

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-LAB-APP-AAA-2020/00005

NAMIBIA EMPLOYER'S ASSOCIATION

APPELLANT

and

EVA-LISA NAILENGE

RESPONDENT

Neutral citation: *Namibia Employer's Association v Nailenge* (HC-MD-LAB-APP-AAA-2020/00005) [2020] NALCMD 4 (23 February 2021)

Coram: GEIER J

Reserved: 21 July 2020

Delivered: 23 February 2021

Flynote: Labour Law – appeal against arbitration award – dismissal found to have been procedurally unfair – finding of substantive unfairness by arbitrator not considered as the dismissal of the respondent in any event could not stand as the failure of the domestic tribunal to apply a fair procedure was sufficient - on its own in the circumstances of the case - to set it aside - as the failure to provide the respondent with the minutes of the informal 'proceedings of 2 October' and also the

refusal to avail the disciplinary code of conduct were fundamental irregularities which materially prejudiced the respondent's ability to prepare and present her defence and also her case relating to an appropriate sanction, where, quite obviously, the offer of a 'final warning', would have been highly relevant and where the reason for the dismissal may thus very possibly have been the result of the irregular procedure that was followed. - In any event it was taken into account that – objectively speaking - there would have been hardly any prospects of success to sustain the substantive fairness of the dismissal in question as it would always have been difficult to sustain the conclusion that a continued working relationship between the parties had become impossible because of the theft of a laptop for which a third party was to be blamed and that the resultant dismissal of the respondent was thus in such circumstances substantively fair. In such circumstances a determination of the raised grounds of appeal relating to the substantive fairness of the disciplinary process became academic and thus unnecessary

Labour Law – an arbitrator is duty bound to provide reasons also for the award that is made consequent to arbitration, particularly when awarding 'compensation'. In casu the arbitrator failed to do so. This was found to be a material irregularity.

Question considered whether the court should in circumstances where the respondent's dismissal was unfair but where the arbitrator had erred in not providing her reasons for awarding compensation and where each party had thus achieved a measure of success on appeal - simply dismiss the appeal or rather refer the question of the award back for reconsideration. As a referral back in such circumstances would do justice between the parties and as the powers of the Labour Court seemed wide enough to allow for such a referral, the matter was referred back to the Office of the Labour Commissioner for purposes of determining an appropriate award, flowing from the respondent's unfair dismissal, afresh.

Summary: The facts appear from the judgment.

ORDER

- a) The arbitration award, made by Ms Fabiola Katjivena, on 23 December 2018, is set aside in part; more particularly paragraphs 2 and 3 of her ruling are hereby set aside;
- b) The matter is referred back to the Office of the Labour Commissioner for purposes determining an appropriate award, flowing from the respondent's unfair dismissal, afresh.

JUDGMENT

GEIER J:

[1] This appeal centers around the theft of a laptop, which cost the respondent her job.

[2] Viewed objectively, this result, immediately, seems extraordinarily harsh.

[3] Nevertheless it is this result which the *Namibia Employers Association* – the appellant in this instance - wishes to perpetuate – and - which it managed to achieve through the respondent's dismissal after internal disciplinary action – which however was subsequently undone by an arbitration award – delivered on 23 December 2019 by Ms Fabiola Katjivena – as it reversed the dismissal and awarded compensation to the respondent in the amount of N\$ 300 000.00, being the equivalent of 12 months' salary.

[4] The loss of the lap top occurred on 31 August 2018.

[5] In order to avoid a formal disciplinary hearing - and after a meeting with certain representatives of the appellant - it was agreed that the respondent should receive a sanction. The respondent was then informed on 4 October 2018 that this sanction would come in the form of a final warning.

[6] Ironically the respondent rejected this offer and opted that formal disciplinary action be taken against her. This disciplinary action then, as mentioned above,

resulted in her dismissal on 19 November 2018, which dismissal was then reversed on 23 December 2019 consequent to arbitration and against which award an appeal was subsequently noted on 21 January 2020.

[7] In this appeal the appellant then raised the following questions:

(a) “Whether, on the evidence adduced, it can be found that the dismissal of the Respondent was substantively unfair?”

(b) “Could an Arbitrator on the whole of the evidence placed before her have found that no valid reason existed for the termination of the respondent’s services?”

