THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J742/2022

In the matter between:

ZIMBINI MAHONONO	**APPLICANT**
And	
NATIONAL HERITAGE COUNCIL	**FIRST RESPONDENT**
CHIEF EXECUTIVE OFFICER OF THE NATIONAL HERITAGE COUNCIL	**SECOND RESPONDENT**
YUSUF SALOOJEE *N.O*	**THIRD RESPONDENT**
MPHO ESTHER MUCHENJE *N.O*	**FOURTH RESPONDENT**

Date of Hearing: 6 July 2022
Date of Judgment: 18 July 2022

Summary: Urgent application – Relief – declarator that termination of contract *void ab initio* and order of specific performance – employer abandoning ongoing disciplinary process and terminating employment peremptorily allegedly on grounds of repudiatory conduct displayed by the employee in the enquiry – Relief granted with costs – principles governing applications for specific performance considered.

JUDGEMENT

LAGRANGE, J

Introduction

[1] This is an urgent application seeking the following final relief:

1.1 A declaration that letters sent to the applicant on 9 June 2022, purportedly establishing a "*parallel disciplinary hearing*" is a breach of contract and *void ab initio*;

1.2 A declaration that the applicant's dismissal in terms of a letter dated 13 June 2022 is a fundamental breach of contract which is unlawful and *void ab initio*;

1.3 An order compelling the respondents to reinstate the applicant with immediate effect and to pay any salaries and benefits due to her from the date on which her employment was terminated; and

1.4 Ordering the first and second respondents to comply with their contractual obligations in terms of the HR Policy-Employee Relations Disciplinary Code Policy incorporated in the applicant's contract of employment.

[2] The applicant was heard via Zoom as the Johannesburg Labour Court has no alternative power supply to conduct hearings in court when there is load shedding. Judgement was reserved until 11 July, but owing to illness on my part it has been handed down a few days later.

Narrative

[3] At the time of her dismissal the applicant, Ms Z Mahonono (Mahonono), was employed by the first respondent, the Heritage Council (Council) on a five-year fixed-term contract due to end on 1 December 2024 as the Council's management accountant/acting supply chain manager.

[4] Clause 1.2.6 of the applicant's contract of employment states:

> ‘Any matters arising, which are not specifically provided herein, shall be dealt with in accordance with the provisions of the act and section 11 [2] and [3] of the National Heritage Council act 11 of 1999, the public service regulations, other legal provisions applicable to the employee and the National Heritage Council’s human resource policies and related operational policies and procedures, which will be deemed to be part of your employment with the National Heritage Council.’ (Emphasis added)

[5] Clause 3 of the contract provides that it may be terminated by discharge in terms of section 17 of the Public Service Act[1] (PSA), or misconduct, non-performance or the non-renewal of the agreement.

[6] On 12 November 2021, the applicant was placed on unpaid suspension until the finalisation of a disciplinary inquiry against her. She was served with notice of the inquiry on 31 January, which was due to start on 9 February of this year.

[7] The charges related to a number of alleged transgressions of the Supply Chain Management Policy and the PSA, and were formulated based on a July 2021 report by forensic investigators into alleged money laundering, misappropriation of funds and other irregularities committed by Council officials.

[8] The commencement of the inquiry was postponed until 24 February as the applicant wanted to obtain legal representation in the inquiry because the employer had appointed advocates as the initiator and chairperson.

[9] On 22 February, the applicant launched a review application in the High Court, Gauteng Division, Pretoria[2] against the Council seeking to set aside, amongst other things, the appointment of the forensic investigators whose report formed the basis of the charges against her and others, the forensic report itself and various other steps taken relating to it. She seeks to set aside no less than thirteen decisions relating to the commissioning, financing and conducting of the forensic investigation and the decision to give effect to all its recommendations. To date, it seems the

[1] Proclamation no. 103 of 1994.
[2] Case no 10903/2022

applicant has not filed a replying affidavit in this application but has not formally withdrawn it. Mr Moela, her counsel assured this Court it was not proceeding, though it is not certain on the affidavits that this is the case.

