

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no.: LCA 4/2016

In the matter between:

TOBIAS DOMINIKUS

APPELLANT

And

NAMGEM DIAMONDS MANUFACTURING (PTY) LTD

FIRST RESPONDENT

PHILIP MWANDINGI

SECOND RESPONDENT

Neutral citation: *Dominikus v Namgem Diamonds Manufacturing* (LCA 4/2016)
[2018] NALCMD 5 (23 March 2018)

Coram: UEITELE J

Heard: 18 August 2017 and 19 October 2017

Delivered: 23 March 2018

Flynote: Dismissal – Substantive and valid reason must exist for dismissal – Dismissal – For Gross Negligence – What constitutes Gross Negligence.

Labour law: More than one sanction – Whether employer entitled to discipline an employee twice for same act of misconduct – Second enquiry may be held if fair to do so in circumstances – must be fair to both employer and employee.

Labour law: Reinstatement – Award of – Factors to be taken into account when considering order of reinstatement – Reinstatement already a tremendous inroad into common law principle that contracts of employment cannot normally be specifically enforced – Accordingly, discretion to order reinstatement must be exercised judicially and on sound grounds.

Summary: The appellant was initially issued with a written final warning, he refused to sign the warning – After his refusal to sign the warning he was charged with misconduct – A disciplinary hearing found him guilty of gross negligence and recommended that he be dismissed – He unsuccessfully appealed against the finding and sanctions and thereafter referred a dispute of unfair dismissal with the Labour Commissioner – The arbitrator found that the appellant’s dismissal was both procedurally and substantively fair – On appeal to the Labour Court.

Held that in the Namibian Labour Law context the question will always be whether an accused employee received a fair hearing prior to the decision to dismiss him or her.

Held that in this matter the appellant was issued with a final written warning without any disciplinary enquiry (whether formal or informal) into his conduct. It is a well-established principle of our law that any disciplinary action must be preceded by a fair hearing. The issuing of a final written warning to the appellant was therefore unfair and the appellant had the right to refuse to acknowledge such a warning.

Held that the decision to charge the appellant with misconduct was not taken because the respondent wanted to correct the appellant’s behaviour, but was taken because the respondent wanted to give the appellant what he had asked for and because the appellant had been making allegations against the management and other members of the respondent. This the court found, rendered the disciplinary hearing of 11 September 2013 and the resultant dismissal unfair.

Held that in labour law, negligence bears the same meaning as it does in other areas of the law namely the culpable failure to exercise the degree of care expected of a reasonable person.

Held that on a holistic view of the evidence, the arbitrator, in arriving at his decision, did not take proper account of the charges that were levelled against the appellant, and whether the evidence and material placed before him were sufficient to prove the allegations against the appellant and did also not consider what the respondent's workplace rules are or what the respondent's procedure with respect to handling and handing over diamonds from one employee to another employee were.

Held that on the basis of the evidence that was placed before the arbitrator, the court was of the view that no reasonable arbitrator would have reached the conclusion which the arbitrator as there was no evidence of the work place rule or procedure that the appellant in this matter failed to comply with.

Held that to force an employer to reinstate his or her employee is already a tremendous inroad into the common law principle that contracts of employment cannot normally be specifically enforced. Indeed, if one party has no faith in the honesty and integrity or loyalty of the other, to force that party to serve or employ that other one is a recipe for disaster. Therefore the discretionary power to order reinstatement must be exercised judicially.

Held that that it is just and fair to order the respondent to compensate the appellant by paying him (appellant) the remuneration that he (appellant) would have received over the period which he remained unfairly dismissed.

ORDER

1. The dismissal of Tobias Dominikus, by NamGem Diamonds Manufacturing Company (Pty) Ltd is both procedurally and substantively unfair.
2. Subject to paragraph 3 of this order the respondent, NamGem Diamonds Manufacturing Company (Pty) Ltd must pay to the appellant, Tobias Dominikus, an amount equal to the monthly remuneration which the appellant would have earned had he not been so unfairly dismissed from the date of dismissal (that is 20 September 2013) to the date that this judgment is granted.

3. Despite the order made in paragraph 2 above, the respondent must, from the time that it would have paid as contemplated in that paragraph, deduct any amounts which the appellant earned as a consequence of any employment, during the period of 20 September 2013 to 23 March 2018.
4. The appellant must fully disclose to the respondent all the income that he has received for the period between 20 September 2013 and 23 March 2018, as a consequence of any employment.
5. There is no order as to costs.

JUDGMENT

UEITELE J:

Introduction and background

[1] Mr Sitemo Tobias Dominikus¹ was, since 8 September 2000 until 18 September 2013, employed as a diamond sorter by NamGem Diamonds Manufacturing (Pty) Ltd, a private company incorporated and registered in accordance with the laws of Namibia and who is the first respondent in this matter (I will, in this judgment, refer to it as the 'respondent').

[2] The second respondent is Mr Phillip Mwandingi, a staff member of the Ministry of Labour, who was on 4 March 2014 designated by the Labour Commissioner to, in terms of s 85 of the Labour Act, 2007, arbitrate a dispute of unfair dismissal that was referred to the Labour Commissioner by the appellant. The second respondent did not, in my view correctly so, participate in these proceedings. I say correctly so because the second respondent was performing adjudicatory functions and has no direct and substantial interest in this matter, so there is no need to cite him and make him a party to these proceedings.

¹ Tobias Dominikus is the appellant in this appeal and is, in this judgment, referred to as 'the appellant'.

[3] The incident that gave rise to this appeal occurred on 18 July 2013 at the respondent's factory, which is situated in Okahandja and that incident led to other events occurring over the following two or three days. On Thursday the 18th of July 2013, a certain Mr Benjamin Shindumbu (I will in this judgment refer to this person simply as 'Benjamin') who is also employed by the respondent, was issued with parcels containing four diamonds which he had to work on that day. It is appropriate for me to stop here and observe that the respondent had a system whereby all the diamonds issued were tracked. The diamonds so issued had, at the end of the day to be returned. At the close of business the diamonds issued were checked and balanced with the diamonds returned so as to ensure that all the diamonds issued were accounted for and returned.

[4] On the day in question (that is 18 July 2013) and at around 13h25 Benjamin, while he was in his work cubicle, threw a parcel containing two diamonds to the appellant. At the time when Benjamin threw the parcel to the appellant, the latter was busy talking on his mobile telephone.

