REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NUMBER: LCA 55/14

In the matter between:

TOW IN SPECIALIST CC **APPELLANT**

And

CHRISTOPH URINAVI **RESPONDENT**

Neutral citation: Tow in Specialist CC v Urinavi (LCA 55-2014) [2016] NALCMD 3 (20 January 2016)

CORAM: UEITELE, J

Heard on: 22 May 2015 & 12 June 2016

Delivered 20 January 2016

Flynote: ***Labour law*** — Dismissal — Proof of — Onus of proof on employee to prove fact of a dismissal in unfair dismissal dispute in terms of s 33(4) of Labour Act 11

of 2007 — Act of dismissal conscious and clearly expressed command or order directed to employee that he/she was discharged from employer's service.
Labour law - Dismissal - For poor work performance - Requirements for lawful dismissal - Substantive fairness - Employer to conduct assessment of employee's performance - Coaching and training essential for proper assessment.

Summary: Mr. Chris Urinavi, the respondent was employed by the appellant, Tow-In Specialist, as a driver of breakdown vehicle. On 17 January 2014 the contract of employment terminated. The respondent alleged that the contract of employment was unfairly terminated by the appellant and he accordingly lodged a complaint of unfair dismissal with the Labour Commissioner. The appellant denied that the dismissal was unfair, contending that the termination of the contract of employment had been consensual. After conciliation failed the matter was referred to arbitration. The arbitrator found that the appellant terminated the respondent's contract of employment without a fair and valid reason and not in accordance with a fair procedure. The appellant appealed against that finding.

Held that Section 33(4)(a) of the Labour Act, 2007 casts a critical *onus* on the employee to establish the existence of the dismissal. It is only when the employee has established the existence of his or her dismissal that s 33(4)(b) comes into play, that is, the presumption that after the dismissal has been established it is presumed that the dismissal is unfair unless the employer proves that he or she had a valid and fair reason to dismiss and that he or she followed a fair procedure in dismissing the employee within the meaning of s 33(1) of the Labour Act, 2007.

Held further that the letter of 16 January 2014 by the appellant is the 'overt act that is the proximate cause of the termination' of the respondent's employment and that the termination constitutes a dismissal as contemplated in s 34(4)(a) of the Labour Act, 2007.

Held further the appellant has not led any evidence to show what the expected standard of performance was. What then did the appellant use as a measure against the respondent's performance? Neither did the appellant lead evidence to demonstrate how

the respondent underperformed and the termination of the respondent's contract of employment on the grounds of poor performance was therefore unfair.

ORDER

(a) That the appeal is dismissed.

(b) The arbitrator's award is amended to read as follows:

'1 The dismissal of Christoph Urinavi by Tow-In Specialist is both procedurally and substantially unfair.

2 Tow-In Specialist is ordered to compensate Christoph Urinavi by paying him an amount equal to ten month's salary (N$ 5 000 x 10) plus the leave benefits that would have accrued to Christoph Urinavi over the ten months period, being what he would have earned from February 2014 to November 2014, if he was not unfairly dismissed.

3 Tow-In Specialist is further ordered to pay Christoph Urinavi the amount which it deducted from his salary without his consent.'

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

JUDGMENT

UEITELE, J

Introduction

[1] In this matter the appellant is Tow-In Specialist CC (I will, in this judgment, refer to it as the appellant, except where the context requires me to refer to it as Tow-In Specialist). Mr. Christoph Urinavi is a former employee of the appellant and I will, in this judgment, refer to him as the respondent except where the context requires me to refer to him as Mr. Urinavi. The appellant appeals against the entire award issued under s 89 of the Labour Act, 2007[1], by the Arbitrator under arbitration case CRWK 220-14 handed down on 10 November 2014. The appeal is opposed by the respondent.

[2] On 4 April 2014, the respondent referred a dispute of unfair dismissal to the Labour Commissioner. The summary of dispute annexed to Form LC 21 sets out the basis of the referral as follows (I quote verbatim):

> 'I **Christoph Urinavi** started working at Tow-In Specialist in 2008 as a driver of breakdown vehicle number plate no: N86976W. In 2011 Mr Jan Kritzinger set a condition that he will deduct N$ 500 from each breakdown vehicle driver's salary to be used for the repair of client's vehicles in case they get damaged during the process of tow-in and that if you don't adhere to this condition you should consider yourself unemployed. Due to the fear of losing our work we agreed to the condition. In the middle of 2011 our boss increased this damage amount to N$ 1500.00 without our consent. I was dismissed in 2013 on the 10th December. I had reported to my boss 3 months in advance that my work vehicle isn't in a good condition and that it needs service, I was advised to park the vehicle and that I should go look for another work. Since 10 December 2013 I remained without a vehicle and I still continued to go log into work until when the office closed for holidays.
>
> In January, Mr Jan Kritzinger told me to come in to the office every day until at the end of the month so that he can pay me a settlement amount. I did as instructed and when it came to the settlement I was not satisfied with the amount which was paid out to me and I would also like to claim for the amount of N$ 1500.00 which was deducted from my salary every month because I didn't agree to that amount, the amount we had agreed on was only N$ 500.00 thus why I want the rest of my money to be paid back to me. And I would also like to claim for settlement for the 5 years and a half that I had worked at Tow-In Specialist.'

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1 Act No 11 of 2007.

