REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

APPEAL JUDGMENT

Case no: HC-NLD-LAB-APP-AAA-2021/00010

In the matter between:

EBENEZER ENGLISH PRIVATE SCHOOL	**APPELLANT**

and

LENSEMORE NYAMHAMBA	**1ST RESPONDENT**
LABOUR COMMISSIONER	**2ND RESPONDENT**
NIKANOR MAEVO SHIKANGALA	**3RD RESPONDENT**

Neutral Citation: *Ebenezer English Private School v Nyamhamba* (HC-NLD-LAB-APP-AAA-2021/00010) [2022] NALCNLD 02 (18 November 2022)

CORAM: **MUNSU AJ**
Heard: **01 July 2022**
Delivered: **18 November 2022**

Flynote: Labour law – Whether termination of contract of employment constitutes dismissal.

Summary: The first respondent was employed as a teacher by the appellant Ebenezer English Private School. The first respondent was unqualified to teach in the

appellant's school, firstly, because his academic qualifications were not evaluated by the Namibia Qualifications Authority and secondly, he did not have a valid work permit. The Directorate of Education carried out an assessment of the appellant's school and issued recommendations, among others, that the appellant must employ qualified teachers. Based on the recommendations, the appellant terminated the first respondent's contract of employment.

The first respondent alleged that he was unfairly dismissed and lodged a complaint with the Labour Commissioner against the appellant on grounds of unfair dismissal, unilateral change of the terms of employment and non-payment of the full salary. The appellant maintained that it did not dismiss the first respondent but merely followed the recommendations issued by the Directorate of Education. The arbitrator found that the first respondent was dismissed by the appellant without notice. The arbitrator further found that the first respondent was never paid his full salary. The arbitrator issued an award in favour of the first respondent.

On appeal, the appellant sought to introduce new evidence that was never placed before the arbitrator. Also, the appellant argued that the arbitrator erred in law by finding that the termination of the first respondent's contract of employment constituted a dismissal.

Held, that the court cannot on appeal consider new evidence that was never placed before the arbitrator.

Held that, there are two statutory impediments to the contract of employment. Firstly, the appellant could not employ the first respondent without offending the Immigration Control Act 7 of 1993. Secondly, the respondent was unqualified to teach in the appellant's school.

Held that, the Directorate of Education was acting in accordance with the law, that is, the Education Act 16 of 2001.

Held that, the appellant was obliged to comply with the directives issued by the Directorate of Education. Failure to comply with such directives would result in the non-registration and closure of the appellant.

Held that, considering the aforementioned two legal impediments, the appellant had a valid and fair reason to terminate the first respondent's employment contract.

Held that, the performance of the employment contract was objectively impossible to perform after the conclusion of the contract.

Held that, there has been a supervening impossibility of performance.

Held that, the termination of the first respondent's employment was not a dismissal within the meaning of section 33(1) of the Labour Act 11 of 2007.

Held that, while the reason for terminating the first respondent's employment contract was valid and fair, the appellant was required to comply with the provisions of the Labour Act, which includes, giving of the notice of termination of employment. The appellant had sufficient time to give the notice of termination as it was given a grace period until 1 December 2019.

Held that, the first respondent signed a contract of employment for a salary of N$ 14 000 per month, however, the appellant failed to pay the full salary contrary to the contract signed by the parties.

ORDER

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1. The application for condonation for the late filing of the appeal is granted.
2. The appeal succeeds in part.
3. The arbitrator's award is amended to read as follows: Ebenezer English Private School is ordered to pay the first respondent the amount of N$ 70 000.
4. There is no order as to costs.

5. The matter is removed from the roll: Case Finalised.

JUDGMENT

MUNSU AJ:

Introduction

[1] This is an appeal against an award of the arbitrator handed down on 11 June 2020 by the third respondent (the arbitrator). The appellant is Ebenezer English Private School. The first respondent was employed as a teacher by the appellant. On 05 November 2019, the first respondent referred a dispute to the second respondent (Labour Commissioner) against the appellant, on grounds of unfair dismissal, unilateral change of terms and conditions, severance package and non-payment of the full salary. He claimed a total amount of N$ 230 000.

