our client has abandoned the appeal in the light of the contents of his affidavit in the review application (my emphasis).

We placed on record to him as we hereby do even in this telefax that it is and was never the stance of client to convey such a message in his affidavit. We informed your Mr Pretorius that the position of client is and was clearly that the appeal should be held in abeyance pending the finalisation of the review application. ... We must therefore advise you that the failure for the appeal to proceed today is at your and your client's instance, certainly not at our client's.

g. On the same day the employer's attorneys responded as follows:

'1. It is our client's position that in the light of the review application which has been brought by your client, the

contents of the application and the telephone conversation between you and me on 13 April 2006 (as confirmed in our letter of 18 April 2006), it is clear that your client has, for his own reasons, elected not to utilise his internal remedy (the appeal procedure provided for in the code) (my emphasis).

2. At no stage during any of our conversations did you dispute my (repeated) assertion that your client had elected not to pursue his appeal.

3. This morning I telephoned you and informed you that our client had considered its position, and that, in light of the fact that your client had elected not to proceed with his appeal, our client was not going to convene an appeal hearing and that we would inform the chairperson accordingly. Your response was, for the first time, to dispute that your client had elected not to utilise the appeal procedures available to him. You indicated that your client's stance was that the appeal should be held in abeyance pending the finalisation of the review proceedings (This was a suggestion put forward by you in a letter dated 31 March 2006, a suggestion which you indicated would be echoed in your client's review application – it was not). I, in turn, disputed this allegation and indicated to you that I would confirm our client's position in writing.

4. Insofar as it is not clear from what is set out above, and insofar as it may be necessary to do so (which is not admitted), our client's position is that, inter alia, in the light of the review application, as well as the contents thereof, it is in any event not permissible for your client to request that the appeal proceedings be held in abeyance' (my emphasis).

[23] So much for the correspondence.

[24] After the plaintiff had testified, he closed his case. The defendant did likewise without calling any witnesses.

[25] The matter was adjourned for a number of months in order for the plaintiff to consider his position vis-à-vis applying to amend his claim to include further outstanding payments of his salary package calculated up to the date that he testified. When the matter resumed the plaintiff indicated that he no longer wished to pursue the application and argument on the merits was presented.

[26] It is contended on the plaintiff's behalf that his cause of action is for specific performance formulated in simple terms as a claim for unpaid salary due to him in terms of an existing contract, and that it had been formally recorded that the defendant did not challenge the jurisdiction of this court to determine the issues as pleaded.

[27] According to the plaintiff, the issues to be decided (and the plaintiff despite his scanty claim to begin with has now introduced no less than seven of these) are the following:

- a. Whether there is any merit in the defendant's residual jurisdictional challenge;
- b. Whether the code of conduct constituted a contractual term which regulated the relationship between the parties (in this regard it is contended that this court is bound to find that the Code has contractual status, particularly in the light of the fact that the defendant did not call any witnesses to explain the nature of the employer's policies and the origin of the Code to gainsay the plaintiff's evidence);
- c. If so, whether the Code had created rights and obligations of a contractual nature as between the parties, particularly in regard to the pre-dismissal procedure incorporating the right of appeal, suspension of the first phase of the adverse disciplinary action and the plaintiff's entitlement to continue receiving a salary package;
- d. Whether the defendant had lawfully terminated the plaintiff's employment and/or whether the employer could lawfully terminate the plaintiff's employment by way of statutory notice contemplated by section 37 of the Basic Conditions of Employment Act;