[5] At the end of that day, all the diamonds that were issued were checked against the diamonds returned. The figures would not balance as two diamonds could not be accounted for. The fact that two diamonds could not be accounted for was reported to the security division of the respondent. The security manager of the respondent resolved to conduct a search for the two missing diamonds. The search conducted on 18 July 2013 and which involved all the respondent's staff who were working in the sorting division continued well into the 'wee' hours (the evidence is that the search continued until around 02H00) of the following morning yielding no positive results. The search for the two diamonds resumed again at 09H00 AM on Friday 19 July 2013 and again the two diamonds could not be found.

[6] On Saturday 20 July 2013 the respondent's general manager, and the production manager decided to view the video material captured by the security cameras which were installed on the factory premises. The video material allegedly showed that Benjamin threw something from his work station to the appellant at his work station. The video material further showed that the thing thrown by Benjamin hit the table lamp on the desk of the appellant and fell into a gap on the microscope which was being used by

the appellant. The video material further showed the appellant who was busy on his mobile telephone standing up and looking around but when finding nothing continued to speak on his mobile telephone.

[7] On Sunday the 21st July 2013, the general manager and the production manager, after they viewed the video material and after they saw the portion where something was thrown by Benjamin to the appellant, decided to go to the appellant's work station and searched the microscope. Upon searching the microscope they found a parcel in the gap of the microscope. They allegedly did not touch the parcel but summoned the head of the respondent's security division who came and removed the parcel and found that the parcel contained the two missing diamonds.

[8] After the two diamonds were found, the respondent on 5 August 2013 issued warnings to both Benjamin and the appellant. Benjamin was issued with a first written warning which warning he accepted and signed for. The appellant was also issued with a warning but in his case the warning was a final written warning. Contending that a final written warning is a severe disciplinary step which ought to have been preceded by a disciplinary enquiry the appellant refused to sign the final written warning. When the appellant refused to sign acknowledgment for the final written warning, the respondent decided to institute formal disciplinary action.

[9] On 13 August 2013 the appellant was served with a notice to appear at a disciplinary hearing scheduled for 11 September 2013. To the notice was attached a charge sheet, the charge sheet amongst others read as follows:

'On the 18th of July 2013 at around 13:25, Benjamin Shindumbu called you from his cubicle in order to provide you with two parcels, each containing one diamond in order for you to grade same. After Mr Shindumbu called you, he threw the two parcels to you accordingly. At the time, you were engaged on your cellphone and did not pay proper attention to the parcels being thrown to you. You failed to conduct a proper search for the parcels, after realizing that same had been thrown to you. You also failed to take the necessary steps in informing management, security and/or the company regarding the incident and as a result, the company suffered extensive losses in finding and securing the parcel in question.

More particularly, it is alleged that:

1. You failed to conduct a proper search for the parcels and continued with your other duties without any further regard to the parcels in question, as it would have been expected from a reasonable person in your position;
2. At close of business 18 July 2013, you were specifically informed by the company that there were two parcels short after reconciliation had been done of all the diamonds worked on for that day;
3. You failed to inform management, security and /or the company as per standard procedure that two parcels had been thrown to you and that you could not locate same after a brief search;
4. Due to the missing parcels not being found on 18 July 2013, the company had to stop overtime production to conduct further search and lost 2 more hours on the 19th July 2013 to conduct another search;
5. After a diligent search, the two parcels containing diamonds were found in your cubicle;
6. There were only two missing parcels on the day in question and same was found in your cubicle;
7. Your lack of skill, care, attention and diligence in performing your duties on the day in question and in this specific incidence, resulted in the company suffering a loss in the amount of N\$ 30 870-00;
8. Had you exercised the proper care and skill in following the prescribed procedures and/or effected a diligent search for the parcels in question, the company would not have suffered any loss and
9. Your conduct in this regard is observed as grossly negligent. Such alleged misconduct has resulted in the following **ALLEGATIONS AND OR CHARGES:**

“1. **Gross Negligence** in that you failed to exercise the standard of care and skill that can reasonably be expected from an employee with your degree of skill and experience and as a result thereof, the employer suffered a loss in the amount of N\$30,870.00, due to production loss, alternatively

2. **Negligence** in that you failed to exercise the standard of care and skill that can reasonably be expected from an employee with your degree of skill and experience and as a result thereof, the employer suffered a loss in the amount of N\$30,870.00, due to production loss.'

[10] On 11 September 2013, the appellant attended the disciplinary hearing. After the evidence was led at the disciplinary hearing, the appellant was found guilty on the main charge of Gross Negligence. The recommendation was that he be dismissed from the respondents' employment. The recommendation was executed on 20 September 2013. The appellant, on 25 September 2013, appealed against the decision to dismiss him. The appeal was heard on 29 December 2013 at which proceedings, the dismissal was upheld.

[11] Following his dismissal the appellant, on 24 February 2014, lodged a complaint or dispute of unfair dismissal with the office of the Labour Commissioner. As I indicated above the Labour Commissioner, on 4 March 2014, designated a certain Mr Phillip Mwandingi as the arbitrator. The Labour Commissioner, on the same day (i.e on 4 March 2014) also notified the parties that a conciliation meeting or arbitration hearing will take place on 14 April 2014 at the Offices of the Ministry of Labour and Social welfare in Okahandja.

[12] From the record before me, it is not clear why the conciliation proceedings did not take place as scheduled on 14 April 2014. It is also not clear as to when the conciliation proceedings took place but what is clear is that the arbitration proceedings which, commenced on 18 September 2014, were preceded by conciliation proceedings. At the arbitration hearing, both the appellant and the respondent presented oral evidence to the arbitrator, they also called witnesses and cross-examined those who testified against them. Both parties were represented during the arbitration proceedings. The appellant was represented by a certain Mr Tjihero who is an officer of the Mineworkers Union of Namibia and the respondent was represented by a certain Simon Raines, a member of the Namibia Employers Association.

[13] On 7 December 2015 the arbitrator, after he evaluated and assessed the evidence placed before him, delivered his award. In the award, the arbitrator found that the appellant's dismissal was procedurally and substantively fair. The arbitrator

accordingly dismissed the appellant's complaint. The appellant is aggrieved by the decision to dismiss his complaint of unfair dismissal and it is against that decision that this appeal lies. The appellant filed its notice of appeal on 16 January 2016.

