THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J502/2022

In the matter between:

DAVID SEDUMEDI **Applicant**

and

SEFAKO MAKGATHO HEALTH SCIENCES UNIVERSITY **Respondent**

Heard: **14 & 15 March 2024; 15 April 2024; 25 October 2024**

Delivered: **4 April 2025**

This judgment was handed down electronically by emailing a copy to the parties. The 4th of April 2025 is deemed to be the date of delivery of this judgment.

Summary: Fixed-term contract – no right to terminate on notice for operational reasons unless such right specifically agreed to as a contractual term

Fixed-term contract – premature termination of fixed-term contract by employer constituting breach – employee's duty to mitigate loss –

damages equal to unexpired portion of contract less income actually earned in similar employment, or income that could have been earned if employee had taken reasonable steps to find such employment – onus on employer to prove employee's efforts at finding such employment unreasonable

Contractual interpretation – incorporation by reference – permissible to incorporate contractual terms into employment contract that have not been read or even seen by employee, provided employee clearly and unequivocally agrees to such incorporation

Contractual interpretation – incorporation by reference – employer's managerial policies only become terms of an employment contract if the employee clearly and unequivocally agrees to such policies constituting contractual terms

Contractual interpretation – correct method of interpretation is a unitary consideration of text, textual context, extra-textual context, and purpose – the text itself has an important interpretative gravitational pull – interpretative gravitational pull strongest with text, then with textual context, then with extra-textual context, then with purpose

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JUDGMENT

MEYEROWITZ AJ

<u>Introduction</u>

[1] In September 2018 the applicant, Mr David Sedumedi (Mr Sedumedi), concluded a five-year fixed term contract of employment with the respondent, Sefako Makgatho Health Sciences University (the University), in terms of which he was appointed as Director: Institutional

Advancement & Internationalisation, from 1 October 2018 until 31 September 2023.

[2] His gross salary was initially R100,500.91 per month but, by the time he received a notice of possible retrenchment on 24 June 2021, his gross salary had been increased to R129,647.17 per month. In the notice the University explained that his position of "*Director: Institutional Advancement & Internationalisation*" would likely become redundant through the creation of a new position titled "*Director: Internationalisation"*, explaining that the "*Institutional Advancement"* function of his job would now be contained in a different subordinate position which would report to the Director: Communications and Marketing.

[3] Mr Sedumedi participated, more or less, in the retrenchment process, but explained to the University that he expected to be automatically appointed to the newly created position of Director: Internationalisation. On 6 August 2021 the University responded stating that he would not be automatically appointed to this position, and duly commenced advertising the position for possible incumbents.

[4] Mr Sedumedi did not apply for the position of Director: Internationalisation.

[5] On 24 February 2022, Mr Sedumedi received notice of the termination of his services for operational reasons. In this notice the University explained that, following the abovementioned interview process, a Dr Jooste had been appointed to the position of Director: Internationalisation, and that Mr Sedumedi was being dismissed as there were no other suitable positions available for him. The University stated that Mr Sedumedi would receive R129,647.17 *in lieu* of one months' notice, three weeks' severance pay in an amount of R101,801.47, and 28 days' of leave pay in an amount of R168,375.17. Mr Sedumedi's last working day would be 28 February 2022.

[6] On 30 March 2022, Mr Sedumedi addressed a letter to the University, through his attorneys, stating that the University had no legal right to terminate his fixed-term contract prior to its natural end date on 31 September 2023. He stated that the notice of termination constituted a repudiation of the contract, which repudiation he accepted, and that he was therefore entitled to payment of the balance of his contract.

[7] On 25 April 2022 Mr Sedumedi issued action proceedings in this court, under section 77(3) of the BCEA[1], for the outstanding 18 months' of his contract in a total amount of R2,333,649.06.

Mr Sedumedi's claim and the University's defence

[8] Mr Sedumedi's claim for the balance of his contract is based on the common law position, set out in the Labour Appeal Court (LAC) decision of *Buthelezi v Municipal Demarcation Board*[2], that unless an employee breaches a material term of a fixed-term employment contract, or the fixed-term contract otherwise provides for termination on notice, the employer has no right to prematurely terminate a fixed-term contract prior to its natural end date. This would be in contrast to an employment contract of indefinite duration which may be terminated by providing reasonable, or otherwise agreed, notice.