- e. Whether the plaintiff, if he did have a right of appeal, abandoned/waived that right by commencing review proceedings (in this regard it is contended firstly that a surgical analysis of the papers reveals that the review is everything but an unequivocal, indisputable intention to abandon the appeal, and secondly, that the plaintiff's viva voce and undisputed evidence is that he wanted to continue with the appeal, and that if the defendant wished to rely on waiver/abandonment the employer ought to have led evidence to that effect);
 - f. Whether this court should exercise its discretion in respect of specific performance in this matter and if so, in what manner it should affect the plaintiff's claim in respect of unpaid salary;
 - g. Whether the plaintiff's claim is one for unpaid salary (ie for specific performance in part) or for damages.
- [28] The defendant (and quite correctly in my view) has contended from the outset, that after this protracted and voluminous exchange of pleadings, it became apparent for the first time during the trial of this matter, that the plaintiff claims that his contract of employment with the defendant remains alive because he has not been afforded an internal appeal, which he claims to be entitled to by virtue of his contract of employment, despite the fact that this case was not made out in his particulars of claim. The defendant contends that the plaintiff is not entitled to any relief for the following reasons:
- a. That the plaintiff waived and abandoned any right to an appeal he may otherwise have enjoyed, and cannot rely on the employer's failure to once again convene an appeal to sustain his claim for damages for breach of contract (despite the fact that the claim is wrongly dressed up as one for specific performance in that there is no claim for reinstatement but at best, only a "tender" of services);
 - b. That he has failed to make out a cause of action for breach of contract which breach consists of the following elements: (i) breach of a material term, (ii) resulting in damages and (iii) that he has complied with his own obligations arising from the contract including the obligation to prosecute an appeal timeously and correctly;
 - c. That the plaintiff's claim (that his employment contract remains alive because the defendant has allegedly failed to honour a term which entitles him to an appeal before the contract can be terminated) fails on the facts (because the plaintiff abandoned his right of appeal), and in law (it being contended that there is no authority for the proposition that a contract of employment survives beyond its termination because the employer has failed to afford the employee an internal appeal);

- d. That at common law a contract of employment terminates upon repudiation by the employer, subject only to the employee's right to accept the repudiation and sue for damages (which the plaintiff has done), or to seek specific performance (which relief the plaintiff has abandoned), and that a damages claim not only requires the appropriate statutory notice but that, in the circumstances, the plaintiff received far more than the requisite one month's notice pay.
- e. That although it was agreed that this court has jurisdiction to entertain the action on the basis of the plaintiff's claim as pleaded (being a contractual one), this court is bound to find that the claim is bad in law, and that the plaintiff's case (as crystalised only after a plethora of pleadings) is that the defendant failed to permit him to appeal internally against his dismissal. This being an allegation that the dismissal was procedurally unfair, it ought to have been dealt with in the labour court under the LRA, which provides a complete and exclusive remedy in the circumstances.

The principles regarding waiver as applied to the facts

- [29] The effect of the waiver of a right is to extinguish that right and the concomitant obligation. Waiver is a question of fact (*Laws v Rutherford* 1924 AD 261).
- [30] It is indeed so that the onus rests on the party relying on waiver (in this case the defendant) to allege and prove such waiver on a balance of probabilities (*Borstlap v Spangenberg* 1974 (3) SA 695 (A)), and that clear evidence of waiver is required (*Feinstein v Niggli* 1981 (2) SA 684 (A)).
- [31] In doing so the defendant must allege and prove that a decision has been conveyed to it that the plaintiff has abandoned the right which is being asserted against the defendant (*Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA)). The decision to abandon can either be express or implied. An implied abandonment is proved by conduct plainly inconsistent with the intention to enforce the right relied upon (*Hepner v Roodepoort-Maraiburg Town Council* 1962 (4) SA 772 (A)). It is furthermore incumbent on the defendant to plead and to prove that, when the waiver took place, the plaintiff had full knowledge of the right and elected to abandon it despite this knowledge (*Netlon Ltd v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 873-874). It has been held that an election generally involves a waiver. In other words, one right is waived when a party chooses to exercise another right which is inconsistent with the former (see *Administrator, Orange Free State v Mokopanele* [1990] ZASCA 69; 1990 (3) SA 780 (A)).
- [32] Having set forth the general principles applicable to waiver, it is necessary to consider them in the light of the pleadings and the undisputed facts before me.

