REPUBLIC OF SOUTH AFRICA
THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable

Case no: JA13/11

In the matter between:

THE SOUTH AFRICAN FOOTBALL

ASSOCIATION **Appellant**

and

KWENA DARIUS MANGOPE **Respondent**

Heard: **16 May 2012**

Delivered: **7 September 2012**

Corum: **Waglay DJP, Tlaletsi JA, Murphy AJA**

JUDGMENT

MURPHY AJA

1] This is an appeal against an order of the Labour Court granting the respondent substantial damages for breach of contract. The

respondent was employed by the appellant, the South African Football Association ("SAFA"), on a fixed term contract as its Head of Security in the run up to the World Cup of 2010. He sued the appellant in the Labour Court by way of application proceedings for damages and an order declaring the appellant's decision to terminate his contract of employment unlawful and in breach of contract.

[2] The application was made in terms of section 77(3) of the Basic Conditions of Employment Act[1] ("the BCEA"), which provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. Section 77A(e) of the BCEA empowers the Labour Court to make a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation. With the introduction of these provisions the Labour Court acquired jurisdiction to determine issues related not only to the fairness of a dismissal but also whether a dismissal is a wrongful repudiation in breach of contract.[2] Where it determines that such a breach has occurred it may make any determination that it considers reasonable, and is thus not restricted to the common law remedies of specific performance or damages.

[3] The court *a quo* (Molahlehi J) held that the appellant's decision to terminate the respondent's contract was unlawful and amounted to breach of contract. It ordered the appellant to pay the respondent an amount of R1 777 000 as damages. The *quantum* of damages was computed to be the full amount of what the respondent would have received in salary for the unexpired period of his 3 year fixed term contract, less any income earned in the interim. Since the respondent

1 Act 75 of 1997.
2 *Langeveldt v Vryburg Transitional Local Council* [2001] 5 BLLR 501 (LAC).

only worked for the respondent for five months, the judge *a quo* calculated his damages to be 31 months' salary, being R1 860 000, less the amount of R83 000 which the respondent had earned since his dismissal.

[4] The court *a quo* refused the appellant leave to appeal. Leave to appeal against the entire judgment was granted by this court.

[5] The appellant's grounds of appeal are poorly formulated and badly drafted in the notice of appeal. Thus, while the appellant clearly challenges the finding that it acted unlawfully in breach of contract, it is not immediately obvious whether the appellant appeals against the award of damages. The notice of appeal focuses for the most part on the ground that the respondent's application should have been dismissed because material disputes of fact existed regarding the respondent's performance of his obligations and the claim for unliquidated damages, which could not be resolved on the papers in application proceedings. The ground in relation to damages is stated in the following terms: 'in light of the respondent's inability to perform a satisfactory service, it was unlikely that he would have proved any damages even if the appellant had afforded him an opportunity to make representations before his dismissal.' It is difficult to make sense of that statement as a ground of appeal. However, if one has regard to the notice of application for leave to appeal and takes a generous approach it is clear that the intention was to appeal against the award of damages. There it is contended that the court *a quo* erred in finding that the alleged breach of contract was of a material nature or that there was a causal link between the appellant's conduct and the amount of damages claimed. The appellant averred further that the court *a quo* erred in not considering any contingency factors, and importantly perhaps, 'omitted to weigh up the interests of both parties'.

[6] In short, therefore, the appeal is directed not only at the findings of the court *a quo* in relation to the repudiation and breach of the contract, but

also at those forming the basis of the damages award.

[7] There is also before us an opposed application for condonation for the late filing of the record of appeal (which resulted in the appeal being deemed to be withdrawn in terms of Rule 5(17)) and reinstatement of the appeal. In terms of Rule 12(1) this court may, for sufficient cause, excuse the parties from compliance with any of the rules. Despite the reprehensible manner in which the appeal was prosecuted, for reasons principally related to the merits of the appeal which I discuss later in this judgment, we were satisfied that it would be in the interests of justice to condone non-compliance with the rules in this instance, and hence that there was sufficient cause to reinstate the appeal.

[8] As mentioned at the outset, the respondent opted to prosecute his claim by way of application rather than by action and trial proceedings. The appellant has contended that this was inappropriate because of disputes of fact. The respondent has countered that the appellant failed to establish any disputes of fact on the papers so as to justify a referral to oral evidence or trial. Hence, it is necessary to reflect on the principles governing factual disputes in application proceedings before approaching the facts and any possible disputes arising in relation to them.[3]

[9] It is trite that an application encompasses pleadings and evidence, all rolled into one.[4] The affidavits take the place of the pleadings and the evidence, and formulate the issues of fact between the parties and contain the evidence upon which each wishes to rely. The applicant must set out in the founding affidavit the facts necessary to establish a *prima facie* case in as complete a way as the circumstances demand. The respondent is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set

3 See generally Harms et al *Civil Procedure in the Superior Courts* (Service Issue 44, 2011
Lexis Nexis) B6 from which I have borrowed liberally to summarise the principles in the text which follows.

