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.

23.02.2018
SIGNATURE DATE

23/2/18

In the matter between:

CHARLES VAN DEN BERG **PLAINTIFF**

and

TSHWANE UNIVERSITY OF TECHNOLOGY **DEFENDANT**

JUDGMENT

AC BASSON, J

[1] The plaintiff, Mr. Charles van den Berg (hereinafter referred to as "the

plaintiff"), instituted action against and claims damages from the defendant in the sum of R8 126 735.00 (alternatively R10 241 336.00), being damages allegedly suffered by him as a result of an alleged breach of contract by his former employer - the Tshwane University of Technology (hereinafter referred to as the "TUT").

[2] The plaintiff was dismissed by the TUT on 5 August 2009, after he was found guilty by a disciplinary hearing that was held in his absence, on various charges relating to several financial irregularities in respect of the Hartebeeshoek training facility utilized by the Department of Horticulture for practical training purposes for students registered for academic degrees falling under the department. At the relevant time the plaintiff was the Head of the Department of Horticulture ("HOD"). In brief, it is the case of the plaintiff that the TUT breached the employment contract that regulated the employment relationship between him and the TUT by not following certain contractually prescribed procedures in dismissing him.

The ambit of the dispute

[3] It is important to emphasise what is before the court: The plaintiff's case is confined to the issue about whether the TUT breached his contract of employment by allegedly not following certain contractually entrenched procedural steps which culminated in the termination of his employment contract.

[4] The plaintiff has elected not to dispute the (substantive) reasons for dismissing him. This election is not without consequence as will be pointed out in more detail herein below, and is particularly significant in light of the fact that the charges preferred against the plaintiff and of which he was found guilty by a disciplinary hearing, are undoubtedly of a serious nature especially in so far as they relate to financial mismanagement and dishonesty.

[5] Although the plaintiff has given extensive evidence as to why he is not guilty as charged and, more in particularly, why the disciplinary hearing ought not to have found him guilty, the plaintiff has elected not to proceed with his action

on the basis that the TUT did not have a valid and fair reason to terminate the contract (dismissal). In fact, it was made clear to the court that the issue before the court was not whether the plaintiff was guilty of the charges preferred against him. The plaintiff elected to proceed, *inter alia*, on the basis that the TUT was not entitled to proceed with the disciplinary hearing in his absence and that he ought not to have been denied his right to an internal appeal. Because the TUT had breach the contract by not following these procedures, the plaintiff alleges that he had suffered damages.

[6] Merits and quantum were separated in terms of the provisions of Uniform Rule 33(4).

Contractual relationship between the parties

[7] The plaintiff relied upon a contract of employment concluded between himself and the TUT dated 5 November 2002. In addition, he relied upon various policies that governed the employment relationship between him and the TUT at the time and, more in particular, relied upon a Policy on Discipline (hereinafter referred to as "the policy") that contains the TUT's official and approved policy on discipline. These policies (and more in particular the Policy on Discipline) formed part of the terms and conditions that governed the plaintiff's employment with the TUT at the time. The plaintiff was therefore contractually entitled to a disciplinary process that conformed with the TUT's policy on discipline. It is trite law that, even where an employee has been found guilty of serious misconduct, such employee would still be entitled to the procedures provided for in the policy (and incorporated into his employment contract) before he or she may be dismissed.[1]

[8] In his particulars of claim, the plaintiff refers to two different versions of the policy: the one is referred to as "Annexure C6" and the other as "Annexure

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[1] See in general: *Solidarity and Others v South African Broadcasting Corporation* 2016 (6) SA 73 (LC) at [54]: "In the context of the SABC disciplinary code, the classification of misconduct as warranting summary dismissal is really an echo of the common-law characterisation of certain conduct as constituting a repudiatory breach of the employment contract which warrants the employer terminating it without notice. However, it would be absurd on this basis to interpret that provision to mean that all serious misconduct set out in clause 1.2 of the code disentitled employees accused of such misconduct to a disciplinary enquiry before their dismissal."

C7". It subsequently became common cause that the policy annexed to the particulars of claim as "Annexure C7" was the applicable policy at the time. It is also common cause that, in terms of his employment contract, this policy was specifically incorporated into the plaintiff's employment contract and that it formed part of the conditions of service of the plaintiff. In terms of the applicable policy the TUT – as the employer – has certain contractual obligations in respect of any disciplinary proceedings instituted against an employee. As already pointed out, it is the plaintiff's case that the TUT had failed to comply with its contractual obligations in respect of the disciplinary process against him and that this (procedural) failure, constituted a breach of contract which resulted in him suffering damages.

Plaintiff's case

[9] In paragraph 6 of the particulars of claim, the plaintiff (initially) relied on the following eleven distinct grounds of breach of his contract of employment:

1. In paragraph 6.1, the first ground for alleging breach is: "*failing to institute disciplinary proceedings no later than 6 weeks after the date of the alleged offence, alternatively after the defendant became aware of the incident, as required by clause 6.2 of annexure "C6*". (This ground subsequently fell away.)
2. In paragraph 6.2, the second ground for alleging breach is: "*by failing to conclude its investigations within the prescribed period as is required by annexure "C6" alternatively as required by annexure "C7".* (This ground subsequently fell away.)
3. In paragraph 6.3, the third ground for alleging breach is: *"by failing to conduct a disciplinary hearing within the prescribed period after notification of the intention to take disciplinary steps as required by annexure "C6" alternatively as required by annexure "C7".* (This ground subsequently fell away.)
4. In paragraph 6.4, the fourth ground for alleging breach is: *"by failing to appoint the members of the investigative committee in accordance with the provisions of annexure "C6" alternatively annexure "C7".*
5. In paragraph 6.5, the fifth ground for alleging breach is: *"by conducting the*

disciplinary hearing without any notification alternatively proper notification having been afforded to the plaintiff as required by annexure "C6" alternatively annexure "C7".

6. In paragraph 6.6, the sixth ground of alleging breach is: *"by failing to appoint the members (inclusive of the chairman) of the disciplinary committee in accordance with the provisions of annexure "C6" alternatively the provisions of annexure "C7".*
7. In paragraph 6.7, the seventh ground for alleging breach is: *"by conducting the disciplinary hearing in the absence of the plaintiff".*
8. In paragraph 6.8, the eighth ground for alleging breach is: "*by failing to afford the plaintiff the right to the prescribed internal appeal in accordance with the provisions of annexure "C6", alternatively the provisions of annexure "C7".*
9. In paragraph 6.9, the ninth ground for alleging breach is: "*by failing to communicate the findings of the disciplinary committee to plaintiff within the prescribed time period as required by annexure "C6", alternatively as required by annexure "C7".* (This ground subsequently fell away.)
10. In paragraph 6.10, the tenth ground for alleging breach is: "*by failing to record the exact events and evidence adduced at the disciplinary hearing as required by annexure "C6"* alternatively as required by annexure "C7". (This ground subsequently fell away.)
11. In paragraph 6.11, the eleventh ground of breach is: "*by dismissing the plaintiff as a result of a disciplinary hearing".*

TUT's defence

[12] The TUT's defence to the plaintiff's claim can briefly be summarized as follows: (i) the TUT disputes that it breached the contract; (ii) to the extent that it may be found that it breached the contract, the TUT contends that it was entitled to terminate the plaintiff's contract of employment in that he committed material breach of contract in that the plaintiff committed misconduct which included gross negligence, dishonesty and acting in conflict of interest, alternatively, in that the plaintiff's conduct constituted a repudiation which was accepted by the defendant and in turn entitled the defendant to dismiss the plaintiff; (iii) the TUT disputes that there is a causal link between the alleged breach and the damages allegedly suffered by the plaintiff; (iv) the TUT further disputes that

the plaintiff had suffered any damages and also contends, in the alternative, that any amount by which the plaintiff's patrimony may have been diminished is not as a result of any breach of contract committed by the TUT; and (v) to the extent that the plaintiff has successfully proven a *nexus* between the alleged breach and the damages allegedly suffered, the TUT contends that there was a duty upon the plaintiff to mitigate his losses.

[13] Although extensive evidence was lead in respect of each of the alleged breaches, the only remaining breaches relied upon by the plaintiff are the five breaches pleaded in paragraph 6.4; 6.5; 6.6, 6.7 and 6.8 of the particulars of claim.

Legislative framework: Jurisdiction

[14] An employee has a choice to contest his or her dismissal on the basis of fairness (in terms of the Labour Relations Act[2] - hereinafter referred to as "the LRA) or to contest the dismissal on the basis of the lawfulness of the dismissal (in terms of the common law). The distinction between the fairness and lawfulness of a dismissal has been explained as follows by the Constitutional Court in *Steenkamp and Others v Edcon Ltd*:[3]

> "[191] The distinction between an invalid dismissal and an unfair dismissal highlights the distinction in our law between lawfulness and fairness in general and, in particular, the distinction between an unlawful and invalid dismissal and an unfair dismissal or, under the 1956 LRA, a dismissal that constituted an unfair labour practice. At common law the termination of a contract of employment on notice is lawful, but that termination may be unfair under the LRA if there were no fair reason for it or if there were no compliance with a fair procedure before it was effected. This distinction has been highlighted in both our case law and in academic writings."

[15] Although the dispute resolution procedures provided for by the LRA to resolve an unfair dismissal dispute are relatively simple, cost effective and quick, the

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[2] Act 66 of 1995

[3] 2016 (3) SA 251 (CC).

limited nature of the compensation[4] (as opposed to damages in terms of the common law) that can be claimed by a successful employee, may serve as an attractive motivation to dismissed employees to rather approach the High Court on the basis of a breach of contract. One of the advantages of proceeding in terms of the LRA and on the basis of fairness (as opposed to proceeding on the basis of breach of contract), is that an employee does not have to prove that he or she had suffered any damages or loss as a result of an alleged non-compliance with, for example, a procedural requirement prior to dismissal: the amount that an employee may be entitled to in terms of the LRA where it is found that the dismissal was substantively and/or procedurally unfair, is statutory regulated (and limited) and does not constitute damages as in a civil claim context.

