

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 21/2016

In the matter between:

**LEONARD HEVELENI
DALE KASUTO**

**FIRST APPELLANT
SECOND APPELLANT**

And

**ERONGO CONTRACT SERVICES
THE LABOUR COMMISSIONER**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Heveleni v Erongo Contract Services (LC 21/2016) [2017]*
NALCMD 17 (12 May 2017)

Coram: Prinsloo AJ

Heard: 21 April 2017

Delivered: 12 May 2017

Flynote: Labour Law – Appeal in terms of Section 89(1) of the Labour Act, Act 11 of 2017 – Notice of Intention to oppose filed late – No Condonation application filed, however an affidavit was filed for the condonation application without the Notice of Motion – Subsequently, no condonation application before court.

Court held: The application for condonation had to be brought on notice of motion, formulating the relief and the affidavit filed would be in support of the said application and cannot be regarded as an application.

Court held further: It is thus clear that a notice of motion play an important part in proceedings for it stipulates the nature, extent and scope of the order or relief sought. Failure to file a notice of motion hinders the court and the opposing party from fully comprehending the full impact of the relief sought.

Court held further: The appeal is treated as unopposed and upheld.

ORDER

1. The appeal is treated as unopposed and upheld in respect all grounds of appeal (excluding 2.2, 2.12 and 2.13)
2. The arbitration award of 12 March 2016 is set aside.
3. The first respondent is ordered to reinstate the appellants in the position in which they would have been had they not been so dismissed.
4. The first respondent is ordered to pay to the appellants' wages and emoluments on the basis of their monthly average earnings at the time of their dismissal for the period from date of arbitration award (being 12 March 2016) to date of reinstatement.
5. No order as to costs made.

JUDGMENT

PRINSLOO AJ:

Introduction

[1] The appellants were employed by the first respondent and were dismissed following an internal disciplinary hearing. The charges levelled against the appellants during said disciplinary proceedings were:

- 1.1 Performance of unauthorised union activities during working hours; and
- 1.2 Disrupting company operations without authorisation.

[2] As a result of the dismissal, the appellants referred a dispute of unfair dismissal to the Office of the Labour Commissioner in terms of Section 82(7) read with Section 86(1) of the Labour Act, Act 11 of 2017 (hereinafter referred to as the 'Act').

[3] Arbitration proceedings commenced on 05th of February 2016 and the Arbitrator, Ms Getrude Usiku delivered the arbitration award on 12th of March 2016.

[4] In terms of the arbitration award Ms Usiku concluded that the dismissal of the appellants were procedurally and substantively fair¹.

[5] The appellants noted an appeal on the 11th April 2016 pursuant to section 89(1) of the Act against the whole award by the Arbitrator and an amended notice of appeal was filed on 02nd of December 2016.

Application for Condonation

[6] The appellants in this matter are duly represented by Ms Nambinga. Initially the first respondent was represented by Koep and Partners, who withdrew as legal representatives of record on 13 March 2017. The notice of withdrawal was sent to the first respondent by e-mail on even date and also served by registered mail.

¹Page 550 of the Court Bundle.

[7] On the date set for hearing of the appeal, i.e. 7 April 2017, Ms Losper made an appearance on behalf of the first respondent but no notice of representation was filed at the time. As the file did not contain certain court orders, the matter was postponed to enable Ms Nambinga to locate said court orders and update the court file. By postponing the matter Ms Losper was given the opportunity to file her notice of representation, which was done later that day.

[8] At this point in the proceedings no notice of intention to oppose the appeal was filed as yet. The date for hearing of the appeal was allocated by the Registrar as if the matter is unopposed. The said notice of intention to oppose the appeal in terms of Rule 17(16)² and ground for opposing the appeal were only filed with the Office of the Registrar and the legal representative for the appellants on 19 April 2017 at 14:45.

[9] Rule 17(16) states the period within which notice of appeal and the statement of grounds of opposition to an appeal should be filed. The relevant part thereof reads:

'16 should any person to whom the notice to appeal is delivered wish to oppose the appeal, he or she must –

(a) *within 10 days after receipt by him or her of the notice of appeal or any amendment thereof, deliver notice to the appellant that he or she intends so to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he or she will accept notice and service of all process in the proceedings; and*

(b) *within 21 days after receipt by him or her of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice of oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.'*

[10] A failure to comply with the peremptory provisions of rule 17(16) (a)-(b) is fatal and has the effect of excluding the non-compliant party from participating in the proceedings³.

