REPORTABLE

CASE NO: LCA 38/2011
LC57/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

AFRICA PERSONNEL SERVICES (PTY) LTD	**APPLICANT**
and	
SIMON SHIPUNDA AND 339 OTHERS	**1ST TO 340TH RESPONDENTS**
MOSES SHITALENI IINANE (ARBITRATOR)	**341ST RESPONDENT**
MERIAM KATJIPOPI NICODEMUS (ARBITRATOR)	**342ND RESPONDENT**
THE LABOUR COMMISSIONER	**343RD RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 29 June 2012
Delivered on: 31 July 2012

JUDGMENT

SMUTS, J [1] The appellant is a labour hire concern. It recruits and engages employees and in turn hires out their services to its clients. It employed the 1st to 340th

respondents (whom I refer to as respondents in this judgment). They were employed by the appellant to render agency work to one of its clients, Etale Fishing (Pty) Ltd (Etale), at Etale's premises[1]. This a concern is engaged in the processing of fish at Walvis Bay.

[2] The respondents engaged in a demonstration at Etale on 10 March 2010. This started during the lunch hour for day shift workers. That demonstration became protracted and violent. The respondents were suspended in the course of the demonstration on 10 March 2010. They subsequently faced disciplinary proceedings which took place on 10-12 May 2010, 15 and 16 June 2010 and 5 and 6 July 2010. The respondents were dismissed pursuant to the disciplinary proceedings. Following an unsuccessful internal appeal, presided over by an independent legal practitioner, the respondents referred a dispute concerning their dismissals to the Labour Commissioner. In doing so, they brought an application to proceed by way of a class dispute[2]. Two arbitrators were appointed to deal with the dispute. They are also cited as respondents (341st and 342nd). They are however referred to as the arbitrators in this judgment.

[3] The arbitrators decided to hear the dispute as a class dispute. The arbitration of the class dispute subsequently proceeded on 19 and 20 January 2011 and further on 22 23, and 24 February 2011.

[4] The arbitrators found in favour of the respondents in an award which was handed down on 28 March 2011 and subsequently varied in certain respects on 8 April 2011. They found that the respondents' dismissals were not effected for a valid and fair reason and ordered that the applicant pay the respondents their salaries from the date of suspension (10 March 2010) until the outcome of the disciplinary hearing on 10 August 2010and further directed that the applicant pay to each of the respondents an amount equivalent to six months' salary as compensation for loss of income as a consequence of the unfair dismissals. The amount payable to each employee was then indicated on an annexure to the award setting out the names of employees and the amount in to paid in respect of each such person.

[1] The nature of this form of business is discussed in detail in *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC) at 615 (par15)

[2] Under Rule 17 of the

[5] The applicant timeously noted an appeal against the award. It subsequently also sought to set aside the award in a separate review application. Both the appeal and the review application are opposed by the respondents but not by the arbitrators who abide the decision of this court.

[6] The appeal, previously set down on 7 March 2012, was postponed by agreement to 29 June 2012. The review application was also then set down together with the appeal. Both counsel have directed argument in respect of both the appeal and review application. They agreed that if the appeal were to succeed, it would not be necessary to deal with the review application.

[7] The respondents have taken two preliminary points against the appellant. Firstly, it is contended on their behalf that the heads of argument filed by the appellant are not in compliance with the Practice Directives and that the appeal should consequently be struck. The respondents contend in the second instance that the appeal has lapsed by reason of the failure on the part of the appellant to prosecute it within 90 days in accordance with the rules. A number of points are also taken by the appellant concerning the proceedings which took place before the arbitrators. These include a challenge to the decision of the arbitrators to hear the dispute as a class dispute as well as a certain further alleged irregularities including on constitutional grounds in the review application. These only arise if the appeal were not to succeed.

[8] The preliminary points raised by the respondents are first dealt with. The facts which gave rise to this appeal are then set out. The arbitrators findings and the award are thereafter referred to. The grounds of the appeal are then considered, including the point taken by the respondents that they do not raise questions of law alone and that the appeal should be dismissed for that reason as well.

Heads out of time

[9] Dr Akweenda, who appeared for the respondents, took the point that the appellant's heads of argument were not filed 15 days before the hearing in accordance with the Practice Directives. In the absence of an application for condonation, he contended that the appeal should be struck with costs. He submitted that the Practice Directives apply to appeals to this court.

[10] Mr Heathcote SC, who appeared together with Ms B. Van der Merwe for the appellant, countered that the rules of this court made by the Judge President expressly provide in rule 17(23) that an appellant is to deliver heads of argument 10 days before the hearing and the respondent 5 days before the hearing. He submitted that the rules thus made by the Judge President on the advice of the Labour Court Rules Board and duly promulgated pursuant to the Labour Act, 11 of 2007 (the Act) should take precedence over the Practice Directives where the rules make specific provision for a matter. He pointed out that the appellant's heads of argument were delivered in compliance with this sub-rule.

[11] I am in agreement that the specific provision provided for in rule 17(23) of the rules of this court would take precedence over the more general directives provided in the form of the Practice Directives. Where the rules of this Court make specific provision for an eventuality, then they are in my view to be followed if they are at variance with the Practice Directives. If no provision is made for an eventuality, then the Practice Directives would apply.

[12] This point accordingly does not succeed.

Lapsing of the appeal

[13] Dr Akweenda also took the point that the appeal had lapsed by reason of the failure on the part of the appellant to prosecute it within 90 days of noting the appeal as is provided for in rule 17(25) of the rules. This sub-rule provides that an appeal must be prosecuted within 90 days after the noting of the appeal and unless so prosecuted, the appeal is deemed to have lapsed. He argued that the terms of this sub-rule are

peremptory and that an agreement between the parties cannot have the effect of extending the time period. He submitted that it was incumbent upon the appellant to apply for condonation in accordance with the rules of this court supported by an explanation under oath given in support of such an application. He pointed out that the appellant had failed to do so and that the appeal had thus lapsed.

[14] Mr Heathcote however pointed out that there was a series of agreements between the parties with regard to the extension of time periods, in respect of both the filing of the record in prosecuting of the appeal and the respondents' opposition to the application to stay the execution of the award. He pointed out that these extensions are fully explained under oath and are set out in the appellant's replying affidavit to a contention made in the respondent's answering affidavit in the review proceedings – to the effect that the appeal has lapsed. This contention was denied. There then followed a detailed reference to agreements reached between the parties' legal practitioners on more than one occasion extending the time periods in respect of three issues. These were to amplify and amend the notice of appeal and review application as well as for the respondents to file their answering papers in the stay application, and finally for the 90 day period provided for in rule 17(25) for the prosecution of an appeal.

[15] The extension granted with respect to the 90 day period provided for in rule 17(25) of 29 November 2011 was met by the appellant. These agreements between the practitioners were not only fully explained with reference to dates in the replying affidavit, but were also supported by contemporaneous correspondence exchanged between the practitioners attached to that affidavit.

