IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 21151/2018

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

19-APRIL-2018 .....
DATE

..... 19/4/18
SIGNATURE

In the matter between:

THANDILE GUBEVU Applicant

and

NATIONAL CREDIT REGULATOR Respondent

Dates of Hearing : 11 April 2018
Date of Judgment : 19 April 2018

JUDGMENT

MANAMELA, AJ

Introduction

[1] The applicant was employed as a research and special projects consultant of the respondent on a permanent basis in terms of a written contract of employment until 02 March 2018, when he was dismissed. The respondent had subjected the applicant to a disciplinary enquiry whereat he was found not guilty by an independent chairperson, but the respondent substituted this finding to a finding of guilty. The respondent contends its policy grants it the prerogative not to be bound by the outcome of a disciplinary enquiry, be it finding of guilt (or the absence thereof) and sanction. The applicant disputes the respondent's interpretation of the policy and now seeks relief in terms whereof the respondent is directed to comply with and give effect to its internal disciplinary policy, by not interfering with the outcome of a disciplinary process and reinstate the applicant.

[2] It is contended that this matter does not concern a traditional labour dispute, although the underlying facts may in addition support a claim of unfair dismissal before the Commission for Conciliation, Mediation and Arbitration (the CCMA) or the Labour Court. The applicant submits that this Court has jurisdiction to order specific performance regarding contracts of employment. Other than the determination to be made about the main issue, there are issues relating to the jurisdiction of this Court and urgency of the matter, which will be dealt with first. The latter issue will only be dealt with for record purposes, as I made an extemporaneous ruling in favour of the applicant on urgency.

[3] This matter was heard in the urgent court on 11 April 2017. Mr FC Lamprecht appeared for the applicant, whereas Mr A Redding SC appeared for the respondent. I reserved this

judgment after listening to oral submissions by counsel and, also, have had the benefit of written argument, for which I reiterate my gratitude to counsel.

[4] The main issue for determination in this matter, as stated above, is whether, in terms of the applicable disciplinary policy, the respondent (as the employer) has the right to interfere with a finding made by an independent chairperson in a disciplinary enquiry, particularly a finding of no guilt on the part of the applicant, as an employee. However, there are other preliminary issues requiring the attention of this Court before attention is given to the aforementioned main issue. The other issues to be dealt with, in no particular order are the following: jurisdiction of this Court to determine what, at first glance, appears to be an unfair dismissal claim; resolution of which version of the disciplinary policy of the respondent finds application, and, consequently, whether there is a dispute of fact due to the lack of consensus on the applicable disciplinary policy. As stated above, I will also reflect brief reasons for holding that the matter is urgent. All these issues will be dealt with after a brief narration of the relevant background to the matter significantly comprising the common cause facts.

Relevant brief background

[5] As stated above, the applicant was employed on a permanent basis as a research and special projects consultant of the respondent until 02 March 2018, when he was dismissed by the respondent. The applicant's employment was in terms of a written contract of employment entered into between the parties on 05 February 2012.

[6] In terms of clause 13 of the applicant's contract of employment, "any applicable written policies, procedures or the like of the [respondent] as amended from time to time (including but not limited to the [respondent's] HR Policies including its Disciplinary Policies and Procedures)" constitute the whole agreement between the parties.[1]

[7] The applicant was subjected to a disciplinary enquiry held on 25 November 2017 in respect of three charges brought against him by the respondent. Aspects relating to the nature and extent of the charges are not relevant for current purposes. At the end of the disciplinary enquiry the chairperson, independently appointed in respect of the disciplinary enquiry, found the applicant not guilty on all three charges and concluded his or her detailed report with the following:

> "**Finding:**
>
> 20.1 Having determined that the employee is not guilty on all charges, I recommend that the suspension be uplifted and the employee returns to work with the immediate effect."[2]

[8] Following the disciplinary enquiry, and on 23 January 2018, the respondent through the office of its deputy chief executive officer, Mr Obed Tongoane addressed a letter to the applicant, whose material part reads:

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[1] See annexure "FA1" to the founding affidavit on indexed p 28.
[2] See par 20.1 of annexure "FA3" to the founding affidavit on indexed p 105.

