



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

6577/22

Case No:

In the matter between:

JURIE WYNAND ROUX

Applicant

And

UNIVERSITY OF STELLENBOSCH

First Respondent

A R SHOLTO-DOUGLAS SC N.O.

Second Respondent

CM ELOFF SC N.O

Third Respondent

RETIRED JUSTICE LTC HARMS N.O.

Fourth Respondent

M VAN DER NEST SC N.O.

Fifth Respondent

Consolidated by agreement with:

Case No: 11368/15

In the matter between:

UNIVERSITY OF STELLENBOSCH

Applicant

and

JURIE WYNAND ROUX

First Respondent

JOHANNES CHRISTIAAN DE BEER

Second Respondent

Coram: Justice V C Saldanha

Heard: 22 August 2023

Delivered electronically: 13 October 2023

JUDGMENT

SALDANHA J:

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal (the SCA) alternatively, the full bench of the Western Cape High Court against the whole of the judgment handed down by this court on 25 April 2023 and the orders including that of costs. In the application for leave to appeal, the applicant contends that there are reasonable prospects of success, if allowed, against the judgment and orders in terms of section 17(1) (a) (i)¹ of the Superior Court Act 10 of 2013 (the Superior Court Act) and with reference to the provisions of subsections (1)(b)² and (c)³ of the Act. In the heads of argument filed in support of the application for leave to appeal and subsequently in argument, the applicant expanded the grounds of appeal to include that in terms of 17(1)(a)(ii)⁴, on the basis that the decisions he seeks to appeal involves questions of law of importance because of their general application.

[2] The review application was brought in terms of section 33(1)(b) of the Arbitration Act 42 of 1965 (the Act):

‘33(1) Where –

(a) ...

(b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings...; or (emphasis added)

¹ 17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
(a) (i) the appeal would have a reasonable prospect of success;

² The decision sought on appeal does not fall within the ambit of section 16(2)(a).

³ Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

⁴ 17(1)(a)(ii). There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

(c) ...'

[3] The legal issues dealt with in the judgment sought to be appealed against relates to the decisions of the Initial Arbitrator and the Appeal Tribunal (the arbitrators) in respect of; (i) whether special damages should have been pleaded and proved by the University in an action in which damages were sought for the breach of a contract of employment, (ii) the question of the “onus” relating to compensating benefits as enunciated by the Supreme Court of Appeal in *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 in the context of an employment contract and (iii) whether the common law relating to the determination of the above two questions should have been developed by the Initial Arbitrator or/and the Appeal Tribunal in terms of section 39(2)⁵ of the Constitution. The applicant contended, that the issues relating to that of special damages, that of the “onus” and the development of the common law should have been dealt with in the context of an employer- employee relationship and not simply on the application of ordinary principles of contract.

[4] This court determined the review application principally, on the basis that the review proceedings arose in the context of a consensual private arbitration, to which the provisions of the Arbitration Act 42 of 1965 applied and in terms of the pleaded case by the parties and on the application of the law by both the Initial Arbitrator and the Appeal Tribunal to the facts found to be proved in the proceedings. That remains the central point of departure, not only in the review proceedings but also in this application for leave to appeal. Crisply stated, the University contended and so found by the court, that the applicant has failed to show that the arbitrators, had committed any gross irregularity in the conduct of the arbitration proceedings that led to the applicant being the subject of an unfair trial. Moreover, the applicant himself never complained that he did not have a fair trial before any of the arbitrators, without which, he could simply not complain that there was any gross irregularity(s) in the conduct of any of the proceedings. In this regard, counsel for the University, as in the review proceedings,

⁵ When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights

pointed to the answering affidavit of the University where it emphatically stated that none of the complaints raised by the applicant against the arbitrators related to the conduct of the arbitration. The court, in its judgment, somewhat tediously, also referred at length to the proceedings before the Initial Arbitrator in which the applicant was given the fullest opportunity of not only considering and moving for an amendment to his pleadings, if he thought necessary, and in tendering any evidence that would have been admissible. The applicant flatly spurned the opportunity of doing so. None of that needs any repetition at this stage. The University maintained in the application for leave, that 'In the circumstances there can be no doubt that (Mr) Roux had a fair hearing'. In his replying affidavit, in the review proceedings the applicant stated 'The question is not whether the hearing was fair but whether there was a gross irregularity in the conduct of the proceedings'. The University contended and in my view, correctly so, that applicant had not and could not complain that the proceedings against him were in any manner or form unfair. His continued reliance on a gross irregularity in the conduct of the proceedings simply did not follow and was moreover was not borne out by the evidence and the findings both on the facts and on the application of the law by the arbitrators.