[16] Dr Akweenda did not dispute the agreements in question. He submitted however that the agreements were not sufficient and that the appellant still needed to apply for condonation.

[17] Mr Heathcote submitted that this point taking was untenable on the respondents' part given their express agreement to the extension. He further submitted that condonation was not necessary in the circumstances but in the alternative moved for

condonation and referred to the detailed explanation provided under oath on behalf of the appellant in support of condonation, in so far as it may be found to be necessary.

[18] Upon enquiry, Dr Akweenda conceded that the respondents sustained no prejudice by reason of the failure to prosecute the appeal within the 90 day time period in question, given their agreement to the extension. He submitted that there was however potential prejudice to the court by reason of the failure to comply with the rule and that condonation should be formally sought by way of application supported by affidavit.

[19] It would seem to me to be understandable that the parties agreed to an extension of the time period referred in rule 17(25), given the voluminous record which needed to be prepared and then filed. The original record runs to some two thousand three hundred pages, as was pointed out by Dr Akweenda. Subsequently, the respondents filed an application for condonation for the late filing of confirmatory affidavits. This application and supporting affidavits extended the record to over three thousand pages.

[20] Whilst it is correct that the rules require that appeals must be prosecuted within 90 days, the obligation to dispatch the record is upon the office of the Commissioner, a labour inspector or arbitrator under rule 17(7). The delay in doing so does not lie at the door of an appellant who has timeously noted an appeal (and thereafter takes the further steps contemplated by Rule 17 within the required time periods). But the consequence of Rule 17(25) in its present formulation when an arbitrator fails to or is unable to provide a record within less than 90 days means that an appeal would lapse through no fault or non-compliance on the part of an appellant. Even where the parties agree upon extentions of the time limit, these do not involve the arbitrator(s) whose statutory duty it is to file the record.

[21] Unlike the express provisions of the rule of the Supreme Court Rules which effectively provide that an agreed extension for the filing of a record serves to extend the time period within which the appeal is to be filed, rule 17(25) does not contain a

provision in similar terms. This is presumably because it is not the duty of an appellant under rule 17 to dispatch the record – but rather that of the arbitrator. Rule 17(25) in its current formulation unfortunately does not take into account that the primary duty to provide the record rests upon the adjudicator and not the appellant. Yet it is the appellant which faces the dire consequence of a lapsed appeal when this obligation is not timeously met.

[22] I have noted applications for condonation in other appeals where the late dispatching of a record (eminently understandable in this appeal) brought on the basis that there would otherwise give be the lapsing of an appeal. This sub-rule in my view requires reconsideration, given the harsh consequence visited upon a party where non-compliance with the rule would not necessarily be by reason of an act or omission on its part. The fact that condonation can be sought does not sufficiently address the inequitable consequence of the rule in its present formulation. It also gives rise to a multiplicity of condonation applications which can serve to delay the final outcome of an appeal and render litigation more costly – an outcome the rules are generally scrupulous in seeking to avoid.

[23] In the absence of an amendment to the rules, it would seem to me that condonation should strictly speaking be sought by reason of the failure to prosecute an appeal within 90 days, despite the express agreement extending the time period in question.

[24] Mr Heathcote in any event applied for condonation if were to be required and referred to the affidavit before court, providing a detailed explanation under oath for the failure to strictly comply with rule 17(25). In the exercise of my discretion, I have no hesitation to grant condonation because of the detailed explanation given under oath upon the issue. In exercising that discretion, I take into account the fact that the respondents are not prejudiced at all by reason of any failure to prosecute the appeal with the 90 day period provided for as they had in fact agreed to the extension and secured a benefit in exchange with regard to longer periods to provide other affidavits. I find it extraordinary that this point is taken in view of the agreement between the parties.

[25] I accordingly grant condonation for non-compliance with rule 17(25). It follows that the appeal has not lapsed and that this preliminary point should also fail.

Background facts

[26] It is common cause that the demonstration took place on 10 March 2010 and started during the lunch hour on that day. It continued until 12 March 2010 after the terms of an interdict (which had been obtained on 11 March 2010) were read out to the demonstrating employees by the Regional Commander of the Namibian Police and the protestors finally dispersed. It would appear to be common cause that the demonstration took place on the premises of Etale as well as outside its entrance in the street. It was also not placed in the issue that the respondents participated in the demonstration. They did so together with several other employees with the effect that, with a few exceptions, the appellant's entire workforce at the Etale, comprising some 624 employees, participated in the demonstration.

[27] In the course of the demonstration and within an hour or two of its commencement, the appellant suspended its entire workforce of 624 employees who are employed to perform services at Etale. Despite the suspension, these demonstrating employees continued with the demonstration well into the night on 10 March 2010 although some went home after an appeal was made to them to do so after 20h00 on that evening. Some employees stayed overnight at the Etale premises. The demonstrating employees assembled again the following day and the demonstration continued until 12 March 2012.

[28] It was not disputed by the respondents and those who testified on their behalf both at the internal disciplinary hearing and at the arbitration proceedings that, in the course of the demonstration, a bus belonging to the appellant and conveying replacement workers to Etale was prevented access to Etale's premises and the bus was pelted with stones and other objects, resulting in its driver being injured and the ignition keys forcibly taken from the bus. It was only with the intervention of the police

that the driver, Mr Albertus Kahimune, was taken to safety. Not one of the employees who testified at the internal disciplinary hearing as well as at the arbitration proceedings stated that they saw the incident or were aware of it. But they did not dispute it. Nor was the damage to the vehicle – in the form of broken windows and dents to its body work and damage to its ignition - disputed. Nor was it disputed that the bus contained employees to perform the work of those who had been placed on suspension and that the appellant had been prevented from transporting these employees to work at Etale by reason of the conduct of persons engaging in the demonstration.

[29] The demonstrating employees were represented by two different unions, the Namibia Seaman and Allied Workers Union (NASAWU) and the Namibia Food and Allied Workers Union (NAFAU). Separate hearings were conducted in respect of the members of the different unions. This appeal concerns employees who are members of NASAWU. Their disciplinary proceedings were conducted before an external chairperson, Mr O Podewiltz. A single hearing was conducted in respect of all the respondents – 340 employees. These proceedings ran into some seven working days, spread over the period between May and July 2010. The detailed ruling prepared by the chairperson was dated 10 August 2010. The respondents were represented by the President of their union (NASAWU), Mr P. Hango at their internal disciplinary proceeding and in the subsequent internal appeal as well as in the arbitration proceedings.

[30] The respondents were charged with five counts of misconduct in respect of the events which transpired over the period 10 to 12 March 2010. The charges were of gross insubordination; secondly, intimidation and threatening behavior; thirdly unlawful damage to company property; assaulting an employee in the fourth instance and finally, bringing the appellant's name into disrepute.