"1. The Executive Committee has considered the recommendations by the Chairperson of the disciplinary enquiry as well as the reasons for finding you not guilty of the charges levelled against you.

2. In accordance with the HR Policy, the EXCO is required to consider/evaluate the recommendations and take a decision it deems appropriate.

3. The Exco is of the view that the Chairperson, in arriving at the judgement erred, both in law and factually.

4. You are therefore requested to provide reasons in writing as to why the NCR should not reject/disagree with the chairperson's recommendations. Your representations are to reach the NCR offices by the 29th January 2018."[3]

[underlining added for emphasis]

[9] On 29 January 2018, the applicant furnished the representations as requested by the respondent. There was a further exchange of correspondences, until in a letter dated 02 March 2018, the respondent advised the applicant that "the chairperson's decision of not founding [sic] you guilty is overturned and replaced with guilty on all three charges" and the respondent summarily dismissed the applicant.[4]

[10] On 05 March 2018, the applicant's attorneys of record addressed a letter to the respondent requesting a reversal of the summary dismissal by not later than 07 March 2018, but no response came forth. A further letter was addressed by the applicant to the respondent

[3] See annexure "FA4" to the founding affidavit on indexed p 106.
[4] See pars 14 and 19 of annexure "FA8" to the founding affidavit on indexed p 113.

demanding reinstatement by 22 March 2018, which was also met with silence. The applicant issued this application on 22 March 2018.

Urgency

[11] The applicant submitted that the urgency in this matter is partly based on commercial considerations and primarily based on considerations relating to the well-being or best interests of his four minor children, including one child who is at university. On the other hand, the respondent contends that the grounds for urgency as given by the applicant, which include economic hardship upon his family and himself cannot serve as a basis for urgency or for foregoing adequate alternative relief in the form of access to the CCMA and consequently the Labour Court. It is also contended that the applicant has been aware, as far back as 23 January 2018, that the respondent was considering rejecting the findings and recommendations of the disciplinary enquiry ought to have acted sooner than he did to launch this urgent application.

[12] The applicant relied on the decision of *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd*[5] in which Goldstone J found that urgency on commercial interests may justify the invocation of rule 6(12) of the Uniform Rules, no less than any other interest, as each case must depend on its own circumstances. This *dictum* was applied in this Division and elsewhere.[6] I also consider it persuasive authority in this regard. I

[5] [1982] 3 All SA 679 (W).

[6] See *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 213E-F; and reported decisions of this Division in the matter of between *National Airways Corporation (Pty) Ltd v Beagles Run Investments 25 CC*, under case number 35554/2009 per Emerson AJ, handed down on 17 August 2009 at par 12, the matter of *South African National Roads Agency Ltd v Chief Registrar of Deeds and Others*, case number 9447/2009 *per Makgoba J (as he then was) handed down on 31 March 2009.*

made an extemporaneous ruling that the matter was urgent based on my considerations of the submissions made on behalf of the applicant, including that the applicant appeared to have a good case which arose from an apparent material breach of his employment contract which impacted on his ability to provide for his minor children and himself.

Jurisdiction

[13] The applicant says that this Court has jurisdiction by virtue of section 77(3)[7] of the Basic Conditions of Employment Act 75 of 1997 (the BCEA). Section 77(3) of the BCEA grants concurrent jurisdiction to this Court and the Labour Court to hear and determine any matter concerning a contract of employment, the applicant submits.

[14] The respondent submits that the true characterisation of the dispute is that it is unfair dismissal dispute. This, according to the respondent, is borne by the conclusions reached in the founding affidavit, as well as references in the applicant's letters to breach of applicant's constitutional rights and that the respondent's conduct is an act of unfair labour practice. In *Gcaba v Minister for Safety and Security*,[8] the Constitutional Court explained that the nature of issues raised in proceedings must be determined on the basis of the pleadings and not on the substantive merits of the case. This principle from *Gcaba* was applied by the Supreme Court of Appeal in the decision of *Greater Tzaneen Municipality v Le Grange*.[9] *Le Grange*, also concerned with relief geared towards specific performance based on employment contract after

[7] Section 77(3) of the BCEA reads: "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."
[8] 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).
[9] (685/2013) [2015] ZASCA 17 (18 March 2015).

rectification of its terms. Therefore, for purposes of determining jurisdiction of this Court, only the applicant's case as pleaded in the founding papers will be considered and not the substantive merits thereof.

