

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2021/00068

In the matter between:

INDONGO AUTO (PTY) LTD t/a INDONGO TOYOTA

APPELLANT

and

HILARIUS MANU IIPINGE

1ST RESPONDENT

LIWELA SASELE NO

2ND RESPONDENT

Neutral Citation: *Indongo Auto (Pty) Ltd) t/a Indongo Toyota v Ipinge* (HC-MD-LAB-APP-AAA-2021/00068) NALCMD 18 (27 April 2023)

Coram: MASUKU J

Heard: 2022

Delivered: 27 April 2023

Flynote: Labour Law – Unfair dismissal – the requirements to be met – Whether employer can depart from the terms of the disciplinary code – The Law of Evidence – Resolution of the disputes of fact and factors to be taken into account – Implications of failure to put one’s case to the opposing witnesses – Civil Procedure – Recusal and considerations to be taken into account in deciding recusal applications – The *Kamanya* principle and its application.

Summary: The appellant, Indongo Toyota employed the respondent, Mr Ipinge as a sales consultant. He was charged with three disciplinary offences, alleging that he had acted dishonestly regarding certain motor vehicle parts which had been booked out for customers

but which do not appear to have been dealt with in terms of the procedures. The respondent was, after a disciplinary hearing, dismissed from employment and his appeal was dismissed as well. He approached the office of the Labour Commissioner, where he lodged a dispute of unfair dismissal. He was successful and the arbitrator ordered that he be compensated and reinstated to his previous position.

Held: That the onus is on the employer to show that the dismissal was procedurally and substantively fair.

Held that: The arbitrator did not properly weigh the irreconcilable versions presented to him in order to make findings of facts based on the evidence and the quality thereof. A trier of fact cannot make credibility findings on a 'hunch' or on a 'gut feeling'.

Held further that: Where a party fails to put its case to the opposing witnesses and adduces evidence in chief for the first time, the court is entitled to regard the new evidence as an afterthought and may disregard it.

Held: That an employer's disciplinary code or policy must not be regarded as immutable as the law of the Medes and the Persians. The court must, at the end of the day be satisfied that the employee has been treated fairly.

Held that: Although the employer may not have complied strictly with its disciplinary code in the instant matter, it was clear that the respondent had committed three counts of dishonesty and had two previous written warnings, which had expired. In view of these considerations, and the deleterious effect they had on the employment relationship, the employer was correct and exercised its discretion properly in dismissing the respondent.

Held further that: For a case of recusal to be upheld, it must be shown that there is a reasonable apprehension of bias arising from the chairperson of the disciplinary tribunal having an association or interest in one of the litigants before him or her or from the outcome of the case. Alternatively, it must be shown that he or she has conducted himself or herself or made utterances prior to or during the proceedings which point to the fact that he or she must recuse him or herself.

Appeal succeeds – arbitral award set aside.

ORDER

1. The appellant's appeal succeeds.
 2. The arbitral award issued by the arbitrator dated 17 September 2021, is hereby set aside in its entirety.
 3. There is no order as to costs.
 4. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:

Introduction

[1] Submitted to this court for the exercise of its appellate curial skills and sagacity, is an arbitral award issued by the arbitrator Mr Liwela Sasele *NO* on 17 September 2021. In terms of the said award, the first respondent, Mr Hilarius lipinge, was to be reinstated to his position and paid an amount of N\$113 400, interest thereon, following what the arbitrator held to have been an unfair dismissal of Mr lipinge by the appellant, Indongo Auto (Pty) Ltd t/a Indongo Toyota.

[2] The appellant, Indongo Toyota cries foul and has punched holes in the arbitration award, claiming in sum, that the arbitrator erred grievously in returning the award that he did. The first respondent, as would be expected, adopts a contrary position. He argues that the arbitrator was eminently correct in his decision and that the award was in line with the principles of labour law in Namibia.

[3] The remit of this court, in the circumstances, is to determine, by reference to the relevant facts and the law applicable, whether the appellant's appeal should be sustained or not. In this particular regard, the court will be called upon to determine whether the appellant's contention that the award is fraught with insurmountable legal hurdles and must be set aside, is, taking all the circumstances of the case into account, correct.

The parties

[4] The appellant is Indongo Auto (Pty) Ltd t/a Indongo Toyota, a company duly incorporated and registered in terms of the company laws of Namibia. Its address of business is situate at 65 Rehobother Street, Windhoek. The first respondent, on the other hand, is Mr Hilarius lipinge, an adult male resident in Katutura, Windhoek. The second respondent is Mr Liwela Sasele *NO*, the arbitrator, who issued the award sought to be impugned in these proceedings.

[5] For ease of reference, Indongo Toyota, will be referred to as 'the appellant'. Mr lipinge, the first respondent, will be referred to as 'the respondent'. I do so for the reason that properly construed, there is effectively, one respondent in the proceedings. The arbitrator, Mr Sasele, has been cited for formal purposes only. He in any event, did not enter the fray, and properly so. I will refer to Mr Sasele as 'the arbitrator'.

Representation

[6] The appellant was ably represented by Ms Bassingthwaighte, on the instructions of Kopplinger Boltman Legal Practitioners, whereas the respondent, was ably represented by Ms Alexander of Sisa Namandje Inc. The court records its indebtedness to both counsel for the assistance duly and professionally rendered in this case.

Background

[7] The circumstances giving rise to the present proceedings are largely common cause. They have been neatly summarised by the arbitrator in his award. I will, in that regard, borrow generously from his consummate summation therein contained.

[8] The respondent was employed by the appellant as a sales executive from 5 March 2015. He was subsequently dismissed by the appellant on 23 June 2020. Before the dismissal was effected, the respondent was subjected to a disciplinary hearing chaired by Ms Marnel Smith, who was then in the employ of Labour Dynamics CC.

[9] In this disciplinary hearing, the respondent was charged with disobeying his superior's instruction not to order and install a cruise control device in a demonstrator motor vehicle. This hearing did not, however see the light of day in that it was not conclusive. It does not, in any event, have a bearing on the matter presently before court.

[10] The respondent was later subjected to another disciplinary hearing which took place on 14 May 2020. It was completed on 15 June 2020. In that hearing, the respondent was charged with 6 counts of misconduct. Two counts were withdrawn and he was acquitted and discharged on one count but found guilty of three counts of dishonesty.

