**REPUBLIC OF NAMIBIA**

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

**JUDGMENT**

Case no: HC-MD-LAB-APP-AAA-2021/00084

In the matter between:

**MUNICIPAL COUNCIL OF WINDHOEK** **APPELLANT**

and

**REYNOLD LEE CLAASEN** **1ST RESPONDENT**
**MEMORY SINFWA** **2ND RESPONDENT**
**THE LABOUR COMMISSIONER** **3RD RESPONDENT**

**Neutral citation:** *Municipal Council of Windhoek v Claasen* (HC-MD-LAB-APP-AAA-2021/00084) [2022] NALCMD 56 (5 October 2022)

**Coram:** PARKER AJ
**Heard**: **16 September 2022**
**Delivered**: **5 October 2022**

**Flynote:** Labour Law – Unfair dismissal – Reinstatement – Court finding 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 – If one has no faith in the honesty and integrity or loyalty of the other, to force that party to serve or employ that other party is recipe for disaster. To

order reinstatement must be exercised judicially taking into account all the circumstances of the case.

**Summary:** First instance and appellate disciplinary hearing bodies found first respondent (employee) guilty of the misconduct he was charged with – First respondent dismissed – Before arbitration there was no appearance – Arbitrator had only the evidence placed before her to arbitrate the dispute – Court finding that arbitrator was entitled to proceed with the arbitration in the absence of appellant – Before arbitration proceedings commenced the arbitrator demonstrable frantic efforts to no avail to get the appellant to appear for the arbitration – Arbitrator made an order for first respondent's reinstatement and ordered compensation to the tune of N$1 712 000 in favour of first respondent – Reinstatement had not been claimed in Form 11 and Form LC 41 filed in terms of rules and no evidence was placed before arbitrator concerning reinstatement – Furthermore, there was no basis for the award of N$1 712 000 and benefits in favour of first respondent and so the arbitrator's decision is arbitrary.

*Held*, where reinstatement has not been claimed on Form 11 and Form LC 41 and there is no evidence to support the claim, it is prejudicial to the other party, if unforewarned, the first time the opposing party reads about reinstatement is after it has been granted. Such exercise of discretion goes against the centerpiece of all that is first and fair in judicial or tribunal dispute resolution.

*Held further,* as a matter of law and common sense, every unfair dismissal amounts to a labour injustice and there must be a solatium, whether the employee asked for it or not in Form 11 and Form LC 41.

*Held,* there was no basis upon which the arbitrator could have granted the amount of compensation and the amorphous and unproved benefits, and so, she plainly erred in law.

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**ORDER**

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1. The arbitrator's order that the first respondent's dismissal is unfair is upheld.

2. The arbitrator's order that first respondent be reinstated is set aside.

3. The arbitrator's order that appellant must 'reimburse' first respondent 'all the benefits that were withheld from the date of suspension to the date of termination' is set aside.

4. The arbitrator's order granting the payment of N$1 712 000 by appellant to first respondent is set aside and replaced with the following:

    4.1 The appellant must on or before 20 October 2022 pay to the first respondent an amount equal to first respondent's 'Basic Pay' at the time of his dismissal for 10 months, subject to any statutory deductions, plus interest on the amount at the rate of 20 per cent per annum from the date of this judgment to the date of full and final payment.

5. The matter is finalized and removed from the roll.

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**JUDGMENT**

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PARKER AJ:

[1] The appellant, represented by Mr Ikanga, appeals from the entire arbitration award in Case No. CRWK 1223-20, dated 6 December 2021. The first respondent, represented by Ms Shikongo, opposes the appeal. Appellant relies on three grounds of appeal in the notice of appeal (Form 11).

[2] Before considering those grounds one by one, I set out hereunder important principles which are relevant in the instant proceeding that should inform the way I

approach the determination of the appeal. The principles are rehearsed from *Germanus v Dundee Precious Metals Tsumeb*[1]:

'(a) The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall…

> "The notice also serves to inform the respondent of the case it is required to meet … Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case (*S v Kakololo* 2004 NR 7 (HC), per Maritz J)."