[15] However, the question still remains as to whether this Court is the competent forum to hear this matter. In *Chirwa v Transnet Ltd and Others,*[10] the court dealt with the issue of whether or not a dismissed employee may have separate causes of action arising from a dismissal by an employer. *Chirwa* dealt with a public sector employee who approached the High Court seeking relief for the review and setting aside of her dismissal and reinstatement on the ground that the decision was a violation of her right to just administrative action, as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and on a claim for unfair dismissal based on section 188 of the Labour Relations Act 66 of 1995 (the LRA. She argued that she had two causes of action in terms of the LRA and one flowing from the provisions of the Constitution of the Republic of South Africa, 1996, read with the provisions of PAJA. The High Court granted an order in favour, but the Supreme Court of Appeal disagreed. In the decision of the *Makhanya v University of Zululand,*[11] the Supreme Court of Appeal was unequivocal about this and, among others, it stated that:

> "The claim that was pursued before the CCMA was a claim to enforce the right of an employee not to be dismissed unfairly (what I have called an LRA right) which is enforceable only in a labour forum. The claim in this case asserts for enforcement a right emanating from the common law to exact performance of a contract. It is plain that the High Courts have the power to consider claims for the enforcement of employment contracts (as does the Labour Court)."[12]

[10] 2008 (4) SA 367 CC.
[11] 2010 (1) SA 62 (SCA).
[12] See *Makhanya* at par [59].

[16] Th decision of *Makhanya* was relied upon in *Le Grange*. There are other authorities which held that an employee may potentially have three separate claims arising from the termination of his or her contract of employment, two of which may arise from the infringement of his or her LRA right and infringement of his or her common-law right.[13] On the basis of the above-mentioned authorities, I find that this Court has jurisdiction to determine the applicant's claim.

Applicant's case

[17] As stated above, clause 13 of the contract of employment requires that the applicant's contract of employment be read with the written policies and procedures of the respondent. The applicant says a hard copy of the disciplinary policy as contained in annexure "FA2" was handed to him by the HR manager, Miss Maria Matlosa, approximately one week before his disciplinary hearing was held. He made use of the policy in this document given to him in preparation for and when conducting his defence in the disciplinary enquiry. But, the respondent denies that the HR Manager handed over the alleged disciplinary policy document and, instead, says that its current disciplinary policy is contained in annexure "JM2" to its answering affidavit. According to the respondent, the lack of consensus as to the applicable disciplinary policy suggests the existence of a dispute of fact. I will revert to this below.

[13] See the unreported decision of the Labour Court in *Leon de Lange v Kosmosdal Ext 61 & Ext 62 Homeowners Association Brooklands 3 Lifestyle Estate*, LCJHB Case Number: JS172/15, *per* Van Niekerk J, dated 05 April 2016.; *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 I LJ 2407 (SCA); 2002 (1) SA 49 (SCA). *Fedlife* was also followed in another decision of the Supreme Court of Appeal in *Denel (Pty) Ltd v Vorster* 2004 (4) SA 481 (SCA); (2004) 25 ILJ 659 (SCA).

[18] Although reliant on annexure "FA2", the applicant submits that in terms of the disciplinary policy the respondent was not entitled to replace a "not guilty finding" by the independent chairperson with a "guilty finding", as fully explained above. The respondent has reciprocal obligations arising from the contract of employment and is bound to honour duties imposed by its policies and procedures, including in respect of disciplinary procedures. Absent compliance with its policies and procedures, the applicant is entitled to seek specific performance directing the respondent to give effect to the terms of the employment contract.