[11] The counts of which he was found guilty, are paraphrased below:

- (a) Dishonesty – in that during the previous disciplinary hearing, on 5 March 2020, the respondent had presented a document as proof of purchase of a cruise and/or speed control of his demonstrator motor vehicle, namely Tax Invoice no: 1482809;
- (b) Dishonesty – in that on or about 11 March 2020, the respondent initiated the costs of a cruise control and/or speed control to be booked against one of his client's vehicle (Job number: D99916519), Tax invoice no. 1491488, without the speed control being fitted into the customer's vehicle;
- (c) Dishonesty – in that on or about 27 June 2020, the respondent initiated the costs of a stainless steel Nudge Bar and Roof Ornaments to be booked against the respondent's customer's vehicle (Job no: D99916519), Tax Invoice No. 1486433, and pick up slip No. 1377442, without the said nudge bar and roof ornaments being fitted on the customer's vehicle.

[12] The respondent was, as recorded above, found guilty of these counts. He was subsequently dismissed on 23 June 2020. Dissatisfied with the dismissal, the respondent, as he was entitled to in terms of the appellant company's procedures, noted an appeal against the dismissal. The appeal served before Mr Dudley Fourie. The appeal was dismissed and that decision was communicated via a letter dated 14 July 2020. This ended the respondent's association with the appellant.

[13] The respondent, further aggrieved by the dismissal, approached the office of the Labour Commissioner, where he lodged a dispute against the appellant of unfair dismissal. The dispute could not be resolved at conciliation and it inevitably resulted in an arbitration, which was terminated in the respondent's favour.

The evidence at arbitration

[14] Two witnesses testified on the appellant's behalf at arbitration. These were Ms Mareika Feris, the appellant's human resources officer. The other witness was Mr Hans

Steinkopf, who had at the time of the arbitration retired from the appellant. He had been the appellant's dealer principal when the events leading to the dismissal took place.

[15] Ms Feris testified under oath that she was present during the respondent's disciplinary hearing and served as an observer on behalf of the human resources department of the appellant. It was her evidence that the charge sheet was issued to the respondent on 5 May 2020 and the disciplinary hearing took place on 14 and 29 May 2020 as well as on 15 June 2020.

[16] It was her evidence that the respondent, at the time the disciplinary proceedings took place, had a verbal warning dated 19 February 2018 and a written warning dated 21 October 2018. She testified that the respondent was dealt with in terms of the appellant's disciplinary procedures in that he was given a charge sheet, the documents to be relied on, was afforded representation, cross-examined the witnesses called by the appellant and was also afforded an opportunity to testify and to call witnesses if he so wished. It was also her evidence that the matter was not discussed by the appellant's representatives with the chairperson from Labour Dynamics CC, in advance.

[17] Ms Feris further testified that on 5 June 2020, she received an application by the respondent for the recusal of the chairperson of the disciplinary tribunal via email. The respondent was questioning the impartiality of the chairperson. She responded thereto, the following day via email and advised the respondent and his representative that the appellant had no control over the chairperson of the disciplinary hearing. She further advised that if the appellant had any compunctions regarding the impartiality of the chairperson and required the recusal of the chairperson, that application must be moved before the chairperson of the disciplinary hearing.

[18] For his part, Mr Steinkopf testified that he was in charge of the appellant's business, including all the other three branches. He confirmed attending the respondent's disciplinary hearings. It was his evidence that at the hearing, the respondent's representative complained that his client had been charged with too many counts, which were in any event, misleading. The parties thereafter agreed that the charges will be consolidated into three charges of dishonesty. There are the ones set out above.

[19] It was his evidence, regarding the first count that the respondent, during his earlier disciplinary hearing produced a document being proof of payment of a cruise control of a vehicle that he had purchased from the appellant's shop. Upon further investigations, it was

discovered that the proof of payment presented by the respondent was effected by another person, a Mr Manie Vermaak, and not the respondent. Mr Vermaak had paid for the cruise control using a credit card at Indongo Toyota.

[20] It was his further evidence that contrary to the respondent's contention that there was an unnecessary splitting of charges, the three charges related to different events that occurred on different dates as indicated in the charge sheet.

[21] The issue of the recusal of the chairperson also featured, this witness testified. It was his evidence that the issue of the recusal was not raised on the first day of the proceedings, ie 5 March 2020 but on the third day of the sitting and after the appellant had closed its case. Mr Steinkopf further testified that the chairperson made a ruling regarding the recusal application and refused it, stating that there were no sound reasons for her to recuse herself.

[22] The witness further testified that the respondent was given a new demo vehicle in July 2019 and it was registered on 4 July 2019. This vehicle was not fitted with a cruise control and the respondent was not authorised to fit same into the vehicle. A pick up slip was thereafter created for a vehicle sold by the respondent to a Mr Heita. Items to be picked up included a cruise control, which the respondent would pick up. The part was therefor booked out on 11 July 2019, supposedly for Mr Heita and this was after the vehicle had been delivered to him, namely on 5 July 2019. When Mr Heita's vehicle came for service months later, it was established that the vehicle had not been fitted with the cruise control although one had been booked out from spares for it.

[23] It was his further evidence, in relation to the third charge that on 27 June 2019, a pick up slip was initiated for Mr Heita's vehicle in respect of a nudge bar and a roof ornament. When perusing the offer to purchase, there was no indication that the said items had been ordered for the vehicle in question. There was no indication that Mr Heita had ordered the additional items although both the respondent and Mr Heita had signed the offer to purchase. No extra items were reflected thereon.

[24] Mr Steinkopf testified that the normal procedure in such instances was that an invoice is drawn from the offer to purchase, meaning the items on the invoice must also be reflected in the offer to purchase. In this case, the invoice reflected that the nudge bar and the roof ornament were booked out at no cost for Mr Heita's vehicle. It was his evidence that although 'freebies' are allowed to be given to customers, there must, however, be

authorisation thereof from management of the appellant for that to be done. In this case, there as was no such authorisation.

[25] The witness further testified that when Mr Heita's vehicle was delivered for service at the appellant's outfit some 8 months later, they discovered that it had not been fitted with the items that had been booked out, namely, the nudge bar and the roof ornament. It was his evidence that in all three instances, the respondent had committed dishonest acts and was dismissed therefor.