(b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal being an inferior tribunal. The Labour Court as an appeal court will not interfere with the arbitrator's findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).)

(c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on a fact if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion, it must uphold the trier of fact. (See *Nathinge v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 201).

(d) Principles justifying interference by an appellate court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-1).) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have gone the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555). See *Edgars Stores (Namibia) Ltd v Laurika Olivier and Others* (LCA 67/2009) [2010] NAHCMD 39 (18 June 2010) where the Labour Court applied *Paweni and Another* and *Powell*.

(e) Respondent bears no onus of proving that the decision of the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong. See

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[1] *Germanus v Dundee Precious Metals Tsumeb* 2019 (2) NR 453 (LC) para 4.

*Powell v Stretham Manor Nursing Home*. If the appellant fails to discharge this critical burden, he or she must fail.'

[3] Before I consider the grounds, it is important to underline the following important indisputable facts. They are important because they have a bearing on the weighing of the evidence that was placed before the arbitrator.

[4] The arbitral hearing had been set down to proceed on 13-15 October 2021. There was no appearance by appellant (respondent in the arbitration). The appellant was aware of the set down dates but chose not to appear at the arbitration; and *a fortiori*, the appellant did not have the decency to inform the arbitrator of its unavailability. The arbitration had previously been set down for 4 August 2022. The hearing was postponed at the last minute on the day of the hearing at the request of appellant. We are here not dealing with a cuca shop owner who has no idea as to how such proceedings are set down and conducted. We are dealing with a public authority with appreciable resources at its disposal.

[5] I have made the foregoing remarks to make this point. The arbitrator was entitled in law to proceed with the arbitration in the absence of the appellant. In any case, Mr Ikanga was not heard to challenge the arbitrator's decision to proceed with the arbitration in the absence of the appellant. It is never part of our law to stop the wheels of justice from rolling along, without a good reason, to allow a party to board at his or her own whims and caprices.

[6] It follows as a matter of course that the only evidence placed before the arbitrator was the viva voce evidence of the first respondent and the record of the internal disciplinary hearing.[2] The upshot is this. Unless first respondent admitted at the arbitration averments in appellant's witnesses' statements that had been made during the first instance internal disciplinary hearing, the arbitrator was entitled to accept first respondent's version put forth at the arbitration hearing as the truth. This should be so, unless of course such version is so improbable that no court or tribunal acting judicially would accept it as the truth.[3] In that regard, it should be

[2] See *Nedbank Namibia Limited v Arendorf* (LCA 1/2015) [2017] NALCMD 9 (16 March 2017).
[3] *Standard Bank of Namibia Ltd v Schameerah Court Number Seven CC and Others* (3939 of 2015) [2018] NAHCMD 378 (27 November 2018) para 5.

remembered, Mr Ikanga's submission before the court, and, indeed, that of Mr Shilongo, is not evidence.[4]

[7] I now proceed to apply this principle of evidence and the principles set out in paragraph 2 above, relating to such appeal as the one presently before this court.

Ground 1

[8] Ground 1 consists of three basic elements. It is clear on the arbitration record that the arbitrator found that the internal disciplinary hearings were flawed procedurally for three reasons: The first reason is that the disciplinary process exceeded the stipulated 180 days. It cannot be controverted that the disciplinary process did, indeed, exceed 180 days. Mr Ikanga sought to explain away the reason for that situation. Mr Ikanga's submission is not part of the evidence which was before the arbitrator; and so, the court pays no heed to it.[5]

[9] The second reason is that first respondent was denied 'his right to postpone the hearing to secure representation'. First and foremost, first respondent did not have any such right. The disciplinary hearing board exercised a discretion as to whether to grant the postponement; and the board exercised their discretion against the postponement sought. The arbitrator did not fault the board's decision; and this court does not. The first respondent had informed 'Josephine and Obrien' that he would not require any representation. In the same breath, he seemed to have requested that the board 'postpone hearing until I have funds to pay for a representative'.