[5] Nonetheless, the applicant contends that the arbitrators committed errors of law, and rely on the decision of Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 69, where he states:

"Errors of law, can no doubt lead to gross regularities in the conduct of the proceedings. *Telcordia* posed the example where an arbitrator, because of a misunderstanding of the *audi* principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith."

In the context of this matter the issue of a lack of *audi* did not arise at all as the applicant was given the fullest opportunity by the arbitrators of leading any evidence he sought to tender and to make any submissions relied upon.

[6] Harms JA in *Telcordia*, also pointed out that an error of law may lead to an arbitrator to exceed his/her powers or to misconceive the nature of the inquiry and his/her duties in connection therewith. There is no complaint of any of the arbitrators having exceeded their powers, but rather, the complaint remains, that they had misconceived the whole nature of the inquiry and their duties in connection therewith. In essence, the applicant claimed that the arbitrators misconceived that in the context of a claim for a breach of contract in an employer- employee relationship, the nature of the inquiry with regard to the proof of the damages also entailed that special damages should have both been pleaded and proved as opposed to mere general damages. That, in context, the “onus” to prove compensatory benefits (if any) should also have been shouldered by the employer where the benefits arose, as in a case of unauthorized expenditure, in the course and scope of the employment of the employee and where the benefits fell within the scope of business of the employer (a “modified application” of the decision in *Japmoco* as counsel for the applicant labelled it).

[7] Counsel for the applicant submitted that they relied on amongst others, the decision of Viljoen J in *Primich v Additional Magistrate, Johannesburg, and Another* 1967 (3) SA 661 (T) which decision was also referred to by Harms JA in *Telcordia* (at paragraph 74) as an example of where a jurisdictional fact was missing or put differently, ‘a condition for the exercise of a jurisdiction had not been satisfied’. That matter related to the provision of security where a plaintiff was not resident in the country. The magistrate made an order against the plaintiff for the provision of security who was in fact resident in the country. Harms JA, found, that amounted to an error of law, (which was, as he stated,

an error of fact dressed up as all too often, as an error of law) where although there was no indication that the magistrate had misinterpreted the rule; “he misunderstood the facts, holding that a jurisdictional fact was present while it was not”. Viljoen J described it as follows:

‘In my view, in coming to the conclusion that, on a mere allegation that the plaintiff was not resident at the address given in the summons, the defendant has satisfied the requirement of

Rule 58 (1) that the plaintiff was not resident in the Republic, and, what is more, satisfied it to the extent only of raising a grave doubt in the magistrate's mind, the magistrate has completely misconceived the whole nature of the enquiry and his duties in connection therewith.'

The applicant contended that the fact that the University had not pleaded special damages was akin to a jurisdictional fact not being present. Hardly so, as in my view, the issue of special damages related to the proof of damages as opposed to a jurisdictional fact for the claim. Moreover, the nature of the enquiry was described by both Viljoen J and Harms JA in the context of that matter.