[16] Despite the fact that the LRA provides for a relatively simple procedure to challenge the fairness of a dismissal, a dismissed employee is not prohibited from approaching the High Court and claim that his or her dismissal constituted a breach of contract which resulted in damages. Therefore, where an employee has been dismissed, the act of dismissal can give rise to different causes of action and a dismissed employee is afforded the right to choose the forum under which he or she wishes to pursue the dismissal. This principle has been confirmed in a long line of decisions. See for example, *Chirwa v Transnet Ltd & others*[5] where the court expressed the view that, although the LRA procedures should be the more appropriate route to pursue in dismissal cases, an employee may nonetheless elect to pursue his contractual remedies. In this regard the Constitutional Court held as follows regarding the jurisdictional boundaries between the Labour Court and the High Court:

> "[41] It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At

[4] A maximum of 12 months' remuneration in the case of an unfair dismissal and a maximum of 24 months' remuneration in the case of an automatically unfair dismissal (section 194 of the LRA).
[5] (2008) 29 ILJ 73 (CC), 2008 (4) SA 367 (CC).

the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims."

[17] The Constitutional Court in *Chirwa*[6], however, also confirmed the principle that a dismissed employee is not confined to the remedies and procedures provided for by the LRA and that the employee may proceed to enforce a damages claim in the High Court:

"[90] The views expressed by Cameron and Mthiyane JJA have subsequently been reaffirmed in two recent decisions of the Supreme Court of Appeal. The views of the Supreme Court of Appeal on the provisions of s 157 are summarized in *Boxer Superstores Mthatha & another v Mbenya* as follows:

'The exclusive jurisdiction of the Labour Court has been carefully circumscribed in recent years. Section 157(1) of the LRA provides that subject to the Constitution and the Labour Appeal Court's jurisdiction, and except where the LRA itself provides otherwise, "the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court'. Despite the seeming breadth of this provision, it is now well established that -

(i) (as Peko ADJP observed in dismissing the jurisdictional objection) s 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship between the employer and employee (*Fedlife Assurance Ltd v Wolfaardt*), and since the LRA affords the Labour Court no general jurisdiction in employment matters, the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations (*Fredericks & others v MEC for Education & Training, Eastern Cape & others*);

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[6] *Ibid.*

(ii) the LRA's remedies against conduct that may constitute an unfair labour practice are not exhaustive of the remedies that might be available to employees in the course of the employment relationship - particular conduct may not only constitute an unfair labour practice (against which the LRA gives a specific remedy), but may give rise to other rights of action: provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could also have been formulated as an unfair labour practice (*United National Public Servants Association of SA v Digomo NO & others*);

(iii) an employee may therefore sue in the High Court for a dismissal that constitutes a breach of contract giving rise to a claim for damages (as in *Fedlife*);

(iv) similarly, an employee may sue in the High Court for damages for a dismissal in breach of the employer's own disciplinary code which forms part of the contract of employment between the parties (*Denel (Edms) Bpk v Vorster*). (Footnotes omitted.)"

See also: *Fedlife Assurance Ltd v Wolfaardt*[7]

"[15] However there can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment. Thus irrespective of whether the 1995 Act was declaratory of rights that had their source in the interim Constitution or whether it created substantive rights itself, the question is whether it simultaneously deprived employees of their pre-existing common-law right to enforce such contracts, thereby confining them to the remedies for 'unlawful dismissal' as provided for in the 1995 Act.

[16] In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the Legislature did not intend to interfere with existing law and *a fortiori*, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only

[7] 2002 (1) SA 49 (SCA).

if that appears expressly or by necessary implication (*Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784D-H). While the advent of the Constitution, and s 39(2) in particular, has not had the effect of prohibiting entirely the use of the presumption against legislative alteration of the existing law (whether common law or statute) when interpreting a statute which is less than clear, it nevertheless limits its field of application. The same is true of the presumption against the deprivation of existing rights. To illustrate: where a statute is ambiguous as to whether or not an existing law or right has been repealed, abolished or altered and the existing law or right is not in harmony with 'the spirit, purport and objects of the Bill of Rights' there would appear to be no justification for invoking any such presumption. But where the existing law or right is not unharmonious the presumption will still find application. The continued existence of the common-law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed-term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case.

[17] The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the Legislature had no intention of doing so."

In *Makhanya v University of Zululand*[8] the Supreme Court of Appeal similarly held as follows:

"[18] Thus to summarise:

- The labour forums have exclusive power to enforce LRA rights (to the exclusion of the High Courts).
- The High Court and the Labour Court both have the power to enforce common-law contractual rights.
- The High Court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment.

This view was confirmed in *Gcaba v Minister for Safety and Security and*

[8] 2010 (1) SA 62 (SCA).

others:[9]

> "[53] First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the *actio injuriarum* in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalization should be avoided.
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> .....
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> "[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies."

More recently in the decision of *Mathabathe v Nelson Mandela Bay Metropolitan Municipality & another*,[10] the Labour Court likewise confirmed the legal position:

> "[17] The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so.'

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[9] 2010 (1) SA 238 (CC).
[10] (2017) 38 ILJ 391 (LC).

And further at para 27 [with reference to *Fedlife Assurance Ltd v Wolfaardt* [11]]

'Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. The dispute falls within the terms of the section only if the "fairness" of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about.'

[17] I do not understand the law to have changed since *Fedlife*, certainly not to the extent of depriving a dismissed employee of any contractual rights where the employee elects to enforce those rights either as an alternative or in addition to any claim for unfair dismissal that may be available under the LRA. This much was made clear by the SCA in the later decision of *Boxer Superstores Mthatha & another v Mbenya* 2007 (5) SA 450 (SCA); (2007) 28 *ILJ* 2209 (SCA). The situation is different where an employee employed by the state seeks to rely on an administrative law remedy. Here, the courts have held that when a party alleges that the employer has failed to comply with the LRA, a remedy must be sought under that Act; the employee may not clothe the dispute as one that concerns the application or enforcement of an administrative law right (see *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC)). In the present instance, the applicant does not seek a remedy that is available to her under the LRA. Her complaint is that the respondents have breached her contractual rights, and it is those rights that she seeks to enforce. I do not understand the more recent decision by the Constitutional Court in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 *ILJ* 564 (CC) to have changed that position. In that case, the affected employees brought their claim directly under the LRA; their cause of action was one based directly on a breach of an LRA obligation. The fact that the content of her contractual right to a fair hearing is defined by reference to what is provided by the LRA does not necessarily require the applicant to invoke an LRA remedy, nor does it deprive her of a contractual right — the issue is one of the nature and

[11] 2002 (1) SA 49 (SCA).

> content of the contractual right. In short, the reference to the LRA in the present instance is one of definition. Clause 15.2 does no more than define the scope of the contractual right to a fair hearing.
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> [18] The issue to be decided therefore is the scope of a right to fair procedure defined by the phrase 'as well as in accordance with the LRA'. Further, to the extent that it becomes necessary, the court must determine whether there has been a breach of that right and, if so, whether the applicant is entitled to the remedy of specific performance."

See lastly: *Nyathi v Special Investigating Unit:*[12]

> "[35] It is further accepted that an employee has rights both in terms of the common law and in terms of the LRA in the event of a premature termination of a fixed-term contract, or in the event of other dismissals, and that the employee has a choice whether or not to pursue his common-law rights to enforce a claim for contractual damages in the event of a termination of the contract or claim on the basis of an unfair dismissal because of a lack of substantive and/or procedural fairness. In this regard the Labour Court in *Jonker v Okhahlamba Municipality and others* stated as follows:
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> > 'A breach of the common-law contract of employment, insofar it has not been supplanted by legislation, may also be actionable under the Constitution. Remedies for such breaches must be derived from the LRA itself.... The interface between the Constitution, labour legislation and the common law depends on the right claimed and how it is pleaded.'"

Section 77(3) of the Basic Conditions of Employment Act

[18] In terms of section 77(3) of the Basic Conditions of Employment Act[13] ("the BCEA") the Labour Court has concurrent jurisdiction with the High Court to determine matters arising from a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

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[12] (2011) 32 ILJ 2991 (LC).

[13] Act 75 of 1997.

[19] More in particular, in terms of section 77A*(e)* of the BCEA the Labour Court has the power to make a determination on any matter that it considers reasonable in terms of section 77(3) in respect of the contract of employment which determination may include an order for specific performance, an award of damages or an award of compensation. In other words, the Labour Court therefore not only has jurisdiction to adjudicate on the fairness of a dismissal, it also has concurrent jurisdiction with the High Court to determine issues related to whether a dismissal constitutes a breach of the employment contract.

[20] In principle therefore, where an employer dismisses an employee without following contractually prescribed pre-dismissal procedures such as failing to conduct a disciplinary hearing or failing to afford an employee the right to an appeal, such an employee can approach the Labour Court (and even on an urgent basis where warranted) for an order declaring his or her dismissal invalid and for an order forcing the employer to comply with its contractual obligations in terms of the procedures (specific performance).[14]

[21] There exist numerous examples of instances where an employee approached the Labour Court in terms of section 77 and 77A of the BCEA to enforce a procedural contractual right, such as the right to a disciplinary hearing prior to dismissal. The most recent example, is the matter of *Solidarity and Others v South African Broadcasting Corporation*.[15] In brief, the applicants in this matter approached the Labour Court on an urgent basis to enforce their contractual right to a disciplinary hearing which was denied to them when the employer (the SABC) dismissed them without affording them the right to a disciplinary hearing. The Labour Court confirmed the right of an employee to approach the Labour Court for an order declaring a dismissal in contravention with disciplinary procedures contained in a contract of employment invalid and to compel the employer to comply with its contractual obligations:

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[14] See: *SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC).
[15] 2016 (6) SA 73 (LC).

"[45] In support of this contention they cite examples of judgments in which the Labour Court has made orders of specific performance compelling an employer to honour contractual obligations to hold a disciplinary hearing and setting aside dismissals in breach of such obligations, namely *Ngubeni v National Youth Development Agency and Another* and the unreported decision in *Dyakala v City of Tshwane Metropolitan Municipality*. In *Ngubeni* the court noted (para 19):

> 'Insofar as it may be contended that the remedy of specific performance is either unavailable or inappropriate, the starting point is to note that s 77A*(e)* of the BCEA specifically empowers this court to make such orders. In Santos Professional Football Club (Pty) Ltd v Igesund and Another 2003 (5) SA 73 (C) ((2002) 23 *ILJ* 2001), the court noted that courts in general should be slow and cautious in not enforcing contracts, and that performance should be refused only where a recognised hardship to the defaulting party is proved.'