[26] When probed as to why the respondent was dismissed for dishonesty, instead of giving him a final written warning, as stipulated in the appellant's disciplinary code, Mr Steinkopf testified that the offences of which the respondent had been found guilty of included an element of theft in them and that theft was, in terms of the disciplinary code, a dismissable offence. As such, the appellant was at large to dismiss the respondent in the circumstances, he further testified.

[27] The respondent also testified under oath and was cross-examined at length. It was his evidence that he had initially been charged with 12 counts. These were later reduced to six, with some being withdrawn and others consolidated.

[28] It was his evidence that during the first disciplinary hearing, he went to the appellant's parts department and requested a copy of the invoice that had been issued to him when he purchased a cruise control. He was given an invoice by Mr Cloete. The invoice had been issued to Mani and not to Manu, the latter being his nickname at work. Mr Cloete informed him that this was an error in spelling.

[29] It was his evidence that he did not know during the first hearing that this invoice was not genuine. When called for the second hearing, he could not come to the appellant's premises to get the correct invoice because he had been barred from entering the premises. I interpose and mention that the respondent could not explain why his representative could not do so on his behalf.

[30] Regarding the nudge bar and the roof ornament, including rubberising the vehicle, the respondent testified that the customer informed him that if he could give the customer a good quotation, he will buy from the respondent. He accordingly agreed to offer the nudge bar, cruise control and roof ornament to the client for free. It was his evidence that he agreed with the customer that when the latter was ready to have the items fitted on the vehicle, he could

bring the vehicle for that purpose. At the time, he testified that the client informed him that he had an emergency to attend to in the North.

[31] Regarding the issue of the recusal of the chairperson during his disciplinary hearing, it was the respondent's evidence that he expected the chairperson to consider the recusal application which can be brought at any time. It was his evidence that he had no reason to raise the recusation on the first day because there was nothing untoward that suggested that the recusal was necessary.

[32] It was also his evidence that he did not know that the chairpersons were from Labour Dynamics CC before. It was only after his dismissal that he learned of this fact. It was also his evidence that when the disciplinary hearing took place, the written and verbal warnings, which were regarded as aggravating circumstances, had already expired. They should not have been taken into account, he testified. The respondent did not call any witness to testify on his behalf and thus closed his case.

The arbitral award

[33] After listening to argument presented by the parties, the arbitrator prepared his award. I will not take a conducted tour of his entire award, save to highlight the important aspects for the purposes of this appeal. Regarding the first count, namely, that of the production of the invoice in respect of the cruise control, after evaluating the case of both parties, the arbitrator came to the following conclusion:¹

'Knowing the allegations which were levelled against him, the applicant was supposed to place evidence to rebut the allegation. He ought to have called Cloete, whom he alleged that he is the one who printed the invoice to testify on the circumstance on which the invoice was printed. He could have also requested for disclosure of the invoice by the respondent at the arbitration proceedings. In the absence of any proof of purchase of the cruise control by the applicant, or a reasonable explanation, I am left with no choice but to agree with the version of the respondent that the applicant did not buy the cruise control, but he presented an invoice which does not belong to him in order to mislead the respondent and that misrepresentation is a dishonest act.'

[33] The arbitrator proceeded to deal with the last two counts at once. This relates to the nudge bar, the cruise control and the roof ornament which were for Mr Heita's vehicle. In dealing with these counts, the arbitrator held as follows:²

¹ Page 76 of the record of proceedings, para 63 of the award.

² Page 77 of the record of proceedings, para 67 – 69 of the award.

[67] The applicant's testimony was that he gave the cruise control, nudge bar and roof ornament free of charge to Mr Heita with the reasoning that he might bring more business to him. But at the time when Mr Heita collected the items, those items were not ready. Since the customer was travelling to the north, they agreed that the items will be installed on the vehicle when he returns back.

[68] The evidence before me proves that the cruise control, nudge bar and roof ornament were initiated by the applicant against the vehicle of a certain Heita. The applicant testified that these items were ordered for Mr Heita as 'freebies' which could not be fitted on the vehicle at the time when Mr Heita collected it because they were not ready.

[69] For the respondent to succeed, the *onus rest (sic)* upon it to prove that the applicant is guilty of dishonesty with respect to charge 2 and 3. There was no evidence placed before me to prove on a balance of probabilities that the applicant misrepresented or misled the respondent regarding the nudge bar and roof ornament.

[70] On a balance of probabilities I found that the version of the appellant regarding charges 2 and 3 is more probable than that of the respondent. Thus, the respondent had not proven on a balance of probabilities that the applicant did commit any dishonest acts with regard to the cruise control, stainless nudge bar and roof ornament which were booked for the customer. I am therefore satisfied that the respondent did not have a valid and fair reason to dismiss the applicant.'

[34] Regarding the issue of bias, the arbitrator found that the chairperson of the disciplinary committee was biased. This was because the person who represented the appellant in the matter at arbitration is an official of Labour Dynamics CC, an entity retained by the appellant for advice on labour related matters.

[35] He concluded the matter as follows:

'Although the evidence of Feris, the respondent's witness that the chairperson would come from Labour Dynamics. I doubt such testimony because even the person who represented the respondent in the instant matter at arbitration proceedings is an official of Labour Dynamics, although he represented NEA, an employers' organisation. This was done knowing very well that the chairperson of the disciplinary hearing came from the same labour consultancy. This I find that the claim of the applicant regarding perceived bias is reasonable because the chairperson of the disciplinary hearing was an official of the retained labour consultant of the respondent which (*sic*) there to serve the interests of the respondent.'

[36] On the splitting of charges, the arbitrator held that no case in that regard had been made out. He reasoned that the offences in question related to different items and were committed on different dates. Regarding the dismissal, in the face of the disciplinary code,

which recorded that an employee found guilty of dishonesty should be given a final written warning, the arbitrator held that the appellant's contention that the dishonesty in this case included an element of theft, a dismissable offence, is not good enough.

[37] If the appellant was of the view that an element of theft was involved, it was at liberty to have charged him with theft as provided for in the disciplinary code. There was thus no good reason proffered by the appellant for not following its own disciplinary code. This resulted in the dismissal not being fair, the arbitrator concluded.