4 *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (A) 30H-31C.

out his version of the relevant facts. In dealing with the applicant's allegations of fact, the respondent should bear in mind that the affidavit is not solely a pleading and that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments of the applicant.[5] Likewise, failure to deal with an allegation by the applicant amounts to an admission. It is normally not sufficient to rely on a bare or unsubstantiated denial.[6] Unless an admission, including a failure to deny, is properly withdrawn (usually by way of an affidavit explaining why the admission was made and providing appropriate reasons for seeking to withdraw it) it will be binding on the party and prohibits any further dispute of the admitted fact by the party making it as well as any evidence to disprove or contradict it.[7]

[10] The inherently limited form and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on the papers in the absence of oral evidence. The various provisions of Rule 7 of the Rules of the Labour Court take cognisance of this reality. Rule 7(3) requires the applicant to set out the material facts in the founding affidavit with sufficient particularity to enable the respondent to reply to them, while Rule 7(4) expects the same on the part of the respondent. Rule 7(7) grants the Labour Court a discretion to deal with an application "in any manner it deems fit", which may include "referring a dispute for the hearing of oral evidence". That discretion, in keeping with general practice and principles applicable in relation to the determination of applications, should be exercised to ensure that justice is done with a view to resolving a dispute of fact. Whether a factual dispute arises from the papers is not a discretionary decision; it is itself a question of fact and, importantly, a jurisdictional pre-requisite for the exercise of the discretion to refer the dispute for the hearing of oral evidence. While the equivalent provision

5 *Gemeenskapontwikkelingsraad v Williams(2)* 1977 (3) SA 955(W).
6 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1163-1165.
7 *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 (A) 605H.

in Rule 6(5) (g) of the High Court Rules is more explicit in this regard, requiring, as it does, the referral to oral evidence to be "with a view to resolving any dispute of fact", there can be no doubt that Rule 7(7) of the Labour Court Rules, being *in pari materia*, should be construed similarly to that effect.

[11] As pointed out in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,[8] a real dispute of fact will arise in one of three ways. Firstly, the respondent may deny one or more of the material allegations made by the applicant and produce evidence to the contrary, or may apply for the leading of oral witnesses who are not presently available or who though averse to making an affidavit, would give evidence if subpoenaed. Secondly, the respondent may admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Thirdly, the respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself give or propose to give evidence to show that the applicant and his deponents are untruthful or their evidence unreliable.

[12] A real dispute of fact will not arise therefore if the respondent relies merely on a bare denial of the applicant's allegations or simply puts the applicant to the proof of allegations and in effect indicates no intention to lead evidence disputing the truth of the applicant's allegations. Bare denials will not suffice to give rise to a dispute of fact where the facts averred fall within the knowledge of the denying party and no basis is laid for disputing the veracity or accuracy of the averment. There is accordingly a duty upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his or her client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen, the court may well take a robust approach and grant the applicant relief in accordance with the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints*

8 1949 (3) SA 1155 (T) 1163.

(Pty) Ltd,[9] which provides that notwithstanding factual disputes on the papers, if the court is satisfied that the applicant is entitled to relief in view of the facts stated by the respondent together with the facts in the applicant's affidavits which are admitted or have not been denied by the respondent, it will grant the relief sought by the applicant.

[13] It has been necessary to set out these well known general principles, at the risk of labouring them, because in dealing with the respondent's case, the appellant and its legal advisors seem to have been unaware of them, or for reasons unknown opted to ignore them. For the most part the answering affidavit fails to respond to the specific allegations in the founding affidavit. Additionally, the relevant averments are not supported by confirmatory affidavits. It is not entirely surprising therefore that the Labour Court took a robust approach and granted the order it did, which has significant adverse financial consequences. The primary question on appeal is whether the Labour Court erred or misdirected itself in the method it employed to determine the facts in relation to its finding of unlawful termination and the award of damages it made.

[14] During September 2009 the parties entered into a written 3 year fixed term contract of employment effective from 1 August 2009 with an expiry date of 31 July 2012. In terms of clause 3 of the contract the respondent was offered appointment in the position of the Head of Safety and Security on the basis "that you have the requisite skills and experience". The position was evidently a senior one in that the respondent would report directly to the CEO of SAFA (the appellant).

[15] The contract defined the respondent's key performance areas to be:

> '• Accountability for safety and security at all SAFA sanctioned events.
>
> • Responsibility for sourcing, evaluation and accreditation of

9 1984 (3) SA 623 (A) 634.

safety and security service providers at all events.

- Responsibility for vetting event and venues.

- Accountability for the safety and security of all stakeholders (local, visiting spectators, officials and property) at SAFA sanctioned events.

- Custodian of FIFA and SAFA guidelines on Safety and Security at Football Matches.

- Maintaining relations and co-ordinations with security authorities.'

The appointment was made in anticipation of the World Cup soccer tournament, hosted by South Africa in 2010.

