

REPUBLIC OF NAMIBIA



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NUMBER: LCA 27/2017

In the matter between:

M COFFEE-LIND & ASSOCIATES

CHARTERED ACCOUNTANTS

M COFFEE-LIND

FIRST APPELLANT

SECOND APPELLANT

and

STEPHANIE KOTZE

RESPONDENT

Neutral citation: *Coffee-Lind and Associates Chartered Accountants v Kotze* (LCA 27/2017) [2019] NALCMD 10 (15 March 2019)

CORAM: **UEITELE, J**

Heard on: **08 SEPTEMBER 2017**

Delivered **15 MARCH 2019**

Flynote: *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: The respondent was employed by the appellant in the position of internal auditor and external audit assistant from 1 March 2016 to 31 October 2016, when the employment contract was terminated by the first appellant on allegations of poor work performance and/or incapacity.

Following her dismissal the respondent, on 9 December 2016, lodged a complaint or dispute of unfair dismissal with the Office of the Labour Commissioner. On 20 February 2017 the designated arbitrator, after evaluating and assessing the evidence placed before her, delivered her award, determining that the respondent's dismissal was both procedurally and substantively unfair. In the award, the arbitrator ordered that the appellants pay an amount of N\$ 74, 757.00 (equivalent to the respondents three months salaries) for loss of income to the respondent. M Coffee-Lind & Associates Chartered Accountants are aggrieved by the award and appeal against that award.

The grounds of appeal contained in the appellants' notice of appeal are three in total. The first ground of appeal relate to the necessary *locus standi in judicio* of the entity cited as the first appellant in these proceedings. The second ground of appeal relates to the finding that the appellant's dismissal was procedurally and substantively unfair. The third ground of appeal relates to whether the relief granted by the arbitrator was appropriate in the circumstances and substantively proven.

Held that a partnership, a firm or an association may sue or be sued in its name. A plaintiff suing a partnership need not allege the names of the partners and if he or she does, any error or omission or inclusion does not afford a defence to the partnership. Ms Kotze was perfectly correct when she cited Ms Coffee-Lind who was trading as M Coffee Lind & Associates Chartered Accountants by that name.

Held further: that termination of a contract of employment on the grounds of poor work performance must be effected in accordance with a fair procedure and for valid reasons.

The court will interfere only if the performance assessment made by the employer is unreasonable, in this instance, a value judgment regarding unacceptable performance by the respondent was not objective and reasonably found to be valid.

Held furthermore that the respondent was not given an opportunity to influence the decision to dismiss her, the meetings and discussions between the appellant and the respondent during the period September 2016 to October 2016 failed to satisfy 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.

Held furthermore that the appellant has failed to show that the dismissal of the respondent was for a valid and for a fair reason.

ORDER

(a) That the appeal is dismissed.

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

'1 The dismissal of Stephanie Kotze by M Coffee-Lind & Associates Chartered Accountants is both procedurally and substantially unfair.

2 M Coffee-Lind & Associates Chartered Accountants is ordered to compensate Stephanie Kotze by paying her an amount equal to three month's remuneration (N\$ 25 000 x 3) plus the leave benefits that would have accrued to Stephanie Kotze over the ten months period (that is from 01 March 2016 to 31 October 2016), if she was not unfairly dismissed.'

- (c) The amount of N\$ 75 000 carries interest at the rate of 20% per annum from 10 May 2017 to the date of hearing this appeal (that is up to 08 September 2017).
- (d) I make no order as to costs.

JUDGMENT

UEITELE, J

Introduction and background

[1] In this matter the appellant is Marlette Coffee-Lind who trades as M Coffee-Lind & Associates Chartered Accountants (I will, in this judgment, refer to her as the appellant, except where the context requires me to refer to her as Ms Coffee-Lind). Ms Stephanie Kotze, who is the respondent in this appeal is a former employee of the appellant and I will in this judgment refer to her as the respondent, except where the context requires me to refer to her as Ms. Kotze.

[2] On 9 December 2016, the respondent referred a dispute of unfair dismissal to the Labour Commissioner. The summary of the dispute annexed to the referral form, Form LC 21 sets out the basis of the referral. In the summary, the respondent alleges that she was employed by the appellant as an Internal Auditor/External Audit Assistant as from 01 March 2016 until 31 October 2016 when her contract of employment was terminated on the ground of alleged poor performance or incompetence.