[9] The University's main defence to Mr Sedumedi's claim was that the fixed-term contract in question, properly interpreted, actually provided for termination on one month's notice for operational reasons. During argument the University also seemed to suggest, based on a criticism of *Buthelezi* by Dr John Grogan in his book *Dismissal*[3], that it would nevertheless have the right to prematurely terminate the fixed-term contract, based on its operational requirements, even if the contract did not provide for termination on notice. However, this argument was not

[1] The Basic Conditions of Employment Act 75 of 1997
[2] (2004) 25 ILJ 2317 (LAC)
[3] Grogan (2022), *Dismissal*, 4th ed, Juta, p360

pursued with particular vigour and I am, in any event, bound by the *Buthelezi* decision.[4]

[10] The salient aspects of Mr Sedumedi's fixed-term contract, contained in his Appointment Letter, are as follows:

> "We have pleasure in confirming your permanent employment, on a five-year renewable contract…
> Designation: Director: Institutional Advancement & Internationalisation
> Effective Date of Appointment: 01 October 2018 – 31 September 2023…
> … **3. Retirement Age**… **4. Termination of Service.** Notice of termination must be submitted to your line manager for his/her acceptance before submission to the Human Resources Division for final processing. You will be required to serve a notice period of one month (Administrative role), or three months (Academic role). **5. Official Working Hours**…
> Your attention is drawn to the fact that all appointments are subject to the articles contained in the conditions of service of the University. Appointments are further subject to decisions lawfully taken by Council of the University on matters pertaining to its employees." (own emphasis)

[11] Ms Scheepers, for the University, conceded during argument that the Appointment Letter did not constitute what might be regarded as "a perfect contract". Indeed, the document seems to suggest that the employment contract was for a fixed period of 5 years, but that Mr Sedumedi would nonetheless have the option of terminating the contract on one month's notice (given that his was an administrative position). Importantly, nothing is said about the University also being able to terminate the contract on notice prior to its natural end date.

[4] See also *SA Municipal Workers Union on Behalf of Morwe v Tswaing Local Municipality and Others* (2022) 43 ILJ 2754 (LAC), *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) and *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA).

[12] The above notwithstanding, it was the University’s position that the phrases “*all appointments are subject to the articles contained in the conditions of service of the University*” and “*Appointments are further subject to decisions lawfully taken by Council of the University on matters pertaining to its employees*”, meant that the University’s “*Human Resources Policies and Procedures*” document constituted actual terms and conditions of Mr Sedumedi’s contract of employment. In particular, the University claimed that Chapter A7 of this document, titled “*Termination of Employment Policy and Procedure*”, constituted contractual terms of his employment. The salient aspects of this policy (the Termination Policy) are set out below as follows:

> **1. INTRODUCTION**
>
> The University is committed to ensure the security of employment of its employees as far as such is consistent with the maintenance of order and with the efficient and economic operation of the institution. Accordingly, it is necessary that <u>a reasonable notice period of termination be provided by both the employee and the University</u> to ensure smooth continuity of service provision.
>
> **2. POLICY STATEMENT**
>
> <u>When terminating employment, the University will comply with the provisions of the employment contract</u> and/or workplace agreements and relevant legislation.
>
> **3. SCOPE OF APPLICATION**
>
> 3.1 This policy and procedure <u>applies to all employees of the University, except those with contracts that include termination procedures that differ from the terms contained herein</u>…
>
> **4. ACCOUNTABILITY**
>
> 4.1 <u>All line managers are accountable for fulfilling the terms of this policy</u> and procedure when terminating an employee's employment…

5. PROCEDURE AND GUIDELINES

5.1 The University shall not terminate the employee's services, unless there is a valid reason for such termination related to the capacity or conduct of the employee or the operational requirements of the University.

5.2 Termination of service, either by the employee or the University, will be in accordance with the specific terms of the employment contract that exists between the University and the employee regarding the giving of notice of termination of such service…

5.7 The period of notice is as follows for the various categories of employment:

5.7.1 Permanent Employees/Fixed-term Contract Employees:

(i) The period of notice will be 3 (three) calendar months for academic employees unless otherwise determined by Senate

(ii) The period of notice will be 1 (one) calendar month for non-academic employees, unless otherwise agreed upon between an employee and his/her line manager, in consultation with the Human Resources Department…

5.8.1 Termination of service may be effected by either the University or the employee without notice of termination, on grounds recognised by law as sufficient commonly referred to as material breach of the employment contract…

5.8.3 University employees whose services have been terminated in accordance with the disciplinary code, and/or upon grounds of material breach of the employment contract, and whether by the giving of notice or not, are entitled to lodge an appeal against such termination in accordance with the provisions of the disciplinary procedure.