[31] As to the first charge gross insubordination, it was alleged that the respondents had been instructed on numerous occasions by the appellant through its union, NASAWU, alternatively by the appellant directly that they were not allowed to protest, demonstrate and/or picket on the property and/or premises of Etale on 10 March 2010 up to 12 March 2010 and/or authorization for a demonstration had not been granted. It

was further alleged that despite been warned that the demonstration or protest action or picketing was not permitted on thus unlawful, the respondents disregarded their employer's lawful instruction and that such conduct amounted to insubordination.

[32] In respect of the second charge of intimidation and threatening behavior, it was alleged that the behavior of the respondents amounted to intimidation or threatening behavior by preventing other employees of the appellant from performing their duties at Etale. The third charge of assaulting a fellow employee related to the assault upon Mr Albertus Kahimune, the bus driver already referred to. It was further alleged that in the alternative that their participation or promotion of the commission of assault upon him amounted to forming a common purpose to assault him. The fourth charge concerns the damage to the appellant's property in the form of the bus when it was stoned and the ignition keys forcibly removed. The fifth charge of bringing the appellant's name into disrepute alleged that by participating in or assisting others in participating in this action at Etale, they had disrupted the operations of Etale and brought the appellant's name into disrepute.

[33] At the internal disciplinary hearing, there were four witnesses called by the appellant. All except one gave evidence in the arbitration proceedings together with Mr Podewiltz who gave brief evidence as to the disciplinary proceedings and confirmed the record of the proceedings together with exhibits in the form of a considerable amount of correspondence which formed part of those proceedings. A union official, Mr B. Petrus gave evidence in both the internal hearing and at the arbitration proceedings on behalf of the respondents. Three of their number gave evidence at the disciplinary hearing and three different respondents gave evidence at the arbitration proceedings.

[34] In his ruling, Mr Podewiltz found the respondents guilty as charged. His ruling also covered the question of sanction which, he indicated, had been fully ventilated before him. In view of all the circumstances and taking into account the factors he listed in his ruling, he found that the respondents should be dismissed which then occurred.

[35] The respondents appealed against the chairperson's ruling. That appeal was presided over by an external legal practitioner engaged to do so, Mr Norman Tjombe. Although he found that there was an overlap in respect of the charges, he found that internal employment disciplinary enquiries do not need to meet the same standard of charge splitting as criminal trials and that a technical approach to the formulation of offences would not be required. He found that the appellant had met the requirement of specifying the charges with sufficient particularity to enable the employees to answer them. He found that all employees were invited to attend the hearing and to testify and found that there was evidence that all of the suspended employees were involved in the demonstration. They choose however not to testify. He confirmed the findings as to their guilt and the sanction. He specifically found that the charges were serious and that the consequences of the charges were even more serious. He thus found that there was no justification to interfere with the recommendation of dismissal made at the disciplinary hearing.

[36] The respondents, represented by NASAWU, reported a dispute and applied for the dispute to be determined by way of the class dispute. This was opposed by the appellant. The arbitrators granted that application and proceeded to hear complaints by way of a class dispute in one single proceeding. In the review application, the appellant questions the regularity of that decision. In view of the conclusion I reach concerning the appeal, it is not necessary for me to deal with the points taken by the appellant in that regard. I would however have thought that it would have been in the appellant's best interest for the matter to have been determined by way of a class dispute rather than the multiplicity of proceedings which would otherwise have resulted. It would also seem to me that substantial compliance with the rule would be required with a minimum of formality in an application for a class dispute, particularly where no prejudice to a respondent is established or even seriously suggested.

Proceedings before the arbitrators

[37] Like the internal disciplinary hearing, these proceedings were somewhat protracted. They took place on 19 and 20 January 2011 and again on 22, 23 and 24

February 2011 the award was handed down 28 March 2011 and subsequently varied in certain respects on 8 April 2011. The respondents, again represented by NASAWU and its president, Mr P. Hango, called four witnesses including its official, Mr B. Petrus, who had given evidence at the internal hearing and three other respondents who had not.

[38] The appellant called four witnesses. These were its then area manager, Mr J Janse van Vuuren, Mr Albertus Kahunime, a non-executive director, Mr Kapembe Johannes and the chairperson of the disciplinary enquiry, Mr O. Podewiltz. In the award it is incorrectly stated that the respondents called only three witnesses. That may be because the arbitrators had scant regard for the internal disciplinary proceedings which took place before Mr Podewiltz (and the subsequent appeal). These documents however formed part of the record and their correctness was confirmed by Mr Podewiltz in his evidence. The arbitrators also called a witness of their own.

[39] During oral argument in this appeal, Mr Heathcote criticized the failure on the part of the arbitrators to refer to the internal disciplinary proceedings in any detail. This may be because the fairness of the procedure was essentially not challenged by the respondents who gave evidence in the arbitration proceedings. The fact that there was thus no material complaint established concerning the fairness or otherwise of those proceedings in the course of the arbitration may possibly explain why those proceedings were hardly referred to. Despite this, the arbitrators did however make an unfavorable reference to the proceedings. But the proceedings before the arbitrators are not appellate in nature. Mr Heathcote conceded that the validity and fairness of the reason for the dismissal of employees is to be to be established at those proceedings. He however correctly points out that the internal proceedings may be an important factor in the assessment by arbitrators of facts when determining the fairness and validity of the reason for the dismissal. He rightly contended that those proceedings could be a factor in weighing to the credibility of witnesses. He referred to the failure on the part of the respondents to call the same witnesses at the arbitration proceedings after their version had been discredited in the ruling by the chairperson of the disciplinary enquiry. This is in my view a criticism which has some force. Those proceedings should have been

taken into account by the arbitrators in assessing the credibility of the respective versions given at arbitration.

[40] The factual background which led to the demonstration emerged in evidence in the arbitration proceedings. The demonstration had been preceded by meetings between NASAWU and the appellant's management. There was also correspondence exchanged between them relevant to the build-up to the protest action. Much of this background emerged from the evidence of Mr Janse van Rensberg as well Mr Kapembe Johannes although the latter was involved to a lesser extent. Their evidence was not essentially put in issue by Mr Petrus who gave evidence on behalf of NASAWU and the respondents. There were however certain respects where he said he was not in a position to confirm the preceding events and the correspondence. But he was also not in a position to place the appellant's evidence in issue. The appellant's evidence in this regard must be accepted, particularly in the absence of the main protagonistic of the union, its President, Mr P. Hango, giving evidence.

[41] What emerged from the evidence is that NASAWU had, prior to the start of the demonstration on 10 March 2010, been engaged in discussions with the appellant directed at entering into a recognition agreement. In these discussions, the appellant had pointed out that NASAWU did not have the required representation to qualify for recognition as an exclusive bargaining agent. The parties were not however *ad idem* concerning the union's membership numbers in the bargaining unit. A meeting was then scheduled for 11 March 2010 for the primary purpose of verifying membership numbers and proceeding with recognition negotiations.