- [33] It seems to me that the plaintiff, in pleading his case, elected to limit his claim to nothing more than one for specific performance for the payment of 22 months of a salary package, partly in terms of the employer's letter of appointment dated 12 February 2001. No degree of scrupulous perusal or enthusiastic attempts at interpretation can have the effect of elevating the claim to anything more than that. On the contrary, a first (and even subsequent) reading of the particulars of claim leaves the reader with the distinct impression that this is a situation where the employer has simply failed, neglected or refused to pay an employee for no reason whatsoever. That is what the claim says. Nothing more. There is no mention of a contract, a code of conduct that has not been adhered to or even the material fact that the employer has actually dismissed this employee.
- [34] It is only once the material facts of this matter are introduced by the employer in the plea and the further pleadings (instead of excepting or invoking any of the other appropriate rules of this court designed to deal with such a vague and embarrassing claim), that the suspicion that the plaintiff pleaded in this manner simply to expedite his matter before this court as opposed to utilising courts having exclusive labour law jurisdiction, is fortified.
- [35] Having said that, the employer has, on the pleadings, not only introduced the material pertaining to the plaintiff's dismissal and the common cause fact that the plaintiff, once his internal appeal had been launched, elected to take the matter on review before this court, but has also pleaded that the plaintiff, in doing so has "abandoned" or waived his internal appeal and has failed to pursue it.
- [36] This is of course very generous and helpful pleading on the defendant's part, particularly when the plaintiff is silent regarding these common cause problems which are clearly the true impediments to the payment of his salary.
- [37] It is common cause that the plaintiff, following upon a disciplinary enquiry, was dismissed on 7 December 2005 subject to his right to pursue an internal appeal against this dismissal to the defendant (which right the plaintiff set in motion), and that he was finally dismissed on 15 May 2006 after he had taken the original decision to dismiss him on review to this court. It is also significant that the plaintiff's present claim for his unpaid salary package (but not for reinstatement) was instituted immediately but only after he had withdrawn his review application in this court, having quietly endured (as an existing employee on his version) the non-payment of these benefits for just short of two years.
- [38] It is against this background that I have formulated the view that the answer to the question of whether the plaintiff waived his rights to payment of an unpaid salary package for 22 months (as this is all his claim is limited to) is capable of resolving this particular claim without having recourse to the numerous other contentions and alternative contentions raised (which in my view not only serve to obfuscate issues but are rather random considering the roots of and the grounds for this claim as described by the plaintiff in his particulars of claim).

[39] In considering whether the defendant has succeeded on proving waiver on a balance of probabilities, I am alive to the fact that the defendant did not call any witnesses at the trial. In making this determination it is accordingly necessary to consider any evidence on oath before me, as well as what is common cause on the pleadings.

The evidence on affidavit

[40] The evidence which I have before me on oath consists of the plaintiff's review affidavit and his viva voce evidence at this trial.

[41] The plaintiff made the following material averments (which I quote verbatim and which is partly repetitive) in his review affidavit:

'...The facts deposed to herein are within my personal knowledge and belief and I verily believe that they are both true and correct unless the contrary appears from the context...

The First Respondent is Dr Palmer E ... who dismissed me from my employ with the 4th Respondent (the Speaker)...

The above Honourable Court has jurisdiction to adjudicate this matter because: ...

- The First Respondent acted unlawfully in dismissing me and I seek to enforce my right to lawful, constitutional, procedurally fair and just administrative action; ...
- The entire subject matter of this application is a constitutional matter, having regard to the fact that the provisions of Section 33 of the Constitution of the Republic of South Africa of 1996 provide that I, and all persons, have the right to fair administrative action which is lawful, reasonable and procedurally fair, that constitutionally entrenched entitlement having been afforded further legislative effect by the provisions of the Promotion of Administrative Justice Act of 2000 ("PAJA")...
- I did not agree to private arbitration and insisted that the matter be dealt with in terms of the 4th Respondent's code of conduct...
- If the alleged offender is not satisfied with the finding or the disciplinary penalty/sentence/ action taken by the Secretariat with regards to the inefficiency or disciplinary enquiry, the alleged offender shall have the right to appeal against either of or both the finding and the disciplinary action to the Speaker of the Legislature, via the Secretary to the Legislature who must submit the reasons and grounds of appeal and all documents in relation thereto to the Speaker of the Legislature...
- I state in paragraph 4 of "LOM" "Appeal" that the appeal is premature, that I will be instituting these proceedings and that the appeal be dealt with in a manner that does not prejudice my right to review.
- A review is appropriate in this matter because:

- a. An appeal to the 4th Respondent arises only if there is a finding and decision of the Secretariat or a properly constituted body in terms of the code.

There is none in this case and the outcome concerned is simply a no decision, in view of the illegality thereof and I am seriously prejudiced thereby...

- b. The basis and core of my complaint is the illegality and fundamental irregularities of the proceedings embarked upon at the 4th Respondent and the 4th Respondent's appeal process is not sited to deal with that as they focus on the outcomes of the disciplinary process and not with the illegality of the process itself...
- c. A review to the above Honourable Court is fitting also because ... the Speaker is not going to attend thereto ... In essence that leaves me with no other authority to appeal to, even if an appeal was the appropriate step. Further and of importance in view of section 7(2) of PAJA, is whether or not I have internal remedy available or to exhaust before I approach the above Honorable court. In view of the above and what is relevant to this issue as said below, I believe I have no internal remedy in terms of the empowering provision. If the above Honorable Court should decide that I have internal remedy or mechanism to still exhaust, I respectfully allege that having regard to what has been set out in this affidavit, there are exceptional circumstances applicable in this matter, such as to exempt me from the obligation to exhaust any internal remedy, being in the interest of justice to do so...
- d. At any rate the core of my complaint, the illegality of the proceedings and results thereof, will not be dealt with in the 'appeal' ... let alone that an appeal is not appropriate where the very procedure is in issue and would be premature in the present circumstances as the legality or otherwise of the dismissal and all that relates to it must first be determined...
- e. At any rate Mr Nkwinti not being the Speaker of the Legislature has no authority in law to attend to the appeal even if it were to be held that an appeal is necessary...
- f. ...the purported appeal procedure has been frustrated and I have been denied that entitlement entirely. All the above necessitate a review by a Court of Law.'

The viva voce evidence on oath

- [42] The plaintiff testified that his appeal was delivered on 8 February 2006 and was accepted as a valid appeal, but that the employer had stopped his salary in January 2006 because he had noted an appeal. He had complained that this was not in the spirit of the Code and his salary was accordingly reinstated and duly paid on the 15th of every month from January to June 2006. Thereafter, and after the employer was of the view that he had abandoned his appeal, his salary package was no longer paid. During cross examination he stated that he had been "waiting" for eight years for his appeal. He was unable to state with any degree of clarity as to what genuine endeavours he resorted to, to take up the internal appeal again after he also withdrew his review in the high court. He was however, adamant that he always intended for his appeal to go on but that the "legal issues" raised on review, "should not be prejudiced" by the appeal. This, despite the fact that he had been advised that he was welcome to traverse

all issues (both substantive and procedural) at his “wide” appeal hearing.

[43] I do not intend repeating the correspondence between the parties referred to at paragraph 22 of this judgment. It is clear therefrom that the employer was at all material times intent on following the internal appeal procedure as prescribed in its Code, and that it was the stance of the plaintiff which eventually persuaded it that the plaintiff was not interested in pursuing the appeal, particularly in that the plaintiff had not indicated in his review application that he intended for his internal appeal to be held in “abeyance” pending the review outcome, but instead had stated (despite what is contained in correspondence

between the attorneys), the following on oath:

‘Further and of importance in view of section 7(2) of PAJA, is whether or not I have an internal remedy available or to exhaust before I approach the above Honourable Court. In view of the above and what is relevant to this issue as said below, I believe I have no internal remedy in terms of the empowering provision.’ (my emphasis)