[8] So too, did counsel for the applicant rely on the decision of Wallis JA in *Palaboro Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA.) In that matter an arbitrator's rulings in respect of the striking out of certain paragraphs of a plea to the counterclaim had prevented an exploration of issues by relieving the respondent, of any obligation, however light, to prove that it would have performed the contract and had suffered loss as a result of being prevented from doing so. The applicant contended that the arbitrator in that matter as did the arbitrators in this matter, failed to apply their minds to the shift in the "onus" as espoused in *Japmoco* relating to the compensatory benefits in the context of a breach of an employment contract. In *Palaboro*, the decision of the magistrate, amounted to a gross irregularity in the actual conduct of the proceedings that lead to an unfair trial, as stated by Wallis JA '...but the cumulative effect was to deprive *Palaboro* of a fair trial of the issues'. Needless to say, the decision in *Palaboro* is distinguishable from the present matter where the arbitrators applied the existing common law, as espoused in *Japmoco*, and as required of them in accordance with their mandate to the specific facts and pleadings before them. Moreover, nothing prevented the applicant from leading any evidence relevant to the proceedings.

[9] In respect of the question as to whether there was a gross irregularity in the conduct of the proceedings, the central question remains, whether the applicant had a

fair trial. In this regard, counsel for the University pointed to, as they did in the review proceedings, to the longstanding pronouncement of Schreiner J (as he then was) in *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551, and embraced by Harms JA in *Telcordia* to the effect;

‘...the issue of “gross irregularity” should be answered by asking whether Telkom, in the words of Schreiner J, had a fair trial...is not contentious. Telkom accepted that the High Court never had asked itself this question and that its own heads of argument had not dealt with the point. When invited by us to state why the hearing had been unfair, counsel who argued this aspect deferred to his lead counsel who, in turn, chose to disregard the invitation.’

[10] Inasmuch as the applicant contends there has been a gross irregularity in the proceedings as a result an error in the determination of the legal issues, it was correctly pointed out by counsel for the University that an error in itself would not amount to a gross irregularity as contemplated by section 33(1)(b). The principle that where the legal issue is left for the decision of the functionary, such as an arbitrator, any complaint about the decision must be directed at the method and not at the result. That principle remains of impeccable vintage as per Innes CJ in *Doyle v Shenker & Co Ltd* 1915 AD 233:

“Now a mere mistake of law in adjudicating upon a suit which the Magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear...”. See also the earlier remarks of Mason J in *Ellis v Morgan*, 1909 T.S. 576 at p. 581.

[11] Moreover, as pointed out by Harms JA in *Telcordia* and reiterated by counsel for the University with reference to the decision of Smalberger ADP in *Total Support Management v Diversified Health Systems (SA)* 2002 (4) SA 661 at paragraph 25, the hallmark of and distinguishing features of an arbitration from that of administrative action was stated as follows;

[24] Arbitration does not fall within the purview of 'administrative action'. It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed. See Mustill and Boyd Commercial Arbitration 2nd ed (1989) at 41.

[25] The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in s 3(1) of the Act. As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE) at 1082G. Decisions made in the exercise of judicial functions do not amount to administration action (cf Nel v Le Roux NO and Others 1996 (3) SA 562 (CC) at 576C (para [24]), and compare also the exclusionary provision to be found in (b) (ee) of the definition of 'administration action' in s 1 of the Promotion of Administrative Justice Act). It follows, in my view, that a consensual arbitration is not a species of administrative action and s 33(1) of the Constitution has no application to a matter such as the present.' (my emphasis)

[12] The applicant literally sought to reargue the legal issues already dealt with in the arbitration proceedings and affirmed in the review judgment. Moreover, the applicant raised three entirely new considerations for the challenges. In the Note on Argument in the review proceedings that was referred to and dealt with in the judgment, counsel for the applicant indicated that a claim for damages by an employer against an employee for a breach of contract was an exceedingly rare occurrence. Initially, they contended that there was in fact no authority for such a claim but then retracted and explained that the case law on the issue was no more than sparse. In the heads of argument in this application and in argument, counsel for the applicant raised three new considerations

in support for their contention that the SCA or another court will find that the ordinary approach to a breach of an employment contract should not simply apply to such claims. The considerations were dealt with under the following subheadings (i) the approach of the Canadian courts to such claims (ii) the statutory provisions applicable to employees of organs of state and (iii), applicable public policy considerations. Mindful that none of these new considerations were raised before the arbitrators nor in the review proceedings and more importantly, in my view, do not and cannot detract from the findings of the arbitrators on both the facts and law on the pleaded case and the evidence, I am constrained though to no more than to deal briefly with each of them.