[10] The next day, 23 February, the applicant launched an urgent application in the same court[3] to stay the disciplinary inquiry, pending the finalisation of the review application and the outcome of a challenge to the appointment of the initiator and chairperson of the enquiry, on the grounds their appointment was contrary to section 217 of the Constitution[4]. Predictably, this application was struck off the roll in the morning on the following day (24 February) and the inquiry commenced that afternoon. The applicant simply pleaded not guilty to all the charges and claimed that she had not yet had a chance to compile her own evidence bundle. The inquiry was then postponed to continue on 4, 10 and 11 March. It did not proceed on 4 March as there had been some IT glitches which had prevented her from retrieving the information she wanted at the Council's premises.

[11] When the inquiry resumed on 10 March, the applicant raised a number of preliminary objections and the employer asked for time to consider these. She should have submitted these objections by 1 March. In any event, she supplemented her preliminary objections with written ones on 14 March and the Council would file answering submissions by 18 March.

[12] The objections concerned, amongst others: allegations that the disciplinary inquiry was premature; that the state attorney was involved; issues relating to the appointment of the initiator and the chairperson; the formulation of some of the charges; that the forensic report could not be a basis for some charges; that the hearing had been unreasonably delayed after the forensic investigation was completed implying that the respondent had waived its right to take disciplinary action and the investigation report was subject to her pending review.

[13] Among the applicant's torrent of objections, she highlighted that the employer now relied on a document called the Consolidated Human Resources Policies, which

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[3] Case no 11132/22.
[4] Constitution of the Republic of South Africa, 1996.

included the disciplinary Code (consolidated policies), but had not provided a full copy to her. She challenged the authenticity of the document.

[14] From an email exchange attached to the founding affidavit, it is apparent that the chairperson tried to arrange a hearing on the preliminary objections on 5 April, but the applicant's representatives were not available. The oral argument of objections had been arranged at the request of the applicant, who was not content to rely on lengthy written submissions. The inquiry was postponed until 28 and 29 March for the hearing of these objections, but on 28 March the applicant attended without her attorney and counsel, and it was agreed the hearing should not proceed as her legal representatives were needed to argue the objections. On 5 April, after expressing her frustrations with the delays occasioned by the applicant and her representatives, the chairperson decided that she would make a determination on the preliminary points on the papers and would convey the outcome by 8 April

[15] However, when the chairperson finally did make a determination on 20 April, her ruling was that the matter should go to the evidence and her reasons would follow. She proposed various alternative dates in May for the hearing to resume. Although it was due to resume on 18 and 19 May, owing to the chairperson not feeling well, it was postponed to 8 and 9 June. On 8 June when it reconvened, the chairperson had still not given reasons for her ruling and the applicant raised this as an issue together with the fact that it had only received the disciplinary policy and not the entire consolidated policies from the Council. She claims that it was conceded by the Council that the consolidated policies did not exist, and she then asked for an adjournment to consider the fact that the chairperson had made a ruling in reliance on an allegation by the Council that the consolidated policies did exist, even though the chairperson had not given her reasons and that her decision was only that the objections should be referred to oral evidence. In any event, the inquiry did not proceed on that date and was postponed until 22 June.

[16] At this juncture, the course of events took a new dramatic turn. On 9 June, the chief executive officer (CEO) of the Council wrote the following letter to the applicant :

‘RE: REPUDIATION OF CONTRACT OF EMPLOYMENT

1. We refer to your continuing disciplinary hearing.

2. On 8 June 2022 at your hearing, your Counsel made the following remarks in relation to your employer:

2.1. Your Counsel is a creature of instruction and his address to the Chairperson is in terms of his instructions;

2.2. The employer is on a witch-hunt in relation to the employee;

2.3. The employer is keeping documentation away from the employee;

2.4. The employer does not want to give the employee information and documents requested, despite the employer allowing the employee access to its computers and documents;

2.5. It was inferred that the employer's amendment of a charge was not made in good faith; and

2.6. When directly asked if you did not trust the employer, your representative declined to answer.

3. <u>These allegations are baseless and amount to a repudiation of the contract of employment</u>.

4. Separately, your Counsel's statements and your conduct demonstrate that you do not trust your employer resulting in a breakdown of the trust relationship.