[2] The Labour Commissioner designated the arbitrator to attempt to resolve the dispute through conciliation and arbitration. The arbitration was held on 13 March 2020 at Oshakati Labour Office. On 11 June 2020 the arbitrator handed down the award in favour of the first respondent. On 24 November 2021, the appellant filed an appeal in terms of section 89(1) (a) of the Labour Act 11 of 2007 (the Labour Act) against the entire award issued under case number NROS 257-19. The appeal is unopposed.

Condonation

[3] The appeal was filed out of time. The appellant's Director deposed to an affidavit seeking condonation for the late filing of the appeal. She explains that after the award was handed down on 11 June 2020, she approached the Registrar of this court and applied for legal representation from the Directorate of Legal Aid. On 12 October 2020, one Mr. Mwahafa was appointed to represent the appellant. However,

due to the bulkiness of the documents in the matter, it took counsel some time to peruse the documents and formulate the grounds of appeal.

[4] Sometime after, it became apparent that there was a lack of mutual understanding between the appellant's Director and the appellant's appointed counsel. She was advised to approach the Registrar's office to apply for the appointment of a different legal practitioner. This was done and counsel of record was appointed. Changes had to be made to the appeal documents and a new Notice of Appeal, Notice of Motion and Founding as well as Confirmatory affidavits had to be drafted.

[5] The first respondent is a foreign national, therefore it took considerable time to locate his address upon which all notices, processes and documents pertaining to this matter were to be served. I am of the view that the appellant demonstrated willingness to prosecute the appeal on time. Its Director managed to explain the delay in filing the appeal.

[6] However, the appellant did not deal with the prospects of success. By law, the appellant is required to satisfy the court that there are reasonable prospects of success on appeal. Having perused the papers, it seems to me that the appellant enjoys some prospects of success. I am inclined to grant condonation.

Background

[7] During December 2017, the appellant's Director, met with the first respondent who at the time was together with his colleague at KFC Oshakati. At the time, the appellant was not yet in operation. The plan was for the appellant to be inaugurated in January 2018. The appellant was in need of four teachers.

[8] The appellant's Director informed the first respondent and his colleague that she would pay each a salary of N$ 7 000 per month. The first respondent and his colleague made a counter offer that they would instead take care of all the four grades for double the amount (N$ 14 000 each). The appellant's Director agreed. However,

she informed the two that she was unsure if such an arrangement was allowed in Namibia.

[9] The agreement was concluded and both the first respondent and his colleague each signed a contract for a salary of N$ 14 000. The two commenced their duties in January 2018. However, during the same month, the Director's husband convened a meeting with the teachers and informed them that the appellant would not be able to pay the salary of N$ 14 000. The reasons were these, firstly, the school had just been inaugurated and the enrolment was low and secondly, that the school had to hire additional teachers for the local language (oshiNdonga) as the first respondent and his colleague were not conversant in the language because they are foreign nationals. The appellant made an undertaking to pay the full salary as from April 2018 onwards. However, this did not happen.

[10] At the relevant time, the appellant was not registered with the Ministry of Education. In order to be registered as a private school, the appellant had to employ qualified teachers, among others. The Directorate of Education carried out an assessment of the teacher's qualifications and found that the first respondent was unqualified as his academic qualifications were not evaluated by the Namibia Qualifications Authority. At the time, the first respondent was only in possession of an acknowledgement letter from Namibia Qualifications Authority. The Directorate of Education instructed the appellant to hire qualified teachers; failure of which the appellant would not be registered as a private school and risked closure. For this reason, the first respondent's employment was terminated.

Arbitration proceedings

[11] The first respondent appeared on his own, while the appellant was represented by its Director. According to the arbitrator, he was required to determine:

(a) Whether the first respondent's dismissal was procedural and substantively unfair.
(b) Non-payment of remuneration, and if so,

(c) The appropriate relief.

[12] The first respondent claimed that he was employed as a Principal of the appellant and that he was demoted to an ordinary teacher for no valid reason. In my view, the arbitrator rightly found that the first respondent was contracted as a teacher pursuant to the contract he signed and that there was no proof that he was employed as a Principal. It was only during the absence of the Director that he acted as Principal.