[46] In *Ngubeni* the court held that clause 10.1 of his contract of employment and a further written undertaking by the employer offering him 'a procedure that would have made any criminal court proud', both constituted binding obligations on the employer which he could enforce by way of specific performance. The court found that his dismissal in breach of clause 10.1 was unlawful and set the termination aside. In *Dyakala* the court held inter alia:

> 'If regard is had to the applicant's contract of employment it is clear from clause 18.2 of the contract that, where the reason for terminating the employment contract include[s] being guilty of any serious misconduct, the employer is entitled to terminate the contract after due compliance with its disciplinary code and procedures. The applicant therefore has, in my view, established that he has a contractual entitlement to a disciplinary hearing. Insofar as there clearly has been no compliance with this contractual obligation to hold a disciplinary hearing before terminating the contract, the termination of the contract was unlawful.'

[47] The SABC advanced no authority why either of these judgments was wrong either with respect to the power of the Labour Court to hear and determine contractual disputes or to make orders pronouncing on the lawfulness of a breach of contract or granting relief in the form of specific performance in the exercise of jurisdiction under s 77(3) of the Basic Conditions of Employment Act (BCEA). I am satisfied that the decision of the Constitutional Court does nothing to disturb the legal premises of either of these and similar

judgments. Consequently, the Labour Court is entitled to entertain the applicants' claims based on any alleged invalid termination of their contracts of employment and to make orders which are competent in claims based on breach of contract."

[22] In *Dyakala v City of Tshwane Metro Municipality*[16] (referred to by the Labour Court in the *Solidarity*[17] matter with approval), the Labour Court set aside the termination of the applicant's contract of employment in circumstances where the employer abandoned a disciplinary hearing midway and instead dismissed the employee. The Labour Court further ordered the reinstatement of the dismissed employee and ordered the employer to comply with its procedural obligations in terms of the contract of employment. (See also *Ramabulana v Pilansberg Platinum Mines*[18]).

[23] I will return to the relevance of this process herein below.

Breach of contract

[24] A party who does not perform in terms of its contractual obligations or performs such obligations in a wrong manner, commits a breach of contract. In response the innocent party has the right to cancel or enforce the contract. It is accepted that not every breach of contract that causes loss to the other party will necessarily give rise to an action based on the alleged beach.

[25] The onus rests on the plaintiff to allege and prove the following requisite elements in order to claim damages resulting from a breach of contract:

1. breach of the contract or repudiation of the contract;
2. that the claimant has suffered damages;
3. a causal link between the breach and damages;
4. that the loss was not too remote.

[26] In the present matter the objection is that the employer breached an

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[16] J572/2015 [2015] ZALCHB 104 (23 March 2015).
[17] *Supra*.
[18] (2015) 36 ILJ 2333 (LC).

employment contract. It is trite that an employee, at common law, owes his or her employer a duty of good faith. In this regard the Labour Appeal Court in *Bonfiglioli SA (Pty) Ltd v Panaino*[19] held as follows:

> "[26] .... This is so because at common law, the employee owes the employer a duty of good faith. In *Ganes & another v Telecom Namibia Ltd*, it was said that the duty of good faith entails that an employee is obliged not to work against the interests of his/her employer and not to place himself/herself in a position where his/her interests conflict with those of the employer. In *Council for Scientific & Industrial Research v Fijen*, it was stated that:
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> > 'It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the "innocent party" to cancel the agreement.'."

[27] This duty to act in good faith was aptly described by Marlize van Jaarsvled in *"An Employee's Contractual Obligation to Promote Harmonious Relationships in the Workplace - When Are the Stakes too High? Some Pointers from the Judiciary"*[20] as follows:

> "So, an employee is contractually obliged to act in good faith during the course of the employment relationship.... The essence of this duty, its nature and its extent are questions of fact which should be deduced from a thorough consideration of the substance of the parties' relationship and any relevant circumstances which affect its operation...
>
> Moreover, it is well established that an employee owes a number of fiduciary duties to his employer during the currency of his employment, and not just during certain periods of their relationship (see *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) at 867H-868A where it was held that this fiduciary duty involves an obligation not to work against his employer's interests, and that this principle applied although an express term to that effect had not been included in the contract; see also *Uni-Erections v Continental Engineering Co Ltd* supra at 252D-253F and, more recently, *Sappi*

[19] (2015) 36 ILJ 947 (LAC).
[20] (2007) SA Merc LJ 204-216.

Novoboard (Pty) Ltd v Bolleurs (1998) 19 ILJ 784 (LAC) at 786F where the duty of an employee to act in good faith towards his employer was regarded as an implied term of the contract of employment).

In *Council for Scientific & In dustrial Research v Fijen* (supra) the Court remarked that at common law the relationship between an employer and employee was in essence one of trust and confidence, and that conduct inconsistent with this duty entitled the innocent party to cancel their contract (see at 26D-E). Harms JA explained that in this regard South African law was the same as English law and that a reciprocal duty of good faith rested upon an employee. However, he was not prepared to view this duty as an 'implied' duty of a contract of employment but rather regarded it as flowing from the naturalia contractus. With reference to the form that the implied term of trust and confidence should take in South African law, Bosch (op cit at 28) aptly observed that the common law of contract had definitely not been obliterated by labour legislation. Where an employee plots against his employer, acts contrary to his employer's interests whilst trying to benefit his own interests, and displays dishonesty, his conduct constitutes a breach of his fiduciary duties and an irretrievable breakdown in their relationship of trust[21] (see also *Van Heerden and Medihelp* (2002) 23 ILJ 835 (ARB) at 847A where it was held that this conduct justified termination of the employment contract by way of dismissal based on misconduct).

Accordingly, an employee is bound to serve his employer faithfully and honestly so that conduct that destroys the relationship of trust and confidence may provide the employer with a just ground for terminating the employee's contract of employment (see *Wille & Millin's Mercantile Law of South Africa* 18 ed (1984) by JF Coaker & DT Zeffertt (eds) at 347)."[22]

[28] Where an employee has been found guilty pursuant to a disciplinary enquiry of conduct involving dishonesty, financial mismanagement or conduct amounting to a conflict of interest, the employer will generally have the right to terminate the contract of employment (dismissal) as such conduct usually destroys the relationship of trust that is inherent and fundamental to the employment relationship.

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[21] My own emphasis.
[22] *Supra,* page 206-207.

Contract of employment

[29] It was not in dispute that the plaintiff's contract of employment made specific provision for the incorporation of TUT's rules and regulations and more in particular TUT's Policy on Discipline ("the policy" - Annexure C7).

[30] It is clear from the reading of this policy that it is aimed at ensuring that discipline is administered justly, efficiently and in an unbiased manner and that disciplinary action should, in the first place, be educational and, in the second place, corrective in nature. From a labour law perspective, the policy is aimed at ensuring substantive and procedural fairness in disciplining a staff member. In contractual terms the policy contains fairly detailed procedures to be followed where an employee faces charges of misconduct and particularly, where the employee faces the possibility of a sanction which may result in his or her dismissal. A dismissal effected in accordance with the provisions of a contract of employment will generally be lawful.

[31] Dismissal (termination of the employment contract) is the most severe punishment that can be imposed on an employee. The purpose of providing for a (fair) procedure is to establish firstly, on a balance of probabilities whether an employee is indeed guilty as charged and secondly, to determine an appropriate sanction in the event of a guilty finding.

[32] The policy provides, *inter alia*, for the composition of a disciplinary committee for the different post levels. Clause 4 of the policy specifically provides for the procedures that must be followed when conducting a disciplinary hearing: in the event of an alleged misconduct that warrants a hearing, the policy provides that a line manager must investigate the alleged misconduct whereafter a suitable recommendation must be made. Clause 4.4 provides for the manner in terms of which the staff member concerned should be notified of the hearing. Clause 4.5 sets out the roles and duties of a disciplinary committee member and sets out who must be the chairperson and initiator of the disciplinary committee. Clause 4.6 sets out the process to be followed in conducting the hearing. For example, the chairperson should open the hearing, the staff member is required to plead and the initiator will present the

case on behalf of the TUT. The staff member may cross-examine witnesses. The staff member has the right to present his or her case and may call witnesses who may be cross-examined by the initiator. The initiator and the staff member may make final submissions whereafter the committee will go into recess to deliberate and decide on guilt only. If the staff member is found guilty, both parties are given an opportunity to plead in mitigation and aggravation. The committee will thereafter again go into recess and consider an appropriate sanction taking into account the respective parties' submissions. The chairperson will reconvene the hearing and notify the parties of the sanction. Clause 7.4 sets out in detail the staff member's right of appeal against a sanction of dismissal. I should point out that it was not contended by either party that any of the clauses are vague or nonsensical or impractical or incapable of practical application.

[33] The policy also explicitly states that where a staff member refuses or fails to attend an inquiry or a disciplinary hearing without reasonable cause, the TUT has the right to proceed with the inquiry or hearing in his or her absence. In these circumstances it will be deemed that the employee has waived his or her right to a hearing.

Brief exposition of some of the salient facts that preceded the dismissal of the plaintiff

[34] I do not deem it necessary for purposes of this judgment to give a detailed exposition of all the facts that were placed before the court. It is, however, necessary to refer to some of the salient facts in so far as they contextualise the procedural disputes on which the plaintiff relies.

[35] The plaintiff commenced his employment with the TUT on 1 January 1980 as a lecturer in the Department of Horticulture at the then Technicon Pretoria. In total, the plaintiff had approximately 35 years' service with the TUT commencing from 1980 up until 2009 when he was dismissed. It was common cause that in 2006 the then Technicon Pretoria merged into what is today the Tshwane University of Technology (also known as the "TUT" – the defendant).

[36] In 2007 the plaintiff was appointed as Head of Department ("HOD") of the Department of Horticulture. Although he was appointed as HOD, he retained his permanent substantive post as a lecturer in the department. In his capacity as HOD, the plaintiff liaised with both top management and with the lecturing and student core. The plaintiff also attended meetings on behalf of the department. It was an important component of the plaintiff's position to also liaise with industry. In this regard the plaintiff explained the importance of practical training of students in addition to the theoretical background they receive from the TUT. In order to enhance the theoretical training of students, the plaintiff identified certain properties that were suitable for the practical training of students. One such a property was a 14-hectare facility which belongs to the Department of Transport, Roads and Works ("Department of Transport"). This property lent itself to horticultural activities in that students are able to physically build gardens and landscape gardens as part of their practical training. This property is referred to in these proceedings as the "Hartebeeshoek training centre / nursery or property".