5. We also note that your hearing commenced on 9 February 2022 and there have been seven sittings of your hearing and no evidence has been led as a result of you raising preliminary points and filing two motion

proceedings before the High Court due to the numerous postponements no evidence has yet been led.

6. The preliminary points have all been dismissed and one of the High Court applications brought on an urgent basis was struck off the roll for lack of urgency. Your employer has a costs order against you that will be taxed soon.

7. Your employer is entitled to depart from the Human Resources Policy and Procedures under these circumstances and to conclude the hearing in an expedient manner.

8. You are hereby invited to provide your employer with written reasons, within 48 hours:

8.1. why the employer should not accept your repudiation of the employment contract; and

8.2. to provide a defence to the charges in the hearing, for your employer to consider.

9. The employer may accept or reject your explanation and decide whether or not to cancel your employment contract. Furthermore, a failure to answer to this letter could also result in the employer cancelling your employment contract.

10. We await your reply.'(Emphasis added).

[17] To some extent, this move by the Council was foreshadowed in some of the comments it had made in responding to some of the preliminary objections raised by the applicant, to the effect that her belief that the Council would construct a fictitious policy document and her questioning of its *bona fides*, indicated that it was not

necessary for the chairperson to make a finding of guilt since the trust relationship was irreparably damaged.[5]

[18] On 10 June, the applicant responded at length to the CEO's letter. The responses are summarised as follows. She placed in dispute the CEO's account of the representations made by Mr Moela, who also represented her at the enquiry, together with her attorney. She disputed being responsible for the delays in proceeding with the leading of evidence claiming that, except on 5 April, the delays had either been on account of the employer or the chairperson and that in any event had been consented to. She denied there had been any repudiation of the employment contract and expressed the views of herself and her counsel in the following personal fashion: "*[s]o stated both Adv Moela and the employee disagree with the employer's new-fanged contentions that the employee has repudiated on the employment contract and that there is a breakdown in the employment relationship as reported in your letter under reply. We contend that you have no inkling of what constitute repudiation and your assumptions are unproven, unfair, devoid of all substance and sense and are dismissed with the contempt they so try and evince for*" (*sic*). There was no basis for the employer to interfere in an ongoing inquiry, which had been postponed, by consent, until 22 June. The employer's demand that the applicant make representations on the alleged repudiation and provide a defence to the charges, amounted to an attempt to establish a process parallel to the inquiry, which was unfair and also a flagrant breach of her contract of employment. She reiterated that she was entitled to approach the High Court to set aside the unlawful decisions of the Council which adversely affected her. As an alternative, she proposed the holding of a pre-dismissal inquiry under section188A(1) of the Labour Relations Act[6] (LRA). She called upon the Council to confirm if it was revoking the existing inquiry by 15H30 on 13 June, so that she could approach a court for urgent relief.

[5] The specific phrase used in the employer's response to the applicant's preliminary objections, was that the representations, which it objected to, demonstrated that "… *the trust relationship is beyond reproach*". It seems this was not obvious typographical error and should have read: "… *the trust relationship is beyond repair*".
[6] Act 66 of 1995, as amended.

[19] On 13 June, the Council responded by informing the applicant that her repudiation of her contract was accepted and notified her of the immediate termination of her services. The letter also noted that she had declined to make any of the representations she was invited to make on the question of the alleged repudiation or to defend herself against the charges. The Council also took umbrage at the imputations that it had acted ignorantly, unlawfully, unfairly and contemptuously. This is interpreted as further evidence of the repudiation of her contract and as being in conflict with the suggestion of conducting a pre-dismissal arbitration.

[20] On 14 June, the applicant's attorneys fired the last salvo in this skirmish of correspondence. They disputed there was any basis for terminating the contract on grounds of any act of alleged repudiation and that it was consequently unlawful. They demanded the immediate withdrawal of her termination and her reinstatement so the inquiry could proceed on 22 June, and failing such an undertaking being given by 16 June, it would proceed with an urgent application to set aside the decision, coupled with a punitive cost award against the Council and the CEO in his personal capacity.