[13] The arbitrator found that the first respondent was dismissed without notice. On the issue of the salary not being paid in full, the arbitrator found that the first respondent was not entitled to claim from January to July 2018 as that period had lapsed in terms of section 86 (2) (a) and (b). The arbitrator therefore only entertained the period from August 2018 to 31 July 2019 as it was within the required time frame. Section 86 (2) reads follows:

> 'A party may refer a dispute in terms of subsection (1) only –
> (a) within six months after the date of dismissal, if the dispute concerns a dismissal, or
> (b) within one year after the dispute arising, in any other case.'

[14] In the end, the arbitrator handed down an award in favour of the first respondent in the following terms:

> **'AWARD**
>
> I order the Respondent Ebenezer English Private School must pay the Applicant Mr Nyamhamba Lensemore an amount of **N$ 63 800.00** for the outstanding salary from **August 2018 to 31 July 2019**, that the Applicant never received and one month Notice in terms of the Labour Act of **N$ 14 000.00**; the amount together is **N$ 77 800.00** and the said payment will be done in three (3) instalment as follows;
>
> - **The first payment of N$ 25 933.33 must be done on or before 31 July 2020; while**
> - **The second payment of N$ 25 933.33 must be done on or before 31 August 2020; while**
> - **The third payment of N$ 25 933.33 must be done on or before 30 September 2020.**
>
> The payment must be done at the Ministry of Labour, IREC at Oshakati.

The Above **amount earns interest** from the date of this award in terms of section 87(2) of the Labour Act.
This ward is final and binding upon the parties hereto, and will be made an order of the Court in terms of Section 87(1) (b) (i) or (ii) of the Labour Act (Act No. 11 of 2007).'

Grounds of appeal

[15] The grounds of appeal can be summarised as follows:

1. That the arbitrator, on the evidence placed before him and upon consideration of the content, meaning, application and interpretation of the term dismissal, erred in law by finding that the termination of the first respondent's employment contract constituted a dismissal (by the appellant), as contemplated by the provisions of the Labour Act.

2. Alternatively, that the arbitrator, on the evidence placed before him, erred in law by finding that the termination of the first respondent's employment contract constituted an unfair dismissal by the appellant.

3. That the arbitrator erred in law by finding that the appellant should have given one (1) month notice to the first respondent prior to termination of his employment contract and consequently erred in making an award ordering the appellant to pay one month notice in terms of the Labour Act.

4. That the arbitrator, on the evidence placed before him at arbitration, misdirected himself and erred in law in finding that the appellant failed to pay outstanding salary of N$ 63 800 to the first respondent from August 2018 to 31 July 2019.

Point in *limine*

[16] From the outset, the appellant raised a point in *limine* which I proceed to consider. Mr. Ndana for the appellant submitted that the arbitrator misdirected himself and erred in law by refusing at arbitration to grant the appellant a further

postponement or sufficient time to obtain evidence of bank statements that were material to defending the case against it and thereby violated the appellant's rights to a fair trial as entrenched in Article 12 (1)(e) of the Constitution.

[17] Mr. Ndana submitted that, although this ground appears to be a ground for review, it is equally a ground of appeal as it involves a determination of a question of law. Counsel relied on the matter of *Meyer v Swartz*[1] wherein the court found that the irregularities committed by the arbitrator raised questions of law, specifically whether or not the appellant received a fair and just hearing. The court made reference to the matter of *Shaama v Roux*[2] wherein Van Niekerk J said the following:

> 'It seems to me that where a defect in the proceedings raises a question of law and such a defect is apparent from the record, a party would be able to bring the matter before the Labour Court either by way of appeal or by way of review'.

[18] For the foregoing reasons, the appellant seeks to introduce new evidence of bank records that were never placed before the arbitrator.

[19] I had regard to the entire arbitration record. There is no point at which the appellant's Director applied for a postponement of the matter to enable her to obtain bank statements. The arbitral proceedings show that the arbitrator invited and directed the appellant's Director to deal with the allegations made by the first respondent. The arbitrator elicited evidence from the appellant's Director on each and every allegation, from unfair dismissal, unilateral change of conditions of service, termination of employment without notice to non-payment of full salary.

[20] To illustrate, the following appears at page 21 para 5-10 of the record:

> '<u>CHAIRPERSON:</u> The non-payment, because one of the issue is non-payment of salary in full.