[37] A lease for approximately three years was concluded between the TUT and the Department of Transport. In terms of the lease agreement the TUT did not have to pay any rental. The property already had some structures on it such as a lecture hall, a few houses, storerooms, sheds and greenhouses. The lease came to an end in September 2007. In terms of the lease agreement the TUT was, however, liable to refurbish the premises and to pay for water and electricity. The plaintiff testified that between R 300 000.00 and R 400 000.00 had to be made available by the TUT for repairs, renovations and maintenance *in lieu* of any rental that would otherwise have to be paid. The plaintiff confirmed that the TUT would receive the water and electricity bill whereafter it would be paid.

[38] The plaintiff explained that the Department of Horticulture had a departmental fund and that some of the funds were used towards the Hartebeeshoek property. The plaintiff also explained that plants were grown by students on the Hartebeeshoek property and that, because there were no funds available from the TUT's side, these plants were sold to the public and the proceeds

thereof used to run and maintain the Hartebeeshoek facility. The plants were sold directly from the nursery. He further explained that a certain Mr. Marius Gouws ("Gouws" – a former student) resided on the property and that he managed the nursery. Gouws was also in charge of the sale of the plants. According to the plaintiff he had asked Gouws to furnish him with a statement of income and expenditure.

[39] The plaintiff admitted that he allowed a space on the Hartebeeshoek nursery to be "sublet" to an entity with the name Index of Living. According to the plaintiff, Index of Living would pay rent in the amount of R 3 000.00 either in cash or by giving ("donating") pots to the students to be used in their landscaping activities. According to the plaintiff the money was collected by Gouws and used for the daily running of the centre. Further according to the plaintiff the then Dean gave permission for the sublease. There is, however, no documentary proof of such permission ever having been granted. Although the plaintiff admitted that the buck stopped with him and that he was the "ultimate decision maker", he denied negotiating with Index of Living (Mr. Blignout). He also admitted that there is no record of any money received from Index of Living towards rent. According to the plaintiff, he gave Gouws permission to use any money received from Index of Living to defray any expenses of the nursery and for Gouws to utilise as petrol money. All of this happened whilst Index of Living conducted its business from the premises allocated to the TUT and in circumstances where the TUT remained fully responsible for the payment of water and electricity to Tshwane.

[40] The plaintiff specifically did not deny that it was his responsibility as HOD to have ensured that Gouws activities were conducted in accordance with proper accounting practices. Significantly, the plaintiff shifted the blame to his superiors, arguing that they should have ensured that there was financial compliance despite the fact that he had also acknowledged at the same time that the nursery was his "baby".

[41] Gouws also conducted his own landscaping business (through a closed corporation named Royal Botanica) from the premises. The plaintiff also

admitted that a certain Mr. Schutte ("Schutte"- a former student and son of one of the secretaries in his department) also occupied space on the facility because he (Schutte) needed space for his landscaping business. Schutte did not pay any rent but, according to the plaintiff, he also donated plants to the facility *in lieu* of rental. The plaintiff admitted that Schutte used the water on the premises for his plants but, according to him, it was not a lot of water. The fact, however, remains that it was common cause that the TUT remained responsible for the payment of the water and electricity consumption.

[42] The plaintiff also admitted that he allowed his own son to store some of his building materials on the property although, according to him, his son did not store the material there – he just left it there so that these building materials could be used by students for their landscaping activities.

[43] When asked about a VISI landscaping, the plaintiff testified that he was not aware of this entity. The plaintiff was also asked about signage that was displayed on the property advertising the aforementioned businesses. He admitted that there was a big banner of Index of Living. He, however, denied having seen any signage of Royal Botanica despite the fact that, according to him, he regularly (every two to three weeks and sometimes more often) visited the property. He also admitted that advertisements are generally used by businessmen to promote their businesses.

The forensic investigative report dated 17 April 2008

[44] The disciplinary process emanated from a Forensic Investigative Report conducted by Mr. Dlamini ("Dlamini"- the TUT's Chief Internal Auditor – "Dlamini") and Mr. Kekana ("Kekana"- a Forensic Auditor of the TUT – "Kekana") into allegations around the operations of the Hartebeeshoek nursery.

[45] The plaintiff was contacted by Dlamini in October 2007. He attended a meeting with Dlamini, Kekana and a certain Dr. Haycock. During this meeting the plaintiff became aware that there were some investigations being conducted into the activities of the Hartebeeshoek nursery. During this meeting various

issues regarding the use of the property by his son, the fact that Gouws conducted a business (Royal Botanica) from the property, the activities of Schutte, the activities of VISI Landscape, the employment of personnel on the premises and other issues were discussed with the plaintiff.

[46] The Internal Forensic Audit Report is dated 17 April 2008 and contains the findings pertaining to the investigation into irregularities at the Hartebeeshoek nursery. The report records that there was a lease agreement between the Department of Public Transport, Roads & Works and the TUT for the period 1 November 2004 until 30 September 2007. It is further confirmed that the plaintiff (as the HOD) had appointed Gouws as the manager on site.

[47] In summary, the report investigated the following issues: firstly, whether the nursery was sub-let to other entities or put differently, whether other companies conducted business on the TUT's premises without the necessary prior authority from management. Secondly, whether the TUT's funds were properly accounted for. Thirdly, whether employees at the nursery were paid in line with the TUT's approved tariff list and fourthly, whether there were any contraventions of applicable legislation, as well as the TUT's Code of Conduct.

[48] During a visit to the nursery in September 2007, it was observed by the investigators that there were signage boards of an entity named Royal Botanica displayed at the reception. There was no TUT signage to indicate that it was a university facility. Upon enquiry, Gouws (the principal owner of Royal Botanica) confirmed to the investigators that he was marketing his own business from the Hartebeeshoek nursery. When the plaintiff was asked by the investigators about the signage, he claimed not to have any knowledge thereof. During the visit the investigators also noticed signage of two other entities: VISI Landscaping and Index of Living. In addition to these businesses that operated from the Hartebeeshoek nursery, it was discovered that Schutte also operated a nursery business from the property. According to the report, the plaintiff confirmed to the investigating team that he had allowed Schutte to use the TUT's leased premises to operate his own business. The report concluded in respect of all of these entities, that they conducted their

businesses on a property leased by the TUT (for university business) without any lease agreements and/or approval from management of the university.

[49] In respect of funds not accounted for, the report recorded that, although plants to the value of R 328 683.67 were sold from the nursery, no funds were paid over to the TUT by Gouws. The report also recorded that the investigative team could not in their review of the statements of income and expenditure find any proof that rental monies allegedly paid to Gouws, was in fact paid over to the TUT. Gouws informed the investigators that he had used the money to pay for nursery operational costs.

[50] The report concluded that, as a result of the fact that the plaintiff had allowed Gouws to conduct his business from the Hartebeeshoek premises without approval, the TUT had suffered a financial loss of about R 73 500.00. The report also concluded that as a result of the estimated rental income collected from Index of Living and VISI Landscape but not declared, the TUT suffered a loss in the amount of R 101 500.00. According to the report Gouws confirmed to the investigators that he had collected a monthly rental fee to the amount of R 3 500.00 from Index of Living and VISI Landscape, respectively. The report concluded that this financial loss was suffered by the TUT as a result of the fact that the plaintiff had allowed other companies to conduct business from the premises of the Hartebeeshoek nursery and as a result of the fact that Gouws did not declare all funds to the plaintiff, who would have detected these discrepancies had the plaintiff done a proper analysis of the statements.

[51] The report found that the plaintiff had allocated a storage facility to his son in the absence of any request or application to the TUT to obtain permission to do so. The investigative team also found that a certain Mr George Els (the owner of Akasia Hardware) used the storage facilities at the property. It was also established that certain employees of Schutte resided in caravans at the nursery. As a result of the fact that the plaintiff had allowed friends and family to operate their business from the property without approval, the TUT paid an amount of R 816 011.03 towards the costs of water and electricity that included the consumption by external parties.

[52] The report also recorded that the plaintiff had misled the defendant's management in respect of the appointment of non-students as student assistants. The report further concluded that the plaintiff was grossly negligent by failing to discharge his duties and to manage the activities that occurred at the nursery which formed part of his responsibilities; that the plaintiff failed to ensure that the TUT's funds were properly accounted for; that the plaintiff circumvented the TUT's policies on the appointment of casual employees as student assistants and that the plaintiff failed to comply with the TUT's Code of Conduct for university employees. The report recommended that criminal charges be instituted against the plaintiff for misappropriation of the defendant's funds.

Commencement of disciplinary action against the plaintiff

[53] On 22 July 2008 the plaintiff was informed by Professor Marais ("Marais"- the Executive Dean: Faculty of Science) of the TUT's intention to take formal disciplinary steps against him. A copy of the charges was attached to this letter. Charge 1 relates to the subletting of parts of the property, without permission or approval, to Royal Botanica CC (belonging to Gouws), VISI Landscaping and Index of Living. The plaintiff was also charged for allowing Gouws to display and market his business by putting up boards or signage on the premises without prior permission. As a result of the aforesaid unauthorised sublease, the TUT suffered financial losses in that: (i) the plaintiff failed to ensure that all sales or profits made from the nursery were accounted for and more specifically failed to ensure that the amount of R 328 683.67 was paid over into the departmental cost centre; (ii) the plaintiff failed to ensure that the rental income emanating from the subletting to the aforesaid companies, in the amount of R 101 500.00 was paid into the TUT's account; (iii) the plaintiff gave approval to Schutte to use the lease premises without paying any rental. This resulted in the TUT having incurred high operational costs in the form of water and electricity in the amount of R 816 011.03 as well as a loss of R 73 500.00, being potential rental income; (iv) the plaintiff failed to review the statement of income and expenditure provided by Gouws which reflected that overtime salaries were not paid to employees and which resulted

in the TUT having incurred a financial loss in the amount of R 170 000.00, having been paid as a settlement. Charge 2 relates to conflict of interest in that: (i) the plaintiff permitted Schutte to operate his nursery business on the premises without permission; (ii) the plaintiff allowed his own son to use the storage facilities on the premises without permission; (iii) the plaintiff permitted his friend Mr. George Els, owner of Akasia hardware, to use the storage facilities on the premises without permission; (iv) the plaintiff allowed Schutte (the son of his secretary) to house his employees in caravans on the property without permission. This resulted in the TUT having incurred unnecessary high amount of costs through water and electricity consumption in the amount of R 816 011.03. Charge 3 relates to the charge that the plaintiff had misrepresented facts by employing casual employees at the nursery under the pretext that they were students of the TUT. This resulted in the "casual employees" not having been paid according to the approved TUT student's tariffs.

