

SOUTH AFRICA / JUDGMENT

Nongogo v Khoza and Others

(J1550/2023)

[2024] ZALCJHB 13 (8 January 2024)

[2024] ZALCJHB 13

COURT

Labour Court Johannesburg

BEFORE

M B Mahalelo

CASE / FILE NUMBER

J1550/2023

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J 1550/2023

In

the matter between:

ANDILE
NONGOGO
Applicant
and
ERNEST
KHOZA First
Respondent
JULLIE
BEYA
N.O Second
Respondent
NCEBA
MAXWELL FUZANI N.O
Third Respondent
SIBONELO
CYRIL MADIBA N.O Fourth
Respondent
RESHMA
MATHURA N.O
Fifth Respondent

BAMANYE
MATIWANE N.O
Sixth
Respondent
LURANCE
VAN STARDEN N.O
Seventh Respondent
PUMELA
MSWELI N.O
Eighth
Respondent
LUCKY
MASUKU N.O
Ninth
Respondent
YONKE
TWANI N.O
Tenth Respondent
SANELE
ZONDI N.O
Eleventh
Respondent
NTOMBIZOZUKO
DYANI-MHANGO
Twelfth
Respondent
THE
MINISTER F HIGHER EDUCATION,
Thirteenth Respondent
HOUNARABLE
MINISTER BLADE NZIMANDE
NATIONAL
STUDENT FINANCIAL AID SCHEME
Fourteenth Respondent

Heard: 16 NOVEMBER
2023

Delivered: 8 JANUARY 2024. This judgment was delivered by
circulation to the parties' Legal representatives
by email. The
date of hand down is deemed to be 8 January 2024.

JUDGMENT

MAHALELO, AJ

Introduction

- [1] The applicant approached this court by way of urgency seeking a declaratory relief pertaining to the termination of his employment contract as well as his reinstatement to the position of the fourteenth respondent's CEO (NSFAS) which he occupied prior to the termination of his employment contract. He entered into a fixed term contract of employment with NSFAS on 16 November 2020. The contract of employment was to endure until 30 November 2025. The applicant also seeks other ancillary relief predicated upon the declaratory relief.

Brief

Facts

- [2] On 16 August 2023 the applicant received a letter from NSFAS's Board placing him on special leave on allegations of possible conflict of interest in the appointment of service providers for the direct payment of allowances of students. On the basis of these allegations the NSFAS Board appointed Advocate Ngcukaitobi SC through Werksmans Attorneys to conduct investigations into the allegations. On 25 August 2023 the applicant received an e-mail from the acting CEO of NSFAS stating that Werksmans Attorneys requested to engage with him. The applicant tendered his complete cooperation with investigations.
- [3] The investigation report was concluded in early October 2023. On the basis of the findings in the investigation report and the recommendations contained therein, on 17 October 2023, the applicant received a letter from the Board of NSFAS informing him as follows:

"Dear Mr. Andile Nongogo

NSFAS INVESTIGATION REPORT OUTCOME

"The investigation conducted by Werksmans Attorneys and advocate Temba Ngcukaitobi SC on behalf of the National Student Financial Aid Scheme (NSFAS) on allegations against you relating to bid number SCMNO22/2021, refers.

In a meeting held on 15 October 2023, Werksman's investigation report (the report) was presented to the Board. The Board adopted the report together with all its recommendations.

The Board resolved that, in view of the adverse findings made against you in the report, your employment with NSFAS should be terminated due to breach of trust. In light of the above, we hereby afford you an opportunity to make representations on why your employment with NSFAS should not be terminated. Your representations should be submitted by close of business on Monday 23 October 2023.”

- [4] The applicant through his appointed attorneys made representations why his employment contract should not be terminated. On 24 October 2023 he received a letter from NSFAS Board summarily terminating his employment contract with NSFAS.
- [5] The applicant launched this urgent application to declare the termination of his contract of employment and summary dismissal unlawful and invalid. The application was served on the respondents and all the necessary papers have been filed to enable the court to determine the application.
- [6] The applicant disavows reliance on the Labour Relations Act[1], (the LRA). He relies on a contractual term, not express but laden with interpretation disputes. The applicant seeks a final declaratory

relief that the decision summarily terminating his employment without a disciplinary hearing is in breach of his employment contract. He also seeks an order of specific performance in terms of section 77(A)(e) of the Basic Conditions of Employment Act[2] (BCEA) reinstating his services under the employment contract with immediate effect and that the Board Members of NSFAS be interdicted

and restrained from implementing the decision of 24 October 2023. The applicant also seeks an order striking out certain paragraphs of NSFAS Board members’ answering affidavit as being irrelevant to the claim brought.