[13] With reference to the Canadian authorities, reliance was placed on a minority decision of Seaton JA in the matter of *D.H Overmyer Co. of Canada Ltd. v. Wallace Transfer Ltd.* (1975), 65 D.L.R. (3d) 717. There, an employee failed to give timeous notice for the termination of a lease of a warehouse on a 30-day notice period. The employer sued the employee for damages based on a breach of contract. The majority court, in a perfunctory one-page judgment upheld an appeal by the employer and significantly did so on the application of legal principles relating to the reasonable duty of care in establishing negligence on the part of the employee. Needless to point out, principles of tort were relied upon to establish liability for a breach of contract. The minority judgment of Seaton J upon which the applicant relied in this matter and preferred, (as did other Canadian courts), dealt at length with the law of tort in Canada and decisions in English law and disagreed with the approach adopted by the majority. Seaton J's views were summed up as follows:

'If an employee, by lack of care, causes loss to his employer, I do not think that it should be presumed that the employee will be liable, and I do not think that we should look at decisions on other employment contracts for the answer. We should look at the hiring to see what was said and at the circumstances to see what might properly be implied. It follows that this employment and this error must be looked at to see what terms were in the contract and whether they were breached.'

Two further Canadian decisions were referred to by counsel for the applicant, that of *Douglas v. Kinger* 90 O.R (3d) 721 (2008) and *Portage La Prairie Mutual Insurance Company v Maclean*, 2012 NSSWC 341 both of which dealt with principles of tort as opposed to that relating damages for a breach of contract.

[14] Counsel for the applicant contended that the import of the Canadian authorities in the context of this matter, and its relevance, was that it demonstrated that in the context of employment law, the ordinary remedy for a breach of contract, is not damages. Damages, they contended, for breach of an employment contract, are ordinarily regarded in law as being too remote to be recoverable. That, in order for an employer to claim damages for breach, the employer would have to show the special circumstances attended at the conclusion of the contract and that the parties had actually or presumptively contemplated that the damages would probably result from the breach. Such damages, the applicant contended, would have had to be in the contemplation of the parties, when the contract was concluded. Moreover, the employer would have to demonstrate that the terms of an employment contract was that the employee would be liable for any damages that arose from the employee's malperformance of its obligations under the contract. They contended further, that the contractual terms would have to specify the level of care and type of fault, (negligence, intention or strict liability) necessary for a claim for a breach to be sustainable. For those reasons, the applicant contended, consideration should be given in South African law, to require that special damages be pleaded and proved where damages are sought for a breach of an employment contract.

[15] Counsel for the University, as did the court, raised its concern at the attempt by the applicant on the particular facts of this matter, to import the conundrum in the Canadian law on the issue and with the conflation of principles of the law of tort into South African law relating to breaches of contract in the employment context. This concern, is and was, not meant to be a narrow chauvinism about South African law as our law is richly infused with legal principles from across many jurisdictions. In fact, the

Constitution encourages the development of South African law with legal principles and precedent from other jurisdictions, where appropriate. However, in the context of this matter, both the Initial Arbitrator and the Appeal Tribunal found that the damages were general and not too remote to be recoverable on the proven facts and application of the law. In this regard, the Arbitrators were mindful of the decision of Corbett, JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at page 687 paragraphs C to H:

‘To ensure that undue hardship is not imposed on the defaulting party... and the defaulting party’s liability is limited in terms of broad principles of causation and remoteness to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (*Shatz Investments (Pty) Ltd v Kalovyrynas* (1976) (2) SA 545 (A) at p 550). The two limbs, (a) and (b) of the above-stated limitation upon the defaulting party’s liability for damages correspond closely to the well-known two rules in the English case of *Hadley v Baxendale* (1854) 150 ER 145, which read as follows (at p 151):

‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.’