[16] The respondent was paid remuneration at a rate of R720 000 per annum (R60 000 per month). Clause 5 of the contract provided for probation in the following terms:

'5. **PROBATIONARY PERIOD**

5.1 Prior to the Employee's employment being confirmed, the Employee will be required to serve a period of probation of three (3) months calculated with effect from the effective date;

5.2 The purpose of the probation is to provide the Association an opportunity to evaluate the Employee's performance before confirming his appointment and although the period of probation is not used for the purposes of depriving the Employee of the status of permanent employment, it is of particular significance that proper evaluation and consideration be given to the Employee's performance, compatibility and overall conduct;

5.3 To the extent that it is necessary, the Employee will be given

reasonable evaluation instruction, training, guidance or counselling in order to allow the Employee to render satisfactory service during the course of the probationary period. The extent thereof will depend upon the seniority and remuneration of the Employee;

5.4 Should the Association determine that the Employee's performance is below standard, the Association will advise the Employee of any aspects in respect of which it considers the Employee to be failing to meet the required performance standards and, at the conclusion of the probationary period either dismiss the employee or extend the probationary period, as the case may be;

5.5 The period of probation may only be extended for a reason that relates to the purpose of probation and the Association will only dismiss an Employee or extend the probationary period after the Employee has made representations, duly assisted by a fellow Employee;

5.6 Should it be determined, however, prior to the expiry of the probationary period that the Employee is not rendering the service satisfactorily as might reasonably be expected by the Association and that, in the opinion of the Association, the continuing of the employment relationship through to the expiry of the period of probation would be inconsequential, the Association may terminate the agreement prior to the expiry of such probationary period.'

[17] Clause 18 provided for termination of the contract. The relevant provisions of this clause read:

'18. **TERMINATION OF CONTRACT**

18.1 This agreement shall automatically terminate on the termination date.

18.2 Notwithstanding anything to the contrary herein, at any time before the termination date, the Association shall be entitled to terminate the employee's employment summarily (without notice or payment in lieu of notice) or on any other basis it considers appropriate if, inter alia, the employee:

18.2.1 …

18.2.2 …

18.2.3 performs his duties and functions unsatisfactorily; and/or

18.2.4 …

18.3 …

18.4 In all such events, the employee acknowledges that he shall not be entitled to payment in respect of the unexpired period of the fixed term agreement. Likewise, should it become necessary for the Association to terminate this agreement prematurely based on its operational requirements, the employee will have no entitlement to payment in respect of the unexpired period thereof save as may be required in terms of Section 41 of the Basic Conditions of Employment Act.'

[18] Clause 18.2.3 thus entitled the appellant to terminate the employment of the respondent summarily if the respondent failed to perform his duties and functions unsatisfactorily. This general power of dismissal was qualified by the specific requirements of clause 5 during the probation period which provides for the employee to be given reasonable evaluation, instruction, training, guidance or counselling "in order to allow the employee to render satisfactory service during the course of the probationary period" to the extent that such was

necessary. Where it is determined during the probationary period that the employee is "not rendering the service satisfactorily" and in the opinion of SAFA the continuation of the employment relationship to the expiry date would be "inconsequential", SAFA would be entitled to terminate the agreement prior to the expiry of the probation period. The clause is consonant with the purpose of item 8 of Schedule 8 of the LRA - *Code of Good Practice Dismissal*, which allows for probationary periods in employment and for a lower standard of substantive fairness for dismissals during or at the end of probation, provided dismissal has been preceded by a fair process of evaluation and training, and consideration of any alternatives to dismissal. However, it should be kept in mind that the respondent has not sued for unfair dismissal. Hence, the provisions of the LRA do not apply in this instance. The respondent's claim has to be determined in accordance with the common law of the contract of employment and the provisions of the BCEA.

[19] On 23 November 2009, about four months after he commenced rendering services, the CEO of the appellant, Mr Raymond Hack, addressed a letter to the respondent which read:

> '**TERMINATION OF EMPLOYMENT CONTRACT**
>
> Dear Mr. Mangope,
>
> In terms of your employment contract your probation period ends on the 31 October 2009 and was subsequently extended to 30 November 2009.
>
> The Association has received a number of complaints in recent weeks. We have attached copies for your convenience. Given these considerations, the Association is not in a position to provide you with permanent employment beyond the date of termination of the probationary period being 30 November 2009. You are accordingly released from your duties with immediate effect.

> I would like to take this opportunity to thank you for the contribution that you have made to the Association over the past months.
>
> Kindly confirm your acceptance of this condition by affixing your signature where indicated below.'

[20] The "attached" copies of complaints referred to in the letter are not annexed to the letter filed as Annexure KM17 to the founding affidavit; nor were they filed as part of the answering affidavit. The respondent in the founding affidavit nonetheless fully set out and dealt with the evidence and issues relating to his performance. In particular, he averred that the allegation regarding the number of complaints against him was exaggerated, and stated that he was only aware of two complaints. As with most of the allegations in the founding affidavit, this allegation was not addressed or denied by the appellant in the answering affidavit. The respondent, as will appear more fully presently, made out a compelling case that his performance was in fact satisfactory and that no factual basis existed to conclude otherwise.

[21] At this point I pause to elaborate further on the shortcomings of the answering affidavit to which I alluded earlier. While the answering affidavit, deposed to by the appellant's Human Resources Manager, Ms Nannie Coetzee, presented a version *a propos* the respondent's performance, supporting the assertion that the dismissal was lawful, it failed entirely to set out which of the respondent's allegations were admitted and which were denied. None of the respondent's allegations were dealt with *ad seriatim*. Many averments were not even referred to, never mind specifically denied, admitted or challenged. The answering affidavit in the main consists of a general narrative and alternative interpretation of the events and does not deal with most of the respondent's averments in the founding affidavit. To make matters worse, there is not a single supporting or confirming affidavit from any witness who had a complaint about the respondent's performance or who made a decision to terminate the contract. The strange reason

advanced for taking this unorthodox approach to the evidence is found in paragraph 4.5 of the answering affidavit, which reads:

> 'Due to the considerable disputes of fact which would inevitably arise in this particular matter, I do not deem it appropriate to go into a detailed analysis of the Applicant's performance during his period of employment and his probationary period with the Respondent. Suffice it, at this junction to record that his performance fell short of what would be required of an individual of his particular experience, ranking and understanding of security and security related issues.'