- [7] The application is opposed by the Board Members of NSFAS who are the first to the twelfth respondents. They raised two preliminary points, namely lack of urgency and that specific performance should not be awarded as a remedy to the applicant. I addressed these preliminary points below.

Urgency

- [8] Rule 8(2) of the Rules for the Conduct of Proceedings in the Labour Court (the Rules), which governs urgent applications, provides as follows:

‘(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

[2] The affidavit in support of the application must also contain- (a) the reasons for urgency and why urgent relief is necessary; (b) the reasons why the requirements of the rules were not complied with, if that is the case; and (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.'

[9] In *Jiba v Minister: Department of Justice and Constitutional Development and Others*[3], this Court considered rule 8 and stated as follows:

'Rule 8 of the rules of this Court require a party seeking urgent relief to set out the reasons for urgency and why urgent relief is necessary. It is trite law that there are degrees of urgency. And the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[10] Urgency is not a matter to be glossed over[4]. An applicant is expected to go beyond an allegation of urgency. Even an allegation of an infringement of constitutional rights on its own does not render a matter urgent[5]. It is an absolute requirement to set forth the reason for claiming that substantial redress would not be possible other than via the urgent application[6].

[11] The applicant contends that NSFAS Board members should not be allowed to terminate his employment contract unilaterally and summarily without holding a disciplinary hearing against him, a right which is entrenched in his employment contract as read with the Disciplinary Policy and Code of Conduct. He contends that he would have no substantial recourse if the matter is not heard on an urgent basis as his reputation and character as a chartered accountant with SAICA will be tarnished beyond repair.

[12] He states that the harm that has ensued to him and his family will be exacerbated as the matter has been widely publicized and word of his termination is already in the media. He averred that the allegations against him are serious and must be properly tested without sole reliance being placed on the investigation report. He contends that he faces significant financial prejudice in that the loss of his income will impact on his ability to support his immediate and extended family and that his future earning capacity will be invariably tainted as he will not be able to procure alternative employment in circumstances where he has been found guilty of serious allegations without being afforded a disciplinary hearing as entrenched in his employment contract. The applicant submits that he has no alternative remedy.

[13] The matter before me is one of an alleged breach of a contract. The applicant does not seek any remedy provided for in the LRA.

In *Mahonono v National Heritage Council and another*[7] Lagrange J had this to say when dealing with urgency in the context of a breach of contract claim:

‘...Of course it also must not be forgotten that an order of specific performance for a material breach of contract is a remedy available

to a party to a contract, who is not obliged to simply sue for damages. When applied to an unlawful termination of employment, it requires the restoration of the actual employment relationship to what it was prior to the breach. The value of this remedy is naturally diluted if it is not sought as a matter of urgency. The timely availability of an order of specific performance as a remedy cannot be equated, except superficially, to an order of reinstatement under the LRA, which must be given effect to if the prerequisites of s 193(2) are met, even years after the dismissal.’

[14] In *Letsholonyane v Minister of Human Settlements and another*[8] this court held as follows:

“[30] When political heads are alleged to have subverted the rule of law, or undermined the express provisions of valid agreements or binding procedures, and unleashed lawlessness on the people they are supposed to lead, courts of law should hasten, when called upon, to intervene - on good cause. Failure by the courts in that situation would lead to a perpetuation of the lawlessness and embolden those in power to continue acting with impunity.

[31] The applicant is left with three years before she retires. A remedy in the ordinary course will in my view be diluted, and by the time the matter is finalised either at arbitration (with the possibility of review proceedings) for an unfair dismissal dispute, or at trial for a breach of contract claim (with the possibility of an appeal), the applicant would be close to reaching retirement or might have already reached retirement age. This case calls for the intervention of this Court at this stage, not later. Having considered the grounds of urgency and the factors above, I am satisfied the application is urgent.”