[42] During this process, NASAWU had on 5 March 2010 requested the appellant for permission to hold a meeting with its members who were the employees of the appellant and employed at the premises of Etale. NASAWU requested the meeting at Etale's premises, for the purpose to provide feedback to the members concerning the recognition negotiations. The appellant's response, recorded in writing, was that this would require the consent of the Etale management as those premises were not under the appellant's control. On 8 March 2010, Mr Janse van Vuuren was informed that Etale

would not permit such a meeting (between APS employees and NASAWU) at its premises. Mr Janse van Rensburg conveyed this telephonically to Mr Hango and also confirmed this in writing. He however indicated that the appellant would permit such a meeting at its own premises.

[43] Mr Janse van Rensburg further testified in court that Mr Hango on 9 March 2010 confirmed receipt of his letter to this effect and a meeting was proposed. That was held on the afternoon of 9 March 2010. Mr Van Rensburg also requested the presence of Mr Kapembe Johannes, a non-executive director of the appellant and its former managing director at the meeting.

[44] Both Mr Janse van Rensburg and Mr Kapembe Johannes gave evidence as to what transpired at that meeting held at approximately 14h00 (on 9 March 2010). Their evidence was mutually consistent. It was to the effect that an explanation was provided to Mr Hango that permission had not been granted by Etale and that NASAWU could not as a consequence proceed with its proposed meeting at Etale's premises.

[45] In response to this unequivocal statement, Mr Hango stated that he would need time to inform members of the union of such discussions. Mr Janse van Rensburg inquired as to when that meeting would take place. Mr Hango informed him that it would occur that very evening of 9 March 2010. It was then agreed that Mr Kapembe Johannes would also attend the meeting to explain the appellant's response and the approach of the Etale (in not granting permission to have the requested meeting on its premises). This union meeting then proceeded that evening of 9 March 2010. Mr Kapembe Johannes's version as to what transpired there was essentially unchallenged in cross-examination. It also accords with the contemporaneous correspondence and the position consistently taken by the appellant on the issue. He also pointed to NASAWU and its members who were present at that meeting that any action in contravention of the clear instruction not to proceed with any demonstration or meeting at Etale premises would be considered as illegal and be contrary to the appellant's instructions and would also jeopardize the appellant's relationship with Etale. He pointed out that Etale could easily terminate its contract with APS if not satisfied with the

conduct of the employees provided (by APS) to Etale or by reason of any employee action at its premises.

[46] Certain of the respondents' witnesses who testified at the internal disciplinary hearing gave evidence that Mr Johannes had in fact given permission for the meeting and demonstration to held at Etale's premises the next day. This was in my view correctly rejected by the chairperson of the disciplinary enquiry. Significantly, those witnesses were not called by the respondents at the arbitration proceedings. The arbitrators however made no mention of this aspect in their assessment of the evidence. This aspect was rightly criticized by Mr Heathcote. Although the respondents' witnesses at the arbitration did not expressly contend that Mr Kapembe Johannes had given permission for the meeting, their position was more nuanced. They asserted that it was their right and entitlement as employees to have a meeting during their lunch hour at their workplace and one of them, Ms Munyala, contended that Mr Kapembe had indicated to them at the meeting (on 9 March 2010) that they should not have the demonstration on Etale's premises but outside those premises. In view of the prior contrary version and Mr Johannes' unchallenged and undisturbed version to the contrary, I am of the view that this version should have been roundly rejected and that no reasonable arbitrator could have failed to do so. The evidence of Mr Kapembe Johannes is clearly to be preferred as it is consistent with that of Mr Janse van Rensburg (and what they said at the disciplinary hearing) and also consistent with the contemporaneous correspondence and the overwhelming probabilities, and further re-enforced by the contrary and conflicting version given at the disciplinary enquiry (to that of given by Ms Munyala).

[47] Early on the morning of the 10 March 2010, Mr Janse van Rensburg testified that he received a fax from NASAWU stating that the appellant's employees who are members of NASAWU would present their petition at Etale's premises and requested that Mr Janse van Rensburg and Etale management receive the petition. Mr Janse van Rensburg stated that he replied to this virtually immediately. Although not recording the exact time, he said that would have been before 10h00 that morning. In doing so, he referred to the conversation of the previous day and stated that the appellant's

permission had not been granted for employees to have a meeting with their union at Etale and that the appellant expressly disapproved any action on the part of the employees at the instance of the union at Etale's premises. He indicated that the appellant was prepared to receive a petition at its own premises, also in Walvis Bay. The letter ended by requesting the union's co-operation and urging NASAWU "not to organize" any illegal action at Etale's premises where APS employees would be involved.

[48] The ensuing reply from NASAWU was received on the same morning. It stated that the petition would be handed over during the lunch hour by workers of the appellant and employees of Etale. It further pointed out that the employees at Etale had the right to hand over grievances to management at the place where they work and disputed the illegality of doing so and indicated that any disciplinary action taken against the employees would be resisted.

[49] Shortly thereafter Mr Janse van Vuuren received word at about 12h30 on the same day that APS employees at Etale were gathering for the purpose of a protest meeting or demonstration. In view of this, which he considered as unprotected and unlawful, he notified the Namibian Police and Etale's security with the view to preventing employees from damaging the appellant's property or that of Etale. He also addressed a memorandum to all the appellant's employees at Etale entitled "Demonstration at Etale Fishing Company." It stated as follows:

> *"It came to my attention that you want to demonstrate at Etale Fishing Company's premises this afternoon.*
>
> *The company herewith wants to inform you that any such actions will be illegal. If any employee partakes in illegal action, strict disciplinary action will be taken that will influence your career in negative ways.*
>
> *The company therefore urges you not to partake in this illegal action."*

[50] He testified that 50 copies of this letter were distributed to the gathering employees at the Etale premises.

[51] Despite this notice and the other efforts on behalf of the appellant, the demonstration proceeded. It is common cause that the entire workforce participated in it. The appellant's offer to receive a petition at the appellant's work place was not accepted by NASAWU.

[52] The evidence was further that the demonstration was held in front of Etale's administration building on its premises and that employees also gathered outside the premises.

[53] Mr Janse van Rensberg also testified that at about 13h45 he received a call from the appellant's financial director advising him that the latter had been requested by Etale's Managing Director to remove the appellant's employees from Etale's premises. Mr Janse van Rensberg then issued a suspension letter addressed to all the appellant's employees at Etale. This was distributed at the premises. It informed all employees that they were suspended with immediate effect for participation in the demonstration at Etale without authorization or permission to do so. The suspension letter also notified them that an investigation would take place and that they would be informed of further developments.

[54] He also testified that he also received a call from Etale's Managing Director informing him that the appellant's employees must leave the premises forthwith and that Etale would not tolerate any industrial action by the appellant's employees on its premises.

[55] The respondents who testified confirmed receipt of the suspension letter but inexplicably denied knowledge of the earlier APS letter which had been distributed amongst the gathering employees warning them that protest action at Etale would be unlawful.