[3] The events which gave rise to the respondent filing a complaint of unfair dismissal are briefly the following. The respondent commenced his employment with the appellant during the year 2008 as a driver of a pick-up vehicle. The appellant alleges that the respondent's performance was satisfactory from the time he commenced his employment until around the last half of the year 2011. On 29 November 2011, the appellant wrote a letter to the respondent addressing his alleged poor work performance, the letter, amongst other things, reads as follows:

> 'We hereby advise you that your work output (performance) is not to the satisfaction of the company. We hereby urge you to step up your working level and performance.
>
> Please be advised that your performance will be monitored for the next three months and should you not improve to the satisfaction and required level, the company will have no other option as to terminate your contract.'

[4] After the respondent received the letter of 29 November 2011 meetings between the respondent and the appellant's Human Resources consultant took place to discuss the respondent's performance. The meetings took place on 28 June 2012, 6 & 9 July 2012, 3 September 2012 and 2 October 2012. At the meeting of 9 July 2012 the respondent undertook to improve his performance and had also indicated that he will earn a commission of at least N$ 7 000 over and above his basic salary. On 2 October 2012 another meeting between the respondent and the appellant's Human Resources consultant took place. The issue of poor work performance was again raised at that meeting and the respondent again undertook to improve his performance.

[5] On 3 September 2013 the appellant's Human Resources consultant addressed another letter to the respondent in that letter the following issues were raised; the appellant's alleged poor work performance, the appellant's alleged involvement in private work and him allegedly making secret profits and the appellant's alleged unavailability over weekends when he is supposed to be on standby duty. The respondent was informed that the appellant has decided to grant him one more opportunity and that it (i.e. the appellant) has extended the period over which the

respondent had to perform with two months. The letter concluded with a declaration which was signed by the respondent in the following terms:

> 'Chris Urinavi declares that he will endeavour to the best to tow a maximum of 20 cars a month, from this date [i.e. 03 September 2013] of the hearing and that no additional opportunities will be granted again after the enquiry. Should I recover for a certain period of time and collapse again in less than 12 months the agreement will also apply.
>
> I Chris Urinavi declare I understand and agree to the above content above and acknowledge the receipt of his letter/agreement/terms signed on the 03rd of September 2013.'

[6] On the 4th of December 2013 the appellant's Human Resources consultant again held another poor work performance meeting with the respondent. At that meeting the respondent was informed that:

(a) The respondent had failed to attain the target he had set himself to tow 20 vehicles per month;

(b) The appellant is giving him (the respondent) a final opportunity for him to improve his performance;

(c) That the respondent was required to fill up the 'bakkie' and to improve his performance during the month of December 2013; and

(d) That the appellant will not grant the respondent another opportunity for him to improve his performance.

[7] During the period of December 2013 the respondent's bakkie experienced some mechanical problems. The respondent alleges that when he reported to the appellant that the bakkie had mechanical problems the appellant's response was that the respondent must park the vehicle and leave, which he did. On 16 January 2014, the appellant's Human Resources consultant had another meeting with the respondent. At that meeting the appellant informed the respondent that it (appellant) was no longer

prepared to continue employing him as a driver of a pick-up bakkie. The appellant accordingly offered the respondent an alternative position of driving a 'roll-back' truck. The respondent's reply was that he did not have the license to drive such a truck.

[8] When the respondent could not be accommodated in the alternative position offered to him the appellant prepared a letter of separation between the parties, which recorded that the employment relationship was being terminated by mutual agreement and that the respondent would therefore not pursue any case of unfair dismissal against the appellant. The appellant advised the respondent to consider the termination letter and to take it to the Ministry of Labour and Social Welfare for advice. On 17 January 2014, the respondent returned to the appellant and signed the letter. The letter reads as follows (I quote verbatim from the letter):

> ' **RE: TERMINATION FOR POOR WORK PERFORMANCE**
>
> With reference to our informal hearing held today at 16 January 2014 at 15:22. The employer has decided to terminate your employment contract due to Poor Work Performance which has being discussed and held with you over a period of 24 months.
>
> This service is voluntary terminated by mutual agreement. It is accepted that neither the employee nor anybody on his behalf will have any claim against the employer arising out of his or her termination.
>
> You will receive 1 months' salary for January 2014.
>
> a) Normal deductions will still be applicable e.g. SSC, PAYE
> b) You will receive a certificate of service;
> c) You will also be compensated for your accumulated leave of 30 days which amounts to N$ 2 076-90
>
> Neither you nor anybody on your behalf will pursue any allegation of any alleged unfair dismissal or unfair labour practice.
>
> I……..acknowledge the receipt of the letter and agree the above information and accept the 1 month's salary, and will not allege any allegations against the employer to any unfair dismissal. I conclude that Tow In Specialist will not make use of my services as from 01 February 2014. Your last working day will be on the 31st day of January 2014. It will be expected of you to be at work on time until the said last day.

……
C URINAVI
……
JJ KRITZINGER
Managing Director

[9] On 7 April 2014 the respondent referred a dispute of unfair dismissal to the Labour Commissioner. After the dispute was conciliated and arbitrated the arbitrator handed down an arbitration award in terms of section 86 (18) of the Labour Act, 2007 amongst others in the following terms:

> ‘1 The dismissal of Christoph Urinavi by Tow-In Specialist is both procedurally and substantially unfair;
>
> 2 The respondent is ordered to compensate the applicant by paying him an amount equal to eleven month’s salary (N$ 5 000 x 11), being what he would have earned from February 2014 to November 2014, if he was not unfairly dismissed and an amount of N$ 55 000, 00;
>
> 3 Respondent is further ordered to pay applicant an amount of N$ 10 250-00 being the amount deducted from his salary without his consent from March 2012 to July 2013
>
> 4 Respondent behaved in a frivolous and vexatious manner during the proceedings and is ordered to pay applicant an amount of N$ 3 200-00 as costs.
>
> 5 In entirety respondent must pay applicant an amount of N$ 68 450-000.’