The appeal, the grounds of appeal and the grounds opposing the appeal

[14] The grounds of appeal contained in the plaintiff's notice of appeal are four in total. The first ground of appeal relates to the finding that the appellant's dismissal was procedurally and substantively unfair. The appellant contends that the arbitrator failed to, on the facts presented to him, to consider whether or not the conduct of the appellant on 18 July 2013 constituted gross negligence. The second ground of appeal relates to the finding by the arbitrator that the evidence as to how the parcel containing the missing diamonds was found was irrelevant. The third ground of appeal relates to the finding by the arbitrator that the appellant was in law correctly issued with a final written warning. The fourth ground of appeal relates to the arbitrators alleged failure to consider whether the disciplinary enquiry which ensued after the appellant was already issued with a written final warning on the same facts was correct. I will in the course of this judgment return to the grounds of appeal.

[15] The respondent opposed the appeal on three grounds. The first ground of opposition is that the appeal did not comply with s 86 of the Labour Act, 2007 and Rule 15 of the Labour Court Rules. The second ground of opposition is that the 'questions of law' raised by the appellant are actually 'questions of fact' and as such the notice of appeal is defective. The third ground of opposing the appeal is, in summary, that the arbitrator was correct in his findings and that the findings by the arbitrator are findings to which 'any reasonable person would come'.

[16] It is therefore clear that the issues which this court must resolve are:

- (a) Whether, on the evidence placed before the arbitrator, he was correct in finding that the respondent discharged the onus to prove that it had a valid and fair reason to dismiss the appellant?

- (b) Whether, on the evidence placed before the arbitrator, was he correct in finding that when the appellant refused to sign the written warning issued to him, the respondent was entitled to give the appellant what he asked for.

[17] The appellant, realizing that his appeal did not comply with s 86 of the Labour Act, 2007 and rule 15 of the Labour Court Rules, applied to this court for the condonation to so comply with the s 89 of the Act and the Rules of the Labour Court. This Court per Prinsloo J condoned the appellant's non-compliance with Rule 17(25) read with Rule 17(19) and also reinstated the appeal. The matter was thereafter set down for hearing before me on 18 August 2017. On that day I enquired from both counsel for the appellant and the respondent, whether the fact that the respondent initially issued the appellant with a final written warning and thereafter withdrew it after the appellant refused to sign it, and charged the appellant with misconduct and, imposed a sanction of dismissal does not constitute double jeopardy. I posed that question because both counsel had not dealt with it in their heads of arguments. After I posed the question counsel requested an opportunity to supplement their heads of argument. I accordingly postponed the matter to 19 October 2017 and amongst others made the following order:

'2 Counsels are granted leave to supplement their heads of argument in order to address the following aspects.

- (a) ...does the rule against double jeopardy operate in our [Namibia] labour law context?
- (b) What constitutes the misconduct of gross negligence?
- (c) In view of the fact that the appellant was dismissed more than four years ago, what is the appropriate remedy if the Court were to find that the appellant's dismissal was unfair?'

[18] Both counsel for the appellant and respondent filed supplementary heads of arguments and I hereby express my gratitude to counsel for the industry in putting those heads of arguments together. The questions that I am required to determine are the questions set out in paragraphs 16 and 17 of this judgment. I find it appropriate to, albeit briefly, before I consider the issues which I am called upon to decide in this appeal,

briefly set out the legal principles governing those aspects.

The applicable legal principles

[19] Labour Relations in Namibia are governed by the Labour Act, 2007² the section that is relevant to the dispute in this matter is s 33. That section 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-
 - (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.'

[20] Section 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.

[21] Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words the reasons why the employer dismisses an employee must be good and well grounded; they must not be based on some spurious or indefensible ground³. This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule⁴. The rule, that the employee is dismissed for breaking, must be valid and

² Act No. 11 of 2007.

³ Collins Parker: *Labour Law in Namibia*, University of Namibia Press, at p 143. Also *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC).

⁴ *Namibia Breweries Ltd, v Hoaës NLLP* 2002(2) (LC).

reasonable. Generally speaking, a workplace rule is regarded as valid if it falls within the employer's contractual powers and if the rule does not infringe the law or a collective agreement.

[22] The requirement of substantive fairness furthermore entails that the employer must prove that the employee was or could reasonably be expected to have been aware of the existence of the rule. This requirement is self-evident; it is clearly unfair to penalise a person for breaking a rule of which he or she has no knowledge of. The labour court has stressed the principle of equality of treatment of employees – the so – called parity principle. Other things being equal, it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past (historical inconsistency), or to dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency)⁵.

[23] Apart from complying with the guidelines for substantive fairness, an employee must be dismissed after a fair pre-dismissal enquiry or hearing was conducted. In the South African case of *Mahlangu v CIM Deltak*⁶ the requirements of a fair pre-dismissal hearing were identified as follows: the right to be told of the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the enquiry; the right to some form of representation; the right to call witnesses; the right to an interpreter; the right to a finding (if found guilty, he or she should be told the full reasons why); the right to have previous service considered; the right to be told of the penalty imposed (for instance, termination of employment); and the right of appeal (usually to a higher level of management). Although these principles are not absolute rules, they should be regarded as guidelines to show whether the employee was given a fair hearing in the circumstances of each case⁷. (Underlined for emphasis)

[24] The Labour Court has placed so high a value on procedural fairness that in many cases employees were granted compensation or even reinstated because of a lack of proper pre-dismissal procedures, even though the court was satisfied that there would otherwise have been a valid reason for the dismissal⁸. Parker has argued that in view of

⁵ *SVR Mill Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2004) 25 ILJ 135 (LC).

⁶ (1986) 7 ILJ 346 (IC).

⁷ *Bosch v T H U M B Trading (Pty) Ltd* (1986) 7 ILJ 341 (IC).

⁸ *SPCA v Terblanche*, NLLP 1998(1) 148 (NLC). *Shiimi v Windhoek Schlachtereij (Pty) Ltd* NLLP 2002(2) 224 (NLC), *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others*; an unreported judgment of the Labour Court of

the clear and unambiguous words of s 33(1)(a) and (b) of the Labour Act, 2007 even where an employer succeeds in proving that he had a valid and fair reason to dismiss an employee, the dismissal is unfair if the employer fails to prove that it followed a fair procedure⁹. Also see the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*¹⁰ where Karuaihe J said:

'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair.'

[25] I will now proceed with the enquiry as to whether the double jeopardy rule operates in in the context of Namibia labour law. The basic principles of *autrefois convict*, and *autrefois acquit*, originates from the common law and later codified in the Constitution. Article 12(2) of the Namibian Constitution provides that:

'(2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction".'

The *rationale* behind the principles of *autrefois convict*, and *autrefois acquit* is to ensure that cases are finalized and that those cases which are closed should not be re-visited except on recognised circumstances.