Respondent's case

[19] Further from what has already been stated above, the respondent contends that the determination of whether or not its conduct was proper depends upon the nature and extent of the delegation of the powers to determine guilt and sanction to the disciplinary chairperson. It is argued that in cases where the employer has delegated its powers to dismiss to the chairperson of the disciplinary hearing then the disciplinary sanction cannot be revisited. But, where the power delegated to the chairperson of the disciplinary hearing is only advisory then the employer can change the decision of the chairperson,[14] subject to the obligation of procedural fairness to hear the employee before making the decision. The external chairperson is only entitled to issue a recommendation and the final decision is the prerogative of the respondent's chief executive officer, as the accounting authority. For, the authority given to the person acting as the chairperson of the disciplinary enquiry is not authority to make a final decision, but authority only to make recommendations, therefore, the respondent is not obliged to follow the decision or recommendations of the chairperson.

[14] See *Central University of Technology v Kholoane and Others* (2017) 38 ILJ 167 (LC).

[20] Apart from the decision of *Central University of Technology v Kholoane and Others*,[15] the respondent's counsel referred me to the decisions of *South African Revenue Service v CCMA and Others*[16] and *South African Revenue Service v CCMA and Others*[17] as authority for the aforementioned viewpoint. Neither of these decisions deal with the powers to replace a not guilty with a guilty finding by the employer, but only the powers of the employer to deviate from the sanction recommended by the chairperson of the disciplinary hearing. There is logic in this and I will revert to it below.

[21] The respondent further contends that it did not breach the contract as it was entitled to terminate the contract. The applicant had an indefinite contract of employment, which ran from month to month and therefore same could be terminated by the employer on notice, without reasons or cause. A monthly contract may be terminated on a month's notice and therefore notice was given on 02 March 2018 and therefore the contract terminated on 02 April 2018, even if the respondent purported to terminate the applicant's employment summarily. I hasten to point out that I find this the latter submissions to the misplaced and therefore offering no assistance to the issues to be determined in this matter and the reasons for this will become clearer below.

Dispute of fact: Which respondent's policy on disciplinary procedures is applicable?

[22] As stated above, the parties do not agree on which disciplinary policy (between "FA2" and "JM2") was applied in the disciplinary enquiry and, therefore, applicable for determination

[15] *Ibid.*
[16] (2014) 35 ILJ 656 (LAC).
[17] (2016) 37 ILJ 655 (LAC).

to be made in this matter. The respondent submits that this is suggestive of existence of a dispute of fact.

[23] According to the applicant the applicable disciplinary policy is contained in annexure "FA2" to his founding papers. As stated above, the applicant says this policy was handed to him by the respondent's human resources manager during November 2017, just before the commencement of the dispute herein which was held on 23 November 2017. He used this policy during his disciplinary enquiry. The material clause, for current purposes, of "FA2" reads as follows:

> "The Chairperson then considers all the evidence placed before him/her taking into account all the facts, the circumstances surrounding the case and the reliability of the evidence. The Chairperson then must make a decision as to the employee's guilt or otherwise and this decision must be on **a balance of probabilities.**
>
> The Chairperson then reconvenes the hearing and informs the employee of his/her decision. IF THE EMPLOYEE IS FOUND GUILTY, then the Chairperson must *afford the Employer and Employee the opportunity to present mitigating and/or aggravating factors.*
>
> *The hearing is again adjourned to allow the Chairperson to consider the appropriate sanction for recommendation to the Executive Committee.*
>
> ...
>
> After a decision has been reached, the hearing must be reconvened and the Chairperson must inform the *parties* of the recommended sanction.
>
> *A Chairperson appointed to preside over a disciplinary enquiry is only allowed to make recommendations to the Executive Committee of the NCR.*

The final decision concerning the appropriate sanction to be imposed is the prerogative of the Executive Committee. This means that the Executive Committee has the right to concur and/or deviate from the Chairperson's recommendation."[18]

[underlining and italics added for emphasis]