Grounds of appeal and grounds of opposing the appeal

[10] The appellant now appeals against the award made by the arbitrator. As I have indicated above, the notice of appeal states that, the appellant intends to appeal against the whole of the award of the arbitrator made on 10 November 2014. On 24 November 2014 the appellant served its Notice of Appeal on the respondents, the Labour Commissioner and the registrar of this court. In the Notice of Appeal the appellant sets out his grounds of appeal as follows:

‘1 In the absence of evidence on which he could reasonably conclude that respondent had been dismissed by appellant, as required by section 33 (4)(a) of the Labour Act 11 of 2007, the arbitrator erred in finding that the respondent was dismissed by the appellant.

2 Alternatively to what is stated in paragraph 1 hereof, the arbitrator erred in finding that the dismissal was both procedurally and substantively unfair.

3 The arbitrator erred in holding that the appellant had unlawfully deducted N$ 10 250, 00 from respondent’s salary, in absence of evidence on which the arbitrator could reasonably have come to that conclusion.

4 The arbitrator applied the provisions of section 86 (16) incorrectly, when he ordered the appellant to pay an amount of N$ 3 200, 00 as costs.’

.

[11] The respondent opposes the appeal. His grounds of opposing the appeal are stated as follows:

‘1 Generally it will be contended by the respondent that the arbitrator acted fairly and within his powers conferred by the Labour Act, Act No. 11 of 2007 in ruling in favour of the respondent/employee during the arbitration proceedings, and rendering the arbitration award accordingly and that this honourable court should uphold the said award.

2 More specifically, the respondent will contend that the reasons adduced by the appellant should be rejected by this honourable court, in that:

2.1 appellant’s first ground of appeal is without merit, since it is clear from the facts that the respondent was dismissed by the appellant and that the respondent could not have voluntarily signed the so called termination agreement;

2.2 appellant’s second ground of appeal is unfounded, since it is patently clear that respondent was never afforded a proper opportunity to be heard at a

disciplinary hearing, nor was any such hearing conducted and accordingly the arbitrator was correct in finding that the respondent's was procedurally and substantively unfair; and

2.3 appellant's third ground of appeal is also flawed, since without an express consent by the respondent for the deductions to have been effected, which are not done in the normal cause and as stipulated by the Labour Act, appellant was not entitled to deduct the amount of N$ 1 500 (apart from the N$ 500) from respondent's salary, and that the calculation effected by the arbitrator is indeed correct.'

The issue which this court is called upon to determine

[12] From the grounds of appeal and the grounds of opposition to the appeal I am of the view that this court is called upon to determining the following issues:

(a) Did the appellant dismiss the respondent?

(b) If the answer is in the affirmative, was the dismissal procedurally and substantively fair?

(c) Was the appellant entitled to deduct an amount of N$ 1 500 from the respondent's salary?

(d) Did the appellant act frivolous and vexatious when it opposed the claim of unfair dismissal entitling the arbitrator to make a cost order against the appellant?

Was there a dismissal?

Submissions by counsels

[13] Mr. Marcus who appeared on behalf of the appellant submitted that, because the respondent agreed to the termination of the contract of employment there was a consensual termination of the contract of employment and thus no dismissal. He further

argued in the absence of evidence on which the arbitrator could reasonably conclude that respondent had been dismissed by appellant, as required by section 33 (4)(a) of the Labour Act, 2007, the arbitrator erred in finding that the respondent was dismissed by the appellant.

[14] Mr. Marcus further argued that at the arbitration proceedings, the appellant produced the termination agreement and led evidence to the effect that the respondent was given an opportunity to consider it and seek advice on it, before signing it. He furthermore argued that the arbitrator accepted that the respondent signed the termination agreement, but found that it was not valid for the reason that there was no consultation and consensus prior to the drafting of the termination agreement.

[15] Mr. Marcus also submitted that the arbitrator erred in law by finding that the termination agreement was not valid for the following reasons:

(a) The arbitrator found that the respondent was uncomfortable signing the termination agreement, despite the fact that the respondent never gave evidence to that effect.

(b) There is no legal requirement that the parties first had to agree on a draft termination agreement before it could be signed. In the absence of such a requirement, an employer is entitled to propose the consensual termination of the employment relationship which can be accepted by an employee after due consideration and reflection. This is what happened in these circumstances so the argument went.

(c) In the absence of evidence that proves that the Respondent was misled into signing the termination agreement or evidence that he signed the termination agreement under duress, the arbitrator could not have found that the respondent proved that he was dismissed. The respondent is bound by his signature so argued Mr. Marcus. In support of this submission Mr. Marcus referred me to the case of *Namibia Broadcasting Corporation v Kruger and Others*[2] where the

[2] 2009 (1) NR 196 (SC) at para 59,

Supreme Court approved the following dictum of Innes CJ in the matter of *Burger v Central South African Railways*[3] where he said:

> 'It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.'

[16] Mr. Boesak who appeared for the respondent on the other hand simply argued that due to the nature of the unequal power dynamics between an employer and employee, it could not be conceivably possible for the respondent to having signed the so-called termination agreement with full and informed consent, despite the fact that he returned the following day, the 17th January 2014, to do so. Accordingly, it is fatally flawed for the appellant to rely on the principle of *caveat subscriptor* in the circumstances.

[17] Mr. Boesak argued that the alleged termination agreement is against public policy, since it clearly attempts to violate an aggrieved employee's right to approach the courts or tribunals as per the Labour Act, 2007.