[3] The events which gave rise to the respondent filing a complaint of unfair dismissal are briefly the following. As I indicated above, the respondent commenced her employment with the appellant on 01 March 2016 as an Internal Auditor/External Audit Assistant.

[4] The appellant alleges that when the respondent commenced work with her, she gave the respondent some time to adapt and adjust to the stressful and high demands of the audit environment. After the first three months, that is, by around June 2016, the appellant states that she discovered that the respondent was not meeting deadlines, could not complete a job which she started and was not handling the stress very well.

[5] Sometime after June 2016, Ms Coffee-Lind summoned the respondent to her office and there they had a *'heart to heart'* talk (from the record that was placed before me, I could not determine the exact date on which the *'heart to heart'* talk took place). During that talk, Ms Coffee-Lind conveyed to the respondent that she was not coping very well under pressure and that she (respondent) was not performing up to the required standards. According to the appellant, the respondent's response was that she admitted that she was not performing as was expected of her and that she promised to try and work harder.

[6] The appellant further alleges that after the *'heart to heart'* talk that Ms Coffee Lind and the respondent had, there was no marked improvement in the performance of the respondent. Because there was no improvement in the respondent's performance, Ms Coffee-Lind called the appellant's office manager, a certain Mr Albany Sithole and the human resources manager, a certain Mr Anton Botha to discuss the respondent's performance.

[7] After the discussion between Ms Coffee-Lind, Sithole and Botha, the respondent was on 05 September 2016 called for a meeting with Sithole and Botha. At the meeting of 05 September 2016, the respondent was informed that she was spending excessive time on auditing and as a result, the 8 hours that she spent on the Omarumba audit had to be written off. She was also informed that she spent in excess of 50 hours on the Telios audit with both her and Sithole performing vouching and that she was shown how to do her work on the China State Construction audit. She was advised that her performance needed to improve. She was furthermore informed that if she could not meet the deadlines, set she must give an explanation for the failure. At the end of the meeting of 05

September 2016, the respondent was given a written warning¹ and it was also agreed that Ms Coffee-Lind will, every Friday, provide training to the respondent.

[8] On Friday the 30th of September 2016, Ms Coffee-Lind again summoned the respondent to her office. During the discussions of 30 September 2016, Ms Coffee-Lind is alleged to have told the respondent that (I quote verbatim):

'Listen here your work is not up to standard there were clients that had to be done by the end of July. The bank wanted to cancel the client's overdraft and we are having, facing very much difficulties asking and pleading from the bank not to cancel their overdraft. That was not done. ... did you go home and did you do the self-training module on the audit program as I requested you? ... listen here the quality of your work is not good. Your work is that from a junior trainee. You are not a senior. You are not able to do what we require from you to do.'

[9] During the meeting of 30 September 2016, Ms Coffee-Lind furthermore informed the respondent that she must utilize the weekend to review her budget and that she (respondent) must come back on the Monday 03 October 2016, so that they (i.e. Ms Coffee-Lind and Ms Kotze) could discuss adjusting the respondent's salary. Ms Coffee-Lind furthermore offered the respondent to be demoted to a junior trainee position, alternatively Ms Coffee-Lind offered to assist the respondent to find alternative employment where she would perform according to her skills.

[10] The respondent did not return to Ms Coffee-Lind on Monday 03 October 2016 with a reply to the offers made by Ms Coffee-Lind. The respondent was again approached on 07 October 2016, 21 October 2016 and 28 October 2016 to respond to the offers made to her. On 31 October 2016 Ms Coffee-Lind again summoned the respondent to her office and this time Mr Sithole was present. Ms Coffee-Lind repeated her assertions that the respondent's work was not up to standard and it was equivalent to that of a junior. She (Coffee-Lind) repeated her offer to demote the respondent to a junior trainee clerk and to reduce her salary, alternatively to find her another job. The respondent refused both the offer of demotion and the offer for the appellant to find her alternative employment.

¹ The written warning amongst other things reads as follows:

'Kindly note that you are hereby issued with first written warning in respect of: Not working to standard of courtesy, efficiency, productivity& commitment, on Telios (vouching) and Omuramba Body Corporate.'