[38] In sum, the arbitrator concluded on a balance of probabilities that the respondent had no fair reason to dismiss the respondent. In sum, he held that the dismissal was substantively and procedurally unfair. He proceeded to find that because the appellant had not established a fair reason for the dismissal, the question of the irretrievable breakdown of the employment relationship did not arise. He thus ordered that the respondent be reinstated, with a final warning being effective from the date of reinstatement.

[39] The arbitrator thus ordered the following:

'(a) The dismissal of Hilarius lipinge is both procedurally and substantively unfair'

(b) The respondent is ordered to reinstate the applicant in the position in which he would have been had he been not so dismissed, i.e. retrospectively to the date of his dismissal, which is 23 June 2020;

(c) The respondent is ordered to pay the applicant, back pay, for an amount of N\$113 400.00 (N\$7,560.00 x 15 months) plus interest at the rate of 20% per annum reckoned from 01 October 2021 to the date of final payment, as compensation for unfair dismissal;

(d) The respondent to issue a final warning to the applicant in respect of charge 1, effective from the date of reinstatement;

(e) The amount referred to above is to be paid to the applicant on or before the 30th September 2021.

(f) The applicant should report for duty at the respondent's premises on the 01st October 2021 at 07H00.

(g) I make no order as to costs.'

The grounds of appeal

[40] The appellant, in his notice of appeal raised certain issues. In order not to do violence to the appellant's case, I have decided to quote the relevant parts of the notice of appeal verbatim below.

'First question of law and its grounds of appeal

1. The arbitrator confirmed the respondent's conviction on the first charge of dishonesty. The arbitrator also found that he had no choice "but to agree with the version of the [appellant] that the [respondent] did not buy the cruise control, but he presented an invoice which does not belong to him in order to mislead the [appellant] and that misrepresentation of facts is a dishonest act." The appellant's witnesses testified before the arbitrator that the employer had lost all trust in the respondent and that the relationship of trust had broken down irreparably. Yet the arbitrator still ordered reinstatement and only a final warning. The first question of law is whether a reasonable arbitrator reached such a conclusion on the evidence before the arbitrator. The appellant's answer is no.
2. The appellant's case on the first question of law is based on the following grounds:
 - 2.1. The arbitrator placed too much emphasis on the respondent's policy that suggested a final warning for a first dishonest act, when the policy is only a guideline.
 - 2.2. The arbitrator did not consider, when he should have, that an employee's failure to accept responsibility or show any remorse is a critical consideration in matters such as this, and that the respondent did not accept any responsibility or show any remorse.
 - 2.3. The arbitrator did not consider, when he should have, that his own finding that "the [respondent] did not buy the cruise control" necessarily meant that the employee had stolen the cruise control, and that this was a material consideration in deciding on an appropriate remedy.
 - 2.4. The arbitrator acted on incorrect legal principle when he found that his conclusion that the appellant had not established a fair reason for dismissal, necessarily meant that that he did not have to consider the question of irretrievable breakdown of the working relationship. This is the wrong legal position, as it is based on the incorrect premise that reinstatement is the primary remedy for unfair dismissal under Namibian law. (Negonga and Another Secretary to Cabinet and Others 2016 (3) NR 670 (LC) at paras 59 – 66). It is also based on a further incorrect premise that finding of substantive unfairness automatically excludes the necessity to consider whether reinstatement is appropriate on a proper evaluation of all the evidence and circumstances before the arbitrator. (For example, in Pupkewitz Holdings (Pty) Ltd v Mutanuka & others [2008]

NALC 1, the Labour Court found that the employee's dismissal had been procedurally and substantively unfair but still interfered with the decision to order reinstatement.)

- 2.5. Every reasonable arbitrator acting on the correct legal principles and considering the appellant's evidence on the breakdown of the trust relationship in combination with the respondent's refusal to accept any responsibility or show any remorse and the authorities on the general impact and consequences of dishonest conduct in the employment space, would not have ordered reinstatement.
- 2.6. Interference with the sanction was not warranted, as the sanction, viewed on the totality of the relevant evidence before the arbitrator does not make one whistle. The contrary is true.

Second question of law and its grounds of appeal

3. The arbitrator found that the respondent's versions on charges 2 and 3 were more probable than the appellant's versions, and thus found the respondent not guilty on those charges. The second question of law is whether a reasonable arbitrator could have reached this conclusion applying the correct legal principles to the evidence before the arbitrator. The appellant's answer is no.
4. The appellant's case on the second question of law is based on the following grounds:
 - 4.1. The arbitrator did not consider all of the evidence before him, when he was obliged to have done so.
 - 4.2. The arbitrator did not undertake a comparison of the parties' versions against the objective facts and general probabilities when he was obliged to have done so as he was dealing with mutually exclusive versions.
 - 4.3. Had the arbitrator considered all the evidence and compared the parties' versions against the objective facts and the probabilities, he would have realised that the respondent's version was so filled with inconsistencies, changes of front (compared to the version presented at the disciplinary hearing and appeal hearing and the version put to the appellant's witnesses in cross examination) on material aspects that were not put to the appellants' witness in cross examination when these witnesses were perfectly placed to deal with the new versions, and improbable coincidences, that the probabilities clearly did not favour the respondent's version.

4.4. Even if the arbitrator could reasonably have found that the probabilities were equipoised, the arbitrator would then have had to consider the credibility of the appellant's witnesses compared to the respondent. He did not, but had he done so, the arbitrator would have found that the respondent was not a credible witness and ought not to have been believed where his evidence differed from the evidence of the appellant's witnesses. In addition to the factors listed in paragraph 4.4, the respondent's credibility was irredeemably tainted, amongst others, when he read parts of his testimony from a mobile phone and continued do so even after he was warned by the arbitrator not to. The arbitrator did not consider this at all.

Third question of law and its grounds of appeal

5. If it is found the arbitrator erred in law when concluding that the respondent's version on charges 2 and 3 was more probable, it would follow that the conviction on charges 2 and 3, or at least one of the two charges, would be reinstated. This would leave a conviction on at least two charges of dishonesty. The third question of law would then be whether a reasonable arbitrator acting on the correct legal principles and properly evaluating all of the evidence before him could order reinstatement because of procedural unfairness. The appellant's answer is no.
6. The appellant's case on the third question of law is based on the same grounds as in respect of the first question of law.