The legal framework:

[18] Section 33 of the Labour Act, 2007 sets out the circumstances under which an employer may dismiss an employee, that section amongst other things reads as follows:

> **'33 Unfair dismissal**
>
> (1) An employer ***must not***, whether notice is given or not, dismiss an employee-
>
> (a) without a valid and fair reason; and
>
> (b) without following-

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[3] 1903 TS 571 at 578

(i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34(1); or

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.

(2) …

(4) In any proceedings concerning a dismissal-

(a) *if the employee establishes the existence of the dismissal*;

(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.' (Italicized and underlined for emphasis)

[19] Section 33(4) of the Labour Act, 2007 thus places the *onus* on an employee (in this matter the respondent) to prove that he or she was dismissed by the employer and once the employee discharges that *onus* the obligation then shifts to the employer to satisfy the court that the dismissal was fair. In the matter of *Benz Building Suppliers v Stephanus and Others*[4] this court per Parker AJ put the position as follows:

> '[3] Section 33(4)(a) of the Labour Act casts a critical onus on the employee to establish the existence of the dismissal. It is only when the employee has established the existence of his or her dismissal that s 33(4)(b) comes into play, that is, the presumption that after the dismissal has been established it is presumed that the dismissal is unfair unless the employer proves that he or she had a valid and fair reason to dismiss and that he or she followed a fair procedure in dismissing the employee within the meaning of s 33(1) of the Labour Act. Thus, the employer must satisfy the requirements of substantive and procedural fairness to rebut the s 33(4)(b) presumption in order to succeed.'

[20] The Labour Act, 2007 does, however, not define the term *'dismissal'* it follows that I have to turn to the common law or other legal instruments defining dismissal to ascertain the meaning of the term 'dismissal.' At common law dismissal is equated with

4 2014 (1) NR 283 (LC)

the termination of the contract of employment by the employer with or without notice. Grogan[5] thus argues that at common law a 'dismissal' is deemed to have taken place if the employer gave the required notice, the employee would however have no legal remedy if the termination was by notice, because one of the implied terms of common law contracts of service is that such a contract may be terminated by either party on agreed notice. In the matter *Meintjies v Joe Gross t/a Joe's Beerhouse*[6] this court held that the word 'dismiss', where it is used in ss 45 and 46 of the Act[7], means the termination of a contract of employment by or at the behest of an employer. In the *Benz Building Suppliers* Parker AJ stated that 'at *somebody's* behest' means because somebody has ordered or requested an act or a thing. Thus 'behest' as a noun means 'command' and so, a thing done at the behest of someone would mean that that someone commanded, requested or ordered the act.

[21] Convention 158[8] and Recommendation 166 of the International Labour Organization do not refer to the term dismissal but rather to termination of employment at the 'initiative of the employer'. Cameron[9] argue that a dismissal takes place where the termination of employment is caused by the employer or the employment is terminated at the behest of the employer irrespective of how precisely the termination takes place in contractual terms. In the matter of *Ouwehand v Hout Bay Fishing Industries*[10] the Labour Court per Van Niekerk AJ articulated this view as follows:

> '[14] …Section 186(1)(a) of the Act defines a dismissal. For the purposes of these proceedings the parties agreed that the relevant provision is section 186(1)(a) which defines dismissal to mean "an employer has terminated a contract of employment with or without notice." This formulation would appear to contemplate that the employer party to a contract of employment undertakes an action that leads to the termination of the contract. In other words, some initiatives undertaken by the employer must be established, which has the consequence of terminating the contract, whether or not the employer has given notice of an intention to do so.

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5 John Grogan *: Dismissal, Discrimination & Unfair Labour Practices* 2nd Ed, 2007 Juta at 180.

6 2003 NR 221 (LC) (NLLP 2004 (4) 227 NLC).

7 The now repealed Labour Act, 1992 (Act 6 of 1992).

8 Namibia acceded to the Convention and ratified it on 28 June 1996 it thus follows that in terms of Article 144 of the Namibian Constitution the Convention is part of Namibian Law.

9 E Cameron, H Cheadle & C Thompson : *The New Labour Relations Act*:, Juta 1988 at 143.

10 [2004] 8 BLLR 815 (LC) or (2004) 25 ILJ 731 (LC).

> [15] It is accordingly *incumbent upon an employee to establish on a balance of probabilities*, where that employee claims to have been dismissed in terms of section 186(1)(a), *some overt act by the employer that is the proximate cause of the termination of employment.* A dismissal in this sense should be distinguished from a voluntary resignation (where the contract is terminated at the initiative of the employee) and the termination of a contract by mutual and voluntary agreement between the parties...' (Italicized and underlined for emphasis)

[22] In the matter of *Newton v Glyn Marais Inc*[11] it appears form the editor of the law report's summary that the applicant employee left the respondent's services after being accused of not doing her work properly. She claimed that she had been unfairly dismissed. The respondent claimed that she had left her employment voluntarily. The commissioner noted that, to establish that she had been dismissed the applicant employee had to prove that the respondent performed some overt act which signified an intention to terminate the contract. However, to establish that the termination was consensual, the respondent had to prove not only that there was an agreement to terminate, but also the specific terms of the agreement. He held that while the parties had discussed the possibility of a severance agreement, they had not reached agreement on its terms. The commissioner further noted that, while the fact that the applicant had packed her belongings and left the office might indicate an intention to resign, she had never communicated that intention to the respondent. He accordingly found that the applicant had not resigned and that the respondent had dismissed the applicant.