[11] On 01 November 2016 another meeting was held between Ms Coffee-Lind, Mr Sithole and the respondent. At the meeting of 01 November 2016, Ms Coffee-Lind repeated her offer to demote the respondent to a junior trainee clerk and to reduce her salary alternatively to find her another job. The respondent again refused both the main and alternative offers. When the respondent refused the offers, she was presented with a letter terminating her contract of employment with effect from 31 October 2016.

[12] Aggrieved by the decision to terminate her employment, the respondent on 09 December 2016 referred a dispute of unfair dismissal to the Labour Commissioner. After the dispute was conciliated and arbitrated the arbitrator, on 10 April 2017 handed down an arbitration award in terms of s 86 (18) of the Labour Act, 2007 amongst others in the following terms:

'1 That the respondent must as a matter of law pay:

1.1. A payment of three (3) months as loss of income in an amount of (NAD 74 757-00) which shall be paid within a month time...'

[13] The appellant is aggrieved by the award made by the arbitrator and now appeals against the arbitrator's award. The respondent opposes the appeal. I will now turn to the grounds of appeal and the basis on which the respondent opposes the appeal.

Grounds of appeal and grounds of opposing the appeal

[14] On 09 May 2017 the appellant served its Notice of Appeal on the respondent, the Labour Commissioner and the Registrar of this court. The grounds of appeal contained in the appellant's notice of appeal may be summarised as follows. The first ground of appeal relates to the *necessary locus standi in judicio* of the 'entity' cited as the first appellant in these proceedings. The appellant contends that the first appellant's business is that of an accountant under the Public Accountants and Auditors Act, 1951² and the person clothed with *locus standi* is the accountant herself.

² Public Accountants and Auditors Act 51 of 1951.

[15] The second 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 her, consider the representations made by the respondent as to her experience, knowledge or skills relating to internal auditing which led to her subsequent employment by the appellants. The third ground of appeal relates to whether the relief granted by the arbitrator was appropriate in the circumstances and substantively proven. The appellant argued further that the arbitrator failed to provide reasons for the award of compensation.

[16] The respondent's grounds of opposing the appeal may be summarised as follows. There is no evidence to support the allegations of poor work performance against her. Further, respondent was never afforded any opportunity to be heard or defend herself before the impugned decision to terminate her contract was arrived at. No investigation was conducted by the appellant to ascertain the main causes of the alleged poor work performance. Nor was there any assessment of the respondent's work and performance. The respondent thus contends that the arbitrator was correct to find that her dismissal was both procedurally and substantively unfair.

The issue which this court is called upon to determine

[17] 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 have *locus standi* in the arbitration proceedings that took place before the arbitrator?
- (b) Was the respondent's dismissal procedurally and substantively fair?
- (c) Is the award for compensation by the arbitrator lawful?

[18] I now proceed to consider the issues that I am called upon to determine.

Does the first appellant have *locus standi*?

[19] Mr Jacobs who appeared for the appellant submitted that the appellant's business is that of accountant under the Public Accountants' and Auditors, Act, 1951. He argued that the person or entity clothed with *locus standi* is the accountant or auditor himself or herself. He continued and argued that the entity (M Coffee Lind & Associates Chartered Accountants) described in the dispute referral form, has no legal personality and therefore no *locus standi in judicio*.

[20] Mr Jacobs proceeded and argued that s 23 of the Public Accountants' and Auditors Act requires persons who desire to be registered as an accountant and auditor to be registered by the Public Accountants' and Auditors Board. The second appellant was not so registered and therefore the agreement between her and the respondent was tainted with illegality and therefore not enforceable.

[21] These grounds of appeal can be dismissed outright and the reason to so dismiss them are not far to find. First, the question of whether or not the appellants have *locus standi* was never raised at the arbitration hearing and is thus not available to the appellant at the appeal stage. Secondly, although the referral of a dispute for conciliation or arbitration form, Form LC 21 in paragraph 5 requires the full name of the respondents to be set out, Ms Kotze sets out the name of the respondent as M Coffee Lind & Associates Chartered Accountants but in the summary of dispute which is attached to the referral of a dispute for conciliation or arbitration form, (Form LC 21) Ms Kotze in clear terms cites the first respondent as M Coffee Lind & Associates Chartered Accountants and the second respondent as M Coffee-Lind in her personal capacity.