(c) “Could an arbitrator on the whole of the evidence tendered and considered against the overall spectrum of the case, find that the sanction was so unreasonable that no reasonable employer would have imposed such sanctions?”

(d) “Whether the Arbitrator could simply interfere with the sanctions imposed or the decisions of the Appellant to dismiss the Respondent?”

(e) “Whether or not the relief granted by the Arbitrator was substantively proven and appropriate in the circumstances?”

(f) “Whether the Respondent has discharged the onus in respect of proving their respective damages and entitlement to compensation?”

(g) Whether the arbitrator erred in failing to provide reasons for the compensation awarded.’

[8] The appeal was opposed on the following grounds:

‘1. “Generally it will be contended by the respondent that the arbitrator acted fairly and within her powers conferred by the Labour Act, 11 of 2007 in the ruling in favour of the respondent during the arbitration proceedings, and rendering the arbitration award accordingly and that this Honourable Court should uphold this award.

2. More specifically the respondent will contend that the appellant’s appeal as set out in its grounds of appeal should be rejected by this Honourable Court in that:

2.1 *The arbitrator was correct in finding that the appellant failed to prove the misconduct charges levelled against the respondent. Hence, the appellant had no fair and justified reason to dismiss the respondent. No reasonable employer would have dismissed the respondent.*

2.2 *The arbitrator was correct in finding that the appellant failed to follow its disciplinary code when it conducted a disciplinary hearing after the respondent refused to sign a final warning.*

2.3 *The arbitrator was correct in finding that the appellant failed to prove that the trust relationship between the parties had broken down.*

2.4 *The arbitrator awarded compensation to the respondent which she considered reasonable, fair and equitable; regard being had to all the circumstances of the case.*

3. *Based on a proper assessment of the totality of the facts before the arbitrator, the arbitrator reached a decision a reasonable decision maker would have reached.*

4. *In the result it is humbly prayed that the appeal be dismissed.”*

[9] In order to set the scene for this appeal adequately it is also apposite to deal with the arbitration award, from which it appears:

- a) that the arbitrator first summarised the evidence of the witnesses;
- b) that she, secondly, and importantly, in her analysis of the evidence tendered, identified certain material procedural irregularities perpetrated during the disciplinary process to which the respondent was subjected to;
- c) that, more particularly, the arbitrator found it ‘very interesting’ that the respondent was not provided with the appellant’s ‘Disciplinary Code of Conduct and Grievance Procedure’¹ during the disciplinary process— although this was requested – and on the basis of which the disciplinary hearing was conducted against her; and

¹ exhibit ‘H’.

- d) that she noted that the respondent was also refused certain documents and the transcript of the proceedings of 2 October 2018 – at which the informal ‘disciplinary’ meeting was held; and
- e) that she found, as a result of these refusals, that ‘...it was fair to conclude that the applicant was not aware of the rules and or offences that she was accused of having committed ...’;
- f) that she then found that the respondent was justified in insisting on a formal disciplinary hearing;
- g) that the appellant wanted to punish the respondent twice for not agreeing voluntarily to a final written warning; and
- h) that she finally found that the reason for the respondent’s dismissal, namely that the relationship of trust (between employer and employee) had been broken, had not been proved;
- i) and finally that the offence with which the respondent had been charged, namely the failure to comply with the duty of care, with her employers assets, had also not been proved;
- j) that, in conclusion, she thus found that there was no valid reason to terminate the respondent’s services – hence the award mentioned above.

[10] Although the arbitrator so concluded that the respondent had been dismissed without a valid reason it emerged also from her findings and summary of the evidence that the procedure followed in this regard was also not fair and was tainted in two material respects when the respondent was refused access to the disciplinary code and the minutes of the meeting of 2 October 2018, which she had requested before the disciplinary hearing and which documents were obviously relevant and required for purposes of defending herself during the disciplinary proceedings.

[11] It should also be taken into account that the reason for the respondent’s dismissal was founded on the theft of a laptop by an unidentified third party, on

which facts and circumstances – objectively speaking - it would in any event always have been difficult to found the conclusion that a continued working relationship between the parties was impossible and that the resultant dismissal of the respondent was thus in the circumstances fair, particularly when, initially, a ‘final warning’ was considered appropriate.