Fourth question of law and its grounds of appeal

7. The arbitrator ordered the appellant to pay the respondent's basic salary for the entire period of 15 months between his dismissal and the delivery of the arbitration award. The fourth question of law is whether the arbitrator exercised his discretion judicially or whether he acted on incorrect principle, incorrect facts, or otherwise acted in such a way that would justify interference with the exercise of his discretion. The appellant's is that the arbitrator did not exercise his discretion judicially and did act on incorrect principle and incorrect facts and that the Labour Court is therefore entitled to interfere with the award.
8. The appellant's case on the fourth question of law is based on the following grounds:
 - 8.1. The arbitrator failed to consider that the respondent had not testified at all on any attempt to mitigate his losses when he was obliged to have done so.
 - 8.2. The arbitrator failed to consider that the respondent was in fact correctly convicted of, at the very least, two charges of dishonesty.

- 8.3. The arbitrator failed to consider the respondent's role in his dismissal, including the failure to accept any responsibility or show remorse and the consistent and unsupportable refrain that he had done nothing wrong.
- 8.4. The arbitrator failed to consider that 6 months' remuneration has been regarded by our courts as an appropriate award for a procedurally unfair dismissal.'

The arguments

[41] In this segment of the judgment, I intend to capture the main essence of the argument presented on behalf of each of the parties. To this end, I will deal with the arguments presented in broad strokes. I commence presently with the appellant's arguments.

The appellant's arguments

[42] Ms Bassingthwaighe, for the appellant, argued that the arbitrator's award should not be allowed to stand because he committed a number of irregularities as evidenced by a reading of his award. It was her argument that in the first place, the arbitrator failed to appreciate, as he should have, that there were irreconcilable differences in the evidence presented for and on behalf of both parties. As a result, there was a need for the arbitrator, by employing established legal principles, to make necessary findings of fact, which would enable him to determine the probabilities.

[43] She further argued that there were issues which were never put to the appellant's witnesses but which the respondent testified about for the very first time during his sojourn in the witness box during the arbitration. These should have been discarded by the arbitrator, she reasoned. It was further submitted on the appellant's behalf that the arbitrator erred when he found in respect of the first count that the respondent was guilty of dishonesty but never placed that finding in the equation when he eventually made the award.

[44] Ms Bassingthwaighe further argued that there was no substance to the argument that there was procedural unfairness committed during the disciplinary hearing. She argued that the evidence shows indubitably, that the respondent's procedural rights were explained to him and that he in fact exercised them. The finding of procedural unfairness made by the arbitrator is therefor at odds with the evidence. In any event, even if the court were to find that there was some procedural irregularity committed, the court is still at large to find that the respondent was fairly dismissed, considering the seriousness of the charges against him.

[45] It was also submitted that the arbitrator erred in elevating the appellant's disciplinary code to an inflexible document. It was her argument that the charges preferred against the respondent were serious and if found guilty of them all, as he should have been, the employer was justified, having regard to their egregious nature, to impose the ultimate sanction of dismissal. Furthermore, the arbitrator failed to consider the guilty verdict on the relationship between the parties and merely held that because the respondent was not guilty of the second and third counts, he should, without more, be reinstated. No evidence was led regarding the possible repair and rehabilitation of the employer and employee relationship.

[46] Last, but by no means least, Ms Bassingthwaighe also argued that the arbitrator oversimplified the test applicable to compensation. All he did, was to simply award compensation based on the respondent's salary. This was done unilaterally, without the respondent having to place any evidence before the arbitrator, that would be useful in determining a just and equitable amount of compensation. There was thus no consideration of the mitigation of losses, which is a standard requirement in these matters. She accordingly submitted that this is a case which is fit for the court to set aside the arbitral award in its entirety due to the irregularities committed by the arbitrator in arriving at the conclusions that he did.

The respondent's arguments

[47] Mrs Alexander, for her part, argued *au contraire*, that having regard to the entire circumstances of the case, the arbitrator acted properly in finding for the respondent. As such, his award should remain intact. It was her argument that the onus in such matters, lies with the employer, to show by admissible evidence that there was a valid reason for terminating the respondent's employment. In this case, the appellant dismally failed to do so.

[48] It was her submission that in relation to the nudge bar, the roof ornaments and the cruise control booked out for Mr Heita's vehicle, there was no evidence to controvert that of the respondent and Mr Heita that these items were booked out for his vehicle and that they were handed to him. On that basis, there was no basis in law to find that these charges had been proved by the appellant and the arbitrator was eminently correct in finding for the respondent in this regard.

[49] Regarding procedural fairness, it was Mrs Alexander's contention that the complaint regarding the bias of the chairperson was evident and the arbitrator was correct in finding as

he did, that there was no procedural fairness, as the chairperson who recommended the dismissal of the respondent, was an official from an entity known as Labour Dynamics CC, which is retained by the appellant to advise it on labour matters.

[50] It was her argument that when complaints regarding her impartiality were levelled, the chairperson should have entertained the application and allowed the complaint by the respondent to be properly ventilated. All she did, was to dismiss the application and proceeded to find the respondent guilty, culminating in her recommending the imposition of the ultimate sanction of dismissal.

[51] Regarding the three counts, on which the respondent was found guilty, Ms Alexander argued that the appellant's disciplinary code required that the respondent, on being found guilty thereof, should have been issued with a final written warning, which was not done. Furthermore, it was her contention that there is nothing stated by the appellant as an explanation for the departure from the dictates of the appellant's disciplinary code. In the premises, she concluded, the arbitrator was correct in upholding the disciplinary code and reinstating the respondent.

[52] Having considered in brief, the argument presented by both parties, it is fitting that I now proceed to make a determination of the sustainability or otherwise of the appeal. I do so presently.

Determination

[53] In this regard, I will first make one major observation in the determination of this matter. It is that after considering the evidence that was led by the parties at arbitration, the arbitrator came to the conclusion that the respondent was guilty of dishonesty on the first count. I say without fear of contradiction that he was correct in that regard. The evidence against the appellant was, in my considered view, overwhelming and no sustainable defence was raised by the respondent.