[22] The appellant further stated that it had been advised (wrongly in my view) that any claim for damages for breach of contract "should be initiated by way of an action and it would not be proper or appropriate, let alone justified to have a dispute of the nature contemplated adjudicated as and by way of application". It accordingly asked for the application to be dismissed on that ground alone. The proposition so stated is simply not correct. It is trite that a litigant may sue for breach of contract by application where there are no foreseeable disputes of fact. Whether any dispute of fact exists or may arise will depend on the responses to an applicant's factual averments. The appellant's naïve, even foolhardy, decision to approach the evidence in the fashion it did, has had detrimental consequences for the appellant which would have been obvious to the least experienced of legal practitioners. In accordance with the principles applicable to determining the facts in application proceedings, the appellant's failure to deal with the allegations made by the respondent in relation to the satisfactory nature of his performance means that such allegations for the most part must be taken to have been admitted, and not being withdrawn, are binding on the appellant as admitted facts which cannot be regarded as disputed. Consequently, as appears from what follows, no dispute of fact has arisen on the papers, in the sense contemplated in *Room Hire*, with the further result that the Labour Court had no jurisdiction to refer the matter to oral evidence, which it correctly

declined to do.

[23] The respondent sets out the events leading to his dismissal in the founding affidavit. At the end of October or the beginning of November 2009, Ms Coetzee, the Human Resources Manager, handed the respondent a letter extending the probation period until the end of November 2009. Coetzee, in response to a question from the respondent as to why, explained to him that it was in accordance with HR procedures that he should serve a full three months probation, and since he had been absent on account of ill health intermittently for a period of 8-10 working days, it was necessary to extend the period. Coetzee then asked the respondent to take the extension letter to Raymond Hack, the CEO, to obtain his confirmation of the extension of the period. When the respondent handed the letter to Hack and requested confirmation, Hack informed him that he was happy and satisfied with his work performance and that the extension of the probation period was to compensate for the period of absence caused by ill health.

[24] In paragraph 6 of the answering affidavit, Coetzee dealt in part with some of these allegations. She in effect denied that ill health was the reason for the extension and claimed that it was explained to the respondent (it is not stated by whom) that the extension was to permit a further opportunity for assessment. It is not denied that the applicant took the letter to Hack for his confirmation; nor that Hack confirmed the extension, stated that he was happy and satisfied with the respondent's performance, and explained to the respondent that the extension was to compensate for the period of illness. No explanation is offered by the appellant for why Hack chose not to depose to an affidavit supporting the vague and non-specific contentions made by Coetzee or setting out any shortcomings of the respondent, or most importantly denying that he had informed the respondent that he was satisfied with his performance. The respondent reported to Hack, who must have played a key role in the decision to extend the probation and ultimately to

dismiss him. Coetzee's unsupported averment amounts to a bare denial and a failure to deny without putting up Hack's evidence in support of the denial. Such does not give rise to a real and genuine dispute of fact. Absent such, the Labour Court was obliged to accept the respondent's version as to both the reason for the extension of the probation period and Hack's positive assessment of his performance.

[25] The respondent, as I have said, canvassed and openly discussed in the founding affidavit various incidents and issues that were relevant to an assessment of his performance. The first related to his involvement in the co-ordination of the security aspects of a football match between the South African national football team ("Bafana") and Serbia. He was jointly responsible for the security issues and preliminary arrangements for the match together with Mr David Nhlabathi, the previous Acting Head of Safety and Security and a former member of the National Executive Committee of SAFA. The respondent annexed to his founding affidavit Nhlabathi's report regarding the security protocol aspects of the event which took place at the Super Stadium in Pretoria - Annexure KM3. The report corroborates the respondent's assertion that the game went ahead without any security hitch. However, there were one or two inconsequential issues in relation to transport. The report indicates that the Serbian team were transported from the airport without the benefit of a police escort due to "a breakdown in communication" within the department of the Pretoria Metro Police. There was also a problem with the vehicles supplied to the Serbian team, but this was sorted out by Hack on the day of their arrival. Despite these problems, Nhlabathi at the time conveyed to the respondent that he was happy with his management of the security for the event, and confirmed as much in a confirmatory affidavit annexed to the founding affidavit.

[26] Once again, the appellant failed to deal specifically with the respondent's averments, the report or Nhlabathi's affidavit. Without referring to the respondent's averments, indicating which of them it

admitted or denied, the appellant said the following in relation to the Metro Police allegedly having failed to honour their commitment to provide an escort to the Serbian team:

> 'In the context of security arrangements and the high risk which these types of fixtures inevitably attract, this is inexcusable. The fact that according to the report the South African Police Services did not have the necessary internal arrangements in place begs the issue and is of absolutely no consequence. The obligation to ensure that there were proper security and safety measures for the visiting Serbian team rested squarely on the shoulders of the Applicant and he failed, dismally at that, in that regard.'