[24] The respondent has a different version of the disciplinary policy and attached this as annexure "JM2" to its papers. The respondent says it was "JM 2" that was sent to the applicant by the HR manager and not "FA2" and that the applicant probably obtained the latter from the respondent's internal electronic network or intranet. The applicant says that the "JM2" was only sent to him by electronic mail on 01 February 2018 evidently long after the disciplinary enquiry. Of current material significance from "JM2" is following:

> "The Chairperson then considers all the evidence placed before him/her taking into account all the facts, the circumstances surrounding the case and the reliability of the evidence. The Chairperson then must make a decision as to the employee's guilt or otherwise and this decision must be on **a balance of probabilities.**
>
> The Chairperson then reconvenes the hearing and informs the employee of his/her decision. IF THE EMPLOYEE IS FOUND GUILTY, then the Chairperson must *ask for evidence in mitigation.*
>
> The hearing is again adjourned *and the chairperson must now recommend what disciplinary action is to be taken.*
>
> ...
>
> After a decision has been reached, the hearing must be reconvened and the Chairperson must inform the *employer* of the recommended sanction.

[18] See annexure "FA2" to the founding affidavit on indexed pp 46-47.

An external chairperson appointed by the NCR is only entitled to issue a recommendation. The final decision will be the prerogative of the CEO as Accounting Authority. However, the employee concerned is entitled to make representations prior to a decision to review is taken. An internal chairperson's decision will be final."

[underlining and italics added for emphasis]

[25] I compared the above quoted portions from "FA2" and "JM2" and the difference lies in the parts in italics. But, the two policies are significantly similar and, in my view, communicate the same message. I agree with the applicant that the deputy chief executive officer appears to have relied on the same policy as the applicant (i.e. "FA2") when communicating with the applicant post the disciplinary enquiry. Therefore, in my view, in all likelihood, the applicant was given the policy he relies on for his sentiments.

[26] But it is not necessary to make a final decision on this, as I hold the view that any differences between the two policies are not germane to the determination to be made in this matter. To me the one policy appears to be more detailed than the other, particularly as to the role of the disciplinary chairperson during the disciplinary enquiry and the prerogative of the chief executive officer of the respondent post the disciplinary enquiry. I turn, next, my attention to analysis of the submissions made on the merits.

Applicable legal principles (an analysis)

[27] The applicant's claim is for specific performance. According to *Amler's Precedents of Pleadings*[19] a party wishing to claim specific performance in terms of a contract must meet the following requirements:

> "(a) allege and prove the terms of the contract;
>
> (b) allege and prove compliance with any and antecedent or reciprocal obligation or tender to perform it fully;
>
> ...
>
> (c) allege non-performance by the defendant; or
>
> (d) claim specific performance."

[quoted without accompanying cited authorities]

[28] As stated above, the respondent's case is that it has not delegated, but retained the power to make the final decision in respect of the disciplinary enquiry of the applicant. It says that this applies to both the finding of guilt or not guilt, and the sanction to be imposed. In other words, it does not matter what happens during the disciplinary enquiry or regarding the analysis of the evidence and determination of the reliability of the evidence or credibility of the witnesses by the chairperson. The respondent through its chief executive officer wielding her so-called powers as accounting officer, has the prerogative to re-decide the matter and find an employee exonerated by a disciplinary enquiry, guilty. I repeatedly enquired from the counsel for the respondent whether this was not only applicable to a sanction recommended by the chairperson and he was very resolute in his submission that the so-called prerogative applied

[19] *Harms*, L.T.C *Amler's Precedents of Pleadings* 8th edition (Butterworths Durban 2015) at pages 281-286.

to both the outcome and sanction, as in terms of the applicable disciplinary policy (i.e. "JM2") the final decision rests with the respondent, through its chief executive officer. As already indicated he referred me to case law which he submitted supported this view.