[56] The appellant's employees at Etale remained on both Etale's premises and outside those premises, continuing with the demonstration after the conclusion of their lunch hour. Later in the afternoon, Mr Janse van Rensberg testified that he received a call from the appellant's Financial Director to the effect that the Etale threatened to terminate its service level agreement with the appellant as the appellant's employees were trespassing upon Etale's premises and ignored instructions not to proceed with the meeting and industrial action on its premises. As a consequence of this call, he contacted Mr B. Petrus of NASAWU to meet him at 18h00 outside Etale's premises in a bid to persuade the employees to vacate Etale's premises. He testified that he then met with NASAWU's president, Mr Hango as well Mr Petrus and other members of NASAWU there and requested them to arrange for him to address the gathered employees. He duly did so with Mr Petrus acting as a translator. He requested the employees to vacate the premises so that the matter could be investigated and so that there could be further discussions with Etale's management to endeavour to find a solution. His requests were to no avail. He later approached Mr Kapembe Johannes to attend at Etale's premises in a bid to convince the employees to vacate those premises.

[57] Mr Kapembe Johannes arrived at the premises at about 20h00 that evening. After short discussions with the union representatives, he and a NASAWU representative again addressed the employees and urged them to leave Etale's premises. This address was in Mr Janse van Rensberg's presence who confirmed the evidence of Mr Johannes in this regard. It was also not placed in issue by Mr Petrus even though he did not however confirm its full effect. Some employees left after this further appeal. But the majority remained, including upon Etale's premises.

[58] At about 22h00 when Mr Janse van Rensberg left the premises, some of the appellant's employees still remained at Etale's premises. Early the next morning on 11 March 2010, Mr Janse van Rensberg's evidence (which was not contested) was to the effect that there was still a number of the appellant's employees on the Etale premises, some of whom had stayed overnight in a tent in front of Etale's administration building. There were other employees on the opposite site of the entrance to Etale – outside the premises.

[59] Etale's management in the meantime requested the appellant to adhere to its obligations under its service level agreement and provide manpower to process raw fish in its factory which was then at risk of being spoiled. The appellant then resolved to provide temporary employees to Etale to process the raw material whilst a solution to the industrial action was being explored. After recruiting temporary employees, the appellant dispatched a group of about 60 to 80 such temporary employees in a bus to Etale's premises as a first detachment of temporary employees. The unchallenged evidence on behalf of the appellant was that the bus could not enter the premises. As it approached the entrance, it was prevented by the demonstrating employees from doing so. It was then that the bus was pelted with stones and bottles and Mr Kahimune was injured and the perpetrators wrenched the ignition keys from the socket so that he could proceed no further. According to the evidence, the intervention of the police prevented further injuries to Mr Kahimune who sustained an injury to his lips (which required stitches) and to his teeth (which required a dental treatment).

[60] The appellant then informed Etale's management that it was unable to bring in employees to Etale's factory. Etale's management then insisted that an urgent court interdict be obtained, following which the appellant would receive a massive claim for damages by reason of damage to raw fish. It is common cause that the appellant obtained and secured an interdict in the High Court that evening (of 11 March 2010) and subsequently received a claim for damages from Etale. Although the employees had by then moved off Etale's premises, they were positioned on the opposite side of the entrance and remained in a position to hinder access to Etale's premises. Despite the court order, the employees remained in that position on the following day until late in the afternoon when the Regional Commissioner of Police further explained the court order and requested the employees to leave the area adjacent to Etale's premises. By 18h00 on 13 March 2010 the employees eventually dispersed.

[61] Mr Janse van Rensberg also testified that shortly after the demonstration had came to an end, NASAWU's rival union, NAFAU, contacted him to contend that its members had not participated in the demonstration. The appellant informed NAFAU that

if employees could prove that they had not participated, their suspension would be lifted and they could then continue to work. At the disciplinary hearing involving the respondents, NASAWU and one of the appellant's witnesses confirmed that 13 of NASAWU's members were also not present at the demonstration, having been on annual leave or sick leave. They were then found not guilty of the charges.

[62] At the internal hearing and at the arbitration proceedings, it would not appear to be an issue that the respondents were in attendance and had participated in the demonstration. As I have said, one of the defences raised at the internal disciplinary enquiry that it was held with the permission of Mr Kapembe Johannes, was not raised in the arbitration proceedings. The respondents and NASAWU asserted that the respondents had the right to hand over the petition and demonstrate at the place where the respondents were employed, namely Etale, despite the union having sought permission beforehand for a meeting there. The respondents who testified at the arbitration proceedings and NASAWU's Mr Petrus denied threatening or intimidating fellow employees or assaulting Mr Kahimune. The respondents confirmed however that NASAWU was involved in organizing the demonstration. Certain respondents alleged that there was discriminatory treatment between NASAWU and NAFAU members but this was not established and allegations to this effect were denied by Mr Janse van Rensberg in his evidence. His denials and the evidence of disciplinary action against NAFAU members were not materially challenged in cross-examination.

[63] In the course of Mr Kahimune's evidence, the appellant sought leave to adduce photographs in evidence indicating damage to the bus and showing signs of blood. Mr Hango who represented the respondents at the hearings objected to the photographs being received because they were not provided at the disciplinary hearing. The arbitrators ruled in favour of admitting the photographs but only "as mere proof of the incident in question, without attaching the probative value thereof" (sic). It is not at all clear to me what was meant by this inept ruling. What it is in any event clear is that the damage to the bus and the injuries to Mr Kahimune were not properly placed in issue by the respondents.

The arbitrators' award

[64] In their award, the arbitrators repeatedly referred to the demonstration as being peaceful, notwithstanding the clear and unchallenged evidence of the assault upon Mr Kahimune, the stoning the appellant's bus and the appellant being forcibly prevented by demonstrating employees from transporting temporary employees to the factory. I stress that the occurrence of these events was not materially placed in issue by the respondents. The respondents who testified merely denied knowledge or involvement in those incidents but did not place the appellant's versions of those events in issue in any material sense. That was also the position of Mr B. Petrus of NASAWU who was also reluctant to confirm what occurred in his presence, such as when Mr Janse van Rensburg and he himself requested employees to leave Etale's premises.

[65] The arbitrators then proceeded to address the question as to whether there was a valid reason to effect the dismissal of the respondents. In doing so they first referred to the charge of insubordination. They concluded that the respondents had been dismissed because they had staged a peaceful demonstration at Etale contrary to the instruction not to do so by the appellant's area manager as well as one its directors. They concluded that this did not amount to gross insubordination and that the charge was disproportionate to the conduct of the respondents. They concluded in this regard:

> *"At most, a charge of failure to obey a lawful instruction would suffice. Needless to say, there is no evidence on record to prove that all employees were aware of the fact that they were not supposed to demonstrate at Etale."*
>
> *It is common cause that some of the workers were performing night shift duties and from this one can clearly deduce that a high possibility existed as to whether they were aware of the notices which the [appellant] had apparently displayed on the notice board on the date on which the demonstration ought to take place and at the time when the workers were on the verge of demonstrating.*

We are mindful of the fact that the union and the [appellant] were constant communication on the fateful day but the conduct of the union, as we heard that at that stage the union did not represent all of them, cannot be imputed on all of the employees collectively without clearly drawing a line as to who was aware of the instruction and who was not."