[54] Against these background facts I will now turn to the procedural complaints relied upon by the plaintiff.

Prior notification of the hearing (paragraph 6.5 of the particulars of claim) and conducting the hearing in the absence of the plaintiff (paragraph 6.7 of the particulars of claim

[55] The plaintiff's fifth ground for alleging a breach of contract is that the TUT conducted the disciplinary hearing without any notification, alternatively, without proper notification having been afforded to him, as required by the code. In essence, it is the plaintiff's case that, in terms of the policy (clause 4.4), notification of the hearing should have been done in a prescribed and formal manner: notification had to be given ten working days prior to the hearing by using an appropriate form (DP5). The plaintiff further contended that such notification should have been handed to him by Industrial Relations ("IR").

[56] It is common cause that a formal Notice to Attend a disciplinary hearing on 26 and 27 November 2008 was handed to the plaintiff by Mr. Moepye ("Moepye")

from IR and that the plaintiff accepted receipt thereof on 10 November 2008. The plaintiff's signature also appears on the second page of the document. Dr. Mukhola ("Mukhola"- Dean of Humanities) is indicated as the chairperson of the disciplinary hearing and Mr. Tlhabadira ("Tlhabadira"- Executive Director of the Centre for Advanced Manufacturing Technology) is indicated as an additional member to the disciplinary hearing. Mr. Rampai ("Rampai") is indicated as the initiator. Mr. Coetzer ("Coetzer") of NUTESA[23] is indicated as the plaintiff's union representative. In this document it is also stated that should the plaintiff not attend, the hearing will proceed in his absence ("Discipline in absentia").

[57] Prior to the issuing of the formal Notice to Attend a disciplinary hearing, Coetzer (of NUTESA) came on record as the representative of the plaintiff. As early as 12 August 2008, Coetzer requested Moepye to furnish him with all the relevant documentation in order to prepare for the disciplinary hearing. The plaintiff also confirmed that Moepye sent an e-mail to Coetzer in which Moepye expressly required input from Coetzer and the plaintiff for five possible dates in order to arrange for the commencement of the hearing. In fact, Moepye expressly stated in an e-mail as far back as 12 August 2018, that it was "important and urgent" that five possible dates be given. The plaintiff was questioned about this e-mail and conceded that at that stage (15 August 2008), the particular date on which the hearing was to be held, was the only outstanding aspect before the hearing could proceed. Moepye confirmed that no dates were furnished by or on behalf of the plaintiff as requested. Yet, despite the urgency expressed in this letter to finalise the dates for disciplinary hearing, months went by before the disciplinary hearing ultimately proceeded albeit in the absence of the plaintiff.

[58] It was also during this time that the plaintiff approached external attorneys (Schoeman & Associates) for legal advice. At that time the plaintiff was also pursuing a formal grievance against the TUT. The plaintiff was referred to a letter dated 15 August 2008 from Schoeman & Associates and addressed to

[23] National Union of Tertiary Employees of South Africa.

the office of the Deputy Vice-Chancellor of the TUT. In this letter the attorneys expressly recorded that the TUT was prohibited from instituting any charges against the plaintiff in circumstances where he has lodged a grievance (a right an employee has in terms of the LRA). It is further recorded that the plaintiff has the right to be legally represented during any grievance procedures. More in particular, it is stated that the TUT was creating an intolerable environment and that the TUT was attempting to constructively dismiss the plaintiff. The letter from his attorneys concludes with the following paragraph:

> "As a last comment, we record and we advise our client that the conduct of your institution as recorded, constitutes nothing else that either an attempt to constructively dismiss our client by creating an environment intolerable for the rendering of services by our client. We advise our client that he should not fall victim to such a process, as it is a well know phenomenon that employers, instead of facing facts, embark upon a process of victimisation in order to procure the resignation of an employee. Our client will not form part of such a process and will address the issue while remaining in the employment of his employer. We suggest that your institution recognises and admits the fact that, for reasons unbeknown to him, but most probably because he is a middle-aged, Afrikaans-speaking, white male, he is an obstacle to others, and victimised because of that."

[59] In response to this letter the plaintiff testified that, at the time, he felt victimised because of the ongoing investigations and that he was being victimised because of his race and age. It was put to the plaintiff that the letter addressed by Schoeman Attorneys in which the grievance was set forth, was in actual fact a threat that, if the hearing did proceed, that the plaintiff would refer the matter to the CCMA. The plaintiff explained that he approached Schoeman Attorneys to assist him with the disciplinary proceedings against him and to represent him at the disciplinary hearing and that the grievance was part of the hearing and that these matters coincided.

[60] In paragraph 4 of this letter the attorneys also complain about the fact that TUT has been delaying for some months the institution of disciplinary proceeding and stated *that "our client will not hesitate to approach the Labour*

Court for the appropriate relief...".

[61] I interpose here to emphasise that it is clear from the facts that the plaintiff was throughout the disciplinary process (which spanned over many months) represented by trade union officials and that he also did not hesitate to elicit the services of attorneys who are labour law practitioners (as is evidence from their letterhead). Undeniable an employee is entitled to union representation and to approach an attorney for legal advice. More in particular, as will be pointed out hereinbelow, Coetzer attended the disciplinary hearings on both occasions when the hearings were in fact convened. The relevance of emphasising this point will become clear where I deal with the plaintiff's complaint that he was denied the right to an appeal hearing.

[62] It was put to the plaintiff that the TUT had, on several occasions, requested the plaintiff to furnish dates upon which the hearing could be held and that it was the intention of TUT to proceed with the hearing going as soon as possible, to which the plaintiff merely responded that the defendant "*was not moving quickly enough*". The plaintiff, however, conceded that no dates were furnished by him and Coetzee. The plaintiff was also asked whether the defendant was still not moving quickly enough, to which the plaintiff had no response.

[63] On 2 September 2008, Moepye addressed an e-mail to Coetzer in which Coetzer was informed of the disciplinary hearing that was rescheduled for 26 and 27 November 2008. In this e-mail Moepye also confirmed that Coetzer was already in possession the bundle of documents, the list of charges and the rights afforded to the plaintiff during the disciplinary hearing. Moepye also refers in his e-mail to the fact that there had been numerous written and telephonic requests regarding dates concerning the disciplinary hearing but that he had received no co-operation or response from either Coetzer or the plaintiff.

[64] Coetzer responded to this e-mail on 3 September 2008 and expressly stated that he was not willing to "*be pressed into a rush of the proceedings*" and that

they were in the process of working their way through documentation. Coetzer further stated in the e-mail that should the TUT attempt to proceed with the proceedings, they would with immediate effect approach the Labour Court for interdictory relief.

[65] Before the scheduled disciplinary hearing could proceed on 26 and 27 November 2008 the plaintiff indeed launched an urgent application in the Labour Court for an order interdicting the intended disciplinary enquiry. The matter was set down for Wednesday, 26 November 2008. On 24 November 2008 an e-mail was dispatched to Moepye informing IR of the fact that the plaintiff had launched an urgent application in the Labour Court and that the hearing of 26 and 27 November 2008, could therefore not proceed. The hearing did not proceed.

[66] On 24 February 2009 at 11:55AM, the plaintiff received an e-mail (also copied to Coetzer) informing him of the fact that the disciplinary hearing was scheduled for 2 April 2009 at 12:00AM to 3 April 2009 at 12:00AM (the reference to AM an obvious error). According to the plaintiff this notice did not constitute a proper notification as a *"notice of set down"* was not attached "*as in the previous instance*".

[67] On 11 March 2009, Moepye again sent out an e-mail confirming the hearing scheduled for 2 and 3 April 2009, this time correctly recording the time of the hearing as 12:00PM. The plaintiff admitted that he had knowledge of these e-mails but testified initially that this did not constitute a proper notification of the hearing.

Hearing scheduled for 2 April 2009

[68] It is common cause that the plaintiff was not (formally) served with a notification similar to the one that was formally served on him prior to the disciplinary hearing scheduled for 26 and 27 November 2008. It is, however, clear from the papers and the evidence that the plaintiff was in fact aware of the rescheduled hearing in that he had received both e-mails from Moepye: the one sent on 24 February 2009 (with the incorrect time) and the one sent

to him on 11 March 2009 that referred to the correct commencement time of the disciplinary hearing.

[69] Although the plaintiff conceded in his evidence that the hearing scheduled for 2 April 2009 was not a new hearing, he nonetheless maintained that he was not formally notified of the hearing and that the e-mail notifying him of the rescheduled disciplinary hearing did not constitute a proper notification in terms of the policy. He did, however, admit that he had received the notification on 11 March 2009. The evidence of the TUT was that only one formal notification is sent whereafter subsequent hearing dates are arranged via e-mail.

China trip

[70] Despite the fact that the hearing was scheduled to proceed on 2 April 2009 and despite protestations on behalf of the plaintiff as far back as 15 August 2008 (in the letter from his attorneys) that the TUT was dragging its heels in proceeding with disciplinary action against him, the plaintiff in an e-mail dated 19 March 2009, informed Marais that he had been invited to China. Furthermore, although the plaintiff was aware by his own admission that the disciplinary hearing was scheduled for 2 April 2009, he nonetheless informed Marais that he had already accepted the invitation and that his flights have already been booked.

[71] After this e-mail the plaintiff and Marais exchanged numerous e-mails in respect of the China trip. On 31 March 2009 Marais in a long e-mail set out the reasons as to why the plaintiff could not go to China. One of the reasons was the fact that the plaintiff did not submit any official applications in respect of the visit and because the plaintiff had not received any prior approval from the TUT to go on this trip. Marais also expressed his concern about the fact that the plaintiff had accepted the invitation without first having applied for the necessary approval and also expressed his dismay at the fact that, when the plaintiff eventually applied for approval, he already had in his possession his flight tickets and visa to enter China:

> "You are therefore placing me in an unenviable position of just about putting the proverbial gun to my head because all arrangements have already been made by the time that I was informed. (I now get a clear impression that I am actually just informed and not asked.)."