Evaluation

Urgency

[21] The conduct of the Council the applicant wants to set aside is her summary dismissal on 13 June 2022. By 16 June, it was plain that the Council was not going to revoke its decision and had appointed attorneys of record. On 17 June, her attorneys commenced drafting the application and she signed the founding affidavit on 20 June. The application was filed on 21 June and set down for a hearing on 6 July, with a timetable for filing answering and replying affidavits by 28 June and 1 July, respectively.

[22] The applicant pleads a number of other factors pertaining to alleged financial hardship, the difficulties of obtaining other employment in the public service having been dismissed for misconduct and the like.

[23] In its answering affidavit, the Council did not put up any serious grounds for opposing the urgency of the application but argued that the applicant had not pleaded why she would not get a substantial redress at the hearing in due course. It argues that the real event which triggered the urgency was its letter of 9 June. The argument based on alleged unnecessary delay is somewhat forced in my view. It would not have been appropriate for the applicant to have taken steps to launch the application without first seeking to dissuade the Council from pursuing the course of action it was intent on, and not acting too precipitously before it was clear her efforts were futile. This only crystallized when the notice of termination was issued and it was not unreasonable of her to give the Council a brief opportunity to reconsider its decision. Her ultimatum of 14 June which expired on 16 June and the filing of the application four court days later, cannot be described as dilatory. It is true that it might have been set down for hearing earlier, but at the same time, this gave the Council a fair opportunity to respond and the risk of a postponement owing to an inability to file a replying affidavit timeously was averted.

[24] In her founding affidavit, the prejudice the applicant said she will suffer if the matter is not dealt with expeditiously, apart from the immediate financial implications of an unforeseen event on her current financial commitments, she claims that her being subject to disciplinary proceedings is already in the public arena and has been aired in Parliament. Her dismissal for alleged misconduct will no doubt also be aired there, and the status of her dismissal will be an obstacle to further employment in the public service. By implication, alternative relief in the form of contractual damages established in trial proceedings or the outcome of arbitration proceedings, will not prevent the short term harm she refers to. She claims that it is important to her to clear her name in the inquiry. Although these issues were not expressly pleaded as the grounds why she would not obtain the same relief in due course, as they ought to have been, effectively that is what they amount to. 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 section 193(2) are met, even years after the dismissal.

[25] Even if I attach less weight to the financial considerations which were pleaded in limited detail, there are good reasons to believe that there is a risk of imminent harm to her job prospects, reputation and the dilution of her right to seek specific performance if the applicant were not able to approach this Court on an urgent basis. The application was also timeously brought and enrolled, given when the breach occurred and to permit a reasonable, though attenuated, time for the papers to be filed. Consequently, the application should be treated as urgent.

Merits

Existence of a fundamental breach

[26] When the Council, through the CEO, decided to dismiss the applicant, by so doing, did it commit a fundamental breach of the applicant's contract?

[27] It is common cause that the Council's disciplinary code is incorporated in the applicant's contract of employment, under clause 1.2.6 of the employment contract, which states:

> 'Any matters arising, which are not specifically provided herein, shall be dealt with in accordance with the provisions of the Act[7] and section 11 [2] and [3] of the National Heritage Council Act NO 11 of 1999, the Public Service Regulations, and other legal provisions applicable to the Employee and the National Heritage Council's Human Resources Policies and related operational policies and procedures, which will be deemed to be part of your employment with the National Heritage Council.' (Emphasis added)

[28] Further, the first bullet point under clause 5.3[c] of the Council's Employee Relations HR policy states:

[7] In terms of clause 1 of the employment contract 'the Act' refers to the PSA.

‘discipline shall be dealt with in terms of the disciplinary code of the NHC and in doing so the provision of schedule 8 of the Act[8] [code of good practice] shall be observed…’

[29] Clause 5.6 of the Council’s Employee Relations HR policy outlines the procedural steps to be taken in convening an inquiry. The disciplinary code itself is a typical example of a fairly standard document setting out stages of progressive discipline and the procedures to be followed at each stage, as well as the rules for constituting a “disciplinary tribunal” and conducting disciplinary inquiries. Clause 5.4 prescribes that a formal disciplinary hearing must be held in terms of the disciplinary code in more serious cases of misconduct.