² Labour Court Rules published in GN 279 in GG 4175 of 2 December 2008 and amended by GN 92 in GG 4743 of 22 June 2011.

³ *Swakop Uranium (Pty) Ltd v Kalipa*(LCA 41-2014) [2015] NALCMD 28 (04 December 2015).

[11] Parker, AJ in the matter of *Benz Building Suppliers v Stephanus and Others*⁴ when dealing with the issue of a failure by a respondent in an appeal, to deliver a statement envisaged in Rule 17(16)(b) stated:

“(13) it must be remembered that this is an appeal and this Court qua appeal should proceed in determination of the appeal on the basis of (a) the record of the arbitral proceedings; (b) the appellants’ grounds of appeal and (c) the respondents’ ground for opposing the appeal. In this regard, as regards the first respondent, it must be remembered that such grounds as are required by Rule 17(16)(b) of the Rules of the Labour Court must be grounds that inform the arbitrator, the appellant and this Court of the grounds on which the arbitration award is attacked by the appellant and which the first respondent supports.”

[12] To cure the non-compliance, the first respondent had the remedy as proposed by Rule 15 which deals with non-compliance as follows:

‘The court may, on application and on good cause shown, at any time-
(a) condone any non-compliance with these Rules;
(b) extend or abridge any period prescribed by these Rules, whether before or after the expiry of such period.’

[13] As there was a glaring non-compliance by the first respondent with the aforementioned rule an application for condonation logically had to follow. Ms Losper found herself in the unenviable position to bring the said application and to explain the non-compliance in spite of the fact that the said non-compliance occurred whilst the first respondent was represented by another legal firm.

[14] On 20 April 2017 at 14:30 an affidavit for condonation application was filed by Ms Losper, bearing in mind that the appeal hearing was scheduled for 09:00 on 21 April 2017. This document was not filed on the offices of appellant’s legal representative and thus Ms Nambinga did not get the opportunity to consider the contents thereof or file an answering affidavit.

⁴

Benz Building Suppliers v Stephanus (LCA 18/2013) [2013] NALCMD 40 (19 November 2013).

[15] After hearing brief arguments from Ms Nambinga and Ms Losper on this issue, I brought it to the attention of MsLosper that there was no application for condonation in terms of Rule 15(a) before me regarding the late filing of the notice of opposition⁵. MsLosper conceded that no such application was filed but argued that the affidavit for condonation in essence set out the application and relief prayed for on behalf of the first respondent and that the court should have regard to same.

[16] The argument advanced by Me Losper is not sound in law. The application for condonation had to be brought on notice of motion, formulating the relief and the affidavit filed would be in support of the said application and cannot be regarded as an application. In this regard this court referred counsel for the first respondent to the matter of *Meroro v Minister of Lands, Resettlement and Rehabilitation and Others*⁶ in which Maritz JA set out specific relief in application procedures as follows:

'[37] The specific relief that the appellant sought and the respondents opposed is contained in the notice of motion. In application proceedings, the affidavits lodged by the litigants in support or opposition of the relief prayed for 'take the place not only of the pleadings, but also of the essential evidence'⁷ that would be adduced in action proceedings at a trial. The relief, as formulated in the notice of motion, determines the cause that must be shown and the evidence that must be presented by applicants in their founding papers. It also informs the respondents of the case they are required to meet in answer and of the orders that may be granted against them should they fail to do so.'

[17] It is clear that a notice of motion plays an important part in proceedings for it stipulates the nature, extent and scope of the order or relief sought. Properly crafted, it enables the opposing party and the court, amongst other things, to determine whether the relief sought is fully explained and grounded in the affidavit filed in support thereof. Failure to file a notice of motion hinders the court and the opposing party from fully comprehending the full impact of the relief sought.