[72] Marais also reminded the plaintiff of the fact that a disciplinary hearing was scheduled for 2 April 2009 at which the plaintiff faced serious allegations and of the fact that the hearing was scheduled some time ago. Marais concluded the e-mail with the following:

> "... I am not in a position to approve ANY leave at this stage unless the application for this overseas trip has been approved by all concerned."

[73] The plaintiff responded defiantly to the e-mail stating that he intended proceeding with the trip *"even if it should be against your will. If at all the hearing does proceed, then it will have to be done in my absence. The matter will be pursued on my return."*

[74] Marais responded to this e-mail by stating that he was very sorry to read the reply and stated that he wanted to "*plead*" with the plaintiff not to travel without the necessary permission. His pleas fell on deaf ears.

[75] On 27 April 2009 the plaintiff also addressed a letter to Moepye "*out of courtesy*" to excuse himself from the disciplinary hearing scheduled for 2 April 2009 as he would be abroad in China.

> "In the second instance, I will not be in the country on either 2 or 3 April 2009. I shall at that time be on leave in China on behalf of the Department of Horticulture and the University. *Had I been here, it is doubtful whether I would (due to non-compliance of procedures) in any case have attended.*"

[76] The letter to Moepye ends with a threat that, should the TUT proceed with the hearing, the TUT will face severe consequences:

> "In the third – and most important –instance, I have been instructed accordingly

> by my attorney. If not already so done, my attorneys will in due time inform you, through TUT attorneys, of the severe consequences, would you wish to persist with conduct which is in direct conflict with Labour Court proceedings. You would therefore, be well-advised to confer with the attorneys concerned, with reference to the Labour Court Directive recently issued in this regard."

[77] In cross-examination the plaintiff was specifically asked whether he knew of the hearing of 2 April 2009 to which he replied that he did. He also confirmed that he and Coetzer had been preparing for the hearing. He then specifically conceded that there was nothing wrong with having been notified by e-mail of the hearing on 2 April 2009:

> "And you were prepared to stand for the hearing? You were prepared to attend the hearing on the 2 April? --- Yes.
> So there was nothing wrong with the notification that you received on the 11 March? --- There was nothing wrong with the e-mail no."

This admission is somewhat startling in light of the plaintiff's insistence throughout the hearing that a notification of a hearing should have been done in a prescribed and formal manner yet, in respect of the rescheduled hearing of 2 April 2009, he had no problem with accepting the notification by e-mail.

[78] The plaintiff was cross-examined about the fact that he himself did not have formal permission from the Dean to go to China but that he nonetheless went. However, when it came to a notification to attend a hearing he insisted upon a formal notification despite the fact that he had actual knowledge of the hearing. When confronted with the statement that he himself made and broke rules as and when it suited him, the plaintiff merely stated that counsel was under the wrong impression.

[79] Despite having received no permission to travel to China, despite the pleas of his senior and despite the fact that the plaintiff knew that he had to attend a pre-scheduled disciplinary hearing at which he was to face serious charges, the plaintiff simply decided to go ahead with his trip to China. The plaintiff

confirmed that he had phoned his attorneys prior to him writing the e-mail to Moepye.

[80] Up until this point in time it is, in my view, clear from the evidence that the plaintiff had no intention of attending the disciplinary hearing and answer to serious allegations of financial mismanagement at the Hartebeeshoek training facility. Instead, the plaintiff threatened the TUT with court action should they proceed with the disciplinary hearing in his absence. This defiant attitude of the plaintiff should be seen in the light of the preceding events: (i) despite numerous requests from Moepye to the plaintiff and his union representative to assist with dates to schedule the disciplinary hearing, no co-operation was received from any one of them. In fact, Coetzer made it clear that they will not be "*pressed into a rush of the proceedings*" and threatened Moepye that should the TUT attempt to proceed with the hearing in their absence they will approach the courts in order to obtain an interdict to prohibit the disciplinary hearing; (ii) the attorneys of the plaintiff rebuked the TUT for dragging its heels in proceeding with disciplinary proceedings yet did nothing to assist the TUT to commence with the process; (iii) prior to the commencement of the hearing in November 2008 the plaintiff obtained an interdict from the Labour Court to prevent the hearing from proceedings whilst his grievance proceedings in the CCMA were still pending; (iv) the plaintiff, despite having had no prior permission and in defiance of his superior (Marais), departed on a (unauthorised) trip to China whilst being fully aware of the fact that a disciplinary hearing was scheduled for 2 April 2009; (v) the plaintiff expressed the view that, because he did not receive formal notification of the re-scheduled meeting, it was in any event doubtful whether he would have attended the hearing which is simply astounding in light of the fact that he and his representative had full knowledge of the date of the hearing; (vi) the plaintiff threatened Moepye with court action should the TUT proceed with the hearing on 2 April 2009 despite the fact that he embarked on an unauthorised trip to China against the express wishes of his employer.

[81] Despite the fact that the plaintiff went on this unauthorised trip and despite his expressed views that it was in any event doubtful whether he would have

attended the hearing on 2 April 2009, the TUT nonetheless postponed the hearing after the members of the disciplinary committee were informed of the plaintiff's absence.

[82] The plaintiff was asked whether he presumed that the hearing (of 2 April 2009) would continue in his absence when he left for China to which he merely responded *"no, because I was not there and would be excused"*.

The disciplinary hearing scheduled for 28 April 2009

[83] On 21 April 2009, Moepye sent another e-mail to the plaintiff, copied to the members of the disciplinary hearing, informing them that the disciplinary hearing was rescheduled for 28 April 2009 at 9H00.

[84] On the morning of 28 April 2009 the disciplinary hearing convened. Coetzer, the representative of the plaintiff, attended. The plaintiff did not attend the hearing and according to Mukhola no one could shed any light as to the whereabouts of the plaintiff. According to Mukhola, Coetzer also did not know where the plaintiff was. The hearing then continued in the absence of the plaintiff.

[85] The plaintiff denied that he ever received the e-mail dated 21 April 2009 as it was sent to his work computer whilst he was in China. The plaintiff was asked whether he had a cell phone and a laptop with him whilst in China and whether he could read e-mails. The plaintiff responded that he could read e-mails on his cell phone and that he had his cell phone with him in China but not his laptop. At first the plaintiff admitted that he could access e-mails on his cell phone but testified that he did not have communication with anyone whilst in China: not with his wife, his office or his secretary because there was no need to. He also did not have any communication with Marais. It was put to the plaintiff that it was highly improbable that he never accessed his phone and never had any communication with anyone in circumstances where a disciplinary enquiry into serious allegation had been hanging over his head for some time. When confronted with this proposition the plaintiff then changed his testimony and stated that, at the time, he did not have any connection

between his phone and his office and that he could not access any e-mails on his cell phone. The plaintiff, however, agreed that he was able to contact South Africa from China but testified that he never did. I am in agreement with the defendant's submission in this regard that it is highly unlikely that the plaintiff would not have had any contact with anyone during his unauthorised trip to China given the circumstances of his departure to China and especially given the fact that he knew that the TUT was persistent in its attempts to proceed with the disciplinary enquiry against him.

[86] The plaintiff returned to South Africa from his unlawful trip to China on 10 April 2009 which was the Friday before the Easter weekend. Responding to a question whether he had spoken to Coetzer upon his return to South Africa he said that he did not.

[87] It was put to the plaintiff that this was also unlikely given that the nature of the charges against him was extremely serious and that the future of his job was at risk. The plaintiff was asked when he thought to call Coetzer regarding the outcome to which he responded, "*on 28 April when I saw the hearing would be held*".

[88] The plaintiff testified that he fell ill on Saturday 11 April 2009 and when his condition became worse, he was subsequently admitted to hospital on 15 April 2009. The plaintiff stayed in the hospital until 20 April 2009. According to the plaintiff's medical certificate he was booked off from 14 until 24 April 2009. With reference to the medical certificate, the plaintiff agreed that he would and was indeed, at work on 28 April 2009. Yet, despite the fact that the plaintiff arrived back in South Africa on 11 April 2009 and returned to work on 28 April 2009 (the day of the hearing), he did not, according to him, communicate with anyone from work – not even with Coetzer (his union representative).

[89] The plaintiff did, however, admit that there was a faculty meeting (on 16 or 17 of April) during the time he was ill. According to him, his wife phoned his secretary to inform her that he would not be at the faculty meeting. The plaintiff, however, called no witnesses to corroborate his version that he had

informed the TUT of his illness.

[90] According to the plaintiff he only read his e-mails on 28 April 2009 upon his return to work and only did so "*late morning*". The plaintiff was asked whether he did not find it necessary to call Coetzer at that point in time. The plaintiff responded by saying that prior to reaching the office his secretary mentioned to him that the Dean's office had left an urgent message to contact Coetzer. Yet despite this message, the plaintiff felt no urgency to contact Coetzer.

[91] I find the version of the plaintiff that he had no contact with anyone from his office from 1 April 2009 until 28 April 2009 whilst being fully aware of the fact that his future employment at the TUT was hanging in the balance, highly improbable: the plaintiff left South Africa for China whilst knowing fully well that he had no authority to do so and that there was a disciplinary hearing scheduled during his absence. He returned to South Africa and even upon his discharge from hospital he still did not deem it necessary to at least contact his representative to establish the status of the pending disciplinary proceedings. He attended work on the day of the disciplinary hearing and still did not deem it necessary to contact his representative.

[92] It is common cause that Coetzer was aware of the disciplinary hearing on 28 April 2009 and that he in fact attended the hearing. This is significant. I find it highly improbable that Coetzer would not have had any contract with the plaintiff prior to the hearing on 28 April 2009 when the plaintiff was only a phone call away. Coetzer was involved in the disciplinary process from the beginning and was very vocal in his interaction with Moepye whenever he was of the view that his member's rights were compromised. The plaintiff has also acknowledged in his evidence that he and Coetzer were preparing for the hearing to face charges that are, on the face of it, extremely serious as some of them relate to financial mismanagement. I simply do not accept that there was no communication between the plaintiff and Coetzer immediately prior to the disciplinary hearing on 28 April 2009. I am therefore persuaded that the plaintiff knew of the hearing on 28 April 2009 and despite this knowledge decided not to attend. It is also significant that the plaintiff has elected not to

call Coetzer to testify on his behalf and particularly to explain why Coetzer was at the hearing but not the plaintiff.