[30] Clause 5.6.1 states:

‘Rules for Conducting an Enquiry

The NHC shall adopt the rules of conducting the disciplinary inquiry which will serve as a guiding tool to the disciplinary tribunal. The said rules are contained in the NHC disciplinary procedure. The parties to the disciplinary tribunal may refer to the rules as and when required to do so.’

[31] Provisions of relevance in the disciplinary code itself are:

31.1 Clause 4 (definitions): among the terms described are “*disciplinary inquiry/hearings*”[9] and “*dismissal*”[10] .

31.2 Clause 5 (procedure):

31.2.1 Clause 5.1 in describing disciplinary principles states *inter alia*: “*[s]ubject to the requirements of substantive and procedural fairness, the disciplinary tribunal has the rights to determine the sanction to be*

[8] In this instance, ‘the Act’ referred to is the LRA.
[9] “*A formal process of establishing facts about the alleged misconduct/inappropriate behaviour of an employee by investigating the allegation in allowing the employee, or his or her representative to state his or her case*."
[10] "*termination of an employee's services, with or without a notice period following the findings of a disciplinary inquiry*." (Emphasis added)

applied, having regard to the seriousness of the offence and provided the sanction is consistent with the provisions as set out herein".

31.2.2 Clause 5.5 sets out an employee's rights in disciplinary hearings, namely: being advised of the allegations in advancement; being given adequate time to prepare a response; to participate in a disciplinary hearing or inquiry "*by responding to the case against them and presenting their version of events*"; being represented by a fellow employee or any other suitably qualified person; put questions to persons giving evidence; "*give evidence/answer the allegations*"; call witnesses on their behalf and be provided with the services of an interpreter. The pro forma notice of the disciplinary inquiry included in this clause repeats the employee's rights to representation, to give evidence and make representations and accordingly cross-examine witnesses. It also makes provision for the employee to note their objection to the chairperson appointed.

31.2.3 An unnumbered provision sets out a checklist of "*[t]he procedural steps to be followed by the chairman of a disciplinary hearing*".

31.2.4 Clause 5.8, which sets out the employer's rights, includes the right to initiate disciplinary action and impose an appropriate sanction within the provisions of the relevant employee relation policy.

31.2.5 Clause 5.12 provides for the rules of conducting the inquiry by the presiding officer. It gives him the power to determine the procedure to be followed for conducting an inquiry that he or she deems appropriate with minimum legal formalities provided that the rules of natural justice are observed. However the rules also provide for the employee to call witnesses and produce other forms of evidence, and for the presiding officers to present their findings of fact, sanctions imposed and reasons for their decisions to the relevant management personnel after the hearing is concluded.

[32] The purported reason for the applicant's dismissal was primarily the alleged allegations made by her counsel in the inquiry, which the CEO attributed directly to the applicant, on the basis that her counsel could only have made those allegations on her instructions and concluded that this was a breach of her obligation to act in utmost good faith as contained in clause 7.1 of her contract[11] and had thereby destroyed any trust. In passing, it must be noted that this clause was not specifically referred to in the CEO's letters, but was subsequently relied on by the Council.

[33] The Council's assertions in its letters essentially amount to complaints that her behaviour at the inquiry, through her representative, were instances of conduct which undermined the trust relationship that exists between her and the Council. If the Council wished to dismiss her on that account then the procedure for doing so was to submit such misconduct either to the inquiry already underway or to another inquiry. In this respect, the Council's behaviour is not different from that of the employer in *Wereley v Productivity SA & another*[12] (*Wereley*). Nothing in the Council's policies suggests that there is an alternative way of dealing with such alleged misconduct, by reducing it to its contractual features and terminating her services on common law grounds.

[34] A formal enquiry was underway under the chairmanship of an advocate, which was the type of enquiry envisaged by the policies and procedures incorporated in the applicant's contract of employment, notwithstanding her own complaints about it not being in conformity therewith. Nothing prevented the Council from charging the applicant with breaching her duty of acting in good faith. Although the letter did suggest that the Council might still base its decision on whether or not she had answered the substantive case against her on the original charges, it did not

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[11] *Viz:* '7. GENERAL
7.1 In the implementation of this Contract, the parties undertake to observe the utmost Good faith and they were not in their dealings with each other that they would neither do anything more refrain from doing anything that might prejudice or detract from the right, assets or interests of each other.'