[66] After referring to the correspondence which was exchanged prior to the demonstration and to the meetings on the day before, the arbitrators concluded that it was not practical for the employees to hand over their petition at the appellant's premises which was some distance from their place of work, Etale and stated:

> "It goes without remarking that the actions of the [appellant] after the demonstration leaves much to be desired and that it was indeed a folic of their own to say the least. Had the [appellant] not suspended the workers due to insurmountable pressure from the managing director of Etale, no single loss would have been incurred because the workers could have proceeded with their work as if nothing had happened.
>
> From the aforegoing it is clear that there was no valid reason to suspend the workers merely because they staged a peaceful demonstration during lunch hour and which did not have any prejudice or whatsoever on their employer". (sic)

[67] They concluded that there was no valid reason to dismiss the respondents and further referred to a breakdown in communication between the union and its members, despite the fact that there was little or no evidence on record to support this. Indeed the contrary in the case. At least one of the respondents acknowledged that NASAWU had organized the demonstration. This was in any event clear from the events leading up to it and particularly its request for permission to have a meeting with members then at Etale's premises in the context of the meetings which preceded the request.

[68] The arbitrators also referred to the disciplinary hearing as having a "dishonourable feature" because of its collective nature. This despite the fact that the collective nature would appear to have been by agreement with the respondents' union.

Furthermore the respondents did not complain of that fact when they testified. Nor did the union representative who gave evidence.

[69] The arbitrators also concluded that there was inconsistency in the sanction visited upon the employees who participated in the demonstration. In support of this conclusion, they referred to the evidence of Mr Kahimune who testified that some of the workers who had participated in the demonstration still worked for the appellant at Etale. But in his evidence he also said that he was unable to identify those who were involved - a fact overlooked by the arbitrators. They also overlooked the largely unchallenged explanation given by Mr Janse van Resnburg concerning the disciplinary action taken against NAFAU members. In drawing upon this single incident without refence to Mr Janse van Rensburg's evidence, they stated that it revealed that the appellant "applied its disciplinary measures selectively thereby putting only a section of demonstrators into a corner." The arbitrators also concluded that, although they accepted that Mr Kahimune was assaulted, it was "*very remarkable"* that all the respondents were found guilty of the assault, concluding that *"it is impossible that a mob of people assaulted the driver with no fraction. The possibility is that only a smaller number of the workers did assault the driver and the finding of guilt for all the workers on the charge of assault was not appropriate." (sic)*

[70] Without dealing with the other charges – and thus only dealing with that of the insubordination and an assault - the arbitrators proceeded to find that the respondents' dismissal was not effected for a valid and fair reason and directed that the appellant should pay them their salaries from their suspension to the outcome of the disciplinary hearing on 10 August 2010 and that a further six months remuneration for loss of income should be provided to all the respondents. Their list of the respondents in favour of whom the award was made exceeded the number of applicants to the class dispute. No explanation was provided for this.

Appeal against award

[71] The grounds of appeal which the appellant persisted with included:

- whether or not the arbitrators correctly applied the mind to the facts and decided the matter on the balance of probabilities;
- whether or not there was evidence on record that all employees were aware of the fact they were not supposed to demonstrate at the Etale premises;
- whether the breakdown in communication, as found in the award as between the union and its members, could in law permit the arbitrators to conclude that there was also a communication breakdown between the appellant and its employees;
- whether or not the respondents' conduct amounted to gross insubordination and if so whether the arbitrators could simply interfere with the decision of the appellant to dismiss the employees in such circumstances; and
- whether there was a fair and valid reason to dismiss the respondents and further whether or not there was evidence on record to that effect.

[72] Dr Akweenda argued that these did not concern questions of law alone and that the appeal should also be dismissed for this reason. This court in addressing this question in *Namibia Power Corporation v Nantinda*[3] stated:

> *"In my view, it clearly constitutes a question of law if an appellant can show that the arbitrator's conclusion could not reasonably have been reached. In doing so, I respectfully follow the approach of the full bench of this court in Rumingo and Others v Van Wyk[4]. The full bench in that matter made it clear that a conclusion reached (by a lower court) upon evidence which the court of appeal cannot agree with would amount to a question of law. This approach is also consistent with that of a subsequent full bench decision in Visagie v Namibia Development Corporation[5] where the court, in my respectful view, correctly adopted the approach of Scott JA in Betha and Others v BTR Sarmcor [6] that a question in law would amount to one where a finding of fact made by a lower court is one which no court could reasonably have made. Scott JA referred to the rationale underpinning this approach being that the finding in question was so vitiated by a*

[3] Unreported 22 March 2012, case no. LC 38/2008 at par 28
[4] 1997 NR 102 (HC) at 105 D-E
[5] 1999 NR 219 (HC) at 224 C-H
[6] 1998 (3) SA 349 (SCA)

lack of reason as to be tantamount as be no founding at all. That in my view aptly describes the finding of the arbitrator in this matter. As was further stated by Scott JA, it would amount to a question of law where there was no evidence which could reasonably support a finding of fact or "where the evidence is such that a proper evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made that finding…" [7]

[73] Certain of the appeal grounds in my view constitute questions of law in particular the first, fourth and fifth.

[74] The reasoning on the part of the arbitrators with reference to the charge of gross insubordination is in my view unsustainable and amounts to a conclusion upon the facts which no arbitrators could reasonably have made.

[75] Mr Heathcote in argument referred to the discussion of obedience to reasonable and lawful instructions in the recent work of Parker, J Labour Law in Namibia[8] where the following is stated:

"An employee's obedience to the lawful instructions of his employer is a touch stone of the employer-and-employees relationship. The employee must carry out a lawful order that is within the scope of the express or imply terms of his contract of employment. Failure to do is insubordination, i.e. the lawful disobedience of the law and reasonable commands of the employer."

And further

"Insubordination will justify dismissal especially if it is unlawful or repeated…"

[76] Implicit in the arbitrators' conclusion is a finding that the respondents had disobeyed a lawful instruction. This would in my view demonstrate the flawed nature of their approach. This is because it is premised upon an acceptance that there was lawful instruction not to demonstrate at Etale. This results in the approach of the respondents

[7] Supra at p 405J – 406B
[8] P 45 - 46

of an entitlement to demonstrate as being shown as unsustainable and not a defence to the change of insubordination.