The proceedings on 28 April 2009

[93] I have already pointed out that Mukhola was appointed as the chairperson of the disciplinary hearing. It was common cause that, at the time, Mukhola was appointed on a level three post as Executive Dean at the TUT. Mukhola confirmed that he presided as chairperson over the disciplinary hearing and testified that the hearing did not continue on 26 and 27 November 2009. Mukhola confirmed that the hearing was scheduled to proceed on 2 April 2009 as per the e-mail correspondence. He confirmed that the hearing did not proceed and confirmed that Coetzer attended but that the plaintiff was absent. Mukhola testified that the hearing of 2 April 2009 was postponed until 28 April 2009 by agreement in the presence of Coetzer (the plaintiff's representative). On 28 April 2009 Coetzer was present but not the plaintiff. Coetzer attempted to ascertain the whereabouts of the plaintiff and went outside to contact him telephonically but could not establish the plaintiff's whereabouts. The disciplinary hearing then continued because there was nothing before the committee to justify the absence of the plaintiff. Mukhola confirmed that Coetzer excused himself when it was decided to continue with the hearing.

[94] Mukhola was referred to an e-mail that Marais had sent to the plaintiff on 29 April 2009 in which Marais recorded that he did notify the disciplinary committee and IR of the fact that the plaintiff was ill but that he (Marais) understood that the plaintiff was no longer in hospital.

[95] This e-mail casts, in my view, serious doubt on the version of the plaintiff that he had no contact with anyone prior to 28 April 2009. In order for Marais to have been able to convey to the disciplinary committee that the plaintiff was ill, there must have been communication with Marais. If there had been communication with Marais in respect of the plaintiff's illness (as the e-mail suggests), the plaintiff must have been aware of the hearing on 28 April 2009, as Marais would have informed the plaintiff of the hearing. In this regard, Coetzer would have been the obvious person to confirm the fact that the

committee was informed of the plaintiff's illness.

[96] Mukhola emphatically denied that Marais ever mentioned anything about the plaintiff being ill. Mukhola also confirmed that the previous hearing was postponed in order to afford the plaintiff an opportunity to attend despite the fact that the plaintiff was absent without consent. He also confirmed that he would have postponed the hearing if it was brought to their attention that the plaintiff was ill.

[97] Mukhola confirmed that the hearing then proceeded in the absence of the plaintiff.

[98] Ntsane also testified regarding the proceedings on 28 April 2009 and confirmed that the plaintiff was not present on 28 April 2009 but that his representative, Coetzer, was there. He confirmed that Mukhola asked Coetzer at the commencement of the proceedings where the plaintiff was and that Coetzer then left the room for a few minutes in an attempt to contact the plaintiff telephonically. Coetzer returned and informed the hearing that he could not locate or ascertain the whereabouts of the plaintiff, whereafter he excused himself.

[99] In terms of clause 3.1.10 ("Non-attendance of hearing") the TUT has the right to proceed with the hearing in the absence of an employee where the employee refuses or fails to attend without reasonable cause. The plaintiff was also repeatedly reminded of this fact through correspondence regarding his disciplinary hearing.

[100] In my view the plaintiff was afforded the right to be heard as provided for by his contract. It is, however, an acceptable principle that where an employee fails to attend a disciplinary hearing without a reasonable explanation, the employer is entitled to proceed with the hearing in the absence of the employee. I am satisfied on the evidence that the plaintiff had full knowledge of the hearing and that he knew that if he did not attend, the hearing would be conducted in his absence. As such I am satisfied that the plaintiff has

abandoned (or waived) his right to a hearing. (See in general: *Mhlongo v SA Revenue Service*;[24] *Faku v Fidelity Guards Holdings (Pty) Ltd*[25]). I therefore find that the TUT did not breach the plaintiff's contract by proceeding with the hearing in his absence.

[101] The disciplinary hearing rendered a guilty finding and recommended a sanction of dismissal. This finding stands and has not been successfully challenged in any forum.

Procedures regarding notification (paragraph 6.5 of the particulars of claim)

[102] I have already referred to the plaintiff's insistence that, unless formal notification as per the policy has been given to him, he will regard it as not having received any notification. There is no merit in this submission. Firstly, the plaintiff received formal notification at the commencement of the initial/first hearing in November 2008. Secondly, the plaintiff received notification of the hearing scheduled on 2 April 2009 by e-mail. He eventually conceded that he did not have a problem with the e-mail notification of the hearing. Thirdly, the hearing rescheduled for 28 April 2009 was done by agreement between all the parties. Despite the fact that the plaintiff did not receive formal notification, I have already concluded on the facts that he knew of the date of the hearing. Even if it is accepted that the notification did not strictly comply with the code, the plaintiff has not shown that he has suffered any damages as a result of such procedural non-compliance. The fact remains that he was aware of the date of the hearing.

[103] In these circumstances I am not persuaded that the TUT had breached the contract.

Composition of the investigating committee (paragraph 6.5 of the particulars of claim)

[104] In terms of clause 3.2.3 of the code an investigating committee will consist,

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[24] (2017) 38 ILJ 1334 (LAC).
[25] [1998] 7 BLLR 746 (SE), (1998) 19 ILJ 1046 (SE).

inter alia, of a chairperson who will be the immediate supervisor of the staff member in question. In the present case the immediate supervisor of the plaintiff was Marais. He was, however, the one who initially approached the TUT with a request that the irregularities at the Hartebeespoort nursery be investigated. Once that was done the report from the internal audit was presented to Marais who then considered the matter and approached Moepye with a set of charges that had to be preferred against the plaintiff. Marais – the plaintiff's immediate supervisor – therefore drafted the charges against the plaintiff. This was not disputed by the plaintiff.

[105] The plaintiff insisted that Marais ought to have been the investigator and because he was not, the TUT breached his contract.

[106] Before I turn to the merits of this procedural complaint raised by the plaintiff, it is necessary to briefly turn to the policy itself. The policy states that it is aimed at ensuring that discipline is administered justly, efficiently and in an unbiased manner and that disciplinary action should be educational and corrective in nature.

[107] There is, in my view against this background, no merit in the plaintiff's claim that the TUT had breached the contract by not appointing Marais as the chairperson of the investigating committee: Marais was the one who recommended to the TUT that an investigation into the alleged irregularities must be conducted. Due to the financial aspect in regard to the irregularities, the investigation was delegated to the TUT's forensic department. It is common cause that Marais was not an auditor. Furthermore, Marais was scheduled to be a witness at the disciplinary hearing. According to the TUT, it was not appropriate for Marais to have been appointed as the chairperson of the investigation committee. In this regard the plaintiff also conceded in his evidence that there were instances where it was justified and warranted to deviate from the policy.

[108] In the event, it is concluded that the plaintiff did not prove that the TUT had breached his contract of employment by not appointing Marais as the

chairperson of the investigation committee. Furthermore, even if it can be said there was non-compliance with procedures, the plaintiff likewise did not prove that he had suffered any damages as a result of this failure to strictly adhere to procedures nor that there is a casual link between the breach and any damages allegedly suffered by him.

Composition of the disciplinary hearing (paragraph 6.6 of the particulars of claim)

[109] In paragraph 6.6 of the particulars of claim the plaintiff contends that the TUT had breached the code in that the TUT had failed to appoint the members (especially the chairperson) of the disciplinary committee in accordance with the provisions of the code.

[110] In terms of clause 3.2.3 of the code the chairperson of the disciplinary hearing shall be the next higher level in the line function. The code, however, further also expressly provides that the chairperson of the disciplinary hearing should not have been involved in the disciplinary investigation. It was common cause that Mukhola was appointed as the chairperson of the disciplinary hearing.

[111] It was also common cause that at the time Prof van Staden ("van Standen") was the immediate supervisor of the plaintiff. According to the TUT, Van Staden could not be appointed as chairperson because of the fact that Marais had previously discussed the plaintiff's matter with him. It was therefore decided to appoint Mukhola as chairperson instead. During cross-examination it was put to the plaintiff that, because Marais had discussed the plaintiff's matter with Van Staden, Van Staden as a result became compromised. This contention is confirmed by the fact that the report prepared by Dlamini and Kekana, was sent to Van Staden. Van Staden therefore had prior knowledge of the matter. During his evidence, Van Staden also confirmed receipt of the report. It was therefore put to the plaintiff that Van Staden's prior knowledge of the plaintiff's matter (pursuant to his discussions with Marais), necessitated the appointment of an impartial and independent person to chair the hearing in order to conduct the hearing in a manner that was fair to the plaintiff. The plaintiff merely responded by saying that Mukhola was from a different faculty, that he was not involved in the plaintiff's line function, that he had no idea of

the plaintiff's activities, and that he could therefore not chair the hearing.

[112] I should also point out that it was not in dispute that both the chairperson (Mukhola) and the additional member (Tlhabadira) did in fact occupy post levels that were higher than that of the plaintiff at the time. Even though the plaintiff initially disputed this, he did not call any witnesses to corroborate his version.

[113] I am not persuaded that the TUT breached the policy by not having appointed Van Staden as the chairperson: Firstly, the policy is expressly aimed at ensuring that an employee's disciplinary hearing is conducted in an unbiased manner. The TUT recognised at the time that Van Staden's ability to act as chairperson may have been compromised. Furthermore, the policy expressly provides that a chairperson should not have been involved in the disciplinary investigation thereby implicitly allowing for a substitution of a chairperson with an unbiased chairperson. Secondly, Mukhola complied with the requirement in respect of his position at the TUT. Thirdly, even if it can be said there was non-compliance with procedures, the plaintiff did not prove that he has suffered any damages as a result of this failure to strictly adhere to procedures nor that there is a casual link between the breach and any damages allegedly suffered by him.

Outcome of the disciplinary hearing

[114] The finding that the TUT did not breach the contract in respect of the composition of the investigating committee, the disciplinary hearing and the notification process should also be viewed in light of my finding that the TUT was entitled to have continued with the disciplinary hearing in the absence of the plaintiff. The outcome of the disciplinary hearing was a guilty finding on the charges and a recommendation that the plaintiff be summarily dismissed.