[12] (2020) 41 ILJ 997 (LC) at para [42] which states that:
'Accordingly, on the basis of the cause of the incompatibility raised by the employer in this instance, the PSA is plainly accusing Wereley of unacceptable conduct giving rise to an alleged breakdown of trust in the employment relationship. Determining whether she has committed such conduct and whether it has led to an irretrievable breakdown, warranting her dismissal, is plainly a dismissal based on misconduct, which ought to be the subject-matter of a disciplinary inquiry.'
In that case, the employer had argued that summary dismissal on account of the employee destroying the trust relationship was not a dismissal which could only be the outcome of a disciplinary enquiry.

purport to rely on any finding it made on those, but only on its findings on her supposedly repudiatory conduct at then inquiry hearing on 8 June and her response to its letter of 9 June.

[35] The Council argued that it was entitled to decide on the applicant's dismissal without complying with the normal requirements of submitting its claim to a formal inquiry. If the applicant was relying on a claim that it was procedurally unfair of the employer to dismiss her in the way it did, then it would be conceivably possible for the employer to argue that it essentially gave her a reasonable opportunity to defend herself against the charge of committing misconduct amounting to repudiation of her contract. However, this case is based on an argument that the Council fundamentally breached a contractual right in dismissing her the way it did, and she demands a contractual remedy. In this regard, the Council's reliance on *Lefatola and Another v City of Johannesburg and Another*[13] is misplaced because in that case, the employees could not rely on any provision in the employment contract, which guaranteed them the right to an oral hearing. It is noteworthy that the Council could not point to any provision in its policies dealing with termination for misconduct which provided that, in certain circumstances where dismissal for misconduct is contemplated, formal disciplinary inquiries are not obligatory.

[36] Considering the above, I am satisfied that the Council was in all likelihood tired of the length of time the inquiry was taking and decided to try another way of obtaining the result it sought, which would make it unnecessary to complete the inquiry. However, it could not escape the fact that ultimately the new reasons it advanced for the applicant's dismissal, still concerned alleged misconduct on her part and it was bound to submit those to the tribunal it had established under the chairmanship of the fourth respondent and argue her dismissal in that forum, or alternatively, before another tribunal established under its disciplinary procedures. Those procedures were incorporated in the applicant's contract of employment and, apart from remedies relating to unfair disciplinary action, she was entitled to approach the Court on the basis that her dismissal, in the absence of the procedures being followed, was a fundamental breach of her contract of employment and to seek contractual remedies for that breach.

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[13] Unreported judgment under case no: J1752/18 delivered on 6 June 2018.

Is an order of specific performance appropriate?

[37] In a case like this, where it is found that a party has committed a fundamental breach of the employment contract, and the other party can institute proceedings for an order of specific performance, the Court has a discretion whether or not an order of specific performance should be granted.

[38] In the seminal decision of *National Union of Textile Workers & others v Stag Packings (Pty) Ltd & another*[14], in which it was held that the mere fact that the contract in question was a contract of personal service was not a good enough reason to decline to grant specific performance, the court stated:

> 'This appeal pertains to the scope of the remedy of specific performance. In our law the grant of specific performance does not rest upon any special jurisdiction. It is an ordinary remedy to which in a proper case an applicant is entitled. The court has, however, a discretion whether to grant the order or not. Generally speaking specific performance will be refused where it would be inequitable in all the circumstances or where, from a change of circumstances or otherwise, it would be 'unconscientious' to enforce a contract specifically. *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 873G. A useful starting point in an enquiry as to the scope of the remedy of specific performance is the authoritative case of *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378 and 379. With due diffidence I will attempt to paraphrase the nature and scope of the court's discretion in the grant of specific performance there set out:
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> 1. The discretion must be exercised judicially. It is not arbitrary or capricious but sound and reasonable.
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> 2. It is not confined to specific types of cases.
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> 3. It is not circumscribed by rigid rules.

[14] (1982) 3 ILJ 285 (T).