[12] Having noted this, the court thus requested the parties to consider these aspects and their impact on the appeal, as it was clear that it was unlikely that the disciplinary proceedings in question could continue to stand and would always be liable to be set aside – irrespective of the required determination of the actually formulated grounds of appeal – as to whether or not the arbitrator had erred in her finding that the dismissal of the respondent was substantively fair – and in which circumstances – and regardless of the outcome of this challenge - the ultimate result would be that the disciplinary process could in any event not be sustained.²

[13] The parties were thus asked to consider the effect of all this also on the aspect of compensation in respect of which the ground of appeal had been advanced ‘whether the respondent had discharged the onus in respect of proving the damages and thus her entitlement to compensation’ and whether the arbitrator had thus erred in awarding compensation to her in the result.

[14] Given the potential impact of all this on their respective cases the parties were also urged and given the opportunity to consider to settle the matter, which opportunity they, unfortunately, failed to utilise.

[15] Subsequently they were then directed to address these further aspects in supplementary heads of argument. Only counsel for the respondent availed himself of this opportunity within the timelines agreed and set for this purpose. Counsel for the appellant’s failure to do so, timeously, was not condoned.

The procedural defects

² The requirements for fair disciplinary action are trite and prescribed by Section 33(1) of the Labour Act 2007 - See also : *Jurgens v Geixob and Others* 2017 (1) NR 160 (LC) at [62] where the Court stated : ‘[62] Once the employer is unable to discharge the onus which is in terms of s 33(1) read with ss (4) on him/her/it, be it on the question of fair procedure or valid and fair reason for the dismissal or both, the finding of unfair dismissal must necessarily follow, provided of course that the employee was able to establish the dismissal. In that event, the provisions of s 86(15) kick in.’

[16] In such circumstances Mr Horn's submissions come to the fore. In regard to the raised procedural irregularities he submitted:

'2. The Employee testified that she had a meeting with certain representatives of the Employer where it was agreed that she will receive a sanction. During this meeting the Employee informed the members of the factual background regarding the theft of the laptop and how it occurred. Thereafter she was requested to leave the meeting in order for the members of the meeting to discuss an appropriate sanction. She never agreed to a final written warning.

(See record page 150)

3. Approximately two days later and on the 04th of October she received feedback that the corrective action to be taken by the Employer will be a final written warning which she refused to sign. The Employee testified that she did not agree to same and similarly was not discussed. Prior to and during the Disciplinary Hearing the Employee requested the minutes of the meeting. Her request was met with a response from the Employer that she must use her own notes, and hence the Employer will not deliver same.

4. The Employee also testified that she requested the Code of Conduct from the Employer on the 07th of October when the final written warning was issued.

(See record page 151)

5. The Employee also testified that she wanted to appeal to the final written warning and that the Disciplinary Code had to guide her as well as the minutes of the meeting as to the reasonableness of the sanction.

6. The question that follows is whether the Employer applied fair procedure in its refusal to provide the Employee with the minutes of the meeting and the Disciplinary Code.

7. The Disciplinary Code of Conduct stipulates that an Employee has the right to be treated fairly, procedurally and substantively. On this basis alone it is respectfully submitted that the Employee was entitled to the Disciplinary Code as well as the minutes of that specific meeting. In terms of page 204 of the record, the disciplinary procedure is regarded as an integral part of the conditions of employment of all employees. It also stipulates that this document (Disciplinary Code) is freely available to all employees. Therefore the refusal of the Employer to provide the Employee with same was prejudicial, and biased towards the Employee.

.....

10. The general requirements of fair procedure implies that an employee must have a fair hearing according to the principles and rules of natural justice. This entails that the Employee is given an opportunity to make adequate preparation in order to present its case and raise a defence. The documents requested by the Employee / Respondent was necessary for her to prepare for her defence and to make adequate preparation. The minutes of the meeting was needed for her to determine what considerations the Employer already took into account when a final written warning was issued to her. Secondly, the Employee wanted to ascertain what is the appropriate sanction in terms of the Disciplinary Code vis-a-vie her alleged misconduct. This right the Employer did not allow the Employee, and failed to observe fair procedure as envisaged in terms of Section 33 of the Labour Act.