[54] It became clear that he had booked out the cruise control illegally and misled the employer by alleging that he had paid for it. In proof of that assertion, he, of his own accord, obtained an invoice from the parts department which reflected Mr Mani Vermaak. There was clearly no evidence that he had paid for the cruise control. He had every opportunity to obtain and present the correct invoice, even before the arbitrator and he failed to do so. No reasonable explanation for that failure, was proffered by him.

[55] I am of the considered view that on the basis of this finding alone, it is clear that the respondent was guilty of dishonesty, which is a serious offence that ordinarily ruptures the employment relationship. I say this subject to what will be discussed later in the judgment regarding the question whether there was a proper basis for the appellant to depart from the provisions of its disciplinary code or policy. That aside, it is clear that the respondent was, as a result of this conviction, standing alone, ordinarily a prime candidate for dismissal, which is the sanction that was recommended and eventually imposed.

[56] I now proceed to deal with the counts on which he was acquitted, namely, counts 2 and 3, which it must be mentioned, both involved dishonesty. I have, in the summation of the main findings in the award, dealt with the reasoning of the arbitrator.

[57] I am of the considered view that the appellant is correct in criticising the arbitrator for the approach he adopted in dealing with the evidence before him. It is eminently correct that there was a contradiction in the nature of the evidence that was adduced before him. In that regard, he was required at law, to make certain credibility findings as to whom he believed and why. This he did not do.

[58] The leading case on the proper approach to a case where there are disputes of fact, with disparate version being adduced before the court or tribunal, is the *locus classicus* judgment of Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie and Others*.³ This judgment has been quoted with approval in this jurisdiction in a number of cases, including the Supreme Court in *Life Office of Namibia Ltd (Namlife) v Amakali and Another*⁴ and in that regard, accurately records the law in Namibia.

[59] Nienaber JA stated as follows, regarding the proper approach to the resolution of disputes of fact:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by our courts in resolving disputes of this nature may conveniently be summarised as follows: To come to a conclusion on the disputed issues, a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the credibility of a particular witness will depend on

³ *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie and Others* 2003 (1) SA (SCA) p 14H-15E.

⁴ *Life Office of Namibia Ltd (Namlife) v Amakali and Another* (LCA 78/2013) [2014] NALCMD 17 (17 April 2014).

its impression about the veracity of the witness. That, in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was placed or put on his behalf, or with established fact or with extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the Court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a Court's credibility findings compel it in one direction and its evaluation of the probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed, probabilities prevail.'

[60] It is thus clear that the assessment of the credibility of the witnesses and a proper weighing of the probabilities is an exercise that cannot be avoided, if the court or tribunal is to make findings as to who to believe in respect of irreconcilable disputes of fact. In this regard, the trier of fact, cannot depend on a 'hunch' or 'gut feeling'. There has to be a methodological and explained reason why he or she believes one witness and not another.

[61] In the instant case, on the two latter counts, I am of the opinion, although I was robbed of seeing the respondent as a witness, that he was not a reliable one. The record does have glimpses, at worst of the type of witness he was. There are a number of instances when this showed and should not have escaped the arbitrator's attention. I will mention only a few.

[62] In the first place, it was put to Mr Steinkopf on behalf of the respondent that the respondent did not invoice the cruise control because it was out of stock.⁵ This was denied by the appellant's witness. In cross-examination, it was put to the respondent that his version regarding the item not being in stock was false.⁶ He was asked as to why he did not remember this allegation and never mentioned it during the disciplinary hearing, considering that it was an important issue. It was put to him that he could also not remember it during

⁵ Page 270 of the record of proceedings.

⁶ Page 932 of the record of proceedings.

conciliation and provided no credible answer.⁷ It was also put to him that this issue was never put to the appellant's witnesses and he could not provide a meaningful answer.⁸

[63] In answer, the respondent mentioned that he only got to remember this issue much later.⁹ Incredibly, the respondent, contrary to most human beings, remembered more issues later, as opposed to remembering them more at an earlier date. An adverse inference can properly be drawn that he was not being candid, as human beings ordinarily remember events clearer soon after they happen than later. It is worth pointing out that key propositions of his case, were not put to the appellant's witnesses and this renders that evidence an afterthought and thus liable to be rejected.¹⁰

[64] A document was later put to the appellant, which showed that the allegation put to Mr Steinkopf was untrue. Strangely, the respondent pretended that he could not read the document in question because according to him, it constituted small print, which he was unable to read.¹¹ At page 945, the following exchange took place in a battle of wits with the appellant's representative:

'REPRESENTATIVE FOR THE RESPONDENT: So arbitrator what is the issue now here, that he does now simply refuse to accept this and I may hand this in and I do not believe it is too small.
HILARIUS IIPINGE: That is (incomplete . . .) you cannot argue with my eyes, if I cannot see unfortunately. . .'

[65] He nailed his colours to the mast in that regard presented himself as a witness located far from the house of truth. His deliberate decision not to read this document was borne from being an evasive witness and which should have counted against him, regard had to the issue of credibility. It was also clear that he had something to gain from not telling the truth on this issue. The answer was clearly self-serving and should have drawn an adverse finding from the arbitrator.

[66] Another issue, which the arbitrator found in relation to the latter two charges, was that the evidence by the respondent that the company policy did not require sales persons to obtain permission before they issued 'freebies' to clients is just improbable, as being a test for establishing probabilities in a case. Although no written policy was produced, it makes

⁷ Page 933 of the record of proceedings, line 11-13.

⁸ Page 933 of the record of proceedings, line 22-23.

⁹ Page 932 of the record of proceedings, line 20-25.

¹⁰ Small v Smith 1954 (3) SA 434 (SWA) at 438E-G.

¹¹ Page 942 of the record, line 4. P 943-945.

business and economic sense that 'freebies' should be authorised. It would be economically unviable and amount to a free for all, for all salespersons to issue 'freebies' to clients, as they wish, without any check or accountability, whatsoever.

[67] Another issue to mention, relates to the fact that Mr Heita's vehicle, in respect of which the items implicated in the second and third charges, 8 months later, did not have these items fitted on it. This was discovered when the vehicle was submitted for service. This fact, standing on its own, in my view, points in the direction that the respondent was engaged in dishonesty regarding the items in question.