[15] Whether the matter should be treated as one of urgency is an issue to be decided on a case-by-case approach, taking into account the facts of each case. Based on the above authorities and the facts of the present matter I am satisfied that the matter is sufficiently urgent.

Application to strike out

[16] The applicant brought an application to strike out certain paragraphs of NSFAS’ answering affidavit on the basis that they are irrelevant to the claim brought under section 77(A)(e) of the BCEA and that he would be prejudiced if the application to strike out is not granted. The said paragraphs are 13 to 18, 23 to 25, 42 to 58, 60 to 66, 75, 125 to

129. The applicant alleges that NSFAS seeks to place facts before court concerning the investigation report prepared by Advocate Ngcukaitobi SC that have no bearing or relevance to the determination of whether he has a contractual right to a disciplinary hearing or not.

- [17] In opposing the strike out application, NSFAS avers that the paragraphs sought to be struck out are relevant for purposes of providing the court with the context within which the contract of employment was terminated, and that the context is particularly important because the applicant seeks the remedy of specific performance in the form of reinstatement.
- [18] The court may, on application, order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted. The test of irrelevance of the allegations forming the subject of the application is whether such allegations do not apply to the matter before court or do not contribute in any way to a decision of the matter. The evidence must relate to the cause of action or merits of the case.
- [19] In dealing with the approach as set out in above, the court in *Beinash v Wixley*[9] held that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First the matter sought to be struck out must be scandalous, vexatious or irrelevant. In the second place the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced. A decision whether or not to strike out is discretionary in nature.[10] In *Tshabalala-Msimang and another v Makhanya and others*[11] it was held that irrelevant matter contains allegations that do not apply to the matter in hand and do not contribute in any way or the other to a decision of such matter.
- [20] In this application, the applicant seeks the remedy of specific performance in the form of reinstatement. NSFAS Board opposes the

relief sought on the basis of the breakdown of the trust relationship between NSFAS and the applicant. The question of whether an employment trust relationship has broken down or not is a question of fact. The court can only properly exercise its discretion and decide that there is a breakdown in the trust relationship if the facts that prove such breakdown are alleged. NSFAS would be unable to show the inappropriateness of the remedy of specific performance unless the facts leading to the breakdown of the trust relationship and ultimately the termination of the employment contract are presented to the court. In the court's view the paragraphs identified are relevant to the determination of the remedy of specific performance in the form of reinstatement.

The merits

- [21] At the heart of the dispute lies the correct interpretation of the applicant's contract of employment and the circumstances under which his contract of employment may be summarily terminated. The applicant contends that he has a contractually entrenched right to a disciplinary hearing in terms of clauses 12.3 (a) and (b) of his employment contract. NSFAS Board members contend that the applicant's contract of employment was summarily terminated in terms of clauses 12.3 (b) and (c) which does not entitle him to a disciplinary hearing. They therefore deny that the applicant is contractually entitled to a disciplinary

hearing before his contract of employment could be terminated. I deal with these clauses below.

[22] The applicant contends that the usage of the word “and” at the end of clause 12.3 (a) indicates that clauses 12.3 (a) and (b) must be read together. According to the applicant, this means that the NSFAS board is entitled to terminate his employment agreement summarily in cases where it is found that the various declarations made by him were inaccurate or invalid and he is found guilty of an offence which justifies summary dismissal in accordance with the Disciplinary Code. The applicant avers that the reading together of the two clauses triggers compliance with the Disciplinary Code and accords with the plain reading of clause 12.3 of the employment contract. The applicant further contends that the Disciplinary Code is aimed at formalizing and standardizing the disciplinary process for all employees of NSFAS in accordance with the applicable legislation and state that:

‘42.1 All disciplinary action will comply with South African law, best practice and governance standards.

42.2 Disciplinary proceedings will be conducted apply natural justice and fair process meaning,

42.2.1 Before a decision is taken, the employee is fully informed of the case against him and has a proper opportunity and time to present their case.