4. Though it governs itself as far as it may by general rules and principles, it at the same time withholds or grants relief according to the circumstances of each particular case when these rules and principles will not furnish any exact measure of justice between the parties .

5. As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are absolutely binding in all cases.

6. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future enquiries.'[15]

[39] There are a number of instances where the courts have intervened and ordered specific performance, where an employer has decided to abandon disciplinary proceedings which are underway or otherwise disregarded contractual provisions governing an employee's termination, and taken the decision to dismiss the employee without waiting for the outcome of the inquiry[16]. However, as mentioned, a finding that a dismissal was in fundamental breach of the employee's contract of employment does not automatically result in the court granting relief in the form of specific performance.[17]

[40] It is clear from the jurisprudence that specific enforcement of employment contracts is now firmly established as common practice, subject only to serious concerns about the practical consequences of restoring the *status quo ante.* The courts are understandably reluctant to allow parties to the employment relationship

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[15] At 289I-290E.

[16] See: *Ngubeni v National Youth Development Agency and another* (2014) 35 ILJ 1356 (LC); *Mafihla v Govan Mbeki Municipality* (2005) 26 ILJ 257 (LC); *Somi v Old Mutual Africa Holdings (Pty) Ltd* (2015) 36 ILJ 2370 (LC); *Ramabulana v Pilansberg Platinum Mines* (2015) 36 ILJ 2333 (LC); *Nationwide Airlines (Pty) Ltd v Roediger and another* 2008 (1) SA 293 (W); *Mpane v Passenger Rail Agency of SA and others* (2021) 42 ILJ 546 (LC*); Dyakala v City of Tshwane Metropolitan and Others* unreported judgment under case no: J 572/15 delivered on 23 March 2015; *Santos Professional Football Club (Pty) Ltd v Igesund and another* (2002) 23 ILJ 1779 (C); and *SA Broadcasting Corporation SOC Ltd v Phasha* (2021) 42 ILJ 816 (LAC) (*Phasha*).

[17] See: *Mntambo v Piotrans (Pty) Ltd* (2021) 42 ILJ 2298 (GJ) and *Botes v City of Johannesburg Property Co SOC Ltd and another* (2021) 42 ILJ 530 (LC), though the latter was decided on account of the court's finding that it had no jurisdiction to make such an order, which is at odds with the approach taken by the Labour Appeal Court.

to just sidestep their binding obligations relating to the termination of employment. A common stratagem is to claim the employee has committed some other conduct tantamount to a repudiation of the contract of employment, which the employer accepts.[18]

[41] In *SA Broadcasting Corporation SOC Ltd v Phasha*[19], in exercising its discretion on the question of relief, the Labour Appeal Court considered whether the employee was prepared to continue with the pre-dismissal arbitration proceedings, and found on the facts that even though she had failed in two recusal applications, there was no suggestion on the papers that she was not prepared to proceed with the pre-dismissal arbitration[20]. In *Wereley,* despite the inquiry proceeding in fits and starts, considerable progress had been made. The scope of the inquiry had been narrowed down by agreement, the employer had concluded its evidence and the employee had filed a statement in response.

[42] What is the position in this case? The inquiry was due to commence on 9 February. At the time the Council abandoned it on 9 June, the applicant's preliminary objections were still pending the outcome of the hearing of oral evidence, which had not yet begun. The applicant was considering the implications of the chairperson's provisional ruling that her preliminary objections be determined after the hearing of oral evidence, given that the provisional ruling had been made in circumstances where the Council had represented to the chairperson that its consolidated policies did exist when they did not. She argues that progress has been made as one charge has been withdrawn and another was the subject of an amendment process which is yet to be finalised.

[43] Although the applicant has not taken a further step to prosecute her multifaceted review application, she has not withdrawn it. Despite suggestions by her counsel that the application was going nowhere, representations in her heads of argument belie any assurance that the matter is dormant. At paragraph 31 of her heads, it is submitted:

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[18] See: *Wereley* and *Phasha*.
[19] *Phasha supra* fn 16.
[20] *Ibid* at para [31].