[10] The request was plainly ambivalent and unreasonable. The first respondent gave no reasonable indication to the board when he would 'have funds'. It is well entrenched that labour disputes should be resolved expeditiously in the interest of both the employee and the employer and the interest of sound industrial harmony. As I have found previously, the arbitrator did not fault the board's exercise of discretion and its decision on the postponement. This court holds the same view.

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[4] *Kennedy and Another v Minister of Safety and Security and Others* 2020 (3) NR 731 (HC) para 20.
[5] Loc cit.

Indeed, no court or tribunal acting judicially would act on first respondent's ambivalent and ambiguous request on representation and postponement.

[11] The third reason is that the arbitrator accepted first respondent's averment that Mr Kahimise who considered his appeal was the one (as the then Chief Executive Officer of appellant) who ordered the investigation involving first respondent and was privy to the investigation report. The arbitrator should not have accepted first respondent's version, even in the absence of the appellant, because the record before her showed clearly that first respondent appealed to the full council of the appellant, who rejected first respondent's appeal.

[12] Consequently, I find that while the arbitrator's decision on representation, postponement and the involvement of Mr Kahimise are wrong, the arbitrator's decision on the 180-day rule is correct and cannot be faulted.

[13] I accept that a provision in an employer's disciplinary code or personnel rules may not always be found to be binding, in the sense that failure to comply with them by the employer would be always fatal, no matter the circumstances.[6] Nevertheless, failure to comply with certain such provisions must be found to be fatal. Examples are these. Provisions which relate to an employee's right to be heard before he or she is punished for some misconduct. Provisions that are in tune with the principles and practice of fair hearing. Provisions which are material and go to the root of employment contract binding the employer and the employee. A time limit within which the disciplinary process must be concluded is one such peremptory provision. After all, it is trite that labour disputes should be dealt with expeditiously,[7] so that the employer and the employee may know quickly what their situation is to manage their affairs accordingly. *Pace* Mr Ikanga, *Namdeb Diamond Corporation (Pty) Ltd* is no authority for the proposition that the employer's disregard for its own disciplinary code or personnel rules can never be fatal; and ought to be overlooked.

[14] Consequently, I respectfully reject Mr Ikanga's submission regarding the effect of non-compliance with the 180 day's rule wherein counsel relied on

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[6] *Namdeb Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee* Case No. SA 55/2019 (25 March 2022).
[7] *Hinda-Mbazira v National Housing Enterprise* 2014 (4) NR 1046 (SC).

*Niighambo v Wildlife Resort Ltd*.[8] *Niighambo* is no authority on the point under consideration. Unlike in *Niighambo,* in the instant matter, a time limit has been set by appellant's personnel rules for the completion of a disciplinary process. Doubtless, that provision is a term of the employment contract binding the appellant and the first respondent.

[15] It is trite that the 'principles justifying interference by an appellate court with exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised on judicial grounds and for sound reason, that is without caprice or bias or the application of a wrong principle, the appellate court will be slow to interfere and substitute its own decision'.[9] It has not been established that the arbitrator is guilty of any of the prohibitive items set out in *Paweni*. Accordingly, as respects the arbitrator's finding that there was a failure of procedural fairness because of the appellant's non-compliance with the 180 days' rule, I conclude that the arbitrator is not wrong; and, so on the authority of *Paweni*, I am not entitled to set aside the arbitrator's decision and substitute it with my own.