(See Food and Allied Workers Union and Others vs Amalgamated Beverages Industries Limited (1994) 15 ILJ 630 IC)

11. In all cases the starting point of a Disciplinary Hearing would be the Employer's Disciplinary Code. The Disciplinary Code is the foundation upon which the Employer applies procedural fairness and complies with certain procedural standards to be followed.

12. Therefore it is respectfully submitted that the Employer's failure to provide the Employee with the Disciplinary Code is a material failure not to observe procedural fairness.'

[17] It does not take much to see why the procedure in question was indeed materially flawed and that the arguments advanced in this regard have merit. This failure caused material prejudice and thus effectively negated the fairness of the process.³

[18] This would also be an instance where the failure of the domestic tribunal to apply a fair procedure would be sufficient to set it aside – without the need to even consider the aspect of the substantive fairness of the dismissal - as the failure to provide the respondent with the minutes of the informal 'proceedings of 2 October' and also the refusal to avail the disciplinary code of conduct were fundamental irregularities which materially prejudiced the respondent's ability to prepare and

³ Compare in this regard: *Atlantic Chicken Co (Pty) Ltd v Mwangi and Another* 2014 (4) NR 915 (SC) at [38].

present her defence and also her case relating to an appropriate sanction, where, quite obviously, the circumstances relating to the offered 'final warning', would have been highly relevant and where the reason for the ultimate dismissal may thus very possibly have been the result of the irregular procedure that was thereafter followed.⁴ Here it should in any event also be taken into account that – objectively speaking - there would have been hardly any prospects of success to sustain the substantive fairness of the dismissal in question as it would always have been difficult to sustain the conclusion that a continued working relationship between the parties had become impossible because of the theft of a laptop by a third party and that the resultant dismissal of the respondent was, thus in such circumstances, also substantively fair.

[19] The conclusion to be reached is inescapable and it becomes clear that the dismissal of the respondent cannot stand, as the arbitrator also found, albite for different reasons. In such circumstances a determination of the raised grounds of appeal relating to the substantive fairness of the process becomes academic and thus unnecessary.

The award

[20] This leaves the question of the award.

[21] Here it should be taken into account that the parties' legal practitioners', in anticipation of the original hearing date - and prior to the Court having raised the abovementioned further questions, which had to be addressed in supplementary

⁴ Compare for instance : *Kahoro v Namibia Breweries Ltd* 2008 (1) NR 382 (SC) [44] The rationale for the rule in *Kamanya* (as to which see *Kamanya* at 126G - H) and similar cases eg *Unitrans Zululand (Pty) Ltd v Cebekhulu* 2008 (1) NR p396 (paras [45] and [46] *infra*) is that a valid and fair reason for a dismissal is one which justifies dismissal of the employee and is independent of the procedure followed before a dismissal is carried out. A valid and fair reason for a dismissal is founded on facts, conduct or circumstances which, independently, make the continuation of the employment relationship impossible. A valid and fair reason for dismissal cannot, in my view, exist in facts which, if a proper procedure were followed, might well have been different. In casu not only is the reason for the dismissal inextricably linked to the procedure, but it is the very result of that procedure. Therein the court a quo erred. It should, on the facts, have come to the conclusion that there was no valid and fair reason for the dismissal.

heads - had already filed heads of argument. Here Mr Philander arguments for the appellant in regard to the grounds of appeal raised vis a vis the award ran as follows:

'In terms of section 86(15)(e) of the Labour Act, an arbitrator may award such amount of compensation as he or she considers reasonable, fair and equitable, and regard being had to all the facts and circumstances of the particular case. In this regard two crucial considerations should not be ignored in the award of compensation in terms of the Labour Act that meets the mark of reasonableness, fairness and equity. They are (a) the extent to which the employee's conduct contributed to his or her dismissal, and (b) the principle that the aim of compensation in terms of the Labour Act is not to punish the employer where an award of compensation is made against the employer in favour of the employee.⁵

In *Springbok Patrols (Pty) Ltd v Jacobs & others* (Unreported judgment of labour court per Smuts J in (LCA 70/2012) [2013] NALCMD 17 (31 May 2013)), the court again emphasized the principle that where a party seeks to claim an amount owing to him or her under the Labour Act, he or she must plead how that amount arose and also lead evidence to prove such an amount.

In the present case, the respondent did not tender evidence to substantiate any damages or an award for compensation, save for the skirting remarks contained on pages 163-164 of the Record. The onus of proof of any claim of damages or compensation that the respondent might have had, as well as the duty to adduce evidence on such claim, rested with the respondent.