[44] Section 7(2) of PAJA reads as follows:

‘(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph

(a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

[45] It is clear from the aforesaid that it was incumbent on the plaintiff to deal with his internal appeal first; alternatively to launch a substantive application for condonation before the reviewing court, failing which it was mandatory for the reviewing court to refer him back to exhaust his internal remedy no matter what he thought of it. The plaintiff herein not only elected (without this Court’s leave) not to exhaust his internal remedy, but he thereafter withdrew his review application in the absence of any ruling from this court as to whether his failure to pursue his internal appeal would be condoned.

[46] In all these circumstances I am of the view that the plaintiff’s own evidence on oath supports a finding of waiver on a balance of probabilities, and that the defendant succeeded in discharging this onus without having to call any witnesses. In my view the plaintiff’s affidavit supporting his review application clearly demonstrates his decision to abandon his right to an internal appeal, and is expressed in the review application in those very words. Even if it was not expressed in the review application, I am satisfied that the defendant has proved an implied abandonment by relying on the plaintiff’s conduct (which again is

common cause) of instituting review proceedings in this court in terms of PAJA. This is plainly inconsistent with an intention to enforce the right to an internal appeal on which the plaintiff rather curiously now relies, despite it not forming any part of the relief which he seeks, which is payment of a salary package for 22 months, and nothing more.

- [47] As is stated in *Makopanele* (supra), an election, such as the one expressly made by the plaintiff, generally involves a waiver in any event, particularly when one right (the right to an internal appeal with all its generous trimmings conveyed in writing which is not disputed) is waived in favour of another right (the right to high court review) which is inconsistent with the former in the sense that the former can never, under any circumstances in term of section 7 of PAJA be exercised after the latter. At best the former can be exercised as a result of an express referral back by the High Court, which point was never reached as a result of the plaintiff's

withdrawal of his review application.

- [48] To sum up, the plaintiff has sued for the non-payment of 22 instalments of what used to be his salary package. The defendant has successfully pleaded and proved by relying on the plaintiff's own evidence on oath, supported by what is common cause or not seriously disputed in the pleadings, that these benefits were lawfully terminated in June 2006 for the following reasons:

- a. The plaintiff was dismissed in December 2005 following the holding of a disciplinary enquiry.
- b. His salary package however, was not terminated pending the outcome of an internal appeal which he had instituted.
- c. In May 2006 his services and his salary package were finally terminated after he had abandoned his internal appeal and had instituted review proceedings in the High Court instead of exhausting his internal appeal remedy as provided for in the employer's code of conduct and in section 7 of PAJA.
- d. This abandonment constituted a waiver of his rights to prosecute his internal appeal, particularly in that he also abandoned his premature review thereafter and has in fact, made no attempt to prosecute the appeal to date.
- e. The plaintiff having abandoned his right to challenge his dismissal as provided for, has not only failed to make out a cause of action for the monetary relief claimed, but has no standing in law to prosecute this claim, and his claim falls to be dismissed.

- f. With respect to costs, it has been contended by the defendant that the plaintiff ought to be liable for the costs of two counsel. I do not intend making such an order. Any complexities which may have crept into this matter which have escalated to protracted pleadings and lengthy heads of argument may well have been avoided by invoking the uniform rules of this court to nip matters in the bud immediately after the delivery of particulars of claim which, on the face of it, are at the very least, vague and embarrassing.

[49] The order which I make is the following:

The plaintiff's claim is dismissed with costs.

I.T STRETCH

JUDGE OF THE HIGH COURT

13 May 2015

Plaintiff's counsel: Mr N Schultz Instructed by: Brown Braude & Vlok Attorneys C/o Squires Attorneys, King William's Town Ref: Mr C J Heunis Defendant's counsel: Mr Buchanan S.C with Mr Grogan Instructed by Wesley Pretorius & Associates Ref: Mr Pretorius/md/E111 C/o Smith Tabata Inc King William's Town

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