[68] In view of the foregoing conclusions, I am of the considered view that the arbitrator committed a serious misdirection when he found that the appellant had failed to show on the probabilities that there was a fair reason to dismiss the respondent. There was, if anything, ample evidence for that finding, as the appellant proved that the respondent had committed two serious cases of dishonesty. These misdirections by the arbitrator, in my considered view, fall within the ambit of questions of law in line with *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd*.¹²

The allegations of bias

[69] In this part of the judgment, I consider the complaint raised by the respondent to the effect that the chairperson of the disciplinary committee, was biased. I must first point out that I do not agree with the evidence of the appellant's witnesses during the arbitration that applications for recusal must be moved on the first day. Recusation applications are not to be moved for the sake of it. As testified by the respondent, and put on his behalf, there was no need to raise the issue of the recusal at the commencement of the proceedings. Recusal applications can be moved at any time whenever there is a reasonable apprehension of bias.

[70] In terms of case law, in *Cupido v Edgars Stores Namibia Ltd*,¹³ in particular, the court held that, 'It has been held that apprehension of bias may arise either from the association or interest the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by the judicial officer prior or during proceedings. In all these situations, the judicial officer must recuse him or herself.'

¹² *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC).

¹³ *Cupido v Edgars Stores Namibia Ltd* (HC-MD-LA-APP-AAA 5 of 2017 [2018] NALCMD 25 (3 October 2018), para 20.

[71] Other instances which may give rise to the reasonable apprehension of bias, is where the presiding officer was involved in the incident giving rise to the charge in question; where he or she is involved in the investigation; where there is a prior issue of bad blood between the employee and the chairperson; prior personal remarks by the chairperson; prior discussion about the case; direct involvement in the events leading to the case; a direct interest in the matter or influence by others.¹⁴

[72] In the instant case, the complaint is that the chairperson of the disciplinary committee did not recuse herself when moved to do so. She was accused of allowing certain evidence to be led improperly and not allowing the respondent sufficient time to consider certain documents that were handed in by the appellant. The evidence adduced by the appellant, was that the respondent was given all the documents relevant to the hearing. This was confirmed by the respondent in cross-examination.¹⁵

[73] The respondent, for the first time, raised a new ground for recusal, before the arbitrator. He claimed that the chairperson was an employee of an outfit called Labour Dynamics CC, which was on a retainer from the appellant. I am of the considered view that ordinarily, the inclusion of an outsider from the employer to chair disciplinary proceedings, is an acceptable and fairer procedure to follow.

[74] I say this because where the chairperson is an employee of the company initiating disciplinary proceedings, it may be that the relationship between the chairperson and the employer may raise suspicions. In any event, I am of the considered view that in the instant case, there was no evidence led by the respondent that could evince a reasonable apprehension of bias. In this connection, Grogan¹⁶ states that ‘Some employers though not required by law to do so, hire outsiders to hear controversial disciplinary matters, thereby highlighting the importance of the requirements of impartiality.’

[75] I have considered the judgment of Sibeya J in *Conrad v Auto Repairs*.¹⁷ In that case, the recusal of the chairperson was raised during the hearing as it was alleged that he belonged to Labour Dynamics. This, he denied he was connected to the said outfit and it later turned out that he had lied in what he had disclosed to the employee’s representative.

¹⁴ Grogan, *Workplace Law*, 10th ed, p 244, para 1.

¹⁵ Page 835 of the record of proceedings line 16-20.

¹⁶ Grogan, *supra*, p 244, para 1.

¹⁷ *Conrad V Auto Repairs* (HC-MD-LAB-MOT-GEN-2020/00319) [2022] NALCMD 25 (26 April 2022).

He alleged untruthfully, the court found, that he was an independent contractor, when he still had a controlling interest in Labour Dynamics. He had been previously warned by Ueitele J in a previous judgment but this fell on deaf ears. The facts are distinguishable in this matter as there was no basis for finding a disqualifying bias because there was no evidence that the chairperson had participated in any manner in the disciplinary process of the respondent, other than serving as the chairperson.

[76] In the event that I am found to be incorrect on the issue of the bias alleged, which is referred to numerous times on the record as ‘biasness’, a word unknown to the English language, I am of the considered view that the *Kamanya* principle, should carry the day.¹⁸ In that case, the applicable law, was adumbrated as follows by O’Linn P:

‘The result in my view is that no order for reinstatement, re-employment or compensation should be made by the District Labour Court against the employer where the employer has succeeded in proving before it a fair reason for dismissal, whether or not such employer has proved that a fair procedure was applied before the domestic tribunal. In such a case, it would be open to the District Labour Court to find that the employee has not been “dismissed unfairly.”

In the alternative, if I am wrong in the view stated above, then in a case where the employer has proved a fair reason for dismissal but has failed to prove a fair procedure, the District Labour Court would be entitled on accordance with s 46(1)(c), not to grant any remedies provided for in s 46(1)(a) and (b), but to confirm the dismissal or to decline to make any order.’

[77] This position was confirmed by the Supreme Court in *Kahoro and Another v Namibia Breweries Ltd*.¹⁹ There, the Supreme Court expressed itself as follows in endorsing the *Kamanya* principle:

‘As I understand the position, *Kamanya* is authority for the proposition that even if an employer fails to prove that a fair procedure was followed leading to the dismissal, the court *may* (not *must*) refuse to hold a dismissal as unfair if the employer proves a valid and fair reason for such dismissal.’

[78] The upshot of this, is that in a case where there may be a doubt or evidence that the dismissal did not follow a fair procedure, the court may, that notwithstanding, hold a dismissal to be in order if there is a fair and valid reason for the dismissal. I am of the

¹⁸ *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR (LC) at 1271-128C.

¹⁹ *Kahoro and Another v Namibia Breweries Ltd* 2008 (1) NR 382 (SC) at 394 para 40.

considered view that the two charges of dishonesty prove that there was a fair and valid reason to dismiss the respondent in the instant case.

[79] Having said this, I must place a *caveat*, namely, that the above finding, in the instant case, will apply if the court agrees with the appellant that the departure from the disciplinary code was justified in the *in casu*. It is to that very issue that I turn presently.

The place of a disciplinary code or policy

[80] The appellant's disciplinary code, entitled, 'Guideline of Offences and Appropriate Action Depending on The seriousness of the Offense',²⁰ provides that in respect of the offence of 'Dishonesty, (concerning work done or otherwise)' for the first offence it is a final written warning. For the second offence, it is appropriate to issue a dismissal.