The arbitrator accordingly ought to have dismissed the respondent case.

In *Namibia Foods and Allied Workers' Union v Novanam Limited* (HC-MD-LAB-APP-AAA-2017/00015) NAHCMD 24 (5 October 2018) it was held:

[23] Reasons behind decisions must be given in order to exclude allegations of arbitrariness and acting whimsically or capriciously on the part of courts and tribunals. This is very important for the observance of the rule of law and confidence in the courts and tribunals and their decisions. Parties may not agree with the decision but they have a right to know the reasons underlying the order issued. Awards without a proper analysis and exposition of the reasons for the decision,

⁵ *Management Science for Health v Kandungure* (LCA 8/2012) [2012] NALCMD 6 (15 November 2012) [Paragraph 11]; *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others* Case No. LCA 47/2007 at para 16 (unreported).

encourages needless appeals, for no other reason than that the party which feels hard done by the decision will naturally resort to an appeal, yet if the reasons had been fully ventilated, they may accept the fact of their loss with dignity.

[24] As it is, in the absence of a proper consideration and discussion of the respective cases argued by the parties, the work of this court is made the more difficult, if not impossible, short of the court in a sense re-hearing the matter and making its own decision based on the papers filed of record. In that case, that does not become an appeal and the matter becomes as good as being heard for the first time. Arbitrators' attention is specifically drawn to this aspect of the judgment so that this court can draw assistance from their awards and accordingly assist in developing our labour law jurisprudence in the process.

It is respectfully submitted that reasons for the learned arbitrator's findings in respect of the compensatory relief granted is lacking and consequently the award should be set aside.

.....

The arbitrator does not provide any reasons for her decision to award the compensation as she did and further to order that leave days should be paid, whilst the respondent did not work nor accrued any leave days requires the honourable Court's consideration.

It is further submitted that the respondent suffered no damages justifying an order for compensation in the amount as awarded or any other amount.

.....

Reinstatement was not a viable option in the circumstances, more so if regard is had to the aforementioned strained relationship as admitted to by the respondent and the time lapse(d) since dismissal.

Wherefore the honourable court is humbly requested to uphold the appeal.'

[22] Mr Horn, who had failed to address this aspect altogether, in his first set of heads, utilised the opportunity, subsequently. He submitted then:

'In terms of the Award (page 324 of the record) the Employee was awarded compensation for 12 months amounting to the sum of N\$300,000.00. The Arbitrator did not

order for the Employee / Respondent to be reinstated. This is a material consideration when one have regard to the 12 month period compensation.

It is respectfully submitted that the Arbitrator did take into account the conduct of the Employer in firstly issuing a final written warning and thereafter to proceed with a Disciplinary Hearing and to dismiss the Employee. It is clear that the Arbitrator was of the opinion that the Employer acted grossly unfair against the Employee. It was the opinion and rightly so of the Arbitrator that where the Employee refused to sign for the written warning such refusal must be noted on the documentation and a third party is to witness this by signature. Therefore once the Employer issued out a final written warning, the validity of same must not be affected by the signing or non-signing of it by the Employee. The Employer therefore acted extremely unfair towards the Employee to proceed with a Disciplinary Hearing to further punish the Employee and ultimately confirming the sanction of a dismissal. These factors the Arbitrator took into account and issued an Award in favour of the Employee of 12 months.

There is no dispute that the Employee did receive a salary of N\$25,000.00 per month as her payslip is part of the record.

In the premises the 12 month remuneration reflects the aforementioned consideration the Arbitrator took into account.'

[23] Two obvious errors emerge immediately from both sets of submissions. Firstly I cannot find from the 'ruling'⁶ that the arbitrator '... ordered that leave days should be paid ...', as was submitted by Mr Philander. Secondly, I could not find anything in the award that expressly explains what conduct the arbitrator took into account when she made her 'ruling', as was submitted by Mr Horn.

[24] It also appears immediately that Mr Philander is correct in his submission that the arbitrator actually failed to provide any reasons – at least for the monetary award that she made in her 'ruling', that is any reasoning for awarding the respondent '*compensation for her loss of income for the period of 12 months amounting to the sum of N\$ 300 000.00, less tax, (i.e.N\$ 25 000 x 12 months) ...*'.