The respondent pointed out in the replying affidavit that when the Serbian game took place he had been in employment for about a week and arrangements had been made for the escort by his predecessor, Nhlabathi. The respondent duly took the matter up with the Metro Police who acknowledged their error and apologised for their incompetence. Nhlabathi confirmed the veracity of this account in a further confirmatory affidavit annexed to the replying affidavit.

[27] The appellant failed to produce any documentary evidence or to indicate that it proposed to produce oral evidence from anybody within SAFA or the Metro Police in support of its contention that the non-arrival of the police escort at the airport was the result of any negligence or failure on the part of the respondent. The statement in Nhlabathi's report that it was a failure on the part of the Metro Police, in the face of the appellant failing to produce countervailing evidence or laying any basis for disputing the accuracy or veracity of the respondent's averment, in effect stands un-denied. In view of that, there was no real dispute of fact arising on the papers regarding the appellant's responsibility for the escort. Additionally, no material evidence shows any other mal-performance on the part of the respondent in relation to the match. On the contrary, Nhlabathi's averment that the appellant performed satisfactorily is not denied or

dealt with and therefore amounts to an admission. Accordingly, the allegation of poor performance on the part of respondent in relation to the game between Bafana and Serbia was not proven and no dispute of fact existed which required the Labour Court to refer the issue to oral evidence.

[28] The respondent also raised and discussed in some detail various aspects of his performance in support of his contention that he properly carried out his obligations. He held meetings with different stakeholders to discuss issues pertaining to staff, risk management, transport and facilities management. He formed a security committee to deal with all matters regarding security and safety. He liaised with the South African Police Service regarding logistics at the airport and communicated with Hack about the upgrading of security systems and technology. He kept Hack abreast of his activities by sending him memoranda. The description the appellant provided of his activities between August and late October 2009 does not give the impression that he had a taxing schedule or that he had many tasks assigned to him. Nevertheless, his assertion that he did what he was required to do properly in that period is not challenged meaningfully by Hack or any SAFA official to whom he reported. The appellant did not deny or admit that the respondent properly performed the tasks he mentions, with the result that these averments too must be deemed to be admitted.

[29] Bafana was scheduled to play against Japan on 14 November 2009. The venue for the match was originally the Orlando Stadium in Soweto. This venue was changed on 25 October 2009 due to the condition of the pitch and moved to the Rand Stadium in Rosettenville, Johannesburg. On 4 November it was again decided to move the game to the Nelson Mandela Bay Stadium in Port Elizabeth. From correspondence annexed to the founding affidavit it appears that the decisions to make the changes were made by Hack and were appropriately aimed at fulfilling a contractual obligation to the Japan Football Association to provide a world-class venue. The respondent

averred that due to the frequent changes of venue at short notice, there were various logistical difficulties that frustrated the flow of information and made it difficult to co-ordinate various security measures. Nevertheless, the required planning meetings were held and the match against Japan went ahead in Port Elizabeth on 14 November 2009 without any security incident. The respondent annexed a newspaper article of 17 November 2009 which includes comments by Mr Danny Jordaan, the CEO of the FIFA Local Organising Committee, regarding the game. The article stated:

> 'Jordaan has rated Port Elizabeth 8 out of 10 for atmosphere, *security arrangements*, accommodation, parking and large crowds following the international at the Nelson Mandela Bay Stadium on Saturday.'

The article noted that a strong security presence was visible in the crowd.

[30] The appellant did not admit or deny the respondent's averments that the change of venue impacted on logistics, that nonetheless planning meetings were held, that the security arrangements were perceived to be a success by FIFA and the media, and that there was no security incident of material negative consequence. In keeping with its blunderbuss approach, the appellant ignored the specific allegations and instead resorted to vague and unsubstantiated allegations to the effect that the respondent was not "hands on", that on the day of the match he was not willing to be placed in the venue operational centre thus was difficult to contact and "very often the information which was provided (the exact nature of which the appellant does not describe) was incorrect and not an accurate reflection of what was being undertaken or experienced". The respondent was also criticised for not ensuring that refreshments and catering facilities were made available, in particular for security personnel. The respondent dealt with these vague allegations in reply stating that he was unaware of any person who had struggled to contact him, that he thought it better to move

around the venue to keep an eye on the security arrangements and that the provision of refreshments was (unsurprisingly) not part of his job description. Moreover, the appellant did not deny the respondent's averment in the founding affidavit that he was not unwilling to be based in the operation centre. He in any event arranged for another employee, Mr. Moerane, to be there. The appellant did not indicate who attempted to contact the respondent, when that happened and what information provided by the appellant was incorrect or an inaccurate reflection of events. Nor was it indicated with any specifics in what respects the appellant was not "hands on". Facts so vaguely stated and unsupported by evidence of persons (other than the HR Manager who did not attend the game) who could properly attest to the respondent's behaviour are not facts at all, do not establish that the respondent performed unsatisfactorily and did not give rise to any genuine dispute of fact requiring referral to oral evidence.