[29] Counsel for the respondent referred me to the decision of *South African Revenue Service v CCMA and Others* (the Chatrooghoon case).[20] In the Chatrooghoon case, Mr Dharamchand R Chatrooghoon was dismissed by his employer, South African Revenue Service (SARS) for misconduct relating to disclosure of confidential or internal information to an outsider. SARS substituted is decision for dismissal of the employee for a penalty of the chairperson of the disciplinary enquiry, claiming that applicable policy allow this. The court held that the "wording of the collective agreement does not only make it abundantly clear that the chairperson's pronouncement on penalty is a final sanction, but...[that] it also leaves no room for interpretation in favour of the parties having intended to provide in the collective agreement a term granting a right to SARS to substitute its own sanction for a sanction imposed by its chairperson".[21] Another decision referred to by counsel for the respondent was in the matter of *South African Revenue Service v CCMA and Others* (the Kruger case).[22] In the Kruger case, Mr Jacobus Johannes Kruger, also an employee of SARS, had pleaded guilty to a charge of referring to a colleague using a derogatory word; consequently found guilty and an independent chairperson of the disciplinary enquiry appointed in terms of the SARS collective agreement imposed "a final written warning valid for six months, suspension without pay for ten days and counselling".[23] SARS marked its dissatisfaction with this outcome by dismissing the employee without the burden of a further hearing, but the CCMA found the dismissal to

[20] (2014) 35 ILJ 656 (LAC).
[21] See the of *South African Revenue Service v CCMA and Others* (the Chatrooghoon case) at par [28].
[22] (2016) 37 ILJ 655 (LAC).
[23] See *South African Revenue Service v CCMA and Others* (the Kruger case) at 655I.

have been unfair and ordered reinstatement of the employee on the same terms as those imposed by the disciplinary chairperson. The Labour Court noted that the collective agreement was silent about whether or not the decision of the chairperson was final; contained no express provision permitting SARS to substitute the chairperson's decision for its own, and, consequently, agreed with the CCMA's commissioner that SARS had no power to change the sanction. The Labour Appeal Court referred and agreed with the decision in the Chatrooghoon case that SARS had no power to change a sanction imposed by a disciplinary chairperson and that SARS was not entitled to treat disciplinary sanctions as mere recommendations. Therefore, the determination of the central issue in this matter depends on the interpretation of the wording of the applicable policy.

[30] The authorities from the upper courts suggest that when dealing with interpretation of documents like contracts one has to apply more than grammatical and ordinary meaning. In decision of *Kwazulu-Natal Joint Liaison Committee* v *Member of the Executive Council, Department of Education, KwaZulu-Natal and others (Centre for Child Law as amicus curiae),*[24] the Constitutional Court quoted with approval the following *dicta* from the decision of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[25]

> "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

[24] 2013 (6) BCLR 615 (CC) on p 651 at para 129.
[25] 2012(4) SA 593 (SCA) and [2012] 2 All SA 262 (SCA) at para [18].

to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."

[quoted without references, but with added underlining]

[31] When one considers the impugned portion in "JM2", which is the policy document preferred by the respondent, it is clear from what is quoted above that the enquiry or the activities therein only continue "in the employee is found guilty". The remainder of the activities after a finding of not guilty are not relevant to the particular employee, but only employee found guilty. For an employee in the latter category, the chairperson has to "ask for evidence in mitigation"; adjourn the hearing and thereafter recommend what disciplinary action is to be taken. Thereafter the Chairperson must inform the employer of the recommended sanction.

[32] It is correct that "JM2" entitles the so-called "external chairperson" (as opposed to internal chairperson) only to issue a recommendation and reserves, as a prerogative of the respondent's chief executive officer, the powers to make the final decision, with the concomitant right of the employee to make representations prior to a decision. But when one looks has regard of the entire policy document in its material part, it is clear that the recommendation made by the external chairperson is with regard to the sanction to be imposed on the employee. The word recommendation and its cognates are used with regard to the