[16] Consequently, I uphold the arbitrator's decision that the dismissal of first respondent was procedurally unfair, within the meaning of s33(1)*(b)* of the Labour Act 11 of 2007. Having upheld the arbitrator's decision respecting procedural unfairness, it would not ordinarily be necessary in determining the appeal to consider her finding of substantive unfairness. It, however, becomes necessary to do so when considering the relief of reinstatement and the quantum of compensation. For this reason, I proceed to consider the arbitrator's finding of substantive unfairness.

Ground 2

[17] Under this head, I recall the aspects of the rule of evidence discussed in paragraph 6 above and the principle enunciated by the Zimbabwean Supreme Court in *Paweni*, discussed in paragraph 14 above, respecting an appellate court's power when determining an appeal. There are also the trite principles that an appellate court will not reject credibility of the trial court in the absence of irregularities or

[8] *Niighambo v Wildlife Resort Ltd* (HC-MD-LAB-APP-AAA-2019/00065) [2020] NALCMD 33 (16 October 2019).
[9] *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 at 724 H-I.

misdirection and further that the function of deciding acceptance or rejection of evidence falls primarily on the trial court or the inferior tribunal.[10]

[18] I have applied the foregoing principles to the facts of the instant case. Having done that, I conclude as follows: I accept Ms Shikongo's submission that no evidence was placed before the arbitrator by the appellant on the issue of substantive unfairness tending to establish the opposite to the arbitrator's factual findings. Additionally, no evidence was placed before the arbitrator that could lead to the conclusion that no reasonable arbitrator could have made the findings, entitling this court to interfere with.[11] It follows that the appellant has failed to persuade the court to interfere with the arbitrator's determination that first respondent's dismissal is substantively unfair, within the meaning of s33 (1)*(a)* of the Labour Act.

Ground 3

[19] It remains to consider the arbitrator's order for reinstatement of the first respondent and the order of compensation in his favour. As regards the relief of reinstatement in terms of the Labour Act, I had the following to say in *Pupkewitz Holdings (Pty) Ltd v Mutanuka and Others*:

'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 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. In the instant case, the likelihood of the appellants having a similar problem like the one that led to their being charged cannot entirely be ruled out. Added to this is the fact that the respondents were dismissed in June 2004 and the district labour court delivered its judgment in February 2006. In *Shiimi v Windhoek Schlachteri (Pty) Ltd* NLLP 2002 (2) 244 NLC, where the intervening period between the dismissal and delivery of judgment was about three years, the labour court declined to order reinstatement.'[12]

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[10] See *S v Ameb* 2014 (4) NR 1134 (HC).
[11] See *Paweni.*
[12] *Shiimi v Windhoek Schlachteri (Pty) Ltd* NLLP [2008] NALCMD 1 (3 July 2008).

[20] In the instant matter, it is Mr Ikanga's submission that the arbitrator should not have ordered reinstatement for the following reasons. First, counsel said that first respondent did not indicate in his summary of dispute set out in Form LC that he claimed reinstatement; neither did he do so in his evidence and submission before the arbitrator. And so, for Mr Ikanga, 'the arbitrator erred as the discretionary power was not exercised judicially'.

[21] Ms Shikongo submitted contrariwise that the 'arbitrator's decision is not limited to what is outlined by an applicant's summary of dispute or during the arbitration hearings as the Labour Act grants the arbitrator the authority to make an appropriate award as outlined in Section 86(15) of the Act.'

[22] With respect, Ms Shikongo misses the point. It is not enough that the arbitrator has the power to grant an appropriate order from the list adumbrated in s85(15) of the Labour Act. A relief granted from the list ought to be appropriate in the circumstances.[13] Form 11 and Form LC 41, when duly completed, inform the opposing party, in the instant matter, the employer appellant, what case it has to meet in the proceedings before the Labour Commissioner during conciliation and arbitration. It is prejudicial to the opposing party, if unforewarned, the first time the opposing party sees a claim against him or her is after it has been granted by the arbitrator. Such exercise of discretion offends the court's sense of justice. It is arbitrary. It goes against the centerpiece of all that is just and fair in judicial or tribunal dispute resolution.