[31] Prior to the Japan game, on 10 November 2009, Hack received a letter from the Divisional Commissioner: Visible Policing of SAPS, AH Lamoer which read:

> 'Previous correspondence dated 2007-12-06 refers.
>
> National instructions to the Provinces to secure the South African and Japan teams could not be submitted due to insufficient and late submission of information received from SAFA. Contingency measures had to be put in place to secure the Japanese team because of the delay in obtaining the itineraries.
>
> The South African Police Service therefore, cannot take responsibility in securing the teams or the event.
>
> Your personal intervention in addressing these issues will be greatly appreciated.'

The letter dated 6 December 2007 to which Lamoer refers (Annexure

KM13 to the founding affidavit) is essentially a complaint by the SAPS that SAFA was failing to provide "sufficient and early information" requested by SAPS to ensure the safety and security of all stakeholders, and stated that SAPS had experienced "numerous difficulties in obtaining the necessary information". It was accordingly requested that SAFA provide SAPS "with timeous information" on the programme of the events and international games that would be held in the country in the lead up to the World Cup.

[32] On 12 November 2009, Hack addressed an internal memo to the respondent requesting him to furnish a report regarding the letter from the SAPS of 10 November 2009. The respondent replied to Hack by email on the same day. The email read:

> 'Your memo dated 12 Nov 2009 has reference
>
> It would appear there has been a long standing communication problem way back from 2007 as per a letter from SAPS. There is indeed a communication challenge within SAFA and the recent letter from SAPS is adequate proof thereof. I must however indicate that inadequate communication with SAPS was exacerbated by the change of venues specifically for the Japan game. Furthermore all information required by this SAPS unit resides in the main with SAFA's Commercial Dept. The required information was coming in drips and drapes (sic) due to the uncertainty of the venue.
>
> I have however met with Supt. Mokoena and we have agreed on a modus operandi for communication in the future in our respective areas of responsibilities.'

[33] The communication problem that existed in 2007 was obviously not the responsibility of the respondent because he was not employed by the appellant at that time. His explanation that the problem was an ongoing one caused by a lapse of communication within the organisation between Hack and the commercial department, is not denied.

Likewise, it is not denied that the respondent satisfactorily resolved the matter, as spelt out in his email. In fact, the answering affidavit does not refer at all to this issue (raised by the respondent in the founding affidavit). Nor is there an affidavit from Hack denying that the problem rested with him and the commercial department, or indicating whether or not he considered the respondent's explanations and the steps taken satisfactory. There is furthermore no confirmatory affidavit from Lamoer attributing any responsibility to or expressing concern about the performance of the respondent. In the circumstances, there is no dispute of fact arising in respect of this issue either, and the averment of the respondent that he bore no responsibility for this matter and that he in any event satisfactorily resolved the problem once it was brought to his attention, must be deemed to have been admitted by the appellant.

[34] On 19 November 2009, Hack received a memorandum from Mr. Jan Koopman, a member of the National Executive Committee of SAFA, complaining about the respondent's performance as regards the match with Japan and a match between Bafana and Jamaica which took place on 17 November 2009. As these complaints appear to have led to the respondent's dismissal a few days later, it is necessary to cite the memorandum in full. It read:

> '1. During the first week of November 2009 the Security Head of SAFA, General Mangope was phoned by myself regarding the issue of the security meetings for the two matches of Bafana Bafana and Japan and Jamaica respectively. Mr Mangope informed me that a meeting was already held in Bloemfontein and that he was currently in Port Elizabeth where a security meeting was taking place. He also informed me that another security meeting will be held in Bloemfontein prior to the match between Bafana Bafana and Jamaica.
>
> 2. On the 11th November 2009 the meeting was held in Bloemfontein with the different stakeholders and it was attended by me and General Mangope, (Security Head of SAFA).

3. During the meeting the following questions were raised by the Operational Commander, Sr. Supt. PG Solo.

- **Practice venues and dates of the two teams**

The Security Head of SAFA could not give information when Bafana Bafana will arrive in Bloemfontein and where their practice venue will be. He was also not sure of the practice venue of Jamaican team.

- **Current status of ticket sales**

The Security Head of SAFA was also unable to give any information on the status of the sale of tickets and whether it will be available at the match venue of stadium.

- **Deployment of Private Security Company (how many and if local people will be used).**

The Security Head of SAFA was not in a position to clarify how many Security Guards will be deployed during the match and how many of them will be local security guards, although the Head of the Private Security Company informed him that they will use local security guards.

<u>Bafana Bafana vs Japan</u>

During the match on 14th November 2009 in Port Elizabeth, Bafana Bafana vs Japan, the Security head of SAFA was not willing to be placed in the Venue Operational Centre (VOC). I was not impressed with the duties of the Security Head because every time I had to phone him for information.

At the debriefing session after the match questions were also raised with regards to the promise that General Mangope made to the VOC that they will be provided with food but in the end no one received any food.

Bafana Bafana vs Jamaica

During the match on 17th November 2009 in Bloemfontein, General Mangope was requested to give feedback to me on security issues but he only said that everything is in order. I also ask him if there was any security meetings held but according to him everything is in order.

At the debriefing session after the match questions were also raised with regard to the promise that General Mangope made to the VOC they will be provided with food but he didn't give feedback to the VOC, then the VOC thanked me and Roxanne Bartlet who intervened and provided them with food and drinks. No water was also available for the VOC personnel.