5.8.4 Employees, whose services have been terminated in accordance with the retrenchment procedure are not entitled to appeal against their retrenchment in accordance with the disciplinary appeals procedure…

7. **EFFECT OF NON-COMPLIANCE**

Any non-compliance with this policy must be dealt with in terms of the normal institutional governance and management processes, including possible disciplinary action where appropriate." (my emphasis)

[13] The University argues that, when the Appointment Letter is read together with the Termination Policy, it reveals that the University was contractually entitled to terminate Mr Sedumedi's employment on one month's notice for operational reasons. Mr Sedumedi argues that the University had no such contractual right, and that it could only have terminated his employment, prior to 31 September 2023, if he had materially breached the contract.

Contractual interpretation

[14] The seminal cases of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5], *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd*[6], and *University of Johannesburg v Auckland Park Theological Seminary and Another*[7], all recently approved by the LAC in *Herbert v Head of Education: Western Cape*[8], make it clear that

[5] 2012 (4) SA 593 (SCA)
[6] 2022 (1) SA 100 (SCA)
[7] 2021 (6) SA 1 (CC)
[8] (2022) 43 ILJ 1618 (LAC)

interpretation begins by considering the text contained in the document, then how the text is situated within its own textual context, then its extra-textual context, then finally by considering the purpose of the document.

[15] Although the Constitutional Court in *University of Johannesburg* stressed that statutory interpretation is now a "*unitary exercise*" that must be approached "*holistically: simultaneously considering the text, context and purpose*"[9], there is no doubt that, as stated in both *Endumeni*[10] and *Capitec*[11], "*the inevitable point of departure [remains] the language of the provision itself*".

[16] Indeed, as pointed out by Unterhalter AJA in *Capitec*, "<u>*interpretation begins with the text and its structure. They have a gravitational pull that is important*</u>*. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text*"[12] (own emphasis).

[17] The above means that, even in the post *Endumeni* world, primacy must still be given to the text of a document. The only difference is that the meaning of the text must now be properly understood after considering context and purpose (as opposed to giving primacy to what used to be referred to, prior to *Endumeni*, as the text's "ordinary meaning", and then only invoking context and purpose if the "ordinary meaning" created an absurdity – with "ordinary meaning" being far too imprecise and subjective a concept in any event). As the court in *Endumeni* warned "*Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual*

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[9] *University of Johannesburg* (*supra*) at [65]
[10] At [18]
[11] At [25]
[12] *Capitec (supra)* at [51]

context it is to make a contract for the parties other than the one they in fact made".[13]

[18] I would go further and state that the gravitational pull is strongest with the text, thereafter with the textual context, then the extra-textual context, and then finally with the purpose. Staying alive to the respective strengths of these different gravitational pulls will, in my view, lead to more certainty and minimise the risk of judges stating what the document's legal implications should be rather than what they actually are.

[19] A straightforward analysis of the text the Appointment Letter does not support the University's claim that it had the contractual right to terminate Mr Sedumedi's contract on notice prior to its natural end date on 31 September 2023. However, before proceeding to a contextual and purposive analysis, it is important to consider whether the Termination Policy formed part of Mr Sedumedi's contract of employment.

<u>Contractual incorporation by reference and quasi-mutual assent</u>

[20] Incorporation of contractual terms by reference is something that has long been recognised in our law.[14] *In Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom*[15] a unanimous Supreme Court of Appeal (SCA) discussed the issue as follows:

> [12] Counsel for Forbes… relied on the case of *Africa Solar (Pty) Ltd* … [in which a] form had been faxed to a customer which included a paragraph reading: <u>'All purchases will be made in terms of and subject to the conditions of trade of Helios Power (Pty) Ltd, as printed on the reverse hereof, which by signing this, I</u>

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[13] *Endumeni (supra)* at [18]
[14] *Christie's The Law of Contract in South Africa* (8th Ed), LexisNexis, p220 *et seq*
[15] 2003 (5) SA 180 (SCA). Insofar as this SCA decision is at odds with the decision of *Eskom Holdings Ltd v Grundy* 2018 (4) SA 242 (KZP), and I am not certain that it is, the former decision overrules the latter.