42.2.2 The NSFAS disciplinary chairperson will be independent and have no personal interest in the outcome of the disciplinary case, and

42.2.3 The process must be seen to be unbiased, open and honest investigations conducted without prejudice.’

[23] The applicant furthermore contends that he has a contractually entrenched right to a disciplinary hearing in accordance with clauses 4, 5.1, 5.2, 5.7, 5.8, 5.9, 5.12 and 5.13 of the Disciplinary Code by virtue of clause 12.3

(a) and (b) of his employment contract. I have already stated some of the clauses above. For the sake of completeness, the following clauses are relevant:

“Principles

Principles to be adhered to in this policy:

4.1

4.2

4.3 All disciplinary actions will be confidential and fair and will be documented and trackable.

4.4 All disciplinary actions will be expedited to minimize negative emotional impact on employees.

4.5 All internal disciplinary processes will be conducted independent of any concurrent criminal and or civil actions.

4.6 The NSFAS may apply sanctions having regard to the seriousness of the offence.

4.7 Discipline is a management function and responsibility.

4.8 Correction, not punishment, is the objective. However, serious breaches could result in dismissal.

5. Policy Provisions

5.1 Investigation of an Alleged Offence

5.1.1 All line managers have a responsibility to investigate allegations of misconduct before disciplinary action is taken and to advise the employee accused of misconduct as a courtesy.

5.1.2 The NSFAS may elect to appoint an internal investigation officer to investigate any allegations of misconduct against any employee.

5.1.3 Where the alleged offence is of a criminal nature, the NSFAS reserves the right to report the matter to the South African Police Service.

5.1.4 The purpose of the investigation is to gather information to determine whether there are sufficient grounds for a charge of misconduct.

5.1.5 The outcome of the investigation must be handed to Human Resources who must engage with the NSFAS management to take the final decision on whether the disciplinary charges would be initiated.

5.1.6 employee is allowed to hinder the investigation.

5.1.7 the internal investigations uncover potential criminal offences? The NSFAS reserves the right to refer the matter to the South African police services.

5.2 Informal Discipline

Informal discipline seeks to correct behavior rather than punish the behavior or conduct.

Informal discipline will be applied in circumstances where the employee has been coached by their line manager, and may have been issued with a verbal warning, written warning and /or final written warning to correct the behavior.

5.7 Disciplinary Hearing

5.7.1 All gross and repetitive offences, misconducts and poor performance matters can lead to a disciplinary hearing. The NSFAS must issue the employee with a notice to attend a disciplinary hearing to make the employee aware of the process being initiated against them.

5.7.2 The employee must be notified of the date, time and place of the hearing, advised of charges and their rights under South African law.

5.7.3 The employee must be allowed seven (7) working days to prepare a response to the charges.

5.7.4 should the employee require more time to respond to the charges they may ask Human Resources to defer their hearing for a further five (5) working days.

5.7.5 The employee may be represented only by a union representative or a fellow employee. External legal representation or personal representation is not allowed.'

[24] The applicant alleges that as the word "and" is included between clauses 12.3 (a) and 12.3 (b) summary dismissal is only appropriate when the elements of both clauses are met. The applicant contends that in both these instances the requirement for a disciplinary hearing applies before the applicant's contract may be summarily terminated as the reading together of those clauses trigger compliance with the Disciplinary Code. The applicant also relies on the following clauses in the Disciplinary Code to assert a right to a disciplinary hearing:

[25] Clause 4.7 states that: "discipline is a management function and responsibility". Clause 5.1.1 which states that: "all line managers have a responsibility to investigate allegations of misconduct before disciplinary action is taken and to advise the employee accused of misconduct as a courtesy".

[26] Clause 5.1.5 which indicates that: "the outcome of the investigation must be handed to Human Resources, who must engage with the NSFAS management to take the final decision on whether the disciplinary charges will be initiated".

[27] Clause

5. 7.5 which states that "the employee may be represented only by a union representative or a fellow employee. External legal representation or personal representation is not allowed".

[28] Clause 5.9 which requires that the human resources manager must submit a report to the CEO for consideration and ratification.