[23] In considering whether there had been a dismissal or a mutual agreement that the employee should leave the commissioner stated as follows (at p7 – 8):

> '**Dismissal or mutual agreement?**
>
> 42. A contract of employment may end in various ways; some consensual, other unilateral. Consensual would be, for instance, by way of an agreed termination agreement or even by way of a pre-determined termination date such as found in so-

[11] [2009] 1 BALR 48 (CCMA).

called “fixed-term agreements.” Section 186(1)(a) of the .....[LRA] reflects what the common law understands by a dismissal: the repudiation of the contract by the employer, or the employer’s acceptance of the employee’s repudiation. The only requirement that must be satisfied for this form of dismissal is that the contract must be terminated at the instance of the employer.

43. Just as the consensus of the parties brings the employment contract into existence, so too consensus may end a contract or may alter its basic terms. *For a contract to be terminated by mutual agreement, the agreement of both parties must be genuine.* Once there is genuine agreement, neither party can unilaterally change his or her mind; the employment contract ends and along with it the employment relationship. If the employment relationship is terminated by mutual agreement, the termination does not constitute a dismissal for purposes of the common law or the LRA. A dismissal occurs only if the employer performs some clear and unequivocal act that indicates that it no longer intends fulfilling its contractual commitments (see *Stocks Civil Engineering (Pty) Ltd v Rip NO and another* (2002) 23 ILJ 3568 (LAC); *Jones v Retail Apparel* [2002] 6 BLLR 676 (LC)).

44. In most cases, informing the employee that the contract has come to an end effects a dismissal in the sense as contemplated in section 186. Cases frequently arise in which the employee claims to have been dismissed, but the employer claims that the employee resigned. *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) serves as an example. In that case, the employer claimed that the termination was “consensual” as the employee had abandoned his employment voluntarily, and that the employer had accepted this. The court held that in such circumstances, the employee is required to prove “some overt act by the employer that is the proximate cause of the termination of employment”. Where an employer pleads that the termination of the employee’s employment was effected in terms of an agreement, the employer bears the onus to prove not only the parties’ common intention to enter into the agreement, but also its specific terms. In a case such as this were an employee effectively signs away her rights, it must be absolutely clear what the terms are, especially the amount involved. The employee effectively “sells” her rights for an amount. ....[I]t is simply a case of the money (see *Springbok Trading (Pty) Ltd v Zondani & others* (2004) 25 ILJ 1681 (LAC) and *Stocks Civil Engineering (Pty) Ltd v Rip NO and another* (2002) 23 ILJ 3568 (LAC)). The employer discharged this onus in the *Stocks Civil Engineering* case. The court found that an employee’s acceptance of a proposal that he would leave the

employer's service if he was paid a severance package, constituted a consensual termination even though the parties had not agreed on the amount of severance pay. The employer failed to discharge the onus in the *Springbok Trading* case.'

[24] In the in *Ouwehand v Hout Bay Fisheries*[12]: Van Niekerk AJ cautions that:

'[15] … Where it is alleged that a contract of employment has terminated by consensus between the parties, the court shall be cautious to ensure that the employer party does not seize upon words or actions that afford them meanings that were not intended. What is required is a consideration of all the factual circumstances and a determination of whether it can truly be said that the employee left the employ of his or her employer on his or her own accord and volition.

[27] As I have noted above, in matters such as this where it is alleged that an employee has effectively acquiesced to the state of affairs represented by the employer and elected on that basis to leave and seek employment elsewhere, the court ought to adopt a cautious approach.'

Evaluation.

[25] The arbitrator found that the respondent was dismissed, in so finding he said (I quote verbatim from the award):

'[35] A closer look at the above (i.e. the alleged settlement agreement), it is rather confusing. In the first paragraph of the letter/agreement, the respondent made reference to an informal hearing and went on to state:

> "the employer has decided (*my emphasis*) to terminate your employment contract due to poor work performance….".

Strangely however, in the next paragraph, it is stated:

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12 *(supra)* (at paras. [15] and [27]).

> "This service is voluntary terminated by mutual agreement. It is accepted that neither the employee nor anybody on his/her behalf will have any claim against the employer arising out of his/her termination."

[36] At the bottom of this letter is a paragraph clearly designed to protect the employer against any claim by applicant.

[37] The only logical conclusion we can draw from the way the document was prepared is that the respondent knew very well at the time it prepared this document that there are issues between the parties that were still outstanding. *It is also obvious that what was reflected on that document was a decision made by the employer and not an outcome of a consultation and consensus, prior to drafting it*. This is also evident from the fact that applicant was not comfortable signing it right away and had to seek advice from third parties. This would not be necessary if the document was prepared after consensus was reached.' (Italicized and underlined for emphasis)

[26] Mr. Marcus attacks the above finding by the arbitrator. He firstly argued that the respondent placed no evidence before the arbitrator on which the arbitrator could make a finding that the respondent was dismissed. I do not agree with Mr. Marcus. The undisputed facts are that, between November 2011 and December 2013 meetings took place between the appellant's Human Resources consultant and the respondent and at those meetings the topic of discussion was the respondent's alleged poor performance. There is furthermore evidence that the final meeting took place on 16 January 2014 at 15:30[13]. At that meeting the respondent was informed that he has had over two years to improve his performance (and he failed to do so) and that he will no longer be given the opportunity to improve his performance. He was thus given the option to acquire a license to enable him to drive a roll back truck and failure to do so would result in the termination of his contract of employment.