acknowledge having read, understood and accepted.' [However], 'the reverse' had not been transmitted. The majority of the Court held that the customer was not bound by the terms of this paragraph as there had been *no animus contrahendi* (for reasons not relevant to the case before us). But the minority (Streicher and Nugent JJA) held that the *animus* had been established and that the customer was bound by the 'conditions of trade' for the reason that 'the reverse' referred to was clearly the reverse of the original document... As a matter of construction, the customer in the Africa Solar case was told that by signing he was committing himself to what was clearly an existing set of conditions… (my emphasis, footnotes omitted)

[21] The unanimous court in *Cape Group Construction* agreed[16] with the minority in *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd*[17], with the latter saying that "*If the reverse was not faxed to him and not known to him he could have called for a copy. By not doing so he indicated that he was nevertheless prepared to contract on the basis of the appellant's standard conditions. The Full Court erred in holding that a person 'cannot be held to be bound by something which he has not seen'. If a person is prepared to contract subject to standard conditions which he has not seen, there is nothing preventing him from doing so* "[18] (my emphasis)

[22] The concept of incorporation by reference is directly linked to the *caveat subscriptor* rule. Referring to *Brink v Humphries & Jewell (Pty) Ltd*[19], the High Court in *Automated Office Technology (Pty) Ltd t/a Assetfin Financial Solutions v Bestmade 160 CC and Others*[20] held that the *caveat subscriptor* principle:

[14]… … can be traced to the oft-cited decision in *Smith v Hughes* where it was explained that: "If, whatever a man's real intention

[16] At [12] by stating that "*As a matter of construction I have no difficulty with that conclusion.*"
[17] 2002 (4) SA 681 (SCA)
[18] At [62]
[19] 2005 (2) SA 419 (SCA)
[20] (A123/2015; A124/2015) [2017] ZAWCHC 3 (17 January 2017)

may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." (footnotes omitted)

[15] This principle is said to be based on the doctrine of "quasi-mutual assent", and is predicated on an objective approach to the theory of contract law ie that the law is concerned with the external manifestation, and not the inner workings of the minds of parties to a contract [otherwise effective commerce would be impossible][21]. So, even where subjectively speaking consensus may be absent, resort may nonetheless be had to this so-called reliance theory to determine whether a binding contract has come into being. In effect what the law does in such matters is to say that a party will ordinarily be held to an agreement he or she has signed, even though they may not have intended to bind themselves thereto contractually, and even though they may not have read the document containing the agreement before signing it". (my emphasis, footnotes omitted)

[23] After discussing both *Cape Group* and *Africa Solar*, the authors of *Christie's The Law of Contract in South Africa* clarify the issue by postulating that the hypothetical phrase "*I haven't read [or even seen] this document but I'm [assenting to it] because I'm prepared to be bound by it without reading it"* is *"an attitude, whether expressed or implied, that entitles the other party to regard the document as binding*".[22]

[24] The above authorities certainly appear to support the University's case in the present matter. However, what remains to be considered is the precise wording used in both the Appointment Letter and the Termination Policy, and a correct interpretation of these two documents.

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[21] See *Irvin and Johnson (SA) Ltd v Kaplan* 1940 CPD 647 at 651; *Christie* (note 14 *supra*) at 224

[22] *Christie* (note 14 *supra*) at 221

The Appointment Letter and the Termination Policy

[25] Mr Sedumedi testified that, when he received the Appointment Letter (signed by the University but not by him), he understood the document to contain the relevant terms of his employment contract with the University. He believed that the contract was for a fixed-term of five years (as indicated in the corresponding advertisement), and he also stated that, if he had known that the contract could have been prematurely terminated, then he would not have given up his permanent position with the Tshwane University of Technology.

[26] Mr Sedumedi also confirmed that when he received the Appointment Letter he had not been provided with any "*conditions of service*" document. The University was unable to gainsay this allegation because the Appointment Letter was provided to Mr Sedumedi by the then Vice-Chancellor, Professor De Beer, who did not testify in these proceedings – the University called only one witness, the present Vice-Chancellor Professor Mbati.