[22] Thirdly, rule 22 of the Labour Court Rules reads as follows:

'Applications of Rules of the High Court

(1) Subject to the Act and these rules, where these rules do not make provision for the procedure to be followed in any matter before the court, the rules applicable to civil proceedings in

the High Court made in terms of section 39(1) of the High Court Act, 1990 (Act 16 of 1990) do apply to proceedings before the court with such qualifications, modifications and adaptations as the court may deem necessary.

(2) The judicial case management rules in terms of the rules of the High Court referred to in subrule (1) apply to proceedings before the court with such qualifications, modifications and adaptations as the managing judge may deem necessary.'

[23] It is common cause that the Rules of the Labour Court do not set out how unincorporated parties must be cited in an action or application. The High Court Rules do, however, make provision for such situation. High Court rule 42 (1) to (3) provides as follows:

'42. (1) In this rule –

“association” means any unincorporated body of persons, not being a partnership;

“firm” means a business, including a business carried on by a body corporate or by the sole proprietor thereof under a name other than his or her own;

“plaintiff” and “defendant” include applicant and respondent, respectively;

“relevant date” means the date of accrual of the cause or matter giving rise to the action or application;

“sue” and “sued” and their grammatical derivatives are used in relation to actions and applications.

(2) A partnership, a firm or an association may sue or be sued in its name.

(3) A plaintiff suing a partnership need not allege the names of the partners and if he or she does, any error or omission or inclusion does not afford a defence to the partnership.

(4) Subrule (3) applies with necessary modifications required by the context to a plaintiff suing a firm.'

[24] From rule 42 of the High Court Rules, which applies to the Labour Court, it is quite clear that Ms Kotze was perfectly correct when she cited Ms Coffee-Lind who was trading

as M Coffee Lind & Associates Chartered Accountants by that name, she did not even have to cite Ms Coffee Lind in her personal name.

[25] As regards the argument that Ms Coffee-Lind was not registered with the Public Accountants' and Auditors Board and therefore the employment of the respondent was in contravention of the relevant Act and thus illegal, I agree with Mr Bangamwambo, who appeared for the respondent, when he submitted that the dispute between the appellant and the respondent arose from a contract of employment concluded between Ms Coffee-Lind and the respondent and there is nothing illegal about that contract of employment. For these reasons, the first ground of appeal fails. I will now proceed to consider the second ground of appeal.

Was the respondent's dismissal procedurally and substantively fair?

[26] The second ground of appeal relates to the arbitrator's conclusion that the respondent's dismissal was procedurally and substantively unfair. The parties agreed that the appellant dismissed the respondent, the only point of divergence being whether or not the respondent's dismissal was procedurally and substantively fair. The arbitrator found that the dismissal was both procedurally and substantively unfair.

[27] The appellant disagrees with the arbitrator. The appellant's attack on the arbitrator's conclusion can be summarized as follows: the respondent was called to no less than three meetings between June 2016 and 31 October 2016 and at those meetings she was told that she had performed poorly and had to improve. At these meetings, she was given the opportunity to improve. Apart from being given the opportunity to improve, she was exposed to daily training and was also ordered to do self-training. It was only after she was given these opportunities and after being offered an alternative position that she was dismissed. The respondent was thus given a fair hearing and her dismissal was thus procedurally and substantively fair, argued Mr Jacobs.

[28] Mr Jacobs furthermore argued that the arbitrator misdirected herself when she failed to consider the evidence presented by the appellant to the effect that during the interview for the position to which the respondent was ultimately appointed, the

respondent represented that she is qualified and an experienced internal auditor. Subsequent to her employment, it became clear to the appellant that the respondent did not have the required knowledge or skill, abilities, qualifications or all these attributes to be a senior internal auditor. The respondent was thus dishonest in her representations during the interview. Jacobs continued and argued that at common law, dishonesty was held to be serious to render the employee unfit for employment or to render the continuation of the employment relationship intolerable.

[29]. I find these submissions by Mr Jacobs startling, to say the least. I will come back to give my reasons why I find the submissions startling.