[27] At the meeting of 16 January 2014 the respondent was presented with a letter which informed him that because of his poor work performance the appellant had decided to terminate the respondent's employment. The letter continued to state that the

[13]The time of the meeting is apparent from Exhibit 'E' which is styled as 'Official Record of Poor work performance inquiry.'

termination is voluntary and by mutual agreement. Mr. Marcus argued that by signing the letter of 16 January 2014 the termination was consensual. In support of his submission he referred me to the case of *Ismail Nadia v B& B t/a Harvey World Travel Northcliff*[14] where the court upheld the *caveat subscriptor* rule. The brief facts of that case are as follows. The Respondent operated a travel agency owned and managed by two partners who are also sisters. It had employed Ms. Nadia (the applicant in that case) as an Intermediate Travel Consultant with effect from 22 February 2010. In terms of her employment contract, she was required to serve probation for three months. On 12 April 2010, Nadia took a day's leave in order to consult with her doctor. Following consultations, she was informed by her doctor that she was three months pregnant. On 13 April 2010, she had disclosed to one of the partners of the respondent that she was pregnant. On the same date, (i.e. on 13 April 2010) Nadia was called to an office in the presence of both partners. The two had congratulated her on her pregnancy and had in the same token, informed her that they were unhappy with her work performance and intended to give her notice of termination of her employment contract. On 14 April 2010, the Applicant was handed a letter of notice of termination of the employment contract which she signed. Her contract was to be terminated on 30 April 2010.

[28] It was common cause that prior (i.e. on 13 April 2010) to Nadia having been issued with the letter of notice, the parties had verbally discussed and agreed upon the termination and also discussed the possibility of temporary employment for Nadia. Other than that, the alternative position was to be offered at a reduced salary of R 9 000. Nadia did not fully commit to the alternative employment arrangements, and had continued to serve her notice. On 28 April 2010, Nadia informed the respondent's partners that she would not accept the alternative position and had left the services of the Respondent. After she left the respondent's services she referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration on 18 May 2010. When the dispute could not be resolved, the applicant approached Labour Court. The Labour Court (South Africa: Johannesburg) dismissed her complaint. When dismissing her complaint the court amongst other things said the following:

[14]An unreported judgment of the Labour Court of South Africa: Johannesburg Case Number JS 574/2010 delivered on 30 July 2013.

‘[52] It was argued on the Applicant’s behalf that she was forced into signing the agreement as “she had no choice”. I fail to appreciate in what material respects the Applicant was forced into signing this notice of termination, more specifically since the issues that were captured in that notice were a proper reflection of what was discussed and agreed with her. Thus the common intention of the parties and the terms of the termination were properly captured in the agreement. It was plain from the facts that the applicant had voluntarily signed the written agreement terminating her employment relationship with the respondent. She had been aware of her rights when she acted in that way.

[53] A further argument advanced in support of the proposition that the termination was consensual was that the consequences of an individual signature on a document were well-known. Reference in this regard was made to *Blue Chip Consultants (Pty) Ltd v Shamrock* [2002] (3) SA 231 (W) at 239F for the principle that a person cannot escape the consequences of his signature. Ms. Stroom during her closing arguments had submitted that the fact that the Applicant had signed the notice was immaterial. I cannot, however, agree with this dismissive approach in view of established legal principles surrounding the *caveat subscriptor* rule, which is that a person who signs a document is taken to have assented to what appears above his signature. See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) which was also referred with approval in *JZ Brink v Humphries Jewel (Pty) Limited* [2005] 2 All SA 343 (SCA).

[54] In dealing with this legal principle in *Khulekile Dyokhwe v De Kock and Others*, [2012] 10 BLLR 1012 (LC) at para 59. Steenkamp J stated as follows;

> ‘Our law recognises that it would be unconscionable for one party to seek to enforce the terms of an agreement where he misled the other party, even where it was not intentional. Where the misrepresentation results in a fundamental mistake (*iustus error*), there is no agreement and the “contract" is *void ab initio*. The purpose of this principle is to protect a person if he is under a justifiable misapprehension, caused by the other party who requires his signature, as to the effect of the document he is signing(*Brink v Humphries and Jewel (Pty) Ltd* 2005 (2) SA 419 (SCA); [2005] 2 All SA 343 (SCA)) It has also been held that the caveat subscriptor principle will not be enforced if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory (*Katzen v Mguno* [1954] 1 All SA 280 (T))

> [55] I did not understand the Applicant's case to be that she had signed the notice under some form of misrepresentation or that she was misled as to the contents of the notice. Her version that she had signed the agreement without reading or had no choice in the matter has been found to be improbable more so in view of her contradictory responses to questions in that regard. As the Applicant had not committed herself to the alternative offer of employment, there is no basis for a conclusion to be reached that she may have been misled. Furthermore, in view of the conclusion that she was not illiterate, and the fact that she was fully aware of her rights and the discussions of 13 April 2010, it cannot be said that she could not have known what she was attaching her signature to.'

[29] The facts of *Nadia v B & B*[15] matter are distinguishable from the facts in the present case. In this case there was no prior discussion the respondent was simply summoned to a hearing and there and then informed of the appellant's decision and presented with a letter which he was asked to sign. The respondent did not sign the letter his testimony is that he went to seek advice at the Ministry of Labour. He further testified that at the Ministry he was informed that he was treated unfairly and that is why he came back the following day and signed the letter. I am of the view that the facts of this case fit in perfectly well with the caution sounded by Van Niekerk AJ[16] that the court must ensure that the employer party does not seize upon words or actions that afford them meanings that were not intended and that what is required is a consideration of all the factual circumstances and a determination of whether it can truly be said that the employee left the employ of his or her employer on his or her own accord and volition.

