

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 1589/2013

In the matter between:

GAMALAKHE GLADSTONE LUGEBU

Applicant

And

WALTER SISULU UNIVERSITY

1st Respondent

Z. B. MKOVANE

2nd Respondent

THE ADMINISTRATOR, WALTER SISULU
UNIVERSITY (PROF VAN STADEN)

3rd Respondent

JUDGMENT

BESHE, J:

[1] This matter as well as that of Mabhovula and Another, instituted against the present respondents, were argued together because one issue in the Mabhovula matter appeared to be the same as what is in issue in this matter. I however deemed it appropriate to prepare a separate judgment in respect of each of the matters. Essentially the order that applicant seeks is the following:

“2. That a rule nisi be and is hereby issued, calling upon the Respondents to show cause, if any, on Thursday 5 September 2013, at 10h00 why the following order should not be made final:-

2.1 That Respondents failure to pay applicant’s salary and other benefits to which he is entitled as an employee of 1st Respondent which were due on 15 June 2013 be and hereby declared wrongful and unlawful.

2.2 That Respondents be and are hereby ordered and directed to pay Applicant’s salary and other benefits to which he is entitled as an employee of the 1st Respondent which were due of 15 June 2013, forthwith, and continue to do so on all subsequent pay dates, pending the exhaustion of all disciplinary inquiry against him, which is pending before the 3rd

Respondent, and as provided for in the conditions of service of 1st Respondent with Applicant.

2.3 That the Respondent pay costs of this application on punitive scale as between attorney and own client, jointly and severally.”

[2] Applicant, a male person of Mthatha was employed as a lecturer by the University of Transkei, the predecessor to the Walter Sisulu University, the first respondent in 1985. In 1997 he was appointed as first respondent’s Chief Accountant. First respondent is a university established in terms of the laws of the Republic of South Africa, whose registered offices are at the Nelson Mandela Drive Campus, Mthatha. Second respondent is employed by the first respondent as Acting Director. Third respondent is the Administrator of first respondent. The applicant annexes a letter of appointment in respect of Doctor Nakani dated 3 April 1986 as an example of a standard letter of permanent appointment and residence of his conditions of employment. Paragraph 4 of the said letter provides as follows:

“Your conditions of service are determined by Council and are as laid down by the University of Transkei Act (Act 23 of 1976). You are advised to make yourself conversant with the contents thereof. A copy of the conditions of service is enclosed.”

Section 13 of the University of Transkei Act 23 of 1976 provides that:

“Subject to the provisions of this Act, the Conditions of Service of Persons in the employment of the University, including the Salary Scales, Salaries, Allowances, Leave and other privileges and the procedure to be followed in the case of any person on the permanent establishment who is alleged to be inefficient or who renders himself guilty of misconduct shall be as determined by the Council with the approval of the Minister.”

[3] Unlike the Mabhovula matter, where it is conceded that that the dismissal of the applicants in that could not stand since the second respondent did not have the authority to dismiss employees, there is no such concession in this present matter. The disciplinary proceedings appear to have been concluded. This can be gleaned from the fact after the conclusion of the disciplinary proceedings an attempt was made to serve the

applicant with a dismissal letter on the 23 May 2013. It would however seem that the applicant was not amenable to receiving the letter whose contents are reproduced hereunder.

“Dear, Mr Lugebu

Dismissal: Yourself

Reference is made to the disciplinary hearing held on 5 and 6 December 2012.

Please be advised that in terms of the said disciplinary hearing you were found guilty of dishonest conduct related to fraud or misrepresentation.

Accordingly this serves to inform you that your employment with Walter Sisulu University is hereby terminated with effect from 31 May 2013.

You are to vacate your office with immediate effect upon receipt of this letter.

Any University property in your possession must be returned with immediate effect. You are also advised to contact Mr T. Moerane on 047 502 2202 for matter (sic) relating to your benefit claims.

Please note that you may appeal by written presentation to the Administrator against the findings and/or penalty: Provided that the appeal and the reasons for appealing are lodged in writing with the administrator within ten days of receipt of this written notification.

You are also advised that, should you wish, you may refer a dispute to the Commission for Conciliation, Mediation and Arbitration in terms of the Labour Relations Act, within 30 days of the dismissal.”

[4] On the 7 June 2013 the National Education Union, Walter Sisulu University (NTEU) addressed a letter to the third respondent under the heading “APPEAL FOR PROCEDURAL AND SUBSTANTIVE FAIRNESS”. The letter is twelve pages long and concludes with the following words:

“35. We further submit that the hearing as a whole was flawed and unlawful in the context of the WSU statutes and must be declared null and void.”

There is no reference made to the finding of the Council to dismiss the applicant.