[26] In the employment context, double jeopardy occurs where an employee is punished twice for the same incident of misconduct or poor performance. An essential requirement of the double-jeopardy rule is that the charges against the employee in the second hearing are the same as they were in the first. This does not mean that the employer can simply redraft the charges in a different form. The test is whether the charges relate to the same cause of action (i.e. the same alleged misconduct).

Namibia Case No. LCA 47/2007, delivered on 3 July 2008 and *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR 123.

⁹ Collins Parker: *Labour Law in Namibia*, University of Namibia Press, at p 156.

¹⁰ 1998 NR 90 (LC).

[27] I have searched and came across no Namibian labour case where the principle of double jeopardy was discussed. In South Africa the principles were discussed in the matter of *BMW (SA) (Pty) Ltd v Van der Walt*¹¹. The facts of this case are that, in 1994 BMW had declared certain wheel alignment equipment redundant and having no value. Van der Walt (an employee of BMW) came to hear of it and also discovered that the scrap value was actually R15 000. Van der Walt arranged that his fictitious company should purchase the scrap metal. Unbeknownst to BMW, Van Der Walt had received a repairing invoice of R11 000.

[28] Van der Walt facilitated, without disclosing all the facts to BMW, for the removal of the equipment by a close corporation from BMW's premises for repairs. After the close corporation repaired the equipment, it sought to buy the equipment and offered R50 000 for the purchase of the equipment. Van der Walt arranged that his fictitious company would invoice the close corporation for the equipment. When the close corporation realized that all was not well, it informed BMW. The employer instituted disciplinary proceedings against the Van der Walt. On or about 11 January 1995, the disciplinary inquiry found that the employee has not committed misconduct and, as a result, no sanction was imposed.

[29] BMW alleging that 'subsequent to the hearing on or about 11 January 1995, further and new information became known to the respondent and on or about 17 February 1995, Van der Walt was charged with a new and different charge of misconduct in that it was alleged that Van der Walt made certain misrepresentations when the wheel alignment was removed from the BMW's premises. Van der Walt was found guilty this time and was dismissed. He challenged his dismissal in the Industrial Court. The court found for Van der Walt. BMW appealed the decision to the Labour Appeal Court. The majority of the court considered the employee was guilty of a fraudulent representation by non-disclosure as he was under a fiduciary duty to his employer to inform it of its error. The majority (Conradie JA with Nicholson JA concurring) said:

'Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in *Amalgamated Engineering Union of SA & others v Carlton Paper of SA (Pty)*

¹¹ (2000) 21 ILJ 113 (LAC).

Ltd (1988) 9 ILJ 588 (IC) at 596A-D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res iudicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick.¹²

[30] The minority judgment was delivered by Zondo AJP he said:¹³

'32. ...My colleague, Conradie JA, expresses the view in his judgment that an employer is entitled to subject an employee to more than one disciplinary enquiry if it is fair to do so. Elsewhere he says it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.

According to Conradie JA, the test whether or not an employer is entitled to subject an employee to more than one disciplinary enquiry is whether or not it would be fair for the employer to do so.

33. I have a difficulty with the test proposed by my colleague. My difficulty lies in this. Firstly, the question whether an employer is entitled to subject an employee to more than one disciplinary enquiry arises in the context of a broader question whether or not the dismissal of the employee is fair. In order to decide whether the dismissal of the employee is fair, it must be determined whether or not the employer was entitled to subject the employee to more than one disciplinary enquiry. It seems to me that in that context one cannot answer the question as to whether the dismissal of the employee is fair where such dismissal is the result of a second disciplinary enquiry by saying the employer is entitled to subject the employee to a second disciplinary enquiry if it is fair to do so. It appears to me to be circuitous reasoning. Secondly that test seems to take into account only the employer's interests and completely to ignore those of employees. In my view the correct test would be one that takes into account the interests of employers as well as those of employees and seeks to balance them while mindful of the objects of the Act and of the fact that labour law does not exist in a vacuum but is part of the whole legal system.

34 Another approach would be to say an employer is only entitled to subject an employee to a second disciplinary enquiry in exceptional circumstances. That would ensure that an employer will have to prove exceptional circumstances before the dismissal of an employee on the basis of a second disciplinary enquiry could be found to

¹² At para [12].

¹³ At paras [32]-[36]. I have in order to avoid confusion omitted the square brackets before the numberings.

be fair. This test places a big burden on an employer and makes it difficult (though not impossible) for him to use endless disciplinary enquiries to harass an employee. This is justified when one has regard to the fact that the employer would have been entitled to a reasonable opportunity of collecting evidence before convening the first disciplinary enquiry so that there would be no need for a further enquiry. This approach will have most of the advantages of the first approach dealt with above but will have the added advantage that in exceptional circumstances an employer would be entitled to subject an employee to a second disciplinary enquiry - which advantage the first approach does not have.'

[31] The Labour Appeal Court revisited *BMW v Van der Walt* in the matter of *Branford v Metrorail Services (Durban)*¹⁴. The brief facts of this case are that Branford who had 21 years in the service of *Metrorail* was charged and subsequently dismissed for making eight fraudulent petty cash claims totaling R 834 for items such as tea, coffee, sugar and milk powder. He was also found to have forged a signature of his manager. Following a meeting with his line manager regarding the allegations, the line manager gave the employee a 'dressing down' and issued a formal warning. The Regional management conducted a formal audit.

[32] After the audit, the employee was subjected to a disciplinary hearing and was later dismissed on 20 October 2000. Branford laid a complaint of unfair dismissal. The arbitrator found that Branford had been subjected to two disciplinary inquiries, and could find no 'exceptional circumstances' to justify the second inquiry. The Labour Court held that the manager's talk to Branford was not an inquiry at all, and that the formal hearing was in fact the first inquiry. There was accordingly no breach of the double jeopardy principle.

[33] Branford was dissatisfied with findings of the Labour Court and appealed to Labour Court of Appeal. The Labour Court of Appeal was again split. One judge held that there was no basis for interfering with the commissioner's decision. Willis JA who delivered the minority judgment said¹⁵:

'The norm in assessing the fairness of a disciplinary offence is a single disciplinary enquiry conducted in compliance with the employer's disciplinary code. Where there has been

¹⁴ (2003) 24 ILJ 2269 (LAC).

¹⁵ At para [7] quoting from *Frost v Telkom SA* (2001) 22 ILJ 1253 (CCMA).

compliance with the company's disciplinary code and the first enquiry has adequately canvassed the facts involved, it will be unfair to hold a second enquiry.'