[25] The only aspects that can be inferred is that the arbitrator, seemingly, regarded the sum of N\$ 300 000, less tax, i.e. made up of the respondent's salary of

⁶ That is how the award was headed.

one year, as adequate compensation for her loss of income. No reasons were provided by the arbitrator, why she considered a period of 12 months 'adequate' or 'fair' or 'just and equitable' and what circumstances she actually took into account in this regard when making the award.

[26] It was this particular shortcoming that Mr Philander had exposed and which he endeavoured to address firstly with reference to the general rationale for the giving of reasons as set out by the Court in *Namibia Foods and Allied Workers' Union v Novanam Limited* (HC-MD-LAB-APP-AAA-2017/00015) NAHCMD 24 (5 October 2018) where it was held:

{23} Reasons behind decisions must be given in order to exclude allegations of arbitrariness and acting whimsically or capriciously on the part of courts and tribunals. This is very important for the observance of the rule of law and confidence in the courts and tribunals and their decisions. Parties may not agree with the decision but they have a right to know the reasons underlying the order issued. Awards without a proper analysis and exposition of the reasons for the decision, encourages needless appeals, for no other reason than that the party which feels hard done by the decision will naturally resort to an appeal, yet if the reasons had been fully ventilated, they may accept the fact of their loss with dignity.

{24} As it is, in the absence of a proper consideration and discussion of the respective cases argued by the parties, the work of this court is made the more difficult, if not impossible, short of the court in a sense re-hearing the matter and making its own decision based on the papers filed of record. In that case, that does not become an appeal and the matter becomes as good as being heard for the first time. Arbitrators' attention is specifically drawn to this aspect of the judgment so that this court can draw assistance from their awards and accordingly assist in developing our labour law jurisprudence in the process.

[27] It does not take much and I am stating the obvious when I find that this reasoning applies with equal force to resultant awards, made in labour arbitrations, as was suggested on behalf of the appellant.

[28] In this case the Court is however left to speculate as to whether or not, the inferences drawn by Mr Horn, as to the reasons that could very well have- and probably did underlie the monetary award, played a role in this instance. This conclusion is also left unaffected by the acceptance that obviously this part of the

award must be read in the context of the entire award and thus cannot be read in isolation. What however remains unknown is to what extent each possible factor actually played a role or not.

[29] The arbitrator wanted to award 'compensation', so much is clear from the actual wording used in her 'ruling'. The concept of 'compensation' is however not as straightforward as one would think – it is apparently '*a difficult horse to ride*'. This alone emerges from a citation of a foreign authority utilised by Mr Philander to underscore this part of the appeal and in respect of which he submitted that the guidelines set there should apply with equal force to Namibia although made against the backdrop of the South African Labour Relations Act, which differs from the Namibia's Labour Act.

[30] For this purpose it is indeed useful to have regard to the relevant aspects that emerge from *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC), where the following was said:

"[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he has suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not to be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.

[23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put, differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The solatium must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising⁶ the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[24] *The determination of the quantum of compensation is limited to what is “just and equitable”. The determination of what is “just and equitable” compensation in terms of the LRA is a difficult horse to ride. There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a solatium for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action (ie action iniuriarum) for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a solatium because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patrimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA.*

In Minister of Justice & Constitutional Development v Tshishonga (Tshishonga), this Court in an award of solatium referred to the delictual claim made under the actio iniuriarum for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one’s dignity, the relevant factors in determining the quantum of compensation in these cases included but were not limited to:

‘...the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff’s humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place...’.

[25] *The above dictum should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s194(3) of the LRA.”*

[31] Without wanting to be exhaustive it emerges that certain aspects, such as the ‘nature’ and ‘seriousness’ and ‘circumstances’ of the case in question, would play a role in the determination of whether ‘compensation’ should be awarded and if so, in what amount and where the aim would be not to make good the patrimonial loss that has actually been suffered, but that ‘compensation’ in the labour context is rather considered to be a *solatium* for injured feelings and the humiliation an employee may have suffered at the hands of an employer. Importantly it is to provide satisfaction to an employee whose constitutionally protected right to fair labour practices has been

violated. Additional factors, such as the motives and behaviour and their effect on the affected party would also have to be considered. It appears in addition that certain boundaries are set as 'compensation' is limited to what is 'just and equitable'. Within these limits 'salary' is one of the tools which can be considered.