[1] *Meyer v Swartz* (HC-MD-LAB-APP-AAA-2020/00042) [2021] NALCMD 11 (29 March 2021).
[2] *Shaama v Roux* 2014 NALCMD 39 (30 September 2014).

RESPONDENT'S REPRESENTATIVE: I explained already. At the beginning now I explained that at the beginning of 2018 when we start the school in January, they make a meeting with my husband that because of this situation we are at the beginning and we are new, and the enrolment of the school is low. We cannot afford.'

[21] The arbitrator enquired further about the non-payment of the full salary, asking specific questions regarding the duration the salary was not paid in full etc. At no point did the appellant's representative indicate that she wished to present bank records or did she apply for a postponement for that purpose.

[22] In *John and Penny Group (Pty) Ltd v Gerhardus Gabriel & 5 others*[3] a labour appeal matter, this court had the following to say:

> 'It must be remembered that this is an appeal and the appeal court should proceed in its determination of the appeal on the basis of (a) the record of the arbitration proceedings, (b) the appellant's grounds of appeal and (c) the respondent's grounds for opposing the appeal.'

[23] Accordingly, this court cannot on appeal consider new evidence that was not placed before the arbitrator.

The issues

[24] When regard is had to the award handed down, it becomes clear that the award is not based on whether the first respondent was unfairly dismissed. The award is only in respect of unpaid salary and payment of one month salary for not giving the statutory one month notice of termination of employment. However, the appeal is against the entire award.

[25] In my view, this court is called upon to determine the following issues:

(a) Did the appellant dismiss the first respondent?
(b) If the answer is in the affirmative, was there a valid reason?

[3] *John and Penny Group (Pty) Ltd v Gerhardus Gabriel & 5 others* (LCA 37/2016) [2016] NALCMD 44 (18 November 2016). See also *Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 (LC).

(c) Was it necessary to give notice?

(d) Non-payment of the full salary.

Did the appellant dismiss the first respondent?

[26] In respect of the first ground of appeal, Mr. Ndana submitted that the arbitrator failed to make a distinction between a dismissal as contemplated by section 33 of the Labour Act and a termination of employment contract brought about by other reasons. Counsel submitted that the termination of the first respondent's employment was not a dismissal but a termination necessitated by a cause recognised by law.

[27] Mr. Ndana referred the court to section 30(6)(b) of the Labour Act which reads as follows:

> 'Nothing in this section affects the right –
>
> (a) …
>
> (b) of an employer or an employee to terminate the contract of employment without notice, for any cause recognised by law, or to make payment instead of notice in terms of section 31.'

[28] It was submitted that the termination was brought about as a result of the appellant following lawful directives and recommendations given by the Ministry of Education, Arts and Culture. Mr. Ndana argued that the appellant was under an obligation to comply with all relevant laws in order for the appellant to be registered.

[29] Counsel further submitted that the appellant's hands were tied because there was no other decision that the appellant could have made other than to terminate the employment of all the unqualified teachers, including the first respondent. Thus, it was contended that the circumstances of the matter do not fit the criteria of a dismissal as the appellant was not the originator of the decision for the employment to be terminated. It is for these reasons that it was submitted that the first respondent's employment was terminated for a cause recognised by law as contemplated by section 30(6)(b) of the Labour Act.

Evaluation

[30] Where an employee claims to have been dismissed, as is the case in this matter, it is incumbent upon that employee to establish the existence of the dismissal.[4] In *Meintjies v Joe Gross t/a Joe's Beerhouse*[5] the court observed that the Legislature intended the word 'dismiss' to bear the more general meaning of 'dismissal', i.e. an employee's discharge from service by or at the behest of the employer. The Court held further that it was only when the word 'dismiss' was interpreted to include any termination of a contract of employment by or at the behest of an employer that the notion of 'fairness', which lay at the heart of sound labour relations, was given its rightful place in the structure of the Act.[6]

[31] Thus, dismissal takes place where the termination of employment is caused by the employer irrespective of the manner in which the termination takes place.[7] On the other hand, termination is the wider category encompassing the termination of the contract of employment at the instance of the employee, the employer and the operation of law.[8]

[32] In the instant matter, it is common cause that the first respondent did not resign; neither did he consent to the termination of employment. Similarly, the employment contract was not terminated by mutual agreement between the parties. Further, the Department of Education was not party to the employment contract between the appellant and the first respondent.