sanction and not the outcome or finding (i.e. regarding a finding of guilty or not guilty) of the disciplinary enquiry. This is a sensible meaning that is to be preferred, lest one yields to insensible or unbusinesslike against the principles of interpretation suggested by *Endumeni*. For, it does not make any sense at all and is, in fact, contrary to the whole concept of holding a disciplinary enquiry, in the first place, to reserve to one party the right to make a final decision as to the guilt of the other party after the process. Disciplinary enquiries are meant to grant an equal and fair opportunity to the employer and employee to advance whatever sentiments aimed at establishing guilt based on the charges (in case of an employer) or maintaining innocence or defeating the charges (in the case of an employee). To hold a contrary opinion to this would clearly render the whole exercise a farce and one wonders whether expenditure incurred with regard to such disciplinary enquiries does not amount to fruitless and wasteful expenditure within the meaning of the Public Finance Management Act 1 of 1999, or any other legislation or policy. Even though the respondent is entitled to hold any opinion it pleases or it is advised, it is clear that the disciplinary code policy as contained in "JM2" when properly and carefully construed does not support the respondent's opinion.

Conclusion and Costs

[33] Therefore, it is my view that the applicant met the requirements for a claim based on specific performance whilst the respondent failed to comply with the reciprocal terms of the disciplinary policy, be it as contained in annexure "JM2" or "FA2", by interfering with or deviating from the finding of "not guilty" pronounced by the independent chairperson of the disciplinary enquiry of the applicant. An order will be made directed the respondent to comply with the applicable part of its disciplinary policy. With regard to whether reinstatement suggested by the chairperson of the disciplinary enquiry falls within the prerogative of the chief

executive officer of the respondent, I find solace from the decision of *Le Grange*, referred to above, in concluding that reinstatement of the applicant ought to be ordered.[26] I am wrong in ordering reinstatement of the applicant, with the finding made above regarding the correct interpretation of the disciplinary policy document, the continued exclusion of the applicant based on the charges he was exonerated from will be unlawful. Therefore, the application will be granted with costs.

[34] The applicant prayed that the respondent be ordered to pay costs of the application on attorney and client scale. Counsel for the applicant submitted that the respondent was granted two opportunities to resolve the matter, but rebuffed both. Further that the manner in which the respondent conducted this litigation; the personal circumstances of the applicant and the potential prejudice to the applicant ought to be considered in support of a punitive cost order. Counsel for the respondent submitted that there was no basis for a punitive cost order as the respondent pursued a very legitimate interest in in this matter. I disagree. The respondent's conduct no matter the noble or legitimate nature of the underlying motives as suggested by his counsel, does not trump the fact that there was no logical or reasonable basis for the interpretation of the impugned policies offered by the respondent. Further, the respondent did not approach this matter in all good faith, particularly with regard to the disclosure of the sequence or applicability of its disciplinary policies. Besides, an appropriate order that will avert any prejudice to the applicant in this matter is one in terms of which the applicant is not rendered out of pocket in respect of the legal fees related to this matter. Therefore, I will order that cost payable by the respondent be the scale of attorney and client.

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[26] See *Le Grange* at par [12].

Order

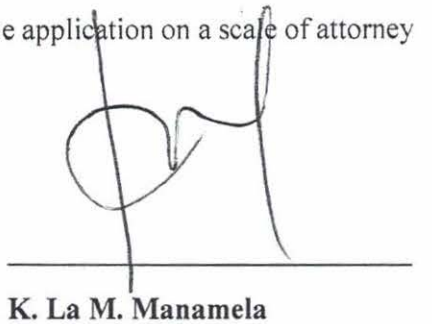
[35] In the premises, the application is granted with an order in the following terms:

a). The respondent is ordered to give effect and comply with the disciplinary hearing ruling issued on 18 January 2018 to the effect that the applicant is not guilty of any charges and should return to work immediately;

b) the applicant's dismissal is set aside;

c) the respondent is directed to reinstate the applicant retrospectively as from 02 March 2018, and

d) the respondent is liable for costs of the application on a scale of attorney and client.



K. La M. Manamela

Acting Judge of the High Court

19 April 2018

Appearances:

For the Applicant	:	FC Lamprecht
Instructed by	:	Shapiro-Ledwaba Inc Pretoria
For the Respondent	:	A Redding SC
Instructed by	:	Shepstone & Wylie Attorneys c/o VDT Attorneys Inc, Brooklyn, Pretoria