[34] But the majority (Jafta JA with Nicholson JA concurring) ruled that the commissioner had erred by looking for exceptional circumstances, and ignoring considerations of fairness. Jafta JA argued that the current legal position as pronounced in *Van der Walt* is that a second enquiry would be justified if it would be fair to institute it.

[35] Having set out some of the legal principle that will guide me to resolve the questions that confront me, I now proceed to deal with the merits of the appeal.

Was the respondent entitled to institute the disciplinary hearing?

[36] The first question that I have to resolve is whether or not the respondent was entitled in law, to institute a disciplinary hearing after the appellant refused to sign the final written warning that was issued to him. The evidence which is not in dispute in this matter is that, after the parcel containing the two diamonds was found, Benjamin who threw the parcel to the appellant received a written warning and the appellant a final written warning. The appellant refused to sign the final written warning where after the respondent resolved to institute formal disciplinary hearing and which hearing resulted in a finding of guilty, leading to the appellant's dismissal. Can it, in the circumstances, be said that the employer breached the 'double jeopardy' rule when it decided to institute the disciplinary hearing? In other words was the appellant punished twice for the same incident of misconduct?

[37] I have indicated above that I have not found a Namibian case that deals with this question. The position in South Africa appears to be that as was pronounced in *Van der Walt*¹⁶ matter namely that 'a second inquiry would be justified if it would be fair to institute it.' I am aware of the decision in the case of *Kamanya and Others v Kuiseb Fish Products Ltd*¹⁷ where the Court was confronted with the question of whether an initially 'unfair disciplinary hearing' could be cured by a 'fair appeal hearing'. In that matter the Court said:

¹⁶ *Supra* footnote 11.

¹⁷ (1996) NR 123 (LC).

'... our Labour Act requires a fair hearing and a fair reason for dismissal, whether or not this was done in the course of a single hearing or in the course of more than one hearing and irrespective of whether one of those hearings is labelled an "appeal" hearing.'

[38] From the above it will be safe to conclude that in the Namibian Labour Law context the question will always be whether an accused employee received a fair hearing prior to the decision to dismiss him or her. In this matter the appellant was issued with a final written warning without any disciplinary enquiry (whether formal or informal) into his conduct. It is a well-established principle of our law that any disciplinary action must be preceded by a fair hearing. The issuing of a final written warning to the appellant was therefore unfair and the appellant had the right to refuse to acknowledge such a warning.

[39] At the arbitration hearing Mr Lavee who is the general manager of the respondent was asked why the respondent did not immediately institute disciplinary proceedings against both Benjamin and the appellant when the diamonds were recovered. His reply was the following (I will quote verbatim from the record):

'The reason we gave him the first written warning is that the time there was a lot of movement, not only with Shooter but also with Shooter where this common practice of throwing stones – check for me or help me, check this stone for a second. Therefore I can also not just wake up one day and blame the guy for doing something we know is happening, and to make it a crisis. So this is why we gave him a first written warning....'

[40] In response to a question as to why Benjamin and the appellant shared 'stones' (I presume that this refers to diamonds) the witness said the following:

'I can only assume but Tobias will be able to explain it better than me, because they share the job. And I assume that once a person is having a load, they doing the same work, once a person is having a load I will want my colleague to help me. But again Tobias will be able to answer better why they were sharing stones.'

[41] The above answer led to a further probe, the witness was asked whether it was allowed to share 'stones' and the witness' answer was that:

'The policy says no. Basically it says no, if you are having stones under your name they are your responsibility....Again the right procedure is if I want to give it to you I need to issue it to you.'

[42] The witness (i.e. Lavee) was furthermore asked why the appellant was issued with final written warning and thereafter a disciplinary hearing arranged. Lavee replied that they decided to institute disciplinary hearing against the appellant because the appellant refused to sign the written warning that was issued to him. Lavee said:

'Tobias [the appellant] refused to sign it [the written final warning] , and since then basically starting with the allegation that he is having against the management, against the securities, against the IT guys, that it is all a big (indistinct) it is all an event to get rid of him .

This the time we decided this the way it is going to be, we pulled back and we went for a hearing, We went for the hearing and this is why we are here today. Tobias could still be working at NamGem. Tobias if he would take responsibility that was clear shown to him on his action he would still work ...'

[43] From the above evidence, I find it difficult to escape the inference that the decision to charge the appellant with misconduct was not taken because the respondent wanted to correct the appellant's behaviour but because the respondent wanted to give the appellant what he had asked for and because the appellant had been making allegations against the management and other members of the respondent. This in my view renders the disciplinary hearing of 11 September 2013 and the resultant dismissal unfair.

Did the arbitrator err when he found the appellant guilty of gross negligence?

[44] There is another basis on which the appellant's dismissal can be found to be unfair. The appellant challenges the arbitrator's finding on the basis that the arbitrator's finding are not supported by evidence. The first ground of appeal is couched as follows:

'The arbitrator erred in law in finding that the basis for the appellant being found guilty of gross negligence by the respondent is the appellant's conduct, who, when the missing diamonds were reported missing on 18 July 2013 wasted the time of those who subsequently searched for the missing diamonds, whereas, according to the arbitrator, the searchers could

have focused on one place, being the appellant's cubicle, had appellant disclosed that diamond parcels were earlier thrown at him.

The arbitrator also failed to consider, in any respect on the facts presented whether the conduct of the appellant on 18 July 2013 constituted gross negligence for which an appropriate sanction was dismissal.'

[45] The respondent's basis of opposing this ground of appeal is that the 'questions of law' raised by the appellant are actually 'questions of fact'. The Supreme Court in the matter of *Wilderness Air Namibia (Pty) Ltd, v Janse van Rensburg*¹⁸ laid to rest the debate as to what is meant by question of law in s 89 of the Labour Act, 2007, O' Reagan who delivered the Court's judgment said:

'43 ... First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr Janse van Rensburg enter Runway without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record and may not be the subject of an appeal to the Labour Court.

44 If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperiled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed, and it echoes the approach adopted by appellate courts in many different jurisdictions.'

[46] My understanding of the appellant's complaint is, amongst other complaints, that the arbitrator did not, on the facts presented to him, in any respect consider whether the appellant's conduct on 18 July 2013 constituted gross negligence. If the appellant's complaint is found to be correct then the arbitrator's decision on the facts is one that

¹⁸ 2016 (2) NR 554 (SC).

could not have been reached by a reasonable arbitrator, and is thus arbitrary or perverse and is subject to appeal to this Court.

[47] In order to determine whether the arbitrator's decision is on the facts presented to him perverse, I will start by looking at the evidence presented to him and thereafter at the basis of his decision.