[23] Indeed, because there was nothing on the record on the form of statutorily generated documents and no evidence adduced by the first respondent in respect of the relief of reinstatement, the arbitrator, with respect, sucked her decision from her thumb, so to speak.

[24] For these reasons, I decline to uphold the arbitrator's decision to order reinstatement. The decision is perverse.[14] I hold that *Namibia Diamond Corporation*

[13] *Adcon CC v Wielligh and Another* [2017] NALCMD 24.
[14] *Janse van Rensburg v Wilderness Air Namibia Ltd* 2016 (2) NR 554 (SC).

*(Pty) Ltd v Coetzee*,[15] referred to the court by Ms Shikongo, is plainly distinguishable on the facts.

[25] I proceed to consider the order of compensation. The same thing said about the order of reinstatement cannot be said about the order of compensation. 'The compensation awarded in labour disputes cannot be equated with civil or delictual damages. The purpose of such compensation is not only to provide for the positive or negative interest of the injured party. There is an element of *solatium* present aimed at redressing a labour injustice.'[16] Thus, the order of compensation should follow as a matter of course to redress a labour injustice such as an unfair dismissal. As a matter of law and common sense, every unfair dismissal amounts to a labour injustice and there must be a *solatium*, whether the respondent asked for it or not in Form LC 41 and Form 11.

[26] The only fly in the ointment is that the arbitrator ought to have called for sufficient evidence to enable her to apply the *Shilongo* principles[17] so that she could exercise her discretion on judicial grounds and for sound reason.[18] The arbitrator considered no principles at all in the determination of the quantum of compensation. Indeed, that makes the decision on the amount of compensation arbitrary and wrong. The arbitrator arbitrarily settled on 'remuneration the applicant would have received had he not been dismissed, and benefits withheld by the respondent (ie appellant) from suspension date until dismissal'.

[27] In that regard, this point is important. When the first respondent was suspended, he had not been dismissed. The arbitrator is therefore wrong in the determination of the amount of compensation to conflate the date of suspension and the date of the dismissal. What she adjudged to be unfair is the dismissal not the suspension. The compensation is not for all the ills of the appellant. It is in respect of only the dismissal. The only evidence that was before her is the payslip of the first respondent. There was no evidence as to any pecuniary losses that first respondent had suffered.[19] Moreover, the arbitrator does not show how she arrived at the

[15] *Namibia Diamond Corporation (Pty) Ltd v Coetzee* LCA 20/2015.
[16] *Pep Stores (Namibia) (Pty) v Iyambo and Others* 2001 NR 211 (LC) at 223F.
[17] See *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 33 (7 August 2014). See Paweni discussed in paragraph 13 above.
[18] See *Paweni* discussed in paragraph 15 above.
[19] See *Namdeb Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee.*

amount of N$1 712 000. And it should be remembered, an award of compensation is not to punish the errant employer and enrich the employee. It is to recompense the employee in order to redress labour injustice.[20]

[28] Granted, the arbitrator exercised *liberum arbitrium* in the making of the compensation order; 'but such exercise of judicial (or tribunal) discretion is not based simply on mathematical calculations without more'.[21] It follows implacably that the part of the order of compensation which pegs the amount thereof at N$1 712 000 and the payment to first respondent of benefits cannot be upheld. It is wrong and perverse. No reasonable arbitrator in the position of the present arbitrator could have reached such decision.

[29] Mr Ikanga suggested that the court should remit the determination of the amount of compensation to the arbitrator to arbitrate afresh that single issue. All things being equal, it is a good idea; but I have disinclined to do that. The dispute arose in 2018 and the first respondent was dismissed in November 2018, that is, a period shy of four years. I think this is a proper case where I should apply the *Shilongo* principles against the available evidence and determine the amount of compensation, as best and just as I can, as I did in *Shilongo*. This is to avoid a protracted 'ping-pong' game between the Labour Commissioner's Office and the Labour Court in respect of any fresh decision an arbitrator might make upon remittal of the issue of quantum of compensation to the Labour Commissioner.