[33] As stated above, Mr. Ndana submitted that the termination of the first respondent's employment was not a dismissal, within the meaning of section 33(1) of the Labour Act but a termination necessitated by a cause recognised by law as envisaged by section 30(6)(b).

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[4] Section 33(4) of the Act. See *Benz Building Suppliers v Stephanus and Others* footnote 3; *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) or (2004) 25 ILJ 731 (LC).

[5] *Meintjies v Joe Gross t/a Joe's Beerhouse* 2003 NR 221 (LC).

[6] At para H-J.

[7] See E Cameron, H Cheadle and KC Thompson *The New Labour Relations Act* 1988 at 143. See also *Du Toit v The Office of the Prime Minister* 1996 NR 52 at 64C-D.

[8] Cameron *et al* foot note 7.

[34] Parker[9] states that the causes or grounds contemplated in section 30(6)(b) of the Labour Act must be common law grounds and grounds found in different sections of the Labour Act, as well as causes or grounds in any other relevant legislation, e.g. Public Service Act 1995 in respect of public servants. The learned author goes further to state that at common law an employer may dismiss his employee with or without notice, i.e. summarily, for breaching a fundamental duty he owes to his employer. Therefore, so the author states, an employer can summarily dismiss an employee who has been guilty of a serious breach of a term of the contract of employment, i.e. a breach that goes to the root of the employment contract.[10]

[35] According to the author[11], further grounds that courts have recognised are instances e.g. where the employee refuses or fails to render his personal service due to persistent and unexplained absenteeism and lack of punctuality and the employee's wilful and repeated disobedience to lawful and reasonable instructions which can lead to only one inescapable inference, namely, that the employee refuses to be bound by the contract of employment.

[36] The learned author states further that:

'Besides, certain forms of conduct falling under the rubric of misconduct have been recognised as entitling an employer to dismiss without notice. Notable among them are such dishonest acts as theft, fraud, violent conduct (particularly fighting and assault) and wilful damage to property of the employer, (especially property that is vital to the smooth operation of the employer's business). Yet again, if an employee holds out to his employer that he possesses a particular skill and fails to apply it, this amounts to breach of the contract of employment, justifying summary dismissal… It must be remembered that the Labour Act protects an employee who is subject to this Act from unfair dismissal within the meaning of the Act.'[12]

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[9] C Parker *Labour Law in Namibia* (2012) at 114.
[10] Ibid at 113.
[11] Parker *op cit* at 114.
[12] Ibid at 114.

[37] Parker goes further to state that, apart from the grounds under the common law, which the courts have recognised as justifying summary dismissal, some labour or employment statutes give employers the right to dismiss their employees summarily based on certain specified grounds. For instance, s 33(8) of Swaziland's Employment Act[13] gives an employer the right to dismiss his employee without notice if the reasons for his dismissal are such as to warrant the immediate cessation of the employer-and-employee relationship and where the employer cannot be expected to take any other course.[14]

[38] It is worth noting from the foregoing that the 'cause recognised by law' must be a common law ground or one that is stipulated by the Labour Act or other relevant legislation governing employer-employee relationships.

[39] The first respondent was subject to the provisions of the Labour Act. There is no doubt that the employment contract in this matter was terminated at the instance of the employer. In most cases, informing the employee that the contract has come to an end effects a dismissal.[15] In *Nafau and 38 Others v United Fishing Enterprices*[16]*,* the court held that the term 'dismissal' is not confined to the termination of a contract of service on grounds of an employee's misconduct but that it may encompass termination of a contract of service on grounds other than misconduct.

[40] Where an employee whose contract is subject to the Labour Act, receives a notice to terminate his contract of employment and he does not accept it, which he is entitled to do, the termination constitutes a dismissal.[17] In that event, section 33 of the Labour Act comes into play. [18]

[41] Section 33 of the Labour Act provides that:

'33 Unfair dismissal

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[13] Act No. 5 of 1980.
[14] Parker *op cit* at 114.
[15] *Newton v Glyn Marais Inc* [2009] 1 BALR 48 (CCMA).
[16] *Nafau and 38 Others v United Fishing Enterprices* Case No LCA 08/2001 dated (05 April 2007) at 7.
[17] See Parker *op cit* at 129.
[18] Ibid.