[48] The respondent called six witnesses at the arbitration hearing, the first witness being a certain Mr Lavee who is the general manager of the respondent. In summary, his evidence was that 18 July 2013 it was reported to him by the securities that they were unable to balance the diamond parcels. He said:

'On the 18th of July sometime after balancing it was communicated by my senior security manager that we are short finding two stones under the name of Benjamin Shindumbu.'

[49] Subsequent to this report, a search of the premises commenced. The witness testified that they searched all over the factory and they did not know where to look. The witness testified that "obviously we started with the room where Benjamin Shooter sits". Lavee continued that the appellant was part of the search team, but he never disclosed that there was a time when something was thrown at him while he was busy on his mobile telephone. He continued to testify that the search continued for two days without yielding any results.

[50] Lavee further testified that it is only after two days search that he and the production manager decided to view security video recordings that they observed Benjamin throwing something to the appellant, while he was on his mobile phone and the appellant appearing to notice that something was thrown at him and he looked for it but when he did not find what was thrown at him, he continued with his conversation on the mobile telephone. When they picked up this piece, they decided to focus their search of the missing diamonds on the microscope in the appellant's cubicle. When they went there they found the two parcels containing the two diamonds in the gauge of the appellant's microscope.

[51] Lavee furthermore testified that after the two missing parcels were found the respondent decided to issue Benjamin who threw the parcels of diamonds to the

appellant and the appellant with warnings. The appellant was then issued with a final written warning which he refused to sign. Lavee further testified that instead of signing the final written warning appellant started making allegations against every one, where after it was decided to institute formal disciplinary hearing against the appellant. Following the disciplinary hearing the appellant was found guilty and a sanction of dismissal imposed.

[52] The evidence of the other five witnesses did not differ in any material respect from the evidence presented by Mr Lavee, I therefore do not find any need to recount the other witnesses' evidence here. At the conclusion of the arbitration proceedings, the arbitrator concluded that the appellant, by failing to shorten the search which resulted in some losses to the respondent, was properly found guilty of the charges he faced. The arbitrator further found that, *'unfortunately for the appellant the chairperson of the disciplinary hearing came to the conclusion that the offence committed by the appellant warranted a sanction of dismissal'*.

[53] The arbitrator's reasoning in finding for the respondent is encapsulated in the following passages in the award (I quote extensively and verbatim from the award):

(59) From the evidence adduced it is obvious that some two diamonds got missing on a certain date. People embarked on a wide search, searching the whole premises including body searches on individuals. They could find nothing. The search lasted several days and production at one point came to a standstill. Applicant was around.

(60) Later some parcels were found on applicant's microscope according to respondent's testimony. On the other hand applicant maintained that if the parcels were found on top of his microscope, then someone must have planted it there. What he stated in his testimony and that of a witness he called was actually that it was impossible for the diamonds to be found on top of his microscope on that Sunday, some days after the search had commenced because a thorough search was carried out in his whole cubicle by himself, Shindumbu and other colleagues which according to him included turning that microscope upside down.

(61) The respondent through several witnesses however is adamant that the parcels were found stuck on top of applicant's microscope. Another issue raised by the applicant is the fact the diamonds were found by managers when they were inside the factory in absence of the Security officer. The video footage displayed by respondent was

apparently taken with a cell phone and not through CCTV footage. The applicant also has a problem with this,

(62) In a nutshell what applicant is saying is that the respondent targeted him by orchestrating a scene where the parcels which were missing would be found in his cubicle. But if I was to believe the applicant, there are some questions that will need to be answered first.

(63) The first question is that, if it could be believed that the parcels were planted by management on top of applicant's microscope, what would the motive be? If the motive was to get rid of applicant, then one would wonder why the same respondent opted to issue applicant with a warning instead of dismissing him right away.

(64) Secondly, the respondent testified that not so long before this incident it retrenched some employees, and if it did not want the applicant, it could simply have used the retrenchment opportunity to get rid of him, but his name was not on the list of those who were retrenched. This meant that respondent wanted to retain the services of the applicant.

(65) Thirdly the parcels discovered had some identities by way of some serial numbers and it was not disputed that the parcels found on top of applicant's microscope were identical to the ones which were missing.

(66) It then follows that how the parcels were found and who found them becomes irrelevant. What is relevant is that the parcels which were missing are the same parcel which were found. After these parcels were found applicant was issued with a warning for according to my understanding wasting time of the searchers, as they could have focused on one place, being his cubicle if only he could have disclosed that there was a time some parcels were thrown at him and based on video footage he was looking around after the throwing.

(67) I do not think he was issued with a warning because the parcels were found on his microscope but for failure to shorten the search which resulted in some losses to the respondent.

(68) Unfortunately applicant refused to accept the warning issued to him. He gave several reasons and the main one being that the sanction imposed on him was never preceded by a disciplinary hearing.

(69) Subsequent to this, the respondent gave him what he asked for, a formal disciplinary hearing. Disciplinary Inquiries are supposed to be conducted by neutral chairpersons who make their decisions/recommendations on the basis of evidence and facts placed before them. Unfortunately, in this case the chairperson came to a conclusion that the offence committed by the applicant warranted a sanction of dismissal as opposed to the warning earlier issued to him.

(70) The other issue is that applicant did not only ask for a disciplinary inquiry to be conducted but he also made some serious allegations against management such as that the whole thing was just a set-up, etc. some of these of these allegations have a potential to damage the trust relationship between the applicant as an employee and the respondent as an employer. This might have influenced the decision/recommendation of the disciplinary hearing chairperson.

(71) The question I now have to answer is whether dismissal was the appropriate sanction under the circumstances. Applicant was charged with Gross Negligence and Negligence and he was found guilty. No evidence was placed before me to suggest a sanction short of dismissal if an accused employee was found guilty of Gross Negligence in terms of respondent's disciplinary policy and or otherwise.

(72) I will therefore find no basis to interfere with the finding and sanction imposed by the independent chairperson of the disciplinary hearing which resulted in the dismissal of the applicant.' (Underlined for emphasis).

[54] These passages represent the only portion in the whole award providing one with a sense of the analysis conducted by the arbitrator of the evidence placed before him and which led him to conclude that Tobias's (the appellant) dismissal was fair. It is clear from these passages that the arbitrator's conclusion was based largely on his view that; the appellant's alleged failure to inform the respondent's management that parcels of diamonds were thrown at him led to a fruitless and unproductive search of the two diamonds resulting in financial losses to the respondent and the allegations allegedly made by the respondent against management.