As was pointed out in the *Victoria Falls* case [1915 AD 1, 22] the laws of Holland and England are in substantial agreement on this point. The damages described in limb (a) and the first rule in *Hadley v Baxendale* are often labelled “general” or “intrinsic” damages, while those described in limb (b) and the second rule in *Hadley v Baxendale* are called “special” or “extrinsic” damages.’

[16] More recently, in *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) par 35, the test was reiterated (and relied upon by the Initial Arbitrator) as follows:

“To sum up therefore, to answer the question whether damages flow naturally and generally from the breach one must enquire whether, having regard to the subject-matter and the terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility. In the case of ‘special damages’, on the other hand, the foreseeability of the harm suffered will be dependent on the existence of special circumstances known to the parties at the time of contracting.”

[17] The second expanded ground proffered by the applicant with regard to why special damages should have been pleaded and proved by the University related to the provisions of the Public Finance Management Act (the PFMA) 1 of 1999 (in particular Chapter 10, Part 1). The PFMA, provides that an accounting officer is guilty of financial misconduct, if he or she willfully or negligently makes or permits unauthorized expenditure, irregular expenditure or fruitless and wasteful expenditure. Such conduct may result in exposure to disciplinary action. Counsel for the applicant contended that it was somewhat anomalous that in contract law an employee may face a civil claim for an entirely innocent or unauthorized expenditure when the legislature has limited their exposure in disciplinary action to willful or negligent unauthorized expenditure. A similar reference was made to Section 32 of the Local Government Municipal Finance Management Act 56 of 2003 which imposes liability on an accounting officer of a municipality for unauthorized expenditure deliberately or negligently incurred. The applicant likewise contended that it was inconceivable that the legislature regarded it as necessary to introduce what it referred to, as a finely crafted suite of statutory remedies, if there existed all along a contractual claim for the full amount of unauthorized expenditure without the need to prove fault and without the need to disprove compensating benefits.

[18] The applicant contended that the statutory regime in the public sector suggested that contractual claims were not as straightforward as the Initial Arbitrator and the Appeal Tribunal dealt with it and contended that fault was required to be proven and only the overspending could be recovered. There is of course nothing, in my view, that indicates in any of the statutes referred by the applicant that the common law remedy for a breach of contract is either specifically or by implication abrogated. In a country that has been ravaged by corruption in the state and in many cases ably assisted by those in the employment of the private sector, it would, in my view, be inconceivable, that the legislature would have abrogated a claim for a breach of contract (or made it in any way more onerous) in the context of an employment relationship such that which existed between the applicant and the University. Importantly, in the context of this matter the applicant was not held liable for a mere trivial breach of contract nor for that which he unwittingly committed. He had over a period of close to eight years “deliberately, dishonestly and in bad faith” misappropriated the funds of his employer, the University. The arbitrators found that he knew exactly what he was doing, did so dishonestly and even attempted to cover his tracks by using software which would not easily reveal a misappropriation of the reserve funds. Counsel for the University emphasized that it was only after Mr. Roux had left his employment and only in the course of an external audit was his dishonest conduct stumbled upon. It cannot, in my view, be countenanced that the only remedy by the University would be that of disciplinary action or for that matter a delictual claim for damages. More so, none of the statutes referred to by the applicant detract from the appropriate criminal remedies available to the state. Moreover, in law, an employer has always been entitled to the remedy for a breach of contract which in the circumstances of this matter, it pursued and correctly so, with all the vigour mustered against the impunity of the applicant.

[19] The third consideration raised by the applicant related to that of public policy in support of its grounds of review. He contended that from a public policy point of view the ordinary principles of damages for breach of contract should not apply to employment contracts. He contended that it was simply not reasonable to impose liability for

damages to be paid for a breach of contract on employees if the issues of liability were simply to be determined in the same manner as with any other contractual claim. The applicant listed a series of policy considerations none of which related to the principles of a breach of contract. To do so, would in my view, import the element of wrongfulness into the law relating to a breach of contract that more appropriately resides in a claim under delict. Once again, it would be entirely inconceivable that in the particular circumstances of the applicant and in the context of this matter, his pleadings and the evidence that he would be entitled to any “favourable” policy consideration, contrary to the exacting and considered findings of the arbitrators for his liability to the University.