[29] On the other hand, the NSFAS Board members contend that the applicant's contract of employment was terminated on the basis of clauses 12.3

(b) and (c) and on a proper construction of the clauses the applicant is not entitled to a disciplinary hearing before his contract of employment is terminated. According to NSFAS Board by reference to the grammatical language, the context and purpose of clause 12.3, the NSFAS Board is entitled to summarily dismiss the CEO if found guilty of an offence listed in the Disciplinary Policy, which entitles the employer to dismiss an employee. The NSFAS Board submitted that in terms of the Disciplinary Policy, one of the grounds which warrants dismissal is gross dereliction of duties, acting outside of delegated authority, fraud or corruption, and serious cases of willful or negligent loss.

[30] Accordingly, so argued NSFAS Board clause 12.3 (b) and (c) do not incorporate a disciplinary hearing, on the contrary, it identifies the reasons which justify a summary dismissal. NSFAS Board members contend that clause 12.3 does not find a case to demand a disciplinary hearing. Moreover, the Board of NSFAS retains the power to dismiss for any other offence provided in the list which justifies summary dismissal. They state that the difference between 12.3

(b) and 12.3 (c) is that under (b), summary dismissal is for offences which are listed and justify some other dismissal, whereas under (c) any dismissible offence listed in the Code of Conduct justifies some other dismissal. In this case, some other dismissal is on the basis of both subclauses (b) and (c). The NSFAS Board members further contended that, even if it were to be accepted that the disciplinary policy was applicable to the applicant's contract, the disciplinary policy does not make a formal disciplinary hearing compulsory.

[31] In interpreting the applicant's contract of employment, it is crucial to have regard to the law on interpretation of contracts as laid down by the Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[12]. What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of

the legislature or the parties to a contract only by reference to the plain meaning of words with a deferential nod, if necessary, in the direction of the Oxford English Dictionary, as was said at paragraph 18:

'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 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... 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...'

[32] And further at paragraph 26:

'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent

purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[33] The interpretation process as already said requires a consideration of a document as a whole and not just one or two clauses. An

interpretation exercise is therefore the sole purpose of establishing the intentin of the parties.

[34] Clause 12 of the applicant's contract of employment stipulates the terms on which the contract may be summarily terminated. It reads as follows:

'12. Termination of employment

12.1 Each party is entitled to terminate this agreement by giving a minimum of three (3) calendar months' notice, in case of a:

- (a) Resignation, or
- (b) Early contract termination by agreement.

12.2 The employer will be entitled to terminate this agreement by giving a minimum of one (1) months' notice in accordance with the provisions of the Disciplinary Code in instances of:

- (a) Poor performance,
- (b) Incapacity ill health

12.3 The NSFAS Board/ Administrator is entitled to terminate this agreement summarily in the case where:

- (a) it is found that the various declarations of the Chief Executive Officer were inaccurate or invalid, and
- (b) The Chief Executive Officer is found guilty of an offence which justifies a summary dismissal in accordance with the Disciplinary Code.
- (c) Any other dismissible offence is applicable and provided for in the Code of Conduct.

[35] It is clauses 12.3 (a) and (b) which the applicant reads together with the Disciplinary Code and Code of Conduct which are said to find a right to a disciplinary hearing. The respondents contended that the termination of the applicant's employment contract was done in terms of clause 12.3 (b) and (c) which entitled the board to summarily terminate the employment contract without affording the applicant a disciplinary hearing.

[36] In *Old Mutual Limited and Others v Moyo and Another*[13] (Old Mutual) the appeal arose as a result of Old Mutual's termination of Mr Moyo's contract of employment in terms of clause 24.1, which provided that either party may, on six months' notice, terminate the agreement. The Full Bench on appeal held that:

'[59] It seems to me, with respect, that despite Mr Moyo's express disavowal of any reliance on his rights under the LRA, the court a quo viewed the interdict application through a labour-law prism, i.e. the perceived unfairness of Old Mutual having raised allegations of a conflict of interest and misconduct on the part of Mr Moyo, and then proceeding instead to terminate the employment contract on notice in terms of clause 24.1.1 without first affording him a hearing before the termination. However, there is no such self-standing common-law right to fairness in employment contracts. A right to be treated fairly when a contract is terminated only exists if it is expressly or impliedly incorporated in the contract.