[18] There was a flagrant no-compliance with the rules in this matter. The participation of the first defendant in the hearing of the appeal is depended on the granting of the application for condonation by this court. However, there is no application for condonation before me to consider.

⁵ Rule 17 (16).

⁶ 2015 (2) NR 526 (SC) at par [35].

⁷ *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) para 10.

[19] This court will be slow to shut the door on a litigant due to the remissness of his or her legal representative. I had regard to the matter of *Katjiamo v Katjiamo and Others*⁸ where Damaseb DCJ discussed the effect of negligence or remissness of a legal practitioner on a litigant as follows:

*'The negligence and remissness of a legal practitioner are only to be visited on the litigant where he or she contributed thereto in some way, was aware of the steps that need to be taken in furtherance of the prompt conduct of the case, or through inaction contributed to the matter stalling and thus impeding the speedy finalisation of a contested matter. The following dictum by Steyn CJ in Salojee and Another NNO v Minister of Community Development*⁹ *has been cited with approval by our courts:*

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court."

The court also added at 141E – H that:

'A litigant, moreover, who knows, as the applicant did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorneys and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney . . . and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'

[20] From the time that this appeal came to the attention of the first respondent to first hearing date of the appeal, the only documentation filed consisted of a Notice of representation, filed on 26 September 2016 and thereafter a notice of withdrawal by

⁸ 2015 (2) NR 340 (SC).

⁹ 1965 (2) SA 135 (A) at 141C; cited with approval in, for example, *Leweis v Sampoio* 2000 NR 186 (SC) at 193; *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) at 57 para 24.

the first defendant's erstwhile legal practitioner on 13 March 2017. No further documentation was filed in between. When the writing was literally on the wall on the date when the appeal was due to be heard, the present legal representative appeared on behalf of the first defendant, on such short notice that she did not even file a notice of representation.

[21] This is not the way in which a conscientious litigant would prosecute his matter. It would seem that a substantial portion of the blame for the delay in opposing this appeal can be laid at the door of the first respondent.

[22] I am in agreement with previous judgments¹⁰ dealing with similar issues and denied the first respondent the opportunity to partake in the hearing of the appeal. In the result, the appeal was heard unopposed. Ms Nambinga proceeded to make her submissions in amplification of her written heads of argument. She discussed the grounds of the appeal with reference to various cases as authority.

The Appeal:

[23] As this appeal is regarded as unopposed I will in summary form discuss issues raised in the grounds of appeal. As is the case in many matters of this nature the grounds of appeal are inextricably intertwined with each other and this court must consider whether the arbitrator erred in finding that the dismissal of the appellants were procedurally and substantially fair.

[24] When determining these issues, it must be borne in mind that the test in appeals based on a question of law (in which there may also be an error of fact), is that the appellant must show that the arbitrator's conclusion is one which he/she could not reasonably have reached¹¹.

¹⁰*Swakop Uranium (Pty) Ltd v Kalipa* (LCA 41/2014) delivered on 04 December 2015; *Walvis Bay Stevedoring Co. (Pty) Ltd v Ndjembela Alutumani* (LCA 46/2014) delivered on 13 May 2014; *Benz Building suppliers v Stephanus and others* 2014(1) NR 283 at 288.

¹¹ *Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo* an unreported judgment of the Labour Court of Namibia Case No. LCA 02/2010 delivered on 07 March 2010; *Rumingo and Others van Wyk* 1997 NR 102 at 105D – E; *Visagie v Namibia Development Corporation* 1999 NR 219 at 224. *Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd* 1998 (3) SA 349 (SCA); *House and Home v Majiedt and Others* (LCA 46/2011) [2012] NALC 31 (22 August 2012) at para [7].

[25] It must be noted that, it was indicated to court that the appellants will not proceed with the grounds of appeal in para 2.2., 2.11. and 2.12. of the Notice of Appeal¹².

[26] The appellants however elected to proceed in respect of the remaining grounds of appeal, namely, paragraphs 2.1, 2.3 to 2.10, 2.13 and 2.14. The issues arising from the grounds of appeal are in summary the following: That the arbitrator erred or misdirected herself on the following issues:-

- a. Finding that disciplinary proceedings, more specifically the appeal proceedings were procedurally fair;
- b. Failure to consider the onus resting on first respondent to rebut the presumption of unfair dismissal;
- c. Finding for the first respondent in her arbitration award in spite of the mutually destructive versions before her;
- d. Failure to consider the inconsistency in applying discipline by first respondent;
- e. Finding that appellants failed to comply with para 11.4 of Recognition and Procedural Agreement between first respondent company and MUN.