(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) …
(3) …
(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.'

[42] Briefly, section 33 (1) provides that an employer must not, whether notice is given or not, dismiss an employee without a valid and fair reason and without following a fair procedure. This is bearing in mind that the employer does not have unlimited power to breach a contract of employment with impunity.[19]

[43] In *Benz Building Suppliers v Stephanus and Others*[20] this court put the position as follows:

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

[44] Once again, Mr. Ndana submitted that the termination of employment was as a result of directives and recommendations by the Department of Education that the

[19] See *Kiggundu and others v Roads Authority and others* 2007 (1) NR 175 (LC).
[20] Footnote 3.

appellant was obliged to comply with in order to be registered as a private school. It was further submitted that the hiring of qualified teachers by the appellant was necessary in order for the appellant to be in compliance with the law and avoid closure.

[45] Mr. Ndana further contended that the appellant's Director held meetings with the first respondent wherein she disclosed contents of the reports received from the Department of Education on the findings, recommendations and directives made therein. Thus, it was argued that the first respondent was at all material times informed of the inspections as well as the imminent termination of his employment. It was further submitted that the meetings held by the appellant were intended to provide a platform for the first respondent to be informed that his employment would be terminated and the reasons thereof.

[46] Moreover, Mr. Ndana submitted that the facts of this matter are different as the case does not involve misconduct. As such, the procedure ordinarily followed in disciplinary proceedings is not applicable in this matter.

[47] It seems to me that the issue regarding the first respondent not being a qualified teacher is in two ways. The first is that his academic qualifications were not evaluated by the Namibia Qualifications Authority. Secondly, he did not have a valid work permit.

[48] The first respondent's case was that he was head-hunted by the appellant's Director based on falsehood. According to him, the appellant's Director assured him that the school was registered. At the time, he was gainfully employed and had a valid work permit which was facilitated by his former employer. This does not take away the statutory impediment that the appellant could not employ the first respondent without offending the Immigration Control Act 7 of 1993.

[49] The second legal impediment relates to the fact that the first respondent was unqualified to teach in the appellant's school. The Directorate of Education was acting in accordance with the law, that is, the Education Act 16 of 2001(the Education Act).

[50] The appellant's Director informed the arbitrator that the Directorate of Education did several inspections and wrote about three letters on different occasions advising the appellant to rectify the issue of unqualified teachers. The first report bears two dates, being 29 June 2018 on the front page and is signed on the last page by the Director of Education and dated 25 September 2018. Its recommendation reads as follows:

> '5. RECOMMENDATION
>
> The school need to employ qualified teachers those having 4 years degree in education so that our Namibian children get quality education, Therefore Ebenezer School to be registered with the Ministry of education art and culture should find another teachers in immediately time to avoid school closure.'

[51] The second report could not be located. However, some ten months later on 17 July 2019, the Directorate of Education issued another report which, among others, reads as follows:

'3 SCHOOL DEFECTS

The following are the defects to be rectified before the school should be closed.

1. The school must release all the unqualified teachers and employ the 4 years degree in education qualified teachers before 1 December 2019.
2. …
3. …
4. Foreigner teachers must have the valid work permit with Ebenezer and NQA evaluations.'

[52] In my view, the appellant was obliged to comply with the directives issued by the Directorate of Education. Failure to comply with such directives would have resulted in the non-registration and closure of the appellant. Considering the aforementioned two legal impediments in terms of the Education Act, I find that the appellant had a valid and fair reason to terminate the first respondent's contract of employment. The performance of the employment contract was objectively impossible to perform after the conclusion of the contract. There has been a supervening

impossibility of performance.[21] I find that the termination of the first respondent's employment was not a dismissal within the meaning of section 33(1) of the Labour Act.

Was it necessary to give notice?

[53] The issue of unqualified teachers was pointed out to the appellant about a year earlier before the appellant abruptly terminated the first respondent's employment contract. The appellant's Director stated in the arbitration proceedings that she was 'covering up' the unqualified teachers. It seems to me that the reason for covering the teachers was not only aimed at ensuring that the first respondent retained his employment but also because the appellant benefited in the process as its Director is on record to say that it could not afford to pay qualified teachers.