[60] In *South African Maritime Safety Authority v McKenzie* 2010

(3) SA 601 (SCA) paragraphs 32-33 and 55-58, the Supreme Court of Appeal had occasion to consider a contract of employment which provided for termination on notice. Wallis AJA held that a right to be treated fairly upon termination could only be held to exist if it is expressly or impliedly incorporated in the contract and that such a term should not be imported into a contract by developing the common law. It was held that the contract in question had been lawfully terminated on notice and there was no requirement for fairness, expressly or impliedly, incorporated into the contract.

[61] In *Transman (Pty) Ltd v Dick and another* 2009

(4) SA 22 (SCA); [2009] 7 BLLR 629 (SCA) para 18, any reliance on the LRA was also abandoned. It was argued that the employee nevertheless was entitled to a hearing before the termination of his employment contract and that such entitlement arose from an implied term of the contract. But Jafta JA held that there was a duty on him "not only to plead the contractual claim but also to prove facts from which the contended tacit term could be inferred", which "he has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment". Accordingly, so it was held, "the court below erred in assuming that his employment contract "was subject to an implied term that he would be afforded a fair hearing before he was dismissed".

[62] No implied term of fairness has been pleaded in Mr Moyo's founding affidavit. Had he intended to rely upon such a term, it was his duty not only to plead the

contractual term, but also to establish facts from which such a term could be inferred. The court a quo, in my respectful view, erred insofar as it might have assumed that the contract of employment was subject to an implied term that Mr Moyo would be afforded a hearing before the employment contract was terminated by providing six months' notice to that effect. The questions whether Old Mutual was contractually entitled to invoke the no-fault termination on

six months' notice provision of the employment contract (clause 24.1.1) as it did, and whether clause 25.1.1 expressly affords Mr Moyo a right to a prior internal disciplinary enquiry or a pre-dismissal arbitration before the invocation of the no-fault termination, as I have mentioned, depend on an interpretation of the employment contract, to which I now turn.'

Analysis

and conclusion

[37] Clause 1 of the Disciplinary Policy makes it clear that it governs, formalises and standardizes the disciplinary process for all

employees of NSFAS, and that it is designed to enforce standards of conduct within NSFAS and ensure that all employees are treated fairly and consistently. However, in my view, there seems to be a conflict between the Disciplinary Code and the contract of employment in that Clause 5.1.1 of the disciplinary code states that: "all line managers have a responsibility to investigate allegations of misconduct before disciplinary action is taken and to advise the employee accused of misconduct as a courtesy". The CEO does not have a line manager. To allege anything else would be to read in what is not stated in the Disciplinary Policy. Clause 5.1.5 indicates that: "the outcome of the investigation must be handed to Human Resources, who must engage with the NSFAS management to take the final decision on whether the disciplinary charges will be initiated". In my view the CEO could not possibly be investigated by the Human Resources department which reports to him.

Clause

5. 7.5 states that "the employee may be represented only by a union representative or a fellow employee. External legal representation or personal representation is not allowed". The applicant acknowledged in his founding affidavit that he was permitted to have legal representation. This on its own indicates

that the applicant was not subject to the disciplinary policy. One can hardly envisage how the CEO could only be represented by a fellow employee, considering the seniority of his position. It goes without saying that the CEO could not have been represented by a union representative. Clause 5.9 requires that the "Human Resources Manager must submit a report to the CEO for consideration and ratification". It would be highly irregular that the Human Resources Manager would submit a report to the CEO about the CEO sanction.

[38] The simple text of the Disciplinary Policy and the applicant's contract of employment in my view shows that the applicant was never intended to be a subject of the disciplinary policy. The CEO cannot be disciplined by management. He may only be disciplined by the Board, as the powers to appoint and dismiss him lies solely with the Board. This on its own goes to show that the procedures set out in the Disciplinary Policy do not make any provision for a disciplinary process in relation to a CEO. The plain reading of the contract of employment also makes it clear that the Disciplinary Code is not specifically incorporated into the

applicant's contract of employment.