[115] This guilty finding by a properly constituted disciplinary hearing is, in my view, significant: a guilty finding, especially on a charge of dishonesty usually entitles an employer to terminate an employment contract. Dishonesty constitutes serious misconduct on the part of an employee and one which

destroys the *substratum* of the employment relationship. (*See Bidserv Industrial Products (Pty) Ltd v CCMA and others*[26] and *Impala Platinum Ltd v Jansen and others*[27]). Put differently, an employer will at common law be able to terminate a contract of employment lawfully in the face of a guilty finding on a charge of dishonesty, which constitutes a serious breach of contract. See in this regard *South African Football Association v Mangope*:[28]

> "[38] The respondent's case is that the termination of his employment was unlawful and in breach of contract. In essence, his main contention is that he performed satisfactorily and there was accordingly no justification for termination in terms of either clause 5.6 or clause 18.2.3 of the contract. *At common law an employer may summarily terminate a contract of employment without notice provided there is a justifiable reason. It is an implied term of every contract of employment that employees must exercise due diligence and skill and will perform their duties competently.*[29] By applying for employment an employee is deemed to warrant impliedly that he or she is suited for that position. Such warranty was expressly given by the respondent in this case in clause 3 of the contract. If the employee is later found to be incompetent, 'then in the eye of the law he stands in the same position as if he had been negligent in the discharge of his duties'. Whether particular conduct justifies summary dismissal or termination of the contract will always be a question of fact. What must be determined is whether the employee's conduct or negligence is serious enough to constitute a repudiation of the contract, or a serious breach of a material express or implied term of the contract. The lawfulness of the termination of the contract therefore depends on the justifiability of the reason for it. Where the employer terminates the contract without lawful reason, the employer will have repudiated the contract permitting the employee to sue for specific performance or damages."

[116] As already pointed out, the plaintiff repeatedly made it clear that the *only* issue that is before the court was the employer's failure to follow certain contractually entrenched procedures before dismissing him. Although the

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[26] (2017) 38 ILJ 860 (LAC).
[27] (2017) 38 ILJ 896 (LAC).
[28] (2013) 34 ILJ 311 (LAC), 2013 JDR 0171 (LAC).
[29] My emphasis.

plaintiff presented extensive evidence that, had he been given an opportunity to contest the claims, he would have successfully contested the lawfulness of the dismissal, the fact remains that up until today he has not successfully contested the guilty finding rendered by the disciplinary hearing. Moreover, having found on the facts that the plaintiff was in wilful default of attending the hearing on 28 April 2009 and that the TUT was entitled to proceed with the hearing on 28 April 2009, it must be accepted that the guilty finding stands. A guilty finding on a charge involving dishonesty and gross negligence justifies an employer to terminate the contract lawfully.

[117] The Labour Appeal Court in *SA Football Association v Mangope*[30] has pertinently addressed the issue and effect of non-compliance with certain procedures prior to dismissing an employee. The Labour Appeal Court accepted that the non-compliance with a procedural process would not necessarily be considered as material or causative at common law. Moreover, particularly where there has been a material breach or repudiation by the employee which justified the employer to cancel the contract, non-compliance with a procedural requirement prior to such a termination will not necessarily be considered as material or causative at common law and unless a procedural breach results in damages, such breach will normally be of little consequence:

> "[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 dismissal; but at common law a procedural breach will be of no contractual

[30] *Supra.*

consequence unless it results in damages, particularly where there has been a material breach or repudiation by the employee entitling the employer to cancel. 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.

[40] It follows that the principal enquiry before the Labour Court ought to have been whether the respondent had repudiated or breached the contract by reason of his alleged incompetence. The learned judge a quo correctly refused to refer the matter to oral evidence on the grounds that no real dispute of fact had arisen on the papers. However, he held that the appellant had repudiated the contract by failing to follow the evaluation procedure in clause 5 and that such entitled the respondent to damages in the amount of R1,777,000. His reasoning, with respect, is unsustainable for the reasons just discussed. The procedural flaws alone may not directly have resulted in damages and would have been immaterial from a contractual perspective if it was established on the evidence before court that the respondent had not performed satisfactorily in terms of the contract. The court thus erred by not determining on the papers whether the respondent had breached or repudiated the warranty of competence in a manner justifying lawful termination by the appellant."

Right to an appeal

[118] I now turn to the common cause fact that the plaintiff was not afforded the right to an internal appeal following the outcome of the disciplinary hearing and the imposition of a sanction of dismissal.

[119] It is clear from the policy that the plaintiff had a contractual right to an appeal. I do not accept the evidence of Moepye that no such a right had existed.

Likewise, I do not accept the evidence of Ntsane that the right of appeal that the plaintiff had was to approach the CCMA.

[120] In general, an appeal will grant a dismissed employee the right to contest not only the outcome of the disciplinary hearing, but also to address various shortcomings in the procedures that were followed in arriving at a finding. In this particular instance the code provides for the option of an appeal hearing in the form of an arbitration presided over by an independent chairperson. By its very nature an arbitration would have allowed for a complete rehearing of the matter: not only would the arbitrator have considered the merits of the charges afresh, the arbitrator would also have been able to deal with any procedural irregularities that may have arisen during the course of the disciplinary process that culminated in the dismissal of an employee. Where a disciplinary hearing had been held in the absence of the employee, the employee would then also have been afforded an opportunity to raise this issue and explain why the hearing ought not to have proceeded in his absence. In brief: the appeal process would have been an ideal opportunity to deal with all the issues that are now before this court.

[121] On 20 August 2009 the plaintiff lodged on appeal against the outcome of the disciplinary hearing. It is common cause that on 3 September 2009, the plaintiff was erroneously informed that the TUT does not have an internal appeal process and that the plaintiff should challenge the decision through the CCMA. No evidence was placed before the court about whether or not the plaintiff disputed this instruction at the time. More in particular, no evidence was placed before the court as to whether the plaintiff's trade union or trade union representative disputed the information that no right to an appeal existed and neither did the plaintiff's attorneys dispute the denial of the plaintiff's right to an internal appeal hearing.

[122] Instead of disputing the denial of his right to an appeal either by writing a letter to the TUT or by approaching the Labour Court in terms of section 77(3) of the BCEA, for an order for specific performance, the plaintiff elected to refer his unfair dismissal dispute to the CCMA. The plaintiff's unfair dismissal dispute

was heard by the CCMA on 2 October 2009. There was no appearance on behalf of the TUT and the CCMA found the dismissal to be substantive and procedurally unfair in terms of the LRA and afforded the plaintiff compensation equal to 8 month's remuneration amounting to R 414 981.44. The CCMA award reflects that the plaintiff was represented by Adv. R. Venter. The plaintiff testified that the CCMA arbitration award was subsequently rescinded. The hearing was rescheduled but up until 2010, no further hearing took place. According to the plaintiff, it was agreed that should the matter not be settled, he could take the matter further to an appropriate court.

[123] Did the TUT breach the employment contract by not affording the plaintiff his right to an appeal under these circumstances. I have approached this issue as follows: Firstly, I have already referred to the fact that the plaintiff was represented throughout the disciplinary proceedings by a trade union of his choice and by attorneys who are labour law specialists. It is also clear from the letter sent to the TUT by the attorneys as far back as 15 August 2008 that they are fully *au fait* with the rights that an employee has prior to his dismissal. I have also referred to the fact that the attorneys have in their letter expressed the clear intention that, should any right of the plaintiff be violated by the TUT, they would not hesitate to approach the Labour Court for relief. I have also pointed out that the plaintiff was represented by counsel during his CCMA hearing. From these facts it is clear that the plaintiff must, at all times, have been aware of his rights and of all possible procedures that could have been pursued in protecting any right that he may have. In this regard it was submitted on behalf of the TUT that it should be taken into account that the plaintiff has never placed the TUT on terms to perform in terms of the provisions of the code. There is merit in this submission: nothing had prevented the plaintiff after he had been informed of his dismissal and after he had been (incorrectly) informed that he had no right to appeal, to approach the Labour Court, even on an urgent basis, for an order compelling the TUT to afford him the right to an appeal in accordance with the provisions of the code. (I have already referred to the case law in this regard.)

[124] Secondly, I have also considered whether, by accepting the advice from Moepye that he should approach the CCMA and that no internal appeal process existed at the TUT whether, on the facts before this court, the plaintiff had waived his right to an appeal by approaching the CCMA (as advised by Moepye).

[125] Whether or not there has been a waiver is a question of fact. All circumstances must be considered in deciding whether a person has waived his or her rights – in this case the right to an internal appeal. More in particular, can it be concluded on the facts that the plaintiff, with full knowledge of his rights, had decided to abandon his right to an internal appeal and that he had intended not to enforce this right? It is trite that a court will not lightly accept that a person will abandon his or her rights. (See in general: *Alfred Mcalpine & Son (Pty) Ltd v Transvaal Provincial Administration*[31] and *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another.*[32]) See also in this regard Edwin Cameron *"The Right to a Hearing Before Dismissal - Problems and Puzzles"*[33] where he stated (albeit in the context of a pre-dismissal hearing) that:

> "... An employee can by his or her conduct abandon or waive the right to a pre-dismissal hearing. Waiver in law occurs when a person with full knowledge of a legal right abandons it. In the employment context it would be unrealistic to apply the full requisites of the legal doctrine of waiver before an employee's conduct could be said to exempt an employer from the hearing requirement. All that should be required is that the employee should indulge in conduct which establishes that the employer can no longer reasonably or fairly be expected to furnish an opportunity for a pre-dismissal hearing."

[126] In light of the aforegoing, I am satisfied that the plaintiff had full knowledge of his rights and that he had decided to abandon it.

Conclusion

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[31] 1977 (4) SA 310 (T) at 468 – 469.
[32] 1993 (2) SA 451 (A) at 468I – 469E.
[33] (1988) 9 ILJ 147 at 176 to 178.

[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.

Order

[128] The plaintiff's claim against the defendant is dismissed with costs.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:	Adv. E van As
	Adv. FJ Labuschagne
Instructed by:	Len Dekker & Associates Attorneys.
For the defendant:	Adv. H Gerber (SC)
	Adv. U Lottering
Instructed by:	Gildenhuys Malatji Incorporated.