REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 16704/2012

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

14/3/2019

SIGNATURE **DATE**

In the matter between:

CHARLES VAN DEN BERG **PLAINTIFF**
(Applicant in the application for leave to appeal)

and

TSHWANE UNIVERSITY OF TECHNOLOGY **DEFENDANT**
(Respondent in the application for leave to appeal)

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

CCMA on 2 October 2009.

[15] In paragraph [123] this Court posed the question whether the TUT breached the employment contract by not affording the plaintiff his right to an appeal under these circumstances set out in the previous paragraph and concluded that the TUT did not, to recap briefly: The plaintiff was at all times aware of his procedural rights, is borne out by the facts. He was represented throughout and at all times during the disciplinary process that stretched over many months. He was also represented by counsel during the CCMA proceedings. At no stage did the applicant made any attempt to enforce his contractual right. Instead he approached the CCMA (whilst being represented by counsel) and sought a full rehearing of the matter by the CCMA[5]. Under these circumstances it can hardly be said that the TUT had breached the contract. Even if had, (which is not the case in my view in the present matter), the breach must be viewed in light of the fact that the plaintiff had been dismissed for serious financial misconduct which ordinarily entitles an employer to terminate the contract in terms of the common law. As was pointed out by the Labour Appeal Court in *SA Football Association v Mangope*: where a contract had been lawfully terminated on account of an employee's conduct, he would have suffered no contractual damages arising from the procedural breaches. I, reiterate what the Labour Appeal Court held in respect of procedural non-compliance in such circumstances:

> "[39] The respondent and the court a quo placed much store on the appellant's failure to follow the evaluation procedure in clause 5 of the contract prior to terminating the contract. The reliance is to a certain extent misplaced in a suit for breach of contract as opposed to one for unfair dismissal. *Accepting that the appellant did not properly evaluate the respondent's work performance or provide reasonable instruction or opportunity to improve, such breaches of contract by the employer would not necessarily be construed as material or causative at common law. Non-compliance with procedural provisions in a contract of employment ordinarily will ground a claim for unfair dismissal in terms of the LRA, even where there is a justifiable substantive reason for*

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[5] It is trite that arbitration proceedings before the CCMA constitute a *de novo* hearing of all charges. See *inter alia*, Zuma and Another v Public Health and Social Development Sectoral Bargaining Council & Others (2016) 37 ILJ 257 (LC); South African Transport and Allied Workers Union v MSC Depots (Pty) Ltd (2013) 34 ILJ 206 (LC) at para [19]; Potgietersrus Platinum Ltd v Commission for Conciliation, Mediation and Arbitration and Others (1999) 20 ILJ 2679 (LC) at para [67.3].

> *dismissal; but at common law a procedural breach will be of no contractual consequence unless it results in damages, particularly where there has been a material breach or repudiation by the employee entitling the employer to cancel.*[6] In the law of contract there must be a causal nexus between the breach (procedural or otherwise) and the actual damages suffered. A contractant must prove that the damage for which he is claiming compensation has been factually caused by the breach. This involves a comparison between the position prevailing after the breach and the position that would have obtained if the breach had not occurred. Accordingly, if the respondent's contract is found to have been lawfully terminated on account of his repudiation of the warranty of competence, he would have suffered no contractual damages arising from the procedural breaches. As I have just explained, he may have been entitled to compensation (not damages) in terms of the LRA for a procedurally unfair dismissal, but then he needed to refer an unfair dismissal dispute to the CCMA in terms of s 191 of the LRA."

[16] It is therefore in light of these facts that the Court held that there was no breach of contract. The fact that the waiver was not specifically pleaded is of no consequence in this particular matter. The fact of the matter is that the plaintiff committed a material breach of the contract; he has never placed the TUT on terms to perform in terms of the provisions of the code in circumstances where he had alternative remedies at this disposal to enforce the terms of the contract and lastly, where a contract has been lawfully terminated, as it has been done in this case, he would not have suffered contractual damages arising from procedural breaches, even if there had been any.

[17] I must lastly also briefly point out that this matter confirms the dangers an employee faces when he elects to craft a cause of action relying on the common law (although he has the right to do so) instead of pursuing his employee rights through the dispute resolution mechanisms provided for in the Labour Relations Act.[7] This much was pointed out by the Constitutional Court in *Steenkamp and Others v Edcon Ltd*[8]:

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[6] My emphasis.
[7] Act 66 of 1995.
[8] 2016 (3) SA 251 (CC).

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VARIATION ORDER

AC BASSON, J

[1] On 23 February 2018, this court made the following order:

> "[127] The plaintiff has not succeeded in proving that the TUT has breached his employment contract in respect of the complaints raised in paragraph 6.4, 6.5, 6.6, 6.7 and 6.8 of the particulars of claim. The claim of the plaintiff therefore falls to be dismissed. I can find no reason why costs should not follow the result."

[2] During the hearing of the application for leave to appeal in this matter, it was brought to my attention that this order contains a patent error. Both counsel on behalf of the plaintiff and the respondent were *ad idem* that this court should have stipulated in its order that the costs included the costs occasioned by the employment of two counsel. This is a patent error as contemplated by Rule 42(1)(c) of the Uniform Rules of Court[1] and one which this court may vary upon the application of any party affected thereby. In this instance the application is supported by both parties.

[3] In the event, paragraph [127] of the order is varied by adding the following:

> [127] The plaintiff is ordered to pay the costs. Such costs to include the cost occasioned by the employment of two counsel."

AC BASSON

JUDGE OF THE HIGH COURT

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[1] "42 Variation and rescission of orders

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

...

(c) an order or judgment granted as the result of a mistake common to the parties."