[20] Counsel for the University reiterated and appropriately so, that the facts of this matter does not assist Mr. Roux. Neither does it in his rather vain attempt at championing the cause of employees/workers in our law against a breach of contract. The hallowed refrain, that each case has to be decided on its own facts, applies equally in this matter. The applicant was hardly a defenseless nor hapless employee who inadvertently misused the funds of his employer. Moreover, he chose his bed in his election of arbitration proceedings and that's where he must lay. His attempt at invoking public policy considerations appears to be nothing more than a desperate and cynical attempt at extricating himself from liability.

[21] In dealing with the second ground of review relating to that of the “onus” to prove compensating benefits, counsel for the applicant did no more than reargue and literally rehashed the claims made in argument in the review proceedings. Once again, they contended that the expenditure was in the course of the business of the University, contrary to the clear findings of the arbitrators. The findings of the arbitrators and the elaborate references to it in the judgment bears no repetition. Nothing more need to be said on this ground other than as with that, relating to the ground of special damages, in my view, both enjoy little prospect of success on appeal.

[22] In respect of the development of the common law, the applicant contended that the court was correct in having found that the arbitrators have the power to develop the common law even when not explicitly raised on the pleadings. The court however, held that the arbitrators were only obliged to consider the development of the common law if it arose either expressly or by implication from either or both the pleadings and the evidence before it. The court found that it was neither implicit in any of the pleadings (which was no more than a bare denial of the claims made by the University) nor did it arise in the evidence for the need to develop the common law in the context of the employment relationship that existed between Mr. Roux and the University.

[23] Counsel for the applicant, when dealing with the claim for the development of the common law, rather strangely, contended for the first time that the applicant did not plead that the University benefited from the expenditure of the funds as “he did not need to”, as his case was, assuming the expenditure was unauthorized, that the University “was required to plead special damages” and had not done so and that the funds had been used or at least in part in the course of the business of the University. Therefore, he contended, the onus should have been borne by the University to prove actual loss and not mere unauthorized expenditure. It was not the contention in the review proceedings that the applicant had not pleaded compensatory benefits because he was of the view that the University should have pleaded special damages. The two grounds were dealt with and relied upon separately. In fact, as the record of the findings of the arbitrators point out, his plea was that of a bare denial of any expenditure, which in evidence he falsely claimed to have been authorized to make. The arbitrators emphatically found on the evidence, that he never enjoyed any such authority. They roundly rejected his version(s). Moreover, and importantly, it had not been proved nor found by the Initial Arbitrator and reiterated by the Appeal Tribunal that the misappropriated funds were in fact, or could have been, used in the course of the business of the University. Strangely too, in argument, counsel for the applicant sought to resurrect the entirely unsubstantiated and ill-founded claim that it was common cause that the expenditure was made in the course of the business of the University.

[24] In contending that the common law ought to have been developed, notwithstanding the factual findings by the arbitrators and the pleadings and having accepted in the review proceedings that the common law could not simply be developed in the abstract, counsel for the applicant now contended that the arbitrators should nonetheless have taken what they referred to as “But if Mr. Roux was wrong...the additional step to inquire whether the common law required development in line with the Constitution to reflect the defenses Mr. Roux had raised”. In my view, no “additional step” needed to be taken and more so in the abstract. His defences were that of a bare denial. In this regard, as was debated with counsel at the hearing of the review application, the court was particularly mindful of the decision of the Constitutional Court in the matter of *Mighty Solutions CC t/a Orlando Service Station v Engine Petroleum Limited and Another* 2016 (1) SA 621 (CC) at paragraphs 38:

“[38] Furthermore, legal certainty is essential for the rule of law—a constitutional value. It is also understandable that litigants who find themselves on the wrong side of the common law or customary law will—often at a late stage in proceedings—seek what they would call its ‘development’.