[54] While the reason for terminating the first respondent's employment is valid and fair, the appellant was required to comply with the provisions of the Labour Act. This includes giving the first respondent a notice of termination of employment.

[55] The appellant informed the arbitrator that it was only given until 01 August 2019 to release the unqualified teachers; however, this is not contained in the report. On the contrary, the date mentioned in the report is before 1 December 2019. Therefore, there was more than sufficient time for the appellant to give the notice of termination of employment to the first respondent, which it did not do.

[56] The appellant's Director immediately terminated the first respondent's contract as soon as she received the last report notwithstanding the fact that she was given a grace period. On its version, the appellant knew that the final report would be issued and was well aware of what would be contained therein especially on the issue of unqualified teachers, yet it still did not find it necessary to give notice of termination to the first respondent.

[57] Although the appellant mentioned that it held meetings with all the teachers to inform them of the developments, the copies of the minutes do not show who attended

[21] Dale Hutchison (Ed) and Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2 ed (2012) at 383.

those meetings. I find it necessary to highlight what was said in *Workers Representative Council v Manzini Town Council*[22] wherein the court observed that:

> 'The termination of contractual relationship is not a trivial matter and the decision to terminate a contract changes the contractual relationship that the contracting parties have towards each other. This is a step, which might cause serious material prejudice to the party against whom the cancellation is effective. This consideration is, in my view, extremely important and is a valid reason why the act of cancellation of an otherwise valid contract must be clear and unambiguous…'

[58] It is common cause that at the time the last report was issued, the first respondent was away on what he termed 'forced leave' at the instance of the appellant. The appellant terminated the first respondent's employment through a text message. This much the appellant's Director admitted when she said:

> 'And then he was in leave, therefore I SMS (indistinct) something behind here, we receive the final letter. Our contract is terminated as we receive the letter for the final to terminate it by force.'

[59] According to the first respondent, he requested to meet with the appellant's Director in order to discuss the matter but was ignored until he approached the Labour Commissioner. There is nothing from the appellant's side that suggests that it engaged the first respondent on the issue.

[60] As a general rule, a party is expected to give a reasonable period of notice, and in the absence of an express term in the contract to that effect, what is reasonable is usually determined by frequency of payment of wages.[23] In this matter, the first respondent was employed for more than one year; hence the appellant was required to give one month's notice.[24]

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[22] *Workers Representative Council v Manzini Town Council* Swaziland CA 3/94 (Court of Appeal) at p.1 (unreported) at 12.
[23] Parker (*op cit*) at 132.
[24] Section 30(1) of the Labour Act.

[61] A notice terminating a contract of employment must be communicated clearly and unambiguously to the intended recipient in order for the notice to be valid.[25] Section 30(3) and (4) of the Labour Act provides that a notice of termination must (i) be given in writing, unless the giver of the notice is illiterate, in which case the notice may be given orally; (ii) set out the reasons for the termination; and (iii) contain the date on which it is given.

[62] Section 31(1) of the Labour Act provides that instead of giving his employee notice to terminate the contract in terms of section 30 of the Labour Act, an employer may pay his employee the remuneration his employee would have received, if the employee had worked during the period of notice.

[63] The appellant did not comply with all the above provisions. According to the appellant, it received the final letter on 17 July 2019 and that's when it terminated the first respondent's contract of employment effective 01 August 2019. This is not withstanding the fact that the Directorate of Education allowed it sometime until 1 December 2019. Consequently, the finding by the arbitrator that the appellant was supposed to comply with the one month notice, which it failed to do, is without fault.

Unpaid salary

[64] The first respondent signed a contract of employment for a salary of N$ 14 000 per month. However, in the very first month of employment, the appellant informed the first respondent that it was not in financial position to pay him the salary of N$ 14 000, and that it was only able to pay N$ 12 000. This is contrary to the contract signed by the parties.

[65] The first respondent's case was that his salary was irregularly paid. Despite being faced with this allegation, the appellant's Director did not present documentary proof to show how the first respondent's salary was being paid during his employment. It cannot be said that the appellant's representative was unaware of the allegation of non-payment of the full salary because the first respondent specifically stated it in

[25] See *Tshabalala v The Minister of Health and others* 1987 (1) SA 513.