[77] Once it was correctly accepted that there was a failure to obey an instruction, their conclusion that there was no insubordination is in my view likewise unsustainable. The reference to the authority cited in paragraph 175 of the award, involving insubordination of a single employee and dismissal for it, is in my view not particularly helpful or applicable to the facts of this case. On the contrary, there were several aggravating features to the respondents' disobedience of the lawful instruction. These included the nature of the demonstration and the unlawful occupation of Etale premises by employees who were not reporting for duties. That plainly amounted to trespass and an unlawful presence on those premises. Further aggravating features included the assault of a fellow employee, the stoning of the bus and the prevention of access to the factory processing perishable raw materials to the appellant for the purpose of providing temporary employees. The prevention of the access would already have had as a consequence considerable damage being sustained by Etale if the perishable goods could not be processed. There is the further consequence of the appellant being held liable for those damages. Importantly, there was clear conduct on the part of demonstrating employees of taking the law into their own hands by preventing access to the Etale premises by the appellant. This resulted in the High Court granting an urgent interdict directed at this and other unlawful conduct.

[78] It is clear from the facts which served before the arbitrators (as well as of those which were presented in the disciplinary enquiry), that there was disobedience on the part respondents to the lawful instruction of the appellant not to proceed with the demonstration or meeting at Etale's premises. The arbitrators correctly accepted that such an instruction was given but did not accept that the failure to adhere to it, by raising an entitlement to proceed with the demonstration, amounted to insubordination. In my view this conclusion is one which no reasonable arbitrator could have come to. Quite how the suspension by the appellant of the employees as a consequence amounted to "a frolic of their own to say the least" is also not explained by the arbitrators. This despite the fact that they accept that an employer is entitled to take

steps if a lawful instruction is disobeyed. Once the arbitrators correctly accepted that there was disobedience of a lawful instruction, then it should have followed in the context of the circumstances put before them, that there was gross insubordination.

[79] The statement that there was a “high possibility” that the night shift employees might have not known about the instruction not to demonstrate negates the evidence on the part of Mr Janse van Rensberg which was not disputed concerning the issuing of notices and more importantly the role of the union representing the respondents which had held meetings with the appellant and given notice in which the appellant had made its position clear that a demonstration was not permitted and a disciplinary action would proceed if it went ahead. The union had after all applied for permission to the appellant to hold a feedback meeting at Etale’s premises, a fact also overlooked by the arbitrators. The role of the union in organizing the protest was not placed in issue and was confirmed by one of the respondents in his testimony. It was incumbent upon the union to have apprised its membership accordingly.

[80] The respondents’ version in this regard it does not in my view assist them. At the internal disciplinary enquiry, a two pronged defence was mounted, namely that permission was granted by Mr Kapembe Johannes and furthermore and in any event they said that they were entitled to hold the demonstration during their lunch hour at their place of work. The first defence was not persisted with at the arbitration proceedings and those who raised it at the internal disciplinary hearing were not called. It would seem that the attitude of both the union and the respondents was that there was an entitlement to proceed with the demonstration at Etale, despite the instruction to the contrary and the request for permission to do so. They said that they were entitled to disobey the instruction to the contrary. This was borne out by the union’s letter (and approval) in the morning of the demonstration.

[81 The arbitrators’ finding that there was miscommunication between the union and its members is thus not supported by the evidence. The nature of the “miscommunication” was not explained or apparent. On the contrary, the union itself had taken up the position on the early morning of 10 March 2010 that the handing over of

the petition and demonstration should proceed and that it and tha it and the employees were entitled to do so. This despite having sought permission for a meeting with its members at Etale.That was also the attitude of the employees who gave evidence in the arbitration proceedings. There was thus no miscommunication established, as was found by the arbitrators. Both NASAWU and the respondents expressed the same view. That was that the demonstration should proceed as of right, given the fact that the respondents did so during their lunch hour at the place where they were employed. This position was taken despite the appellant's express instruction to the contrary and the union's request for permission on behalf of its members, the respondents. One of the respondents who testified at the arbitration also confirmed that NASAWU was involved in organizing the demonstration. The "miscommunication" as found by the arbitrators is in fact at odds with the approach of both the union and the respondents – and indirectly with that of the arbitrators themselves. The facts plainly establish a request for such a meeting, its refusal and decision by both the union and its members to defy the refusal of permission. The arbitrators' acceptance of a lawful instruction and the clear decision to defy it, re-enforced by the approach of both the union and its members of an entitlement, demonstrates that a "miscommunication" was not only not established but is as also at variance with the facts.

[82] Dr Akweenda's submitted that there was no basis for the appellant to have sought to prevent the respondents from holding a meeting at Etale during their lunch period (as it was their free time).

[83] A registered trade union's rights of access to the premises of an employer and to consult and hold meetings with its members are spelt out in s 65 of the Labour Act, 11 of 2007. Of relevance are subsections 65(1) and (2) which provide:

> "(1) An employer must unreasonably refuse access to the employer's premises to an authorized representative of a trade union that is recognized as an exclusive bargaining agent under section 64-
>
> (a) during working hours-
>
> (i) to recruit members; or

(ii) to perform any function in terms of a collective agreement, the union's constitution or this Act; and

(b) outside of working hours, to hold meetings with members.

(2) an employer must not reasonably refuse an authorized representative of a registered trade union access t the employer's premises, outside of working hours –

(a) to recruit members;

(b) to hold a meeting with members; or

(c) to perform any union functions in terms of a collective agreement, the union's constitution or this Act.

[84] The constitutional right to assemble is foundational to the exercise of democratic rights, including in the context of hard won workers' rights. What was said by Navsa, JA, albeit in a different statutory context in South Africa, applies with equal force to Namibia.[9]

> *"Public demonstration and marches are a regular feature of present day South Africa. I accept that assemblies, pickets, marches and demonstrations are an essential feature of a democratic society and that they are essential instruments of dialogue in society. The Constitutional Court has recognized that the rights presently enjoyed by employees were hard won and followed years of intense and often grim struggle by workers and their organizations. The struggle for workers' rights can rightly be expected to continue. Trade unions should ensure that a noble struggle remains unsullied."*

[85] But this fundamental freedom to assemble is not unfettered or absolute. It is subject to the limitations which must meet the requisites of Article 21(2). One such limitation upon that freedom is the constitutional right to property enjoyed by others, including employers. Hence the need for s 65. But, as was also stressed by Navsa JA, the right to assemble and demonstrate is only protected under the Constitution if it is

[9] *SATAWA v Jarvis and Others* 2011(6) SA 382 (SCA) at 393-4

peaceful and that violent unlawful conduct directed at others is the antithesis of constitutional values[10].

[86] The respondents entitlement to be on Etale's premises is for the purpose of rendering services there. If they are not thus rendering services, they do not have a further right to be on those premises. That includes the right to organize and assemble there. Once the respondents were no longer on duty or were suspended, they no longer had the right engage in protest action upon Etale's premises. Their right to meet with their union (and the union's concomitant right to meet its members) were not affected. That meeting could have taken place at the union's premises or, as offered, at the appellant's premises, but not, as of right, at Etale's.

[87] The holding of a meeting during the lunch hour even if it fell outside of working hours could at the time[11] only be exercised at the premises their employer. The employer in question was the appellant. The appellant however had indicated that the petition could be handed over at its premises and that the union and its members could meet there to do so.