[55] The comments I made above brings me to consider what constitutes the misconduct of gross negligence in the employment context. Grogan¹⁹ opines that in

¹⁹ Grogan John: *Workplace Law* 12th Ed 2017, ch 12-p 238

labour law, negligence bears the same meaning as it does in other areas of the law namely the culpable failure to exercise the degree of care expected of a reasonable person. In the workplace context, the 'reasonable person' would be the reasonable employee with experience, skill and qualifications comparable to the accused employee. The learned author continues and says:

'Negligence may manifest itself in acts or omissions. The test is whether a reasonable employee in the position of the accused employee would have foreseen the possibility of harm and taken steps to avoid that harm. Employees may be guilty of negligence even if no harm results from their acts or omissions; what matters is if they might have caused harm. Negligence is akin to carelessness; if the employee actually foresaw the harm, the misconduct would be classified as deliberate, not negligent, and would self-evidently be more serious. Negligence and poor work performance overlap to the extent that work negligently performed is poor. However, poor work performance connotes consistent slipshod work.

A single negligent act seldom warrants dismissal at first instance, unless it is of a kind so gross as to amount to recklessness.'

[56] The learned author in another work²⁰ argues that the test in negligence cases is 'objective': the employee's conduct is compared with the standard of skill and care that would have been expected of a hypothetical reasonable employee in the same circumstances.²¹ He proceeds to argue that the test also entails a 'subjective' element in that the hypothetical reasonable employee with whom the employee is compared must have experience and skill comparable with that of the employee charged. He continues and argue that negligence is usually established with reference to workplace rules or procedures in the workplace. He argues that:

'To warrant dismissal at the first instance, negligence by an employee must be 'gross'. Gross negligence may be said to have occurred if the employee is persistently negligent, or if the act or omission under consideration is particularly serious in itself.'²²

[57] Applying the principles I have outlined in the preceding paragraph to the facts of this case and the reasoning of the arbitrator, the conclusion is inescapable, in my view, on a holistic view of the evidence that, the arbitrator, in arriving at his decision, clearly

²⁰ John Grogan: *Dismissal* 2010, at 201.

²¹ *Ibid.*

²² *Supra.*

did not take proper account of the charges that were levelled against the appellant, and whether the evidence and material placed before him were sufficient to prove the allegations against the appellant and did also not consider what the respondent's workplace rules are or what the respondent's procedure with respect to handling and handing over diamonds from one employee to another employee were.

[58] If the arbitrator had considered those aspects, he would have realised that the only evidence with respect to the workplace rules or procedure relating to the receiving and handling of diamonds was that of Lavee who testified that once diamonds were issued to an employee, they remained the responsibility of the employee in whose name they were issued. He also testified that the practice of throwing diamonds between employees was prohibited and that management knew about the practice but did nothing about it, he testified that if an employee wanted to share diamonds with another employee that employee must issue the diamonds to the employee he or she wants to share the diamonds with.

[59] The evidence on the record is furthermore that at the end of the day on 18 July 2013, it became apparent that the two diamonds that were issued to Benjamin Shindumbu could not be accounted for. In my view the person who had the duty and obligation to explain what happened with the two diamonds was Benjamin and not the appellant. The evidence is furthermore that when Benjamin threw the diamonds to the appellant, the appellant was busy talking on his mobile phone and did not pay attention to Benjamin. I therefore fail to appreciate how, in those circumstances, the appellant was expected to know that Benjamin threw diamonds to him.

[60] On the basis of the evidence that was placed before the arbitrator, I am of the view that no reasonable arbitrator would have reached the conclusion which the arbitrator reached namely; that the appellant wasted time of the searchers, and failed to shorten the search time. There is no evidence of the work place rule or procedure that the appellant in this matter failed to comply with. The interpretation reached by the arbitrator is in my view perverse. The arbitrator's finding that the appellant was grossly negligent can therefore not be allowed to stand and is set aside.

The appropriate relief.

[61] Having concluded that the appellant was unfairly dismissed, what remains to be determined is the relief that may be granted by this court. Section 86 (15) of the Labour Act, 2007 empowers an arbitrator to make any appropriate arbitration award including an order of reinstatement of an employee or an award of compensation. The section confers a discretion on the arbitrator. The arbitrator has a discretion to determine whether compensation should be awarded at all, and if so, to determine what amount is reasonable. This court in turn is entitled to confirm, vary or set aside an order of the arbitrator 'according to the requirements of the law and fairness'²³.

[62] In the present matter, the appellant was dismissed on 29 December 2013, the appellant thereafter referred a complaint of unfair dismissal to the Labour Commissioner on 24 February 2014 (that is approximately two months after his dismissal). For reasons not explained on the record, the arbitration proceedings took more than 15 months (from September 2014 to December 2015) to complete. The appeal against the award issued by the arbitrator was filed on January 2016 and this judgment granted on 23 March 2018. The process of determining the dispute thus took a period of four years and three months. The question therefore is would it be just and fair to order the respondent to reinstate the appellant.

[63] Advocate Barnard who appeared on behalf of the respondent argued that order for reinstatement of the appellant in the same position he would have been but for the dismissal will, in the circumstances of this case, be unfair to the employer and must not be made. He provided two reasons for that submission. In the first instance, he submitted that the appellant was dismissed on a serious charge of misconduct and that during the investigation of the charges the appellant accused his employer of grave dishonesty, trumping up charges. These accusations, submitted Advocate Barnard, destroyed the trust relationship that existed between the appellant and respondent. Secondly, Advocate Barnard submitted that due to the long delay of approximately four years between the incident and the hearing of the matter in the Labour Court, it would not be fair to reinstate the respondent in his old position.

[64] Ms Nambinga who appeared for the appellant on the other hand, argued that taking into account the facts of this case, the track record of the appellant, the type of work he performed and the fact that his co – employee (Benjamin) continued to enjoy

²³ See section 89 (10) of the Labour Act, 2007.

employment security as well as all his benefits despite his (Benjamin's) misconduct, it would just be fair to order the respondent to reinstate the appellant. She referred me to the matter of *Parcel Force Namibia (Pty) Ltd v Tsaeb*²⁴ where Muller P said:

'I do not agree ... that these reasons should prevent the reinstatement of the respondent as an employee of the appellant in the same position. The long delay of four years was not the fault of the respondent. He was wrongly dismissed. In fact Swartbooi was reinstated. In respect of the argument of destroyed confidence, the respondent was a lorry driver and, though he had to act responsibly by delivering parcels entrusted to him, he was not in a position of, for example, a financial manager in the employ of the appellant. Reinstatement follows the decision by the chairperson of the district labour court to the effect that the respondent should have received a warning and should not have been dismissed by the appellant on the recommendation of the disciplinary committee. That means in fact that he would have continued with his work with the appellant. Reinstatement would not change it and in fact Swartbooi, who was apparently dismissed for the same reason, was reinstated. The *Pupkewitz* decision is distinguishable from this matter, because the circumstances are totally different.'