[39] In any event, even if it is to be accepted that the Disciplinary Policy and Code is applicable to the applicant's contract of employment the Disciplinary Policy does not make a formal disciplinary hearing compulsory. Clause 2 of the Disciplinary Policy,

which provides for the scope of the disciplinary policy, indicates that the policy applies for managing discipline and where possible, initiating corrective or disciplinary action. The clause also lists behaviour and circumstances that may require disciplinary action.

[40] The use of the word "where possible" and "may" does not make it compulsory for NSFAS to take disciplinary action in circumstances that are listed therein. Clause 5.1.2 of the Disciplinary Policy also states that NSFAS may elect to appoint an internal investigation officer to investigate any allegation of misconduct against any employee. Once again, the use of the word "may" indicate that the provisions of the disciplinary policy are not peremptory.

[41] Clause 5.7.1 states that all gross and repetitive offences, misconduct and poor performance matters can lead to a disciplinary hearing. Again, the use of the word "can" indicate that it is not peremptory for NSFAS to conduct a disciplinary hearing. It is therefore clear that the plain language of the applicant's contract of employment does not make a disciplinary hearing compulsory. The NSFAS contended that the applicant's contract was terminated in accordance with clauses 12.3(b) and (c) and that the interpretation of these clauses do not entitle the applicant a formal disciplinary

hearing before summary dismissal. The context of the contract and the Disciplinary Policy in the court's view supports the interpretation adopted by the NSFAS Board members. The applicant has therefore failed to make out a case for the relief it seeks in the notice of motion. Given the view I take at the end it is unnecessary to deal with the question of specific performance which is in any event discretionary.

Costs

[42] The last issue to decide is the question of costs. Both parties asked for costs to be awarded on a punitive scale. This court has a wide discretion in respect of costs, considering the requirements of the law and fairness. In this court the principle that costs follow the result does not always find application. This was confirmed in *Zungu v Premier of KZN and Others*.

[14] In this case the Constitutional Court stressed that the court should seek to strike a balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and on the other hand allowing those parties to bring to this court cases that should not have been brought to court in the first place.

[43] The present case is a case where the court has to strike a balance considering the requirements of fairness and the law.

[44] The general accepted purpose of awarding costs is to indemnify the successful party for the expenses he/she had been put through by being compelled to initiate or defend litigation. In casu, it is my considered view that the application to strike out certain paragraphs in the respondents' answering affidavit was unnecessary and meritless. The applicant should therefore be ordered to pay the costs of that application. As to the main application, having considered the above stated principles regarding the award of costs in this court it is only fair and equitable that I make no order as to costs.

[45] In the premise the following order is made:

Order

1. The applicant's non-compliance with the rules of this court is condoned, and this application is heard as one of urgency in terms of Rule 8 of the rules of this Court.
2. Application to strike out certain paragraphs in the answering affidavit is dismissed with costs.
3. The main application is dismissed with no order as to costs.

M. B. Mahalelo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate Terry Motau SC

Advocate Ziyaad Navsa

Instructed by : Victor Nkhwashu Attorneys Inc

For the Respondent : Advocate Nazeer Cassim SC

Advocate Zaryl Manentsa

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[1] No. 66 of 1995, as amended.

[2] No. 75 of 1997.

[3]

(2010) 31 ILJ 112 (LC) at para 18.

[4] See: *Hultzer v Standard Bank of SA (Pty) Ltd*

(1999) 20 ILJ 1806 (LC) at 1809: 'The court will, however, only grant such relief where an applicant is able to persuade the court that extremely cogent grounds for urgency exist.'

[5] See: *Moyane v Ramaphosa and Others*

[2019] 1 All SA 718 (GP)

[6] See: *Mokoena v West Rand District Municipality and Others* (39460/19) [2019] ZAGPJHC 477 (10 December 2019) at para 32.

[7] (2022) 43 ILJ 2335 (LC) at para 24.

[8]

(2023) 44 ILJ 1740 (LC) at para 30.

[9] 1997 (3) SA 721 (SCA).

[10] See: *Stephen v De Wet* 1920 AD 279.

[11] 2008 (3) BCLR 338 (W).

[12] 2012 (4) SA 593 (SCA).

[13]

[2020] 4 BLLR 401 (GJ) at paras 59 - 62.

[14]

(2018) 39 ILJ 532 (CC)

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