[27] Under cross-examination Mr Sedumedi conceded that he had read and understood the Appointment Letter, that he considered the terms of the Appointment Letter binding, but he denied that the Termination Policy constituted a contractual term of his employment.

[28] The Appointment Letter states that (a) "*all appointments are subject to the articles contained in the conditions of service of the University*", and that (b) "*Appointments are further subject to decisions lawfully taken by Council of the University on matters pertaining to its employees*".

[29] To begin with, I am very sceptical of the University's argument regarding sentence (b). I find it difficult to believe that the University had the legal right to unilaterally transform a 60 month (i.e. 5 year) employment contract, into a 42 month employment contract, simply through a

resolution of its Council. This seems to go against the principle of *pacta sunt servanda* (although I am aware that a contract granting one party the right to unilaterally vary that contract's terms is not entirely anathema to our law).[23]

[30] Fortunately, this issue is beyond the facts of this case because the University is relying on sentence (a) to incorporate the Termination Policy – which policy existed at the time of Mr Sedumedi's appointment – and not on any decision by the University Council that is unrelated to the Termination Policy. Furthermore, even the decisions to start retrenchment proceedings and ultimately retrench Mr Sedumedi, if those decisions were indeed taken by the University Council, were decisions premised on the assumption that the University had the contractual right to prematurely terminate Mr Sedumedi's contract for operational reasons; there is no evidence that the University Council made a decision to alter the terms of Mr Sedumedi's contract.

[31] Sentence (a), which states that "*all appointments are subject to the articles contained in the conditions of service of the University*", places the University on much firmer ground. However, when Mr Sedumedi received the Appointment Letter he was not made aware of where he could find "*the conditions of service of the University"* or even if these "*conditions*" existed in a specific document. *In Siyotula vs Mogale City Local Municipality & others*[24] Snyman AJ considered the issue of when an employer's policies might be elevated from mere operational directions falling within the employer's managerial prerogative, to actual contractual terms by virtue of an employee undertaking to be bound by such policies. After considering the cases of *Wereley v Productivity SA*[25] and *Mpane v Passenger Rail Agency of SA*[26], the learned judge reached the following conclusion (with which I respectfully agree):

[23] See *NBS Boland Bank Ltd v One Berg River Drive CC* 1999 (4) SA 928 (SCA)
[24] Unreported judgment dated 5 April 2024 under case number J224/2024 per Snyman AJ
[25] (2020) 41 ILJ 997 (LC)
[26] (2021) 42 ILJ 546 (LC)

> “[30]… incorporation by reference must be clear and unequivocal. The provision that one often finds in contracts of employment… that the employee is <u>bound by or subject to or must comply with a disciplinary code as it may exist from time to time simply does not cut it. It must be stipulated that the disciplinary code is a contractual term that is part of the essential terms of the employment contract</u>. Mere reference to the disciplinary code and an undertaking in the contract that the employee is bound by it, does not constitute such incorporation necessary to assert the provisions of such disciplinary code as a contractual term. (my emphasis)

[32] The existence of managerial policies in the employment space is an important contextual factor, informing contractual interpretation, that is generally absent in purely commercial settings. In *Africa Solar* (discussed above) the phrase “*All purchases will be made in terms of and subject to the conditions of trade of Helios Power (Pty) Ltd, as printed on the reverse hereof*”, is similar to sentence (a) relied upon by the University in the present matter. However, given the sales context, the underlined portions cannot be confused with one party’s managerial prerogative to give the other party directions on how to act. As Snyman AJ expressed the issue in *Siyotula*:

> “[29] All that the employment contract provides for in these clauses is that the applicant is <u>subject to</u> the first respondent's rules and regulations, and disciplinary procedures, as it exists from time to time. This is a standard provision found in most employment contracts. I simply do not believe it can be legitimately contended that <u>an undertaking by an employee to be bound by the terms of a disciplinary code</u> from time to time then entitles that employee to a contractual right, as established by that disciplinary code. In my view, far more than such a reference is needed to establish incorporation of such a right”. (my emphasis)

[33] Indeed, in *Africa Solar* the relevant phrase went further with the customer expressly agreeing that "*<u>by signing this [document], I acknowledge having read, understood and accepted [the conditions of trade</u> of Helios Power (Pty) Ltd, as printed on the reverse hereof]".* In his Appointment Letter Mr Sedumedi only agreed that "*all appointments are subject to the articles contained in the conditions of service of the University*", and he did not state that he had read, understood and accepted these apparent "*conditions of service*". Furthermore, in the employment context it is possible, even probable, that these "*conditions of service*" refer only to the University's various managerial decisions, as crystallized in its policy documents, rather than to specific contractual terms of employment.