On the issue of procedural fairness

[27] In her summary, the arbitrator made the following finding: '*The procedure taken is not disputed hence with the dismissal is procedurally and substantively fair*'¹³. The arbitrator goes further to say in para 6 of her summary, i.e. '*Mr. Dale Kasuto agreed with the respondent's representative Mr. August Awaseb that their*

¹²Which states in summary as follows:

'Par 2.2 – Benchmarking of the respondent's disciplinary policy against the evidence that was presented;

Par 2.11- The arbitrator choosing to be bound by admissions of law made by the appellants who are lay persons instead of making a determination as to whether the appellants were dismissed for a fair and valid reason following fair procedure as contemplated in section 33 of the Labour Act.

Par 2.12- That the arbitrator could not in the circumstances and acting reasonably come to her conclusion.'

¹³Page 548 of the Court Bundle, at par 7 of the Arbitration Award.

dismissal was procedurally and substantively fair and that they were given a fair chance to appeal.'

[28] It is indeed correct that the 2nd appellant made a number of concessions regarding the procedure followed during the disciplinary hearing however contrary to what the arbitrator found, the fairness of the disciplinary proceedings as well as the appeal process was placed in dispute. It was not disputed that the applicants/appellants had the opportunity to appeal the decision of the chairperson of the disciplinary hearing, the issue which was pertinently raised on behalf of the applicants/appellants was that the appeal chairperson was attached to the same firm, OSMAN, as the initiator who acted in the disciplinary hearing. Said initiator also represented the first respondent during the arbitration proceedings. It would also appear that the OSMAN is the labour consultant firm retained by the first respondent. There is thus a real issue of perceived bias on the part of the appellants. The formulation of the test relating likelihood of bias as set out in the matter of *Foster v Chairman, Commission for Administration, and Another*,¹⁴ which was accepted by Uitelet J in the matter of *Cenored vs Ikanga*¹⁵. In the case of *Foster v Chairman, Commission for Administration, and Another* Brand, AJ explained it as follows¹⁶:

'Regarding the question as to when an administrative decision can be set aside on the

ground of bias, a Full Bench of this Division in Mönning and Others v Council of Review and Others 1989 (4) SA 866 (C) decided that the 'reasonable suspicion of bias'-test and not the 'real likelihood of bias'-test is the one to be applied. According to the former, the question is not whether the decision-maker concerned would in fact be partial or impartial. The question is whether an observer in the position of applicant would reasonably suspect that the decision-maker would not be impartial.'

[29] It was denied by the first appellant that they were aware of the nature of the relationship between the initiator and the chairperson of the appeal. This factor was not considered by the arbitrator when she reached her findings.

On the issue of substantive fairness

¹⁴1991 (4) SA 403 (C).

¹⁵(LCA 13/2013) [2014] NALCMD 18 (30 April 2014).

¹⁶1991 (4) SA on page 411.

[30] Contrary to the finding of the arbitrator as set out in para 26 of this judgment, the 2nd appellant never made the concession that the dismissal was substantially fair. When he was asked during cross-examination what was not fair in the procedure, the 2nd appellant replied 'the timing, everything was not fair'. There was no follow up question to clarify that issue and it was left at that. So the arbitrator could hardly draw the conclusion that the appellants agreed that their dismissal was procedurally and substantively fair.

Failure of first respondent to rebut the presumption of unfair dismissal

[31] Section 33(4)(a) and (b) of the Act provides that once an employee establishes that he/she has been dismissed, it is presumed in any proceedings concerning a dismissal that the dismissal is unfair unless the employer proves the contrary. The onus thus rests on an employer to justify a dismissal both procedurally and substantively.

[32] The issue of whether or not the appellant's dismissals were substantively fair can only be determined on the basis of whether or not sufficient evidence was presented to show, on a balance of probabilities, that they performed unauthorised union functions during working hours and thereby disrupted company operations without permission.