[30] In this matter the letter concludes as follows:

> 'I……..acknowledge the receipt of the letter and agree to the above information and accept the 1 months salary , and will not allege any allegations against the employer to any unfair dismissal. I conclude that Tow In Specialist will not make use of my services as from 01 February 2014. Your last working day will be on the 31st day of January 2014. It will be expected of you to be at work on time until the said last day.
>
> Signed
>
> C URINAVI

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15 *Supra*

16 In the matter of Ouwehand *supra* at footnote no. 13

Employee

Signed
JJ RITZINGER
Managing Director'

[31] In my view these concluding words are not indicative of the fact that the respondent was agreeing to a mutual termination of the employment relationship. The words simply mean what they say namely that the respondent acknowledges that he has received a letter and that he agrees with the information contained in the letter. The letter contains contradictory information, in that on the one hand it conveys the employer's decision to terminate the employment relationship and on the other hand the information portrays the termination to be by mutual agreement thus leaving doubt as to what the respondent is agreeing to. I am thus satisfied that flowing from the *dictum* in *Ouwehand (supra),* the appellant undertook some initiative which had the consequence of terminating the respondent's contract of employment. In other words the letter of 16 January 2014 by the appellant is the 'overt act that is the proximate cause of the termination' of the respondent's employment. I further find that the termination constitutes a dismissal as contemplated in s 34 (4) (a) of the Labour Act, 2007.

Was the respondent's dismissal fair?

[32] Having found that the appellant dismissed the respondent the next question which follows is whether the dismissal was fair or not. Mr Marcus argued that the appellant had valid reason for terminating the respondent's contract of employment. That reason argued Mr Marcus was the respondents poor work performance. He submitted that the arbitrator found that the Respondent was dismissed for poor performance at work, specifically that he was not towing enough vehicles every month, and thus not bringing in money into the Employer's business. He concluded by submitting that:

(a) The respondent's performance fluctuated towards November 2011 and he failed to improve up until the termination of his employment contract;

(b) The Respondent was aware that his work performance was very poor and admitted that he performed poorly and had no excuse for not performing in accordance to the standard that was expected of him;

(c) The Respondent failed to meet his targets of earning a commission of N$ 7 000. per month and towing a maximum of 20 vehicles per month.

(d) Despite assistance from the Employer the Respondent still failed to improve his performance, and as such dismissal was the only appropriate sanction.

[33] Mr Boesak on the other side argued that the arbitrator was correct in finding that the respondent's dismissal was procedurally and substantively unfair, since there was no hearing whatsoever and agreed with the reasons and findings made by the arbitrator. He argued that the appellant did nothing more than the few occasions when they held informal poor performance hearings.

[34] I appreciate that an employer, especially one who operates a profit making venture, has a right to set down standards for their businesses in order to maximize their profit margins. However, where such standards are not met by an employee, the employer has the right to terminate the contract of employment of the underperforming employee. But as in the case of the termination of a contract of employment on the grounds of misconduct, termination of a contract of employment on the grounds of poor work performance must be effected in accordance with a fair procedure and for a valid reason.[17]

[35] How does an employer proof that an employee's work is deficient and does not meet the standards which the employer has set? A survey of judicial decisions indicate that the court have established two important principles which impact on the assessment of performance: First, as indicated above, an employer is entitled to set his own standards as to the performance required of his or her employees and the court will

[17] See section 33(1)(a) & (b) of the Labour Act, 2007.

only interfere where such standards are inappropriate.[18] Secondly, it is for the employer to determine whether or not the required standard has been met, and the court will interfere only if the performance assessment made by the employer is unreasonable. In the matter of *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith*[19] the then Industrial Court of South Africa held that:

> '... An employer is obliged to make an assessment (appraisal) when the reason for dismissal is substandard performance due to lack of skill in the broader sense. A value judgment regarding unacceptable performance must be objective and reasonable to be valid. It would, where there is no assessment be neither. The assessment would be incomplete if no attempt was made to establish the reason for the employee's shortcomings and, save where the incompetence is irremediable, an attempt was made to assist the employee to overcome his shortcomings by advice and guidance.... [The] authorities make it clear that an assessment is required. It will in fact be extremely difficult for an employer to claim that he has acted fairly if he fails to carry out a *proper appraisal of the employee's competence* ...'

[36] In the matter of *White v Medpro Pharmaceuticals (Pty) Ltd*[20] Ms White, the employee, was dismissed for consistently not meeting her sales targets. Her employers, Medpro, justified their decision to dismiss White by stating that meeting sales targets was one of White's main performance areas. Medpro also alleged that, if White had made the targeted number of client calls, she would've achieved her sales targets. The arbitrator held that it was Medpro's responsibility to prove the performance standards set were applied fairly. As the company didn't do this, the arbitrator found the dismissal to be both procedurally and substantively unfair. The arbitrator said:

> 'Failure by employees to meet performance standards set by their employers may of course justify the employee's dismissal. However, the right of the employer to jettison underperforming employees has now been qualified by the requirement that the performance standards set by the employers must be reasonable and consistently applied, and that the employer must before resorting to dismissal endeavour to ascertain

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[18] *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC), *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC) at 979E-F and *Palmer v S Mazor Aluminium CC* 1997 (2) 3 LLD 108.)

[19] [1993] 14 ILJ 171 (IC), at p 175.

[20] [2000] 10 BALR 1182 (CCMA).

> the reason for the underperformance and to assist the employee to maintain the required performance standard. Although these requirements may be less rigorous in the case of certain kinds of work, they must nevertheless be applied in every case when dismissal for poor work performance is considered.'

[37] In conclusion Le Roux and Van Niekerk[21] suggest. 'A dismissal for poor work performance must satisfy the test of substantive fairness. An employer is required to adduce evidence of a set of factual circumstances which discloses poor work performance on the part of the employee. It is incumbent on the employer, therefore, to provide sufficient proof of incompetence. In the present case the appellant has not led any evidence to show what the expected standard of performance was. What then did the appellant use as a measure against the respondent's performance? Neither did the appellant lead evidence to demonstrate how the respondent underperformed. The evidence simply shows that between November 2011 and December 2013 meetings were held between the respondent and the appellant's Human Resources consultant to discuss the respondent's alleged poor work performance. In my view these meetings fell far short of the requirement that an employer is obliged to make a proper assessment (appraisal) when the reason for dismissal is substandard performance due to lack of skill in the broader sense.