[34] Turning to the Termination Policy itself (described in paragraph [12] above), it seems to me that this document does not intend to alter any contractual terms contained in the written contracts of employment concluded between the University and its respective employees. Firstly, the document is clearly a set of instructions to the University's managerial employees regarding how to handle the dismissal of subordinate employees (and a failure to comply with the policy might result in disciplinary action being taken against those managerial employees). Secondly, at clauses 2, 3.1 and 5.2 the policy states, in effect, that if an employee's employment contract varies from the dictates of the policy, then the contractual terms must be respected.

[35] The high point of the University's case are the following two clauses:

> 5.1 The University shall not terminate the employee's services, unless there is a valid reason for such termination related to the capacity or conduct of the employee or <u>the operational requirements of the University</u>…
>
> 5.7 The period of notice is as follows for the various categories of employment:
>
> 5.7.1 Permanent Employees/<u>Fixed-term Contract Employees</u>:…

(ii) The period of notice will be <u>1 (one) calendar month for non-academic employees</u>, unless otherwise agreed upon between an employee and his/her line manager, in consultation with the Human Resources Department… (my emphasis)

[36] Assuming, for the sake of argument, that the Termination Policy indeed constitutes contractual terms of Mr Sedumedi's contract of employment, I am not convinced that the above two clauses even purport to introduce a termination on notice clause to Mr Sedumedi's fixed term contract. What these clauses do, in my view, is proceed on the assumption that the University is entitled to terminate fixed-term contracts on notice for operational reasons, unless those fixed-term contracts stipulate otherwise. That is a far cry from saying that, for example, "*all employees on fixed term contracts agree that their contracts may be prematurely terminated on one months' notice as a result of the University's operational requirements*". And here the *contra proferentem* rule works against the University. As the drafter of both the Appointment Letter and Termination Policy, the University "*[only] has [itself] to blame for not speaking more plainly"*[27].

[37] Given that the Termination Policy does not even purport to amend the terms of Mr Sedumedi's fixed-term contract, it matters not whether the Appointment Letter incorporates the Termination Policy as a managerial policy or as a contractual term. However, given the contents of the Termination Policy, it is likely that the Termination Policy is not in fact a contractual term.

[38] In light of above, my decision is that Mr Sedumedi's fixed-term contract did not entitle the University to terminate his employment on notice on the basis of its operational requirements (or indeed on any basis other than his material breach of the contract). Although it is perhaps strange that Mr Sedumedi was afforded the right to cancel on notice and not the

[27] *Cape Group Construction* (note 15 *supra*) at [13] (quoting Grotius).

University, that is what the contract says, and I am not a liberty to substitute what the contract says for what I believe it should have said.

Remedy and quantum

[39] Given that the University was not entitled to terminate Mr Sedumedi's contract of employment, by doing so it repudiated the contract. Mr Sedumedi chose to accept the repudiation and sue for damages. The LAC in *Buthelezi*, referring to *Meyers v Abrahamson*[28] held that "*The measure of damages accorded [an] employee [whose fixed-term contract has been prematurely and unlawfully terminated] is… the actual loss suffered by him represented by the sum due to him of the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment*."[29].

[40] At the beginning of his testimony Mr Sedumedi explained that, since his employment was terminated in February 2022, he had not been employed nor had he been earning an income. He explained further that during this time he had been applying for jobs while his wife supported him financially as the family's sole breadwinner. This testimony was not challenged under cross-examination.

[41] In its closing submissions the University argued that Mr Sedumedi had failed to prove the quantum of his alleged damages. I disagree. It is common cause that at the time of his termination he was earning R129,647.17 per month (this fact was even conceded to by Mr Sedumedi during his cross-examination – a fact put to him apparently in pursuit of an argument regarding waiver)[30]. It is also common cause that the "*unexpired period of the contract*" was 18 months – i.e. April 2022 to September 2023 inclusive, being R129,647.17 x 18 = R2,333,649.06.