[33] It is common cause that the appellants were members of the Mine Workers Union (MUN) appointed in various representative positions. It is further common cause that the appellants in their capacity as representatives of MUN undertook union activities by disseminating a petition to the employees of the first respondent and did so with the permission of their supervisor.

[34] In the summary of her findings, the arbitrator found on '*a balance of probabilities coupled with the unchallenged evidence of the respondent's second witness the applicant's called the workers out past eleven is probable*¹⁷'. For some reason the arbitrator heavily relied on the evidence of this witness, one Mr Hanganda, as to the time of the incident. However this witness could not specify an exact time apart from saying it was past eleven (11:00). It was also not determined

¹⁷ Page 547 of Court Bundle, par 1 on said page.

as to what he based this evidence on. The nature of his evidence as to the time was along the following lines:

‘REPRESENTATIVE FOR THE RESPONENT:	What time was it when it happened?
JUNIUS HARDLY QUINCY HANGANDA:	It was past 11:00 (eleven).
REPRESENTATIVE FOR THE RESPONENT:	It was past 11:00 (eleven)?
JUNIUS HARDLY QUINCY HANGANDA:	Past 11:00 (eleven) ja.’

[35] The other witnesses for the first respondent was Mr Van Wyk, has no personal knowledge of the time of the incident as he was not present and is dependent on hearsay, and Mr Basson, who just said he was approached to read a letter after lunch time but stated no specific time.

[36] According to the appellants and their witnesses, they approached the employees during lunchtime and the second appellant was really taken to task during cross-examination regarding the specifics of what happened and at what time.

[37] The issue of time is very important in this matter as it is common cause that lunch hour of the appellants was their free time which they could use as they please, including union activities. The charge was specifically that the union activities were conducted during working hours.

Mutually destructive versions

[38] Considering the two conflicting versions, there is no indication how the arbitrator found this issue regarding the time to be proven on a balance of probabilities.

[39] Once the arbitrator is faced with two mutual versions he/she has to, on probabilities, decide which of the versions is likely to be true. The test was stated as follows by Eksteen, AJP in *National Employers General Insurance v Jagers*¹⁸ -

¹⁸ 1984 (4) SA 437 (C) at 440 E-G. Also see the unreported judgment of *The Motor Vehicle Accident Fund Of Namibia v Lukatezi Lennox Kulobone* Case No. SA 13/2008 delivered on 05 February 2009.

“Where there are two mutually destructive stories the plaintiff can only succeed ...if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false”.

[40] The arbitrator does not make any credible findings in this matter to determine why the version of the first respondent's witnesses should be accepted and that of the appellants be rejected.

[41] The first respondent *in casu* did not show on a preponderance of probabilities that its version is true and accurate and the arbitrator could therefore not reach the conclusions that she did.

Inconsistency in applying discipline

[42] It is common cause that it was not just the two appellants who approached the other employees regarding the petitions concerned in their capacity as union representatives. Apart from the appellants, Messrs Heveleni and Kasuto, there was also a Mr Fanuel, who accompanied them and who held the position of union secretary. No disciplinary proceedings were instituted against Mr Fanuel and at the time of the arbitration proceedings he still held his position as assistant Boiler Maker at the first respondent.

[43] John Grogan in his work *Dismissal, Discrimination & Unfair Labour Practices* August 2005 at 225 - 226 stated the following regarding a claim of inconsistency:

“Consistency challenges should be properly mounted. Little purpose is served by employees simply claiming at the beginning of an arbitration hearing that the employer has treated other employees more leniently in some earlier case or cases. Where this occurs, the employer’s representative can justifiably raise the objection that he or she is unaware of the details of the earlier case(s). The arbitrator must then disallow the objection or grant a postponement. Furthermore, a claim of inconsistency can be sustained only if the earlier cases relied on are sufficiently similar to the case at hand to warrant the inference that the employer has indeed been inconsistent. Comparison between cases for this purpose requires consideration not only to the respective employees’ conduct, but also of such factors as the employees’ remorse and disciplinary record, whether the workforce has been warned that such offences will be treated more severely in future, and the circumstances surrounding the respective cases”.