Moreover, in the matter of *Member of the Executive Council of Health and Social Development Gauteng v DZ on behalf of WZ* 2018 (1) SA 335 (CC), the Constitutional Court set out the nature of the inquiry that the court was required to engage in when the development of the common law was sought:

[27] To start the enquiry, one must be clear on (1) what development the common law means; (2) what the general approach to such development is; (3) what material must be available to a court to enable the development; and (4) the limits of curial, rather than legislative, development of the common law.

[28] As O’Regan J explained in K, the common law develops incrementally through the rules of precedent, which ensure that like cases are treated alike. Development occurs not only when a common-law rule is changed altogether or a new rule is introduced, but also when a court needs to determine whether a new set of facts falls within or beyond the scope of an existing

rule. Thus development of the common law cannot take place in a factual vacuum.' (my emphasis)

In context, the arbitrators would have required the "material", based on the pleadings and the evidence that would have triggered and enabled a development of the common law in the context of the applicant's case. As indicated in the judgment, none existed or manifested.

[25] The court found that the common law did not limit the section 25(1), property rights, nor the section 23(1), fair labour practice rights, of the applicant because, as set out in *Japmoco*, as the applicant need merely have pleaded and proved what the benefits were that allegedly accrued to the University. The court held that Mr. Roux knew exactly how the money was spent. There was therefore no risk of any unfair labour practice or arbitrary deprivation of property on that score. Counsel for the applicant contended that the court missed the point as it was not whether Mr. Roux could have pleaded benefits to the University. "He could have and he did not". That contention, however, was simply contrary to that what Mr. Roux claimed in his replying affidavit where he dealt with the University's refusal to provide him with any documents that he sought relating to subsidies received by the University, which the University refused on the basis that it was neither relevant to any matter in question nor defined in the pleadings. There, Mr. Roux contended "In the light of these responses and the fact that the applicant has no access to Universities records it would have been impossible for him to prove compensation benefit." Needless to say, the argument submitted in this application does not accord with the applicant's own claims in the review application. In any event, there was no one better than the Mr. Roux himself, who knew exactly what compensatory benefits alleged accrued to the University over the eight-year period in which he unlawfully and dishonestly misappropriated the funds of his employer.

To reiterate, the facts of the applicant's case, his pleadings, the evidence and more importantly the findings made by the arbitrators in respect of the facts and the application of the law which they were mandated by the arbitration agreement to apply,

derogates from the applicant's desperate bid for the development of the common law in these proceedings.

[26] In the concluding submissions in their heads of argument, counsel for applicant contended that all three errors committed by the Initial Arbitrator and compounded by the Appeal Tribunal amounted to gross irregularities in the conduct of the proceedings. They contended that in each instance the arbitrators had misconceived the true nature of the inquiry. Once again, this was yet another demonstration that the applicant did not contend that he had not received a fair trial as none of the claims made by him throughout the review proceedings and so too in the application for leave to appeal was there any claim made that he had in fact not received a fair trial.

[27] I am mindful that the applicant seeks to raise important and novel issues in an employment context. More so, in consideration of foreign law. None of it, in my view, on the facts of this matter, would or could have assisted him. Mr. Roux was most certainly not the disadvantaged underdog in his employment relationship with the University. More importantly, the legal issues determined in this matter and any suggestion of the development of the common law could only have taken place in the actual context of the pleadings, the evidence and the findings by the arbitrators. If anything, the conduct of Mr. Roux, besides not only having been found by the arbitrators to be dishonest and in bad faith, is compounded by his impunity, that demonstrates a desperate refusal to accept accountability for his unlawful conduct. Regrettably, in my view, his resort to trawling the selective choice of Canadian law and the attempt to conflate principles of tort with that of the South African law of contract, (mindful though, of its instructive virtue) and by the attempt to introduce policy considerations in the face of the actual facts of this matter, alludes in my view, to no more than a delaying tactic (to put it politely) at avoiding liability for his, unauthorized, dishonest and surreptitious conduct. He received a fair trial, before both the Initial Arbitrator and the Appeal Tribunal.

[28] In the result, the application for leave to appeal is dismissed with costs, including that of two counsel, where so employed.

VC SALDANHA
JUDGE OF THE HIGH COURT