Questions were also raised regarding the availability of General Mangope to answer security related questions from SAFA.

CONCLUSION

General Mangope was not up to standard regarding the security issues during both matches. He only provided me with little information on security meetings. It was an embarrassment for SAFA during both matches because promises were made but it was not delivered.'

[35] When the respondent was dismissed he was simply called into Hack's office and given the letter of termination dated 23 November 2009. He was not asked at any time prior to his dismissal to comment on the allegations in Koopman's memorandum. The dismissal was presented to him as a *fait accompli*. These allegations were not denied by the appellant. The respondent in the founding affidavit however addressed the complaints made in Koopman's memorandum. Some have already been discussed. With regard to the practice venues, he averred that it was the duty of the commercial department to inform him of the venues, and only then would he arrange for security. The venues are arranged in conjunction with SAFA local structures. At the time of the meeting he was awaiting instructions. Likewise, ticket sales and

distribution are the exclusive responsibility of the commercial department and he awaited that information too. By reason of the constant and ongoing venue changes, as the respondent understood it, the commercial department was not in a position to furnish him with the information before the meeting of 11 November 2009. As for the private security company and the deployment of security guards, the respondent denied the allegations made by Koopman in the memorandum. He maintained that he told Koopman that local security guards would be used. He was unable to tell him the exact number due to the fact that the final coordination meeting for setting in motion a final security plan would only be held on 16 November 2009 and that this would be conveyed to the SAPS at that meeting.

[36] At first sight there might have been some merit in the appellant's general concern that the respondent did not act proactively. However, that has to be assessed against the common cause fact that no security incidents occurred at any of the matches for which the respondent bore responsibility, namely those against Serbia, Japan, Jamaica and Madagascar. Moreover, the respondent's averments that the issues raised by Koopman fell outside of his KPA's and that given a proper opportunity he would have demonstrated that the allegations made in the complaint were largely baseless and without substance were not denied by the appellant. The respondent reiterated that the established procedures for security planning had been complied with.

[37] The answering affidavit deals with some of the issues raised in the Koopman complaint in a vague and unsatisfactory manner, without addressing the exculpatory explanations tendered by the respondent. There is no affidavit from Koopman confirming his complaints under oath or seeking to refute the respondent's allegations that the complaints were baseless. The deponent to the answering affidavit, Ms Coetzee, who had no personal knowledge of what transpired at the relevant meetings because she did not attend them, stated baldly that "the applicant did not have the necessary information and statistics and

data at his disposal to provide critical and important advice" and referred to the various issues raised by Koopman. Coetzee merely repeated the allegation that the respondent was requested to provide proper and adequate feedback on all security issues and that his only response was that everything was in order; and also that he did not make himself available to answer queries. It was not stated in either the memorandum or the affidavit who requested feedback and in what respects it was inadequate, or why an assessment that all was in order (which proved to be the case) was deficient or incomplete. Yet again, therefore, the appellant failed to make out a proper case that the respondent performed unsatisfactorily or presented evidence in a manner giving rise to a real dispute of fact obliging a referral to oral evidence.

[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.[10] 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".[11] 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

10 *Wallace v Rand Daily Mails Ltd* 1917 AD 479, 482.
11 *Ndamase v Fyfe-King NO* 1939 EDL 259, 262.

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.

[39] The respondent and the court *a quo* placed much in 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 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 section 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.

[41] Be that as it may, as it turned out the respondent was entitled to relief because, as already discussed, the appellant did not prove that he had breached or repudiated the contract. The allegations of unsatisfactory performance or incompetence were not established. In those instances where the respondent may have fallen short, it cannot be said that his conduct attained a level of habitual negligence or persistent incompetence as to constitute a breach of the warranty of competence or a repudiation of the contract.[12] All the more the case when the appellant neglected to follow the procedure in clause 5 to put the respondent on terms *a propos* his performance. The inescapable conclusion is that the appellant repudiated the contract, permitting the respondent to accept the repudiation and to claim damages.

[42] The respondent filed a supplementary affidavit *inter alia* quantifying his damages, and in which he claimed the balance of his fixed term contract; which he determined to be 31 months at R60 000 per month =

12 *Hankey Municipality v Pretorius* 1922 EDL 306.

R1,86 million, less certain interim earnings of R83 000, giving a total of R1, 777 000, the amount which the Labour Court awarded.

[43] The *quantum* of damages awarded seems to rest upon an uncritical application of the standard enunciated 60 years ago by the Cape Provincial Division in *Myers v Abramson*[13] which in relation to damages for breach of a fixed term contract of employment (as opposed to an indefinite term contract terminable on notice) stated the following:

> 'The measure of damages accorded such employee is, both in our law and in the English law, the *actual* loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.'[14]

There is a tendency among lawyers practising in the field of labour law to rely on these *dicta* to contend that the unlawful premature termination of a fixed term contract of employment entitles the wrongfully dismissed employee to be paid the balance of the unexpired portion of his or her contract. That view has been reinforced by the order made more recently by the Constitutional Court in *Masetlha v President of the RSA and Another*.[15] In that case the court held that the dismissal of the applicant from his post of Director-General of the National Intelligence Agency was in violation of his constitutional rights. In exercising its discretion in terms of section 172(1)(b) of the Constitution to grant a remedy which is just and equitable, the Constitutional Court ordered the appellant to be paid the remuneration payable for the balance of his fixed term contract. It is not clear from the judgment whether the court gave any consideration to either a contractant's duty to mitigate damages or the collateral benefit rule as envisioned in the *dicta* pronounced in *Myers v Abramson*. The order in *Masetlha*, being one in terms of the Constitution, was not intended, in

13 1952 (3) SA 121 (C).
14 At 127 D-E.
15 2008 (1) SA 566 (CC).

my opinion, to re-define the contractual measure of damages in respect of a material breach of a fixed term contract of employment.