> ‘31. We submit that the applicant could not have reasonably rearranged her financial affairs in light of the manner in which her contract was terminated. Even if it can be argued that she should have reasonably expected that the abandoned disciplinary hearing could have resulted in the termination of her employment, we submit that she would have been entitled to approach the court, having exhausted all internal appeal process, for an order staying the execution of her termination pending the review that is already at an advanced stage (further discovery stage). It cannot therefore be argued that the situation that she finds herself in was inevitable.’

At paragraph 20.1 of her heads, she claims that one of the eventualities that the Council has tried to avoid by its stratagem is “…*the high court review application, where, amongst other things, the applicant is challenging the validity and enforceability of the forensic report*.” The submission continues:

> ‘The respondents have also excitedly made a submission that the review application is now moot since they are of the view that they applicant’s locus standi has judicially vanished because of tyrant termination of her employment contract.’ (*sic*)

[44] The applicant claims that the internal disciplinary process “*is a suitable environment to clear my name*”. She cites the withdrawal of the charge and the pending amendment of another as evidence of the progress made. Her preliminary objections relate mainly, in one way or another, to the right of the Council to convene or proceed with the disciplinary proceedings. Except for challenging the formulation of certain charges, the enquiry has become bogged down in dealing with her preliminary objections. The fact that this has become a protracted process, apart from the applicant wanting to make both written submissions and present oral argument on them, is largely due to the chairperson deciding to permit an extraordinarily elaborate process for deciding these. Had this process been completed and the chairperson then decided to proceed to the merits and the applicant then took further steps to prevent the enquiry proceeding, in those circumstances, if the Council acted in the way it has done, I have little doubt that,

despite the applicant being entitled to bring a similar application for specific performance, a court would be less inclined to order it.

[45] I do have misgivings about the applicant's *bona fides* of wanting to clear her name in the inquiry. However, I believe it would be premature at a point where the long-overdue finalisation of the preliminary points is still pending, to conclude that she is not prepared to engage with the merits, if the chairperson dismisses her objections.

[46] Accordingly, an order of specific performance should be made.

Costs

[47] Even if the applicant was only entitled to a declaration that her dismissal was unlawful and void *ab initio*, I would have ordered the respondents to pay the costs of the application, as a mark of the Court's disapproval of adopting a high-handed stratagem to avoid its contractual obligations. However, its opposition to an order of specific performance was not without merit and there is no reason to order costs on a punitive scale. Although the CEO took over the function of the inquiry in deciding to dismiss the applicant, there is nothing to suggest he did not do as a representative of the Council and there is no reason to hold him personally liable for costs.

[48] I realise that full-blown disciplinary procedures like that of the Council can get bogged down in procedural wranglings that mimic those of some court proceedings. Such a process can frustrate the handling of disciplinary matters promptly and without huge financial outlays. However, the procedural edifice which exists was not foisted on the Council, but is its own creation. It chose such a formal process for dealing with its disciplinary issues. It is indeed regrettable that it is the public purse that ultimately must fund it.

[49] In the premise, I make the following order:

Order

[1] The application is dealt with as one of urgency in terms of Rule 8(2) of the Labour Court Rules, and any non-compliance with the provisions of service and time periods is condoned.

[2] The termination of the Applicant's service in a letter dated 13 June 2022, was a fundamental breach of her contract of employment and the dismissal was unlawful and void *ab initio.*

[3] The First Respondent must reinstate the Applicant without delay, with retrospective effect to 13 June 2022, and must pay the Applicant any unpaid remuneration and benefits due to her from that date.

[4] The First and Second Respondents must comply with its Human Resource Policy and Procedures in Annexures "FA22" and "FA23" insofar as they are applicable to the disciplinary enquiry instituted pursuant to the Notice dated 28 January 2022 (Annexure "FA7") in the event the parties do not agree to conduct a pre-dismissal inquiry under section 188A of the Labour Relations Act, 66 of 1998, instead. All references to annexures in this paragraph refer to the Applicant's founding affidavit.

[5] The First Respondent must pay the Applicant's costs.

R. Lagrange
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	L Moela
Instructed by:	Ngcingwana Inc Attorneys

For the First and

Second Respondents:	T Madima SC
Instructed by:	Madima Inc Attorneys