[88] The position of employees of a labour hire concern raises anomalies when they seek to exercise their right to organize contemplated both by the Act and also by the Constitution, given the fact that they invariably do not perform their work at their employer's premises but at one of its clients[12]. But this did not give them the right to proceed to have a demonstration or meeting where they work. This much was acknowledged by their union in seeking permission to do so. Once that was refused, it may even have been open to NASAWU or the respondents to dispute the reasonableness of that refusal to permit the meeting and to exercise remedies under the Act or under the Constitution rather than proceed with it after an unequivocal instruction had been given to them not to do so. When such a lawful instruction, as correctly acknowledged by the arbitrators, had been given to the union and its members

[10] Supra at p394 par 48
[11] The position may be different under the Labour Amendment Act, 2012 after being put into operation shortly.
[12] This anomaly would in the meantime be addressed by the Labour Amendment Act, 2012 which comes into operation in August 2012.

not to proceed with such a meeting or demonstration, it was not open to them to defy or ignore it. They did so at their peril and at peril of facing disciplinary proceedings for their failure to obey that instruction as was accepted by the arbitrators. The constitutional order is after all premised upon the rule of law. It is certainly not open to workers, employers or unions to take the law into their own hands. If the union or its members felt aggrieved by the conduct of the appellant or even Etale, it was open for them to address the issues to the extent the Act and the Constitution provide remedies. But it was not open to them to ignore (and indeed defy) a lawful instruction and occupy Etale's premises and interfere with the Etale's and appellant's rights and those of its other non demonstrating employees.

[89] The arbitrators misdirected themselves by repeatedly referring to the demonstration as being peaceful, despite having correctly concluded that Mr Kahinime had been assaulted by employees - and with that acceptance, acknowledging the stoning of the bus with the purpose of preventing its access to the Etale premises, although inexplicably not dealing with these uncoroverted facts and the charges relating to them. This conclusion as to the demonstration being peaceful and which is material, is likewise a conclusion which no reasonable arbitrators could have reached upon the facts before them.

[90] Once it is accepted that the respondents were guilty of gross insubordination and given the aggravating features of this matter, it lay within the discretion of the appellant as employer to determine an appropriate sanction. There should only be interference with that sanction if justified on grounds of unreasonableness or unfairness. This approach was reaffirmed by this court in Rossing Uranium Limited v Georg H. Von Oppen[13]. In that matter, this court quoted with approval the following extract from Nampak Corrugate Wadeville v Khoza:[14]

> *"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the*

[13] Unreported judgment 4/4/2008 at P9 with reference to the authorities collected there
[14] (1999) 20 ILJ 578 (LAC) at 584-A-E

employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable. In judging the reasonableness of the sanction imposed, courts must remember that:

> *'There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him then the dismissal must be upheld as fair; even though some other employers may not have dismissed him.'*

British Leyland UK Ltd v Swifts 919810 IRLR 91 at 93 para 11.

It seems to me that the correct test to apply in determining whether a dismissal was fair is that enunciated by Lord Denning MR in British UK Ltd v Swift at 93 par 11, which is:

> *'Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair'. (at 584 A-E)"*

[91] The dismissal of employees for gross insubordination in circumstances before the arbitrators did not in my view amount to such an unreasonable or unfair sanction which could be regarded as so excessive that no reasonable employer could have taken in it.

[92] It follows in my view that the award of the arbitrators in finding that the dismissal was not for a valid and fair reason falls to be set aside.

[93] Establishing gross insubordination with aggravating features could in my view have justified the dismissals. It would thus not be necessary to determine whether the other charges had been established against the respondents and whether the arbitrators erred in finding that the assault charge had not been established against the respondents. Although the respondents admitted participating in the demonstration, all

those who gave evidence denied any knowledge of the assault and the stoning of the bus. It was open to the other respondents to give evidence. They decided not to do so. Mr Heathcote relied in argument upon a passage by Nugent, J (as he then was) in Food and Allied Workers Union and Others v Amalgamated Beverage Industries Limited[15] where he stated the following in the context of a challenge to a finding of assault which had occurred where there was no direct evidence linking any of the appellants in that case to the specific assault and where the respondents' case was based upon inference alone. He held:

> "The inference which the respondents seek to draw from the evidence is that all the appellants were present at the time the assault took place, and either actively participated in the assault or at least supported and encouraged the actual perpetrators. It is a cardinal rule of logic that when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn… In my view all the evidence in the present case is consistent with that inference."

[94] In this matter, it is not necessary to determine the question as to whether the finding of assault in respect of all the employees was correct. But it would seem to me that despite the denials of any knowledge, the respondents, being present at the time, at least supported and encouraged the prevention of access and stoning of the bus. The chairperson of the disciplinary enquiry considered that the failure on the part of any of the employees to disassociate themselves with the assault and to give evidence that they were not involved when considered with the clear evidence of the assault and the purpose of the assault and stoning of the vehicle within its context could give raise to an inference adverse to the respondents. This may be relevant in respect of the assault charge – a question I leave open - but would, in my view apply with reference to the charges of damage to properly and threatening and intimidating behavior. These latter two charges were not dealt with at all by the arbitrators. Their finding on the assault charge may have been intended to apply to these charges as they are inter-related. But then they should have said so.

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[15] (1994) 15 ILJ 1057 (LAC) at 1063

[95] The arbitrators also did not deal with the further charge that the respondents' conduct had brought the name of the appellant into disrepute by reason of their unauthorised demonstration on and subsequent conduct in the vicinity of Etale's premises with the aggravating features I have already referred to.

[96] There had been a finding at the disciplinary enquiry on this charge, upheld in the internal appeal. Given my view that the gross insubordination would be sufficient to justify dismissal, it would thus not be necessary for me to canvas this charge as well, save to point that failure on the part of the arbitrators to have even referred to this charge institutes a yet further misdirection on their part. It would however also seem to me that this charge was established on the facts of this case.

[97] It would follow in my view that the appellant has established its grounds of appeal against the award and that the appeal is to be upheld and that the arbitrators award is to be substituted with an order dismissing the respondents' complaint that they were unfairly dismissed.

[98] Given the conclusion I have reached with regard to the appeal, it is not necessary to deal with the review application and I decline to do so. It would then be removed from the roll.

[99] It follows that the order I make is that the appeal against the arbitrators award dated 28 March 2011 as varied on 8 April 2011 succeeds and the arbitrator's award is set aside and the respondents' complaint of unfair dismissal is dismissed. The application for review is removed from the roll. No order is made as to costs.

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SMUTS, J

ON BEHALF OF THE APPELLANT	**MR. R. HEATHCOTE**
Assisted by:	**MS B. VAN DER MERWE**
Instructed by:	**MB DE KLERK & ASSOCIATES**

ON BEHALF OF 1- 340 RESPONDENTS	**MR. S AKWEENDA**
Instructed by:	**HARMSE ATTORNEYS**