[44] The standard in *Myers v Abramson* intimates that an employee will be entitled to his proven *actual* damages reduced by collateral benefits and other justifiable deductions. In an action for damages the onus of proving damages rests on the plaintiff. The mitigation rule requires the defendant to prove that the amount claimed by the plaintiff does not represent the true amount because of a failure to take reasonable steps to mitigate; the evidentiary burden shifts to that extent. There remains nonetheless a duty on a plaintiff to prove the value of the prospective loss of the expectancy of income.

[45] In accordance with general principle, a plaintiff claiming damages for a prospective loss of future salary must adduce evidence enabling a fair approximation of the loss even though it is of uncertain predictability and exactitude. It is not competent for a court to embark upon conjecture or guesswork in assessing damages when there is inadequate factual basis in evidence.[16] Moreover, allowance has to be made for the contingency or probability that the anticipated future loss may not in fact eventuate, at least not in its entirety, because the dismissed employee may obtain another job or source of income. There should be evidence as to the reasonable period it would take a person in the position of the respondent to obtain analogous employment. By similar token, any amount awarded as damages for future loss has to be discounted to current value. In other words, the value of the expectancy of future salary before and after the breach has to be determined in order to quantify damages. Where it is highly probable that the expectancy would have been realised but for the breach, the value of the expectancy will usually be the value of the expected income (the salary for the unexpired period) less amounts which reasonably might be earned (potential collateral and mitigated

16 *Hersman v Shapiro and Co* 1926 TPD 367, 379; *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) 970E; and *Aaron's Whale Rock Trust v Murray and Roberts Ltd and Another* 1992 (1) SA 652 (C) 655F-656E.

amounts), adjusted firstly by a contingency for the possibility of the entire loss not being realised, and discounted in addition for the advantage of the expectancy being accelerated or received earlier than it would have been.

[46] In the present case, the appellant did not allege or prove any failure by the respondent to mitigate his accrued damages. In its answer to the supplementary affidavit it however submitted:

> 'As to the *quantum* of damages claimed, the Applicant has not alluded to what the *future prospects* are of him mitigating his damages. I am advised that a discounted factor must be taken into account to reflect the prospects of the Applicant mitigating his damages during the balance of the fixed-term contract.'

The respondent proved his actual, past damages, but did not adduce any evidence to support his claim for the non-realisation of his future income beyond the date of the Labour Court judgment. No evidence was before the Labour Court with regard to the future value of the respondent's package, an appropriate rate at which to discount it or a proper basis for adjusting for contingencies. The appellant merely proved his accrued mitigated damages, his *damnum emergens.*

[47] It was therefore, in my opinion, wrong for the Labour Court to equate, without further ado, the respondent's damages with the salary owing for the balance of the unexpired period of his fixed term contract. Such an amount, in the nature of things, will in all cases be the maximum payable as damages. But the maximum does not axiomatically follow upon breach. As a result, the award of damages was not reasonable, as required by section 77(A) of the BCEA. A reasonable award in the circumstances would be the amount of the actual damages proved. The dismissal was at the end of November 2009 and the judgment of the Labour Court was handed down on 17 December 2010; meaning that the damages proved amounted to 12 months' salary at R60 000

per month and R60 000 at a ratio of 17:31 in respect of December 2010, less the amount of R83 000 in collateral earnings. Thus R720000 + R32 903 - R83 000 = R669903. The appeal should therefore succeed to that extent and the order be varied accordingly.

[48] Given that the appellant had good prospects of succeeding significantly on the question of damages, the reinstatement of the appeal was in the interests of justice and sufficient cause was shown to condone non-compliance. However, the manner in which the appeal was prosecuted was unsatisfactory and the reasons advanced for the delay in filing the record were unconvincing. For those reasons the appellant should not be awarded its costs in the application. As both parties enjoyed some success in the appeal, it is just that there be no costs order in respect of the appeal either.

[49] In the result the following orders are issued:

(a) The appeal succeeds to the limited extent as provided in this order.

(b) The order of the Labour Court is set aside and substituted as follows:

> ‘1. The decision of the respondent to terminate the applicant’s contract on 23 November 2009 is declared to be in breach of contract and unlawful.
>
> 2. The respondent is ordered to pay the applicant damages in the amount of R669 903.
>
> 3. The respondent is ordered to pay the costs of the application.’

c) There is no order as to costs in respect of both the appeal and the application for condonation.

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MURPHY AJA

I agree

_____

Waglay DJP

I agree

_____

Tlaletsi JA

APPEARENCES

FOR THE APPELLANT:	W Hutchinson
INSTRUCTED BY:	Fluxmans Incorporated
FOR THE RESPONDENT:	F Boda
INSTRUCTED BY:	Eversheds