[28] 1952 (3) SA 121 (C)
[29] At [20]
[30] The waiver argument was not seriously pursued by the University. In any event, it is well settled that a waiver of rights must be clear and unambiguous (see *Van Haght v JBS Building Co (Pty) Ltd* (2024) 45 ILJ 2629 (LC) at [23]), and I am not satisfied that Mr Sedumedi's participation in the retrenchment consultations, such as they were, constituted a clear and unambiguous waiver of his contractual rights.

[42] Mr Sedumedi is not entitled to the severance pay and leave pay he received as a result of his purported retrenchment, so an amount of R101,801.47 plus R168,375.17 = R270,176.64 must be deducted from the total.

[43] What must also be deduced from the total is "*any sum he earned or could reasonably have earned during such latter period in similar employment"* – which factor derives from Mr Sedumedi's contractual duty to mitigate his loss.[31] This factor, in my view, means income that he may have actually received from being similarly employed, or income he could have received in similar employment if he taken reasonable steps to find such employment.

[44] Mr Nhlapo, appearing on behalf of Mr Sedumedi, argued that there was nothing more that Mr Sedumedi was required to do to demonstrate, at least on a *prima facie* basis, that he had taken reasonable steps to mitigate his loss. I agree. On this point the authors of *Christie's The Law of Contract in South Africa*, with reference to *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[32] state the following:

> "<u>The plaintiff does not have to plead and prove that it has done what is reasonable</u> to mitigate its damages, because <u>the onus is on the defendant to prove that it has not</u>. The plaintiff is not required to do more than a reasonable person would do to mitigate his or her damages, <u>and the defendant's onus of proving that the plaintiff has not acted reasonably is difficult to discharge</u>".[33] (my emphasis)

[45] Mr Sedumedi's testimony was therefore sufficient to establish, at least on a *prima facie* basis, that he had taken reasonable steps to look for similar employment. The only thing put to him under cross-examination on this

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[31] See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* [1977] 4 All SA 94 (A)
[32] [1977] 4 All SA 94 (A)
[33] *Christie* (note 14 *supra*) at 693

point was the fact that he had not requested a reference letter and certificate of service from the University, and that same might have "*helped [him] in [his] job search*" – to which Mr Sedumedi simply replied, "*I don't know*".

[46] I am not satisfied that failing to request a reference letter, on its own, is enough for the University to discharge the difficult onus of proving unreasonableness. The University could have interrogated Mr Sedumedi on the exact steps taken by him to look for work, but it did not do so (perhaps because the evidence would not likely be favourable to it). In any event, on the facts before me I cannot find that Mr Sedumedi's attempts at finding similar employment were unreasonable.

[47] In light of the above, Mr Sedumedi is entitled to R2,333,649.06 - R270,176.64 = R2,063,472.42.

<u>Costs</u>

[48] This is a purely contractual matter and, as such, there is no reason why costs should not follow the result.

[49] However, Ms Scheepers argued that, if the University was held liable for costs, Mr Sedumedi should nevertheless be made to pay the costs of the third and final day of evidence because his imprudent conduct caused the matter to be part-heard and resulted in the need for a third day of evidence (which had to be convened several weeks' later).

[50] Ms Scheepers explained that Mr Sedumedi only challenged the authenticity of the Termination Policy during his re-examination on the first day of evidence, resulting in a postponement so that the University could obtain and introduce proof of the document's authenticity and thereafter cross-examine Mr Sedumedi on this discreet point – which is the procedure I allowed to take place.

[51] The authenticity of the Termination Policy was not disputed in either the University's replication or the pre-trial minute. The University was therefore within its rights to assume that the authenticity of the Termination Policy was not disputed. This means that blame for the postponement should fall at Mr Sedumedi's feet.

[52] In the circumstances I make the following order:

<u>Order</u>

1. The respondent is ordered to pay the applicant a total amount of R2,063,472.42, plus interest at a rate of 7.25% *per annum a tempore morae*.

2. The respondent is ordered the pay the applicant's costs of suite, save for the costs incurred by the applicant regarding the hearing of evidence on 15 April 2024.

3. The applicant is ordered to pay the respondent's costs regarding the hearing of evidence on 15 April 2024.

Mark Meyerowitz

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate Sinclair Nhlapo

Instructed by: Mncedisi Ndlovu & Sedumedi Attorneys, Johannesburg

For the Respondent:	Advocate Melissa Scheepers
Instructed by:	Malatji & Co Attorneys, Johannesburg