[65] In the matter of *Swartbooi and Another v Mbengela NO and Others*²⁵ the Supreme Court held that the remedying award must not only be fair to employees but also to employers. The Court proceeded to acknowledge that the Labour Court has declined to order reinstatement in cases of delay, given that prejudice could result to innocent third parties who have positions held by successful appellants. Other factors to be taken into account in declining to order reinstatement have been where the employment relationship has broken down or trust irredeemably damaged. The Court concluded by stating that in the circumstances of that case²⁶, the delay of more than five years from the dismissals renders a reinstatement impractical, inappropriate and unfair to an employer.

[66] I must determine what is fair and reasonable in the circumstance of this case. In the matter of *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others*²⁷ Park P argued that:

'It is important to note that to force an employer to reinstate his or her employee is already a tremendous inroad into the common law principle that contracts of employment cannot normally be specifically enforced. Indeed, if one party has no faith in the honesty and

²⁴ 2008 (1) NR 248 (LC).

²⁵ 2016 (1) NR 158 (SC).

²⁶ *Swartbooi and Another v Mbengela NO and Others*.

²⁷ An unreported judgment of this Court Case No. LCA 47/2007 delivered on 8 July 2008.

integrity or loyalty of the other, to force that party to serve or employ that other one is a recipe for disaster. Therefore the discretionary power to order reinstatement must be exercised judicially.'

[67] In the matter of *Parcel Force Namibia (Pty) Ltd* the dismissed employee was a driver. And all he could do is driving heavy vehicle trucks. In this matter the dismissed employee is a diamond grader, the person who may have filled the appellant's position may have required of the respondent to invest in his training (as the respondent did in the case of the appellant, there is evidence on record that the respondent invested in the training of the appellant). In my view, a period of four years even though not attributable to any fault by the appellant, may lead to injustice to both the employer and the other person who may have been appointed in the appellant's position. There is also evidence on record that the appellant in this matter secured another job, albeit on a month to month basis, in the meantime. I am therefore of the view that it will be unfair and impractical to order the respondent to reinstate the appellant.

[68] With respect to compensation, Parker²⁸ opines that an arbitrator should award such amount of compensation as he considers reasonable, fair and equitable, regard being had to all circumstances of the case. Therefore, in determining the amount of compensation, the courts have taken into account the extent to which the claimant's own conduct contributed to the dismissal. The courts have also taken into account the view that compensation must not be calculated in a manner aimed at punishing the employer, or at enriching a claimant because it is awarded based on the principle of *restitutio in integrum*²⁹. It must be borne in mind that discretion is not the equivalent of caprice. I am bound to exercise a discretion, and to do so within the limits imposed by the Act.

[69] If I choose to award compensation as I have done in this matter, what I award must be compensation properly so called. Compensation is not synonymous with a gratuity. In its ordinary meaning the term envisages an amount to make amends for a wrong which has been inflicted.³⁰ The primary enquiry must accordingly be to determine what that loss is. The loss in this case is the remuneration over the period of the unfair dismissal of the appellant and it is that loss that must be made good.

²⁸ Collins Parker: *Labour Law in Namibia*. Unam Press (2012) at 193.

²⁹ Also see the case of *Novanam Ltd v Rinqwest* 2015 (2) NR 447 (LC).

³⁰ See *Novanam Ltd v Rinqwest (supra)* at para [18].

[70] In the matter of *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*³¹ this Court held that where an arbitrator awards compensation that is equal to the amount of remuneration that would have been paid to the employee had the employee not been dismissed, it is not necessary for the employee to lead evidence to establish the amount involved. Gibson J said:

'It is common cause that the respondents had all been in the appellant's employment. The question of what the appellant paid the respondents was not in issue. It was a circumstance which could easily be ascertained without the need for formal evidence from the respondents as it lay exclusively within the purview of the appellant's domain. The failure to lead the formal details is more of a technicality. There cannot be prejudice to the appellant in mere failure to depose to the salaries paid to the workers.'

[71] I am therefore of the view that it is just and fair to order the respondent to compensate the appellant by paying him (appellant) the remuneration that he (appellant) would have received over the period which he remained unfairly dismissed (that is from September 2013 to the 23rd March 2018 (the amount of remuneration must include the adjustment, either upward or downward which took place at the respondent's factory over that period). There is evidence on the record that the appellant has, since his dismissal been employed on a temporary contract which endure on a month to month basis by Nampost in Okahandja. Keeping in mind the principle that compensation is not aimed at enriching a dismissed employee, the remuneration that the appellant received during his employment with Nampost must be deducted from the compensation that the responded is ordered to pay to the plaintiff. To enable the respondent to determine the monetary amount which the respondent must pay, the appellant must make a full disclosure of the remuneration that he received as a consequence of any employment between the periods of September 2013 to 23rd March 2018.

[72] Consequently, the appeal succeeds. For the avoidance of doubt, the award of the arbitrator dated 7 December 2015 is set aside and replaced with the following order:

1. The dismissal of Tobias Dominikus, by NamGem Diamonds Manufacturing Company (Pty) Ltd is both procedurally and substantively unfair.

³¹ 2005 NR 372 (SC).

2. Subject to paragraph 3 of this order the respondent, NamGem Diamonds Manufacturing Company (Pty) Ltd must pay to the appellant, Tobias Dominikus, an amount equal to the monthly remuneration which the appellant would have earned had he not been so unfairly dismissed from the date of dismissal (that is 20 September 2013) to the date that this judgment is granted.
3. Despite the order made in paragraph 2 above, the respondent, must from the time that it would have paid as contemplated in that paragraph, deduct any amounts which the appellant earned as a consequence of any employment, during the period of 20 September 2013 to 23 March 2018.
4. The appellant must fully disclose to the respondent all the income that he has received for the period between 20 September 2013 and 23 March 2018, as a consequence of any employment.
5. There is no order as to costs.

S F I Ueitele

Judge

APPEARANCES

APPELLANT: S NAMBINGA
Of AngulaCo, Windhoek

FIRST RESPONDENT: P BARNARD
Instructed by EnsAfrica|Namibia, Windhoek