[44] In the matter of *Namibian Wildlife Resorts Limited v Ilonga*¹⁹ Hoff J referred to the following, which was said in relation to the issue of inconsistency by van Niekerk J in *Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others*:²⁰

‘The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employee apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC) at paragraphs [37] – [38]). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to a different treatment, usually in the form of a disciplinary penalty less severe than that imposed to the claimant (see *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2001] 7 BLLR 840 (LC) at paragraph [3]). Similarity of circumstance is the inevitably most controversial component of this test. An

¹⁹ LCA 3/2012 [2012] NLC 26 (05 July 2012).

²⁰2009 11 BLLR 1128 (LC) [at para 10].

inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.'

[45] There was no reason advanced why Mr Fanuel was treated different from the two appellants who all found themselves in a similar situation. It thus appears that the first respondent did not act consistent in applying discipline.

Failure to comply with para 11.4 of Recognition and Procedural Agreement

[46] Lastly, the arbitrator found that the appellants failed to adhere to para 11.4 of the Recognition and Procedural Agreement between first respondent and MUN which reads as follows:

'Shop Stewards shall be allowed access to management representatives only when they have received permission from their immediate supervisor and management has agreed to the holding of the meeting'.

[47] Ms Nambinga argued that there is no merits in the findings of the arbitrator that the appellants contravened this said paragraph of the collective agreement as the supervisor of the appellants came to testify during the arbitration proceedings who he gave the two appellants permission to perform the union functions and argued further that this specific paragraph does not apply as the union members they approached to disseminate the petition, was not management representatives.

[48] It would appear that Ms Nambinga cannot be faulted for her interpretation of this paragraph.

[49] For reasons discussed above and in absence of any grounds for opposing the appeal no reason exists why the appeal should not succeed and the appellants dismissal is found to be procedurally and substantively unfair.

Compensation

[50] The matter however does not end there. Since the court found that the appellants must succeed the effect is that the arbitration award dated 12 March 2016 is set aside.

[51] During conciliation and arbitration proceedings the appellants prayed for re-instatement and compensation for the period of unemployment.

[52] In respect of the issue of re-instatement Ms Nambinga argued that the relationship between employee and employer was not irretrievably broken down and that there is no reason why the appellants cannot be re-instated.

[53] Neither of the appellants set out the amount claimed for in respect of compensation. In the matter of *Shilongo vs. Vector Logistics (Pty) Ltd*²¹ Parker AJ considered the issue of compensation and found that in such an instance the court is at large to award any reasonable amount without the benefit of the appellant's input; but not any amount in respect of every loss imaginable²².

[54] It would appear that the appellants were compensated for their leave days and 'all payments while the case was ongoing'²³.

[55] Compensation awarded in labour disputes cannot be equated with contractual and delictual damages. There is an element of *solatium* present aimed at redressing injustice in labour relationships²⁴. Thus, compensation awarded in labour disputes should not aim at punishing an employer or enriching an employee²⁵.

Conclusion

²¹ (LCA27/2012) [2014] NALCMD 4 (5 February 2014)

²² At Par [17] of the judgment.

²³ Page 536 of the Court Bundle.

²⁴ *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC).

²⁵ *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC); *Camdons Realty (Pty) and Another v Hart* (1993) 14 ILJ 1008 (LAC).

[56] This court therefore makes the following order:

1. The appeal is treated as unopposed and upheld in respect all grounds of appeal (excluding 2.2, 2.11 and 2.12)
2. The arbitration award of 12 March 2016 is set aside.
3. The first respondent is ordered to reinstate the appellants in the position in which they would have been had they not been so dismissed.
4. The first respondent is ordered to pay to the appellants' wages and emoluments on the basis of their monthly average earnings at the time of their dismissal for the period from date of arbitration award (being 12 March 2016) to date of reinstatement.
5. No order as to costs is made.

J S Prinsloo
Acting Judge

APPEARANCES

APPLICANT/APPELLANT:

S Nambinga

OF:

Angula& Co. Inc., Windhoek

RESPONDENT:

G K Losper

OF:

Elago-Tjombe, Windhoek