[32] I do not think that I have to determine the precise extent to which this South African authority fits into the Namibian context as it was essentially utilised to underscore the ground of appeal that the arbitrator had erred in failing to provide any reasons for the 'compensation' awarded and why this misdirection was a material one in the absence of a reasoned consideration of any of the required factors relevant to the awarding of 'compensation'.. These points were thus well- made and it follows that all the related grounds of appeal have to be upheld.

[33] If one then turns to the resultant picture that so emerges it appears that it is beyond doubt that the respondent's dismissal was unfair and that the respondent would thus be entitled to an award – and that this part of the award should thus continue to stand - but that the arbitrator had erred in not providing her reasons for awarding compensation in the amount that she did and that this part of her award thus must be set aside. Each party has thus – if one views it from that angle – achieved a measure of success. To simply dismiss or uphold the appeal, in such circumstances, would however not do justice between the parties, in my view.

[34] It is in these circumstances that Mr Horn's concluding submissions, as made in the 'Respondent's Supplementary Heads of Argument', fall to be considered and where it was submitted that:

'In the event that this Honourable Court is of the opinion that the damages aspect of the Award was not fully traversed and further evidence needs to be lead, it is respectfully submitted that in terms of the rule 22 of the rules of the Labour Court, the Labour Court rules do not make provision for the procedure to be followed in any matter before the Labour Court the rules applicable to civil proceedings of the High Court made in terms of Section 39(1) of the High Court Act do apply to these proceedings.

It is common cause that the High Court has an inherent jurisdiction and it is within this jurisdiction that this Honourable Court can refer the matter specifically back for hearing on the damages suffered by the Employee. There is no prohibition placed upon this

Honourable Court to refuse to refer a certain aspect of the Award to the Arbitrator for her reconsideration and further evidence.’

Can the court thus refer the matter back on appeal for a re-hearing on the award as was submitted?

[35] It is clear that the suggestion of a referral back for the proper consideration of the aspect of ‘compensation’ does indeed merit consideration, as it would achieve a fair result. The question thus arises whether this can legitimately be done within the powers that this Court can exercise?

[36] I don’t believe that Mr Horn is correct that such a reconsideration should be done in terms of Rule 22 of the Labour Court Rules, or in terms of the Court’s inherent jurisdiction and powers, when the answer obviously lies in the provisions of section 117 of the Labour Act 2007, in terms of which this Court is granted its general powers to determine appeals - also in respect of the awards made by arbitration tribunals⁷ established in terms of the Labour Act, as in this case – but where the statute - in addition – also seems to confer very wide and general powers under section 117(h) – and – in terms of which the Court ‘... *may make an order which the circumstances may require in order to give effect to the objects of this Act*’, meaning the objects of the Labour Act 2007.

[37] Furthermore the court may in terms of section 117(i):

‘(i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.’

[38] While I have no doubt that the envisaged referral back - in this instance - for purposes of properly and fairly having the aspect of ‘compensation’ determined in circumstances where both parties can present their cases - is something that the exigencies of this case would require in order to do justice between the parties, as I have stated above. It is also beyond doubt that this would generally be in line with the objects of the Labour Act, whose provisions have been enacted to do justice between employer and employee.

⁷ Compare section 117(a)(ii). As to the Court’s powers see also : Sections 89(10)(a),(b) and (c)

[39] In any event a referral back would be incidental to the functions the Court would be exercising on appeal under the Labour Act and its objects, where the envisaged referral back should be seen as a necessary step to be taken do achieve a fair result.

[40] I will accordingly accept the invitation and exercise my powers accordingly.

[41] In the result I make the following orders:

- a) The arbitration award, made by Ms Fabiola Katjivena, on 23 December 2018, is set aside in part; more particularly paragraphs 2 and 3 of her 'ruling' are hereby set aside;
- b) The matter is referred back to the Office of the Labour Commissioner for purposes determining an appropriate award, flowing from the respondent's unfair dismissal, afresh.

H GEIER
Judge

APPELLANT:

S.R Philander

Instructed by LorentzAngula Inc,

Windhoek

RESPONDENT:

S. Horn

De Klerk Horn & Coetzee Inc., Windhoek