[30] In the instant matter, no evidence was led concerning the first respondent's length of service with the appellant. In *Shilongo*,[22] the first respondent employee had put in 30 years of service before his dismissal. In *Shilongo*, the court awarded an amount equal to Shilongo's four month's salary. There, the court found that the employees' conduct had contributed markedly to their dismissal. In the instant case, the evidence does not establish sufficiently that first respondent's conduct contributed markedly to his dismissal.

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[20] See *Shilongo v Vector Logistics (Pty) Ltd*; and *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*.
[21] *Africa Personnel Services (Pty) Ltd v Ndero and Another* [2021] NAHCMD 49 (11 November 2021).
[22] See footnote 20.

[31] As it was in *La Croix Du Sud Holdings (Pty) Ltd t/a Truck & Cab v Indombo N.O.*,[23] in the instant matter, too, there is no evidence tending to establish that first respondent made any efforts to mitigate his losses. With the greatest deference to Ms Shikongo, I find that Ms Shikongo misreads s89(1)(a) of the Labour Act. Her reliance on *Namdeb Diamond Corporation v Mupetani*[24] is misplaced. The dispute which was referred to the Labour Commissioner for conciliation and arbitration was not about whether first respondent mitigated his losses after his dismissal. Consequently, in the instant matter, s89(1)*(a)* does not apply to the issue of whether first respondent mitigated his losses. The issue is only a factor which a court on tribunal minded acting judicially would consider when determining the amount of compensation that may be awarded for unfair dismissal. Thus, with the greatest defence to Ms Shikongo, I should say counsel's submission on the point has no merit. *Ex nihilo nihil fit*.

[32] Additionally, by a parity of reasoning, the arbitrator's order in paragraph 4 of the order cannot be upheld. It is trite that the burden of proof is on the employee to prove the benefits and to do so, he or she must not only plead how those amounts arose but must also lead evidence to prove those amounts.[25] In the instant matter there was no basis upon which the arbitrator could have granted the order in paragraph 4 of the order about some amorphous and unproved benefits. She plainly erred in law when she did so.[26]

[33] Based on these reasons, the appeal succeeds in part. Accordingly, I order as follows:

1. The arbitrator's order that the first respondent's dismissal is unfair is upheld.

2. The arbitrator's order that first respondent be reinstated is set aside.

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[23] *La Croix Du Sud Holdings (Pty) Ltd t/a Truck & Cab v Indombo N.O.* (HC-MD-LAB-APP-AAA-2018/00029) [2018] NALCMD 29 (30 October 2018).
[24] *Namdeb Diamond Corporation v Mupetani* (HC-MD-LAB-APP-AAA-2020/00029) (NALCMD 9 (16 March 2021).
[25] See *Namdeb Diamond Corporation v Henry Denzil Coetzee* para 157.
[26] See ibid para 156.

3. The arbitrator's order that appellant must 'reimburse' first respondent 'all the benefits that were withheld from the date of suspension to the date of termination' is set aside.

4. The arbitrator's order granting the payment of N$1 712 000 by appellant to first respondent is set aside and replaced with the following:

   4.1 The appellant must on or before 20 October 2022 pay to the first respondent an amount equal to first respondent's 'Basic Pay' at the time of his dismissal for 10 months, subject to any statutory deductions, plus interest on the amount at the rate of 20 per cent per annum from the date of this judgment to the date of full and final payment.

5. The matter is finalized and removed from the roll.

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C PARKER

Acting Judge

APPEARANCES:

| | |
|---|---|
| APPELLANT: | M Ikanga<br>Of Ikanga Legal Practitioners, Windhoek |
| 1ST RESPONDENT: | L Shikongo<br>Of Metcalfe Beukes Attorneys, Windhoek |