[30] I briefly deviate to consider the legal position with respect to dismissal for poor work performance. I had an occasion in the matter of *Tow in Specialist CC v Urinavi*³ to discuss the legal position as regards dismissal for poor work performance. In that matter I said the following:

‘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.’⁴

How does an employer prove 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 courts 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 only interfere where such standards are inappropriate. 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.’

³ *Tow in Specialist CC v Urinavi* (LCA 55-2014) [2016] NALCMD 3 (Delivered on 20 January 2016).

⁴ See s 33 (1) (a) and (b) of the Labour Act, 2007.

[31] I further remarked that it is for the employer to determine whether or not the required standard has been met, and that the court will interfere only if the performance assessment made by the employer is unreasonable. I quoted with approval from the matter of *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith*⁵ where 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 ...'

[32] In the South African case of *JDG Trading (Pty) Limited t/a Price and Pride v Brundson*⁶ Zondo AJP, (as he then was) writing for the majority of the court, observed as follows:

'[61] Some argument was advanced by the appellant's counsel that the respondent was employed as a senior manager and that he knew what his shortcomings were. That an employee is a senior manager does not, in my view, give the employer license to dispense with the observance of the *audi alteram partem* rule. Such an employee is also entitled to the observance of the *audi alteram partem* rule. What may be relaxed in the case of a senior manager may be the form which the observance of the rule may take....'

[62] The opportunity which is given to a senior employee must still meet at least two basic requirements of the *audi alteram partem* rule, namely, he must be given notice of the contemplated action and a proper opportunity to be heard. The reference to 'notice of the contemplated action' necessarily implies that the action has not been decided upon finally as yet but it is one which may or may not be taken depending on the representations which the affected person may give.'

⁵ *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* [1993] 14 ILJ 171 (IC), at p 175.

⁶ *JDG Trading (Pty) Limited t/a Price and Pride v Brundson* (2000) 21 ILJ 501 (LAC),

[33] I now come back to my statement that the submission by Mr Jacobs was startling. I say so because, first the appellant does not tell this court how the respondent's performance was assessed, nor does she tell the court whether she attempted to establish what the reason for the alleged substandard performance was.

[34] Secondly the appellant knew, when she summoned the respondent to the meeting of 01 November 2016, that the intention was to discuss her performance and to demote her or terminate her services in the event that her explanation were not to be accepted. Yet the appellant did not convey this information to the respondent when she summoned the respondent to the meeting 01 November 2016. The respondent was literally ambushed.

[35] Thirdly, given that the appellant knew what the purpose of the meeting of 01 November 2016 was, it was obliged but failed to warn the respondent that she would be expected to give reasons at that meeting why she should not be demoted or dismissed. In fact, even at the meeting itself, the respondent was not told that the deliberations of the management's representatives were about her possible demotion or dismissal. She only learnt that this was the case when she received her letter of termination of the contract of employment.

[36] Fourthly, the respondent was entitled to some sort of representation. She could not exercise her right to representation because she was not told what the purposes of the meetings to which she was summoned were nor was she alerted of her right to representation. No reason has been advanced why she was not accorded this basic right.

[37] Fifthly, at the meeting of 30 September 2016 it was agreed that Ms Coffee-Lind would provide training for the respondent every Friday. There is no evidence that this training was given. The evidence on the record was that the respondent was instructed to do self-training.

[38] The respondent was not informed of the action contemplated against her prior to the meetings of 30 September 2016, 31 October 2016 and 01 November 2016. She was not given an opportunity to influence the decision to dismiss her. In my view, the meetings and discussions between the appellant and the respondent during the period September 2016 to October 2016 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.

[39] We are reminded above (in the case of *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith*⁷) that a value judgment regarding unacceptable performance must be objective and reasonable to be valid. It would, where there is no assessment, be neither. We are further reminded that 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 or her shortcomings by advice and guidance.

[40] In my view the appellant in this matter did not make an assessment of the plaintiff's performance, did not seek to establish the reason for the respondent's alleged poor performance and did also not attempt to assist the respondent to overcome her shortcomings (telling the respondent to conduct self-study and to enroll for tertiary education, is in my view neither assistance nor guidance). I have thus come to the conclusion that there was, in *the* present matter, a complete failure to observe the *audi alteram partem* rule. The fact that the respondent was a senior auditor does not mean that she was not entitled to a proper observance of the *audi alteram partem* rule.