Form LC21 and in his summary of dispute at the time of referring the dispute to the Labour Commissioner. The aforesaid Form LC21, which depicts the nature of the dispute and the first respondent's summary of dispute was served on the appellant's Director on 05 November 2019 before conciliation and arbitration hearings took place. Furthermore, on 12 December 2019 the parties attended conciliation at the Labour Commissioner office before the matter proceeded to arbitration on 13 March 2020.

[66] On the other hand, the first respondent presented documentary evidence concerning the payment of his salary during the period of employment. The said evidence is in the form of a bank statement and a handwritten note that contains the first respondent's calculations. According to the appellant's Director, the teachers were getting paid on the 20th of every month. It appears from the evidence that the first respond's salary for a single month would be paid on different days during the same month either through his bank account or via e-wallet service. For example his salary for July 2018 was paid as follows:

23 July 2023:	E-wallet:	N$1400
26 July 2023:	Banked:	N$1000
27 July 2023:	Banked:	N$1500
03 August 2023:	Banked:	N$2000
08 August 2023:	E-wallet:	N$1000
Total salary paid:		**N$6900**

[67] Mr. Ndana submitted that the arbitrator should have disregarded the first respondent's handwritten note as it does not constitute relevant evidence. The argument was not premised on any legal basis. However, the first respondent did not only present the handwritten note but equally submitted his bank statement. The amounts on the bank statement correspond with the amounts on the handwritten note.

[68] Because of the irregular manner in which the salary was paid, the handwritten note is helpful in breaking down the amounts paid for each month. It would have been a daunting task for the arbitrator if such summary was not done. The record would have been voluminous and a lot of time would have been wasted on an exercise that could easily be summarised and more helpful when reduced to a piece of paper.

[69] Furthermore, unlike the bank statement, the handwritten note includes the amounts paid via e-wallet which amounts are not reflected on the bank statement. Had the arbitrator disregarded the handwritten note, the total amount of unpaid salary would have been higher than determined and would not have reflected the correct information.

[70] The arbitrator entertained the first respondents claim of unpaid salary only from August 2018 to July 2019 and disregarded the claim from January 2018 to July 2018 because such period lapsed in terms of section 86(2) (a) and (b). The first respondent referred the dispute to the Labour Commissioner on 05 November 2019. The period within one year as envisaged by section 86(2)(b) is 06 November 2018 to 05 November 2019. Therefore, the arbitrator should have further disregarded the period from August 2018 to October 2018 as such period equally prescribed.

[71] On my calculations, the total amount of unpaid salary from August 2018 to July 2019, being the period considered by the arbitrator is N$ 73 800 and not N$ 63 800 as determined by the arbitrator. However, because the claim from August 2018 to October 2018 prescribed, the amount of unpaid salary for those months totalling N$ 17 800 should also be disregarded.

[72] Only claims falling within the period 06 November 2018 to 05 November 2019 can be sustained in terms of section 86(1)(b) of the Labour Act. However, at the time the first respondent referred the dispute to the Labour Commissioner, his contract of employment had already been terminated in July 2019. The issue of future loss of income did not arise and was not dealt with at arbitration. Such a claim should have been proved during the arbitration, for the first respondent bore the onus to prove what he alleged.

[73] Therefore, the period to be considered is from 05 November 2018 to July 2019. The total amount payable for that period is N$ 126 000, that is N$ 14 000 multiplied by nine months. From this amount should be deducted amounts that the appellant had paid to the first respondent, that is N$ 70 000 leaving indebtedness of N$ 56 000. To

this amount should be added N$ 14 000 for failure to give one month's notice of termination of employment.

Order

[74] In the result, it is ordered as follows:

1. The application for condonation for the late filing of the appeal is granted.
2. The appeal succeeds in part.
3. The arbitrator's award is amended to read as follows: Ebenezer English Private School is ordered to pay the first respondent the amount of N$ 70 000.
4. There is no order as to costs.
5. The matter is removed from the roll: Case Finalised.

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D. C. MUNSU

ACTING JUDGE

APPEARANCES:

APPELLANT	D K Ndana Of Jacobs Amupolo Lawyers & Conveyancers, Ongwediva.
RESPONDENTS	No appearance.