[81] It was argued by Ms Alexander that in the instant case, the appellant's disciplinary code prescribed that where an employee has been found guilty of dishonesty, a final written warning must ensue. It was argued in this connection that the appellant failed to place reasons, which tend to show that the deviation from the policy, and in this case, to issue a dismissal was warranted. In terms of the policy, it is in cases of theft where a dismissal would be warranted as a sanction, she further submitted.

[82] Ms Bassingthwaighte, for her part, argued that the arbitrator erred in regarding the disciplinary policy as a hard and fast rule. It was her submission that it must be regarded as a guide. I am in agreement with this submission. It is very clear from the heading of the policy that it is termed a 'guideline', meaning that it is not cast in stone and that some flexibility, where called for, must be allowed.

[83] In the *Namdeb Diamond Corporation (Pty) Ltd v Richard Ronnie Gaseb* case,²¹ the Supreme Court reasoned that, 'I agree with the observation that "a court should guard against an elevation of a disciplinary code into an immutable set of commandments which have to be slavishly adhered to." I also agree that where there is a departure from such a code it should not be to the detriment of an employee. In my view, the overriding consideration should be whether the employer had complied with, in the particular circumstances of the case, a fair procedure.'

²⁰ Page 190 of the record of proceedings.

²¹ *Namdeb Diamond Corporation (Pty) Ltd v Richard Ronnie Gaseb* SA 66/2016 [2019] NASC (9 October 2019).

[84] I am of the considered view that in the instant case, the employer cannot be held to the policy as if it were the law of the Medes and the Persians. In this case, a fair procedure was followed and the appellant was correctly found guilty of three counts of dishonesty. These are, on any basis, serious charges that serve to rupture the element of trust between the employer and the employee, pointing to dismissal being the appropriate form of censure, in those circumstances.

[85] It must also be considered that the respondent in this case, was not a mere trespasser in the area of dishonesty. He had been found guilty of dishonesty on two previous occasions and was given one written and one verbal warning, which had expired when the present charges emerged in the picture. I am of the considered view that these previous warnings, although no longer operative and had expired, cannot be wished away or placed in the sea of forgetfulness, when the same employee is subsequently found guilty of the same transgression. It may be a pointer that there is a worrisome pattern which may suggest the parting ways with him or her may be the best option, regardless of what the disciplinary code, strictly interpreted and slavishly followed, may require.

[86] Properly construed, the guideline refers to work done or otherwise in relation to dishonesty. This, to my mind would mean that it relates to dishonesty in relation to how an employee does his or her work. In other words, the work must be done honestly and conscientiously. In the instant case, the dishonesty involved theft of the employer's property and does not relate strictly to dishonesty in relation to how the work was done.

[87] In any event, it must also be stressed that the court should be slow to interfere with sanctions imposed by an employer where the guilt of an employee has been established. In *Namibia Custom Smelters (Pty) Ltd v Mupetami and Another*,²² the court reasoned as follows:

[8] Be that as it may, it is well entrenched that punishment – dismissal or any alternative punishment is squarely within the discretion of the employer. On that score, I accept Mr Rukoro's submission on the point, but with a caveat. The discretionary power of the employer is not absolute. There is the qualification that the punishment imposed must be fair after the employer has weighed all the factors In any case, it would be biting off more than it can chew, if the court were to prescribe in each case what the punishment an employer should impose on an errant employee.

²² *Namibia Custom Smelters (Pty) Ltd v Mupetami and Another* 2015 (3) NR 859 (LC) para 8 to 11.

[9] In *Namibia Tourism Board v Kauapirura-Angula* 2009 (1) NR 185 (LC), the court held that the employer was entitled to dismiss the employee for insubordination, assault and use of abusive language. These were the forms of misconduct the employee in *Zwane v Tip Top Holdings Swaziland IC 77/95* (unreported), at p 7, which Mr Rukoro, counsel for the appellant, referred to, was found to have committed; and there, the Industrial Court of Swaziland held that the employer was entitled to dismiss the employee for those forms of misconduct because they were capable of cancelling the unblemished record of good service. . . . Howsoever that may be, the misconduct of which the first respondent was found guilty and which the second respondent accepted, as I have stated above, is an act of appropriating his employer's property dishonestly and in breach of the company rules. In that regard, it can be said that mutual trust and confidence between the employer (the appellant) and the employee (the respondent) had clearly disappeared beyond recall. . . . I conclude therefore that the dishonest act of the first respondent rendered the continuation of the employment relationship insupportable.'

[88] I am of the considered view, having regard to the foregoing excerpts, that it should be remembered that the employer's disciplinary code must not be elevated to immutable law, such as the Ten Commandments. As long as at the end of the day, an employee is dealt with in a fair manner in the imposition of the sanction – which meets the seriousness of the transgression and the deleterious effect thereof on the employer-employee relationship, the court should not lightly interfere. The court should recognise that the imposition of the penalty pre-eminently resides in the bosom of the employer.

[89] The instant case, as recorded above, is one where the respondent committed several acts of dishonesty – three for which he was dismissed. These included pilfering the employer's property and was recorded as dishonesty. As mentioned earlier, the respondent had two previous counts of dishonesty, in respect of which he had received formal warnings in terms of the disciplinary guidelines. Although these had expired, they were relevant in respect of the appropriate sanction to be imposed on the respondent. It was accordingly fair to dismiss the respondent, regard had to the particular circumstances of the case, the provisions of the disciplinary code, which are, in any event, a guideline, notwithstanding.

Conclusion

[90] In the premises, I am of the considered view that the appellant has satisfied the court that this is a case in which the arbitrator committed serious errors of law that serve to vitiate the arbitral award. I find it unnecessary, in the circumstances, to consider the other grounds and bases on which the award is attacked, including the absence of evidence on the amount of compensation awarded. I am of the considered opinion that the appeal must be upheld.

Order

[91] In the premises, and having regard to the discussion, the conclusions and findings above, the order that commends itself as being appropriate in the circumstances, is the following:

1. The appellant's appeal succeeds.
2. The arbitral award issued by the arbitrator dated 17 September 2021, is hereby set aside in its entirety.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPELLANT: N Bassingthwaight
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1ST RESPONDENT: N Alexander
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