[41] The argument that the respondent was dishonest when she was interviewed for the position to which she was ultimately appointed is even more startling because the respondent was never charged and found guilty of the misconduct of dishonesty, let alone alerted that the reason why she was being dismissed is the fact that she was allegedly dishonest at her interview for the position to which she was ultimately appointed. I am satisfied therefore, that the appellant has failed to show that the dismissal of the respondent was for a valid and for a fair reason.

⁷ *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* (1993) 14 ILJ 171 (IC).

[42] I now proceed to consider the final issue that is up for determination namely whether the arbitrator was in law justified to award to the plaintiff the compensatory award that she did.

Was the award of compensation lawful?

[43] The appellant attacks the compensation awarded by the arbitrator on the ground that that the respondent led no evidence of her losses and therefore the arbitrator could not make the award she did. Mr Jacobs further argued that the arbitrator did not give reasons for the compensation award that she made. The submission is not quite correct as a factual statement. At the commencement of the arbitration proceedings, Ms Kotze submitted her contract of employment and her pay slip which indicated what her earnings were.

[44] Parker⁸ opines that traditionally, compensation in labour law is strictly a remedy for unfair dismissal or other disciplinary measure. He furthermore opines that compensation consist of:

‘1 an amount equal to the remuneration that the employer ought to have paid to the employee had he not been dismissed or suffered other unfair disciplinary measure or some other labour injustice;

2 an amount equal to any losses suffered by an employee because of the dismissal or other unfair disciplinary measure or some other labour injustice.’

[45] Section 86(15) (e) of the Labour Act, 2007 empowers an arbitrator to, upon a finding that an employee was unfairly dismissed, make an award of compensation. The section confers a discretion on the arbitrator. The arbitrator has a discretion to determine whether compensation must 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.'⁹

⁸ Collins Parker: *Labour Law in Namibia*. UNAM Press 2012 at p 193.

⁹ See s 89 (10) of the Labour Act, 2007.

[46] In her referral of a dispute for conciliation or arbitration form, Form LC 21, the respondent claims relief in terms of s 86 of the Labour Act, 2007 that is, 'reinstatement alternatively losses suffered by her as a result of the unlawful dismissal'. At the hearing of the appeal, the respondent indicated that she will abandon her claim for reinstatement and opts for compensation. Thus, the respondent's entitlement to such payment under the Labour Act inures by operation of law.

[47] In *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*,¹⁰ 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 she not been dismissed, it may not be necessary for the employee to lead evidence to establish the amount involved. The amount should be within the employer's domain.

[48] I am therefore of the view that the arbitrator correctly exercised her discretion when she awarded the respondent's compensation. It is common cause that the respondent was employed by the appellant and the question of what the appellant paid the respondent was, as I indicated above, not in issue.

[49] In conclusion, I hold that the appeal has no merit. The award by the arbitrator is upheld, so also is the order to compensate the respondent. I accordingly make the following order:

- (a) That the appeal is dismissed.
- (b) The arbitrator's award is amended to read as follows:

'1 The dismissal of Stephanie Kotze by M Coffee-Lind & Associates Chartered Accountants is both procedurally and substantially unfair.

¹⁰ *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC).

2 M Coffee-Lind & Associates Chartered Accountants is ordered to compensate Stephanie Kotze by paying her an amount equal to three month's remuneration (N\$ 25 000 x 3) plus the leave benefits that would have accrued to Stephanie Kotze over the ten months period (that is from 01 March 2016 to 31 October 2016), if she was not unfairly dismissed.'

(c) The amount of N\$ 75 000 carries interest at the rate of 20% per annum from 10 May 2017 to the date of hearing this appeal (that is up to 08 September 2017).

(d) I make no order as to costs.

SFI UEITELE
Judge

APPEARANCES

FIRST & SECOND APPELLANT:

JAPIE JACOBS

Instructed by ENS AFRICA INC (LorentzAngula)

RESPONDENT:

FRANCOIS BANGAMWAMBO

Of F Bangamwambo Law Chambers.