[38] A value judgment regarding unacceptable performance of an employee must be objective and reasonable to be valid. In my view the value judgment by the appellant in this case was not reasonable and objective. I say so for the reason that, in my view there is no evidence of how the appellant attempted to assist the respondent to overcome his shortcomings by advice and guidance. Mr. Marcus argued that the appellant assisted the respondent in that on 3 September 2013, the appellant gave the respondent an amount of N$ 2 000 for a personal matter and that during the same month, the respondent took 2 weeks leave in order to attend to personal issues and that such leave was not deducted from his annual leave. In December 2013, the employer also assisted the respondent by paying for the fuel for his bakkie. Mr. Marcus concluded by arguing that the arbitrator could, therefore not have reasonably found that the appellant did not assist the respondent. The point which Mr. Marcus misses is this, the

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[21] *The South African Law of Unfair Dismissal* (Juta and Co Ltd Cape Town 1994) at p 222.

appellant was required to identify the causes of the respondent's under performance and to institute remedial action in the form of training and counseling the respondent to enable him to perform to his optimum. The vacation leave is not training but as indicated was to enable the respondent to attend to his personable problems. The N$ 2000 advance was a loan which the respondent testified he had repaid. The fuelling of the bakkie in December 2013 is negated by the evidence of the respondent that after the bakkie was fuelled in December 2013 it had mechanical problems and it broke down and he was instructed to park it. The termination of the respondent's contract of employment on the grounds of poor performance was therefore unfair.

[39] Even if I were wrong in my conclusion that the appellant unfairly terminated the respondent's contract of employment the appellant still needed to discharge the *onus* resting on it to prove that it followed a fair procedure. Mr. Marcus argued that when the respondent's performance started to fluctuate towards the end of 2011, the appellant warned him that he was performing poorly and for 2 years the respondent was continuously counseled and assisted by the appellant in order to improve his performance, the respondent was warned that if he does not improve he would be dismissed; and the respondent was always given an opportunity to state his case during the performance meetings, up until the meeting of 16 January 2014 when his services were terminated.

[40] The meetings that took place between November 2011 and December 2013 do not in my view qualify as counseling sessions. From the documentation on record the meeting of 16 January 2014 appears to have taken a mere eight minutes (i.e. 15h22 to 15h30) and at that meeting and the meeting of 4 December 2013 the respondent was faced with a *fait accompli* in that the appellant had already decided that the respondent will not be given another chance and his contract of employment will be terminated for poor work performance. I therefore do not agree with Mr. Marcus that the respondent was given an opportunity to explain and address the allegations against him of poor performance. The procedure followed was in my view also not fair.

<u>Did the employer make unlawful deductions from the respondent's salary?</u>

[41] The third ground of appeal relates to the deductions made by the appellant

Section 12 of the Labour Act sets out the parameters within which lawful deductions can be made by an employer. It reads as follows:

> **‘12 Deductions and other acts concerning remuneration**
>
> (1) An employer must not make any deduction from an employee's remuneration unless-
>
> (a) the deduction is required or permitted in terms of a court order, or any law;
>
> (b) subject to subsection (2), the deduction is-
>
> (i) required or permitted under any collective agreement or in terms of any arbitration award; or
>
> (ii) agreed in writing and concerns a payment contemplated in subsection (3).’

[42] Mr. Marcus did not deny that the appellant made deductions exceeding what the respondent agreed to. What Mr. Marcus disputed is the amount deducted by the appellant. He submitted that the document submitted as ‘Exhibit G’ shows for a period of eleven months no deductions were made from the respondent’s salary. He argued that if arbitrator had taken cognisance of Exhibit G, he would have found that the Employer only over deducted N$ 5 250. He further submitted that an amount N$ 1 106 should have been deducted from N$ 5 250, which was a refund to all employees during December 2011 from the fund into which the deductions were paid, thus leaving a balance of N$ 4 144. My own calculations indicate that the amount which the appellant over deducted from the respondent’s salary is the amount of N$ 5750.

Did the appellant act frivolous and vexatiously when it opposed the complaint lodged by the respondent?

[43] Mr. Boesak conceded, correctly in my view, that the arbitrator erred when he reached the conclusion that the appellant acted frivolously and vexatiously when it opposed the complaint lodged by the respondent. In view of that concession I will set

aside the award ordering the appellant to pay the respondents cost in the amount of N$ 3 200.

[44] The order I accordingly make is:

(a) That the appeal is dismissed.

(b) The arbitrator's award is amended to read as follows:

'1 The dismissal of Christoph Urinavi by Tow-In Specialist is both procedurally and substantially unfair.

2 Tow-In Specialist is ordered to compensate Christoph Urinavi by paying him an amount equal to ten month's salary (N$ 5 000 x 10) plus the leave benefits that would have accrued to Christoph Urinavi over the ten months period, being what he would have earned from February 2014 to November 2014, if he was not unfairly dismissed.

3 Tow-In Specialist is further ordered to pay Christoph Urinavi the amount which it deducted from his salary without his consent.'

(c) I make no order as to costs.

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SFI UEITELE
Judge

APPEARANCES

APPELLANT:	NIXON MARCUS Of NIXON MARCUS PUBLIC LAW OFFICE
FIRST RESPONDENT:	WERNER A BOESAK INSTRUCTED BY CLEMENT DANIELS ATTORNEYS