On the 26 June 2013 third respondent responded as follows:

“Dear Prof. Nakani

APPEAL FOR PROCEDURAL AND SUBSTANTIVE FAIRNESS

Your submission, in the abovementioned regard, signed on 7 June 2013 as well as my letter, dated 16 April 2013, refers.

After considering all the facts and circumstances in this matter I am convinced that justice will be best served by convening an Appeal Hearing. By agreement the appeal may be heard by an impartial arbitrator appointed by the parties.

I remain committed to the fair treatment of all employees at WSU.”

However, it appears to be common cause that the applicant did not receive his salary on the 15 June 2013, hence the present application. Having heard counsel for the applicant, Mjali J issued a rule nisi calling upon the respondents to show cause why the following order should not be made:

“2.1 That Respondents failure to pay Applicant’s salary and other benefits to which he is entitled as employee of 1st Respondent, which were due on 15 June 2013 be and is hereby declared wrongful and unlawful.

2.2 That Respondents be and are hereby ordered and directed to pay Applicant’s salaries and other benefits to which he is entitled as an employee of the 1st Respondent which were due on 15 June 2013, forthwith, and continue to do so on all subsequent pay dates, pending the exhaustion of all disciplinary internal processes available to Applicants regarding the disciplinary inquiry against him, which is pending before the 3rd Respondent, and as provided for in the conditions of service of 1st Respondent with Applicant.”

[5] In his founding affidavit, applicant took the trouble to explain why he is of the view that the disciplinary enquiry that was instituted by first respondent against him is flawed. However in view of the fact that these proceedings are not concerned with the validity or

otherwise of the disciplinary proceedings against the applicant, I do not deem it necessary to deal with this aspect.

[6] It is noteworthy that nowhere in the founding affidavit does applicant refer to his dismissal or purported dismissal, in view of his impugnement of the disciplinary procedure that was employed by first respondent.

[7] In his affidavit in support of the answering affidavit, Mr Mtuli Ndlwana states that he telephoned applicant on the 30 April 2013 to inform him that he had in his possession a letter of his dismissal which he was to serve of the applicant. Applicant responded that his union was dealing with the matter. Further, that on the 23 May 2013 he visited applicant's office with a view of serving him with the letter of dismissal. He advised him of the contents of the letter and asked him to sign for a copy of the letter. Applicant however refused to accept the letter. In my view therefore it would be fair to accept that applicant was aware of the action taken by first respondent to dismiss him.

[8] Respondents' case in a nutshell, is that in view of applicant's dismissal, there is no longer a question of a contract of employment for him to enforce against first respondent. That, until such time that the dismissal is set aside, he is not entitled to be remunerated by first respondent. His right to remuneration lasted as long as he remained an employee of first respondent.

[9] I prayer 2.2 applicant seeks the continued payment of his salary "pending the exhaustion of all disciplinary internal processes available to him regarding the disciplinary inquiry against him, which is pending before third respondent, as provided for in the conditions of service of first respondent with the applicant". (my underlining). Applicant does not state what he means or envisages by the "disciplinary internal processes available to him" or what steps he has taken in this regard. In terms of annexure B that forms part of applicant's affidavit, an officer who has been charged and found guilty of misconduct by the Council shall have the right of appeal to the Minister against the findings of the Council. Provided

that such officer shall within fourteen (14) days of the date upon which he was informed of the findings, give written notice of appeal to the Council. The letter that was addressed to the first respondent on 7 June 2013 by NTEU makes no reference to the applicant's dismissal. Nor does it seem to be a notice of appeal to the Minister against the finding of the Council. According to the letter of dismissal, applicant's attention is drawn to the options that are open to him. Namely that he may appeal by written representation to the Administrator against the findings and or penalty. And that he may refer the matter to the Commission for Conciliation, Mediation and Arbitration in terms of Labour Relations Act within thirty (30) days of dismissal. Even if applicant had appealed against his dismissal, it is now trite that such an appeal would not automatically suspend his dismissal. As only an order of court is suspended by the noting of an appeal. See *Nchabeleng v University of Venda and Others* (2003) 24 IJL 585 (LC) and authorities referred to in the judgment.

[10] Based on the foregoing reasons, I am not persuaded that the applicant has succeeded in making out a case for the relief that he seeks.

[11] Accordingly the application is dismissed with costs, such costs to include:

- (a) Reserved costs of the 20 and 27 February respectively,
- (b) Costs of the application and
- (c) Costs of two counsel where such services have been employed.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : Adv. V Notshe SC & Adv. Matyumza

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Ref.: UC/pp/CIV 1629

Date Heard : 11 March 2014

Date Reserved : 11 March 2014

Date Delivered : 29 January 2014

