REPUBLIC OF NAMIBIA

REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-LAB-MOT-REV-2019/00271

WAYNE SMITH **APPLICANT**

and

DESERT FRUIT NAMIBIA (PTY) LTD **FIRST RESPONDENT**
PHILIP MWANDINGI **SECOND RESPONDENT**
LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Smith v Desert Fruit Namibia (Pty) Ltd* (HC-MD-LAB-MOT-REV-2019/00271) [2020] NALCMD 13 (01 April 2021)

Coram: GEIER J

Reserved: **09 June 2020**
Delivered: **01 April 2021**

Flynote: Labour Law – Disciplinary proceedings – Suspension without pay – An employer may suspend an employee without pay during such proceedings only

where the contract of employment or collective agreement provides for such action to be taken –

Labour Law – Suspension without pay – common law position endorsed – in terms of which an employer may only suspend an employee without pay during disciplinary proceedings if the parties have contracted to that effect, either when the contract was first concluded or if a collective agreement or regulation provides for that penalty, or if the employee, faced with dismissal, agrees to unpaid suspension as an alternative penalty–

Labour Law – Suspension without pay – Whatever the reason an employer may have for suspending an employee, that act does not relieve the employer of its contractual duty to pay the employee while on suspension, even when the employee has requested a postponement of disciplinary action against him–

Labour law – Arbitration – Review – A reviewable irregularity occurs if an arbitrator fails to exercise the statutory functions entrusted to him by the Labour Act 2007, the result of which is to deny a party the right to a fair hearing. In casu the arbitrator failed to deal with the case before him in accordance with the functions and objects of the Labour Act which require the expeditious and cost-effective resolution of labour disputes and which impose on arbitrators the duty to assist in this regard and to 'live up to that mandate'. Arbitrators employed at the Office of the Labour Commissioner are duty bound to assist in a fair and impartial manner with the resolution of Labour disputes and to ensure that is done in the most cost- effective and expeditious manner. When, in the circumstances of this matter, the arbitrator did not do so and abdicated his jurisdiction and the functions entrusted to him by the Labour Act this resulted in a situation in which the applicant was denied the right to a fair hearing – Such conduct thus amounted to a prejudicial miscarriage of justice, resulting in a reviewable irregularity – Decision of arbitrator set aside on review

Summary: The facts appear from the judgment.

ORDER

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1. The orders made by the 2nd respondent under case number SRKA-15-18 on 8 August 2019 are hereby reviewed and set aside.

2. The 1st respondent is ordered to make payment to the applicant as follows:

2.1 N$ 112,000.00, together with interest thereon calculated from 1 October 2017 at the rate of 20% per annum;

2.2 N$ 112,000.00, together with interest thereon calculated from 1 November 2017 at the rate of 20% per annum;

2.3 N$ 112,000.00, together with interest thereon calculated from 1 December 2017 at the rate of 20% per annum;

2.4 N$ 112,000.00, together with interest thereon calculated from 1 January 2018 at the rate of 20% per annum;

2.5 N$ 112,000.00, together with interest thereon calculated from 1 February 2018 at the rate of 20% per annum;

2.6 N$ 112,000.00, together with interest thereon calculated from 1 March 2018 at the rate of 20% per annum;

2.7 N$ 112,000.00, together with interest thereon calculated from 1 April 2018 at the rate of 20% per annum;

2.8 N$ 112,000.00, together with interest thereon calculated from 1 May 2018 at the rate of 20% per annum;

2.9 N$ 112,000.00, together with interest thereon calculated from 1 June 2018 at the rate of 20% per annum;

2.10 N$ 112,000.00, together with interest thereon calculated from 1 July 2018 at the rate of 20% per annum;

2.11 N$ 112,000.00, together with interest thereon calculated from 1 August 2018 at the rate of 20% per annum;

2.12 N$ 112,000.00, together with interest thereon calculated from 1 September 2018 at the rate of 20% per annum;

2.13 N$ 112,000.00, together with interest thereon calculated from 1 October 2018 at the rate of 20% per annum;

2.14 N$ 112,000.00, together with interest thereon calculated from 1 November 2018 at the rate of 20% per annum;

2.15 N$ 112,000.00, together with interest thereon calculated from 1 December 2018 at the rate of 20% per annum;

2.16 N$ 112,000.00, together with interest thereon calculated from 1 January 2019 at the rate of 20% per annum;

2.17 N$ 112,000.00, together with interest thereon calculated from 1 February 2019 at the rate of 20% per annum;

2.18 N$ 112,000.00, together with interest thereon calculated from 1 March 2019 at the rate of 20% per annum;

2.19 N$ 112,000.00, together with interest thereon calculated from 1 April 2019 at the rate of 20% per annum;

2.20 N$ 112,000.00, together with interest thereon calculated from 1 May 2019 at the rate of 20% per annum;

2.21 N$ 112,000.00, together with interest thereon calculated from 1 June 2019 at the rate of 20% per annum;

2.22 N$ 112,000.00, together with interest thereon calculated from 1 July 2019 at the rate of 20% per annum;

2.23 N$ 112,000.00, together with interest thereon calculated from 1 August 2019 at the rate of 20% per annum;

2.24 N$ 112,000.00, together with interest thereon calculated from 1 September 2019 at the rate of 20% per annum;

2.25 N$ 112,000.00, together with interest thereon calculated from 1 October 2019 at the rate of 20% per annum;

2.26 N$ 112,000.00, together with interest thereon calculated from 1 November 2019 at the rate of 20% per annum; and

2.27 a proportionate amount together with interest thereon calculated from 1 December 2019 to 11 December 2019 at the rate of 20% per annum;

3. The 1st respondent shall pay to the applicant his legal costs up to and inclusive of the 16th of July 2020, which shall include the costs of two instructed- and one instructing counsel on the legal practitioner and own client scale.

JUDGMENT

GEIER J:

[1] This case originally turned on the applicant's claim for the payment of his unpaid salary, while on suspension.

[2] The applicant had been suspended without pay while facing disciplinary proceedings, which proceedings have since been finalised and which resulted in the imposition of sanctions, but not his dismissal. The employer, Desert Fruit Namibia

Pty Ltd, the first respondent herein, nevertheless dismissed the applicant on 11 December 2019. This in turn triggered a complaint of unfair dismissal lodged with the Office of the Labour Commissioner on 10 June 2020.

[3] In a separate complaint, instituted already on 2 August 2018, the applicant had claimed payment of his salary for the period of his suspension, being the period of 1 October 2017 to the date of his dismissal, on 11 December 2019.

[4] The first respondent countered by applying for a stay of these proceedings, which application was granted by the second respondent, the arbitrator.

[5] The applicant now seeks to review the arbitrator's decision. He contends that, in the event of the review succeeding, the Court should not refer the matter back and that in the circumstances of the case it would be appropriate for this Court to order the first respondent to now pay the applicant's salary with interest as well as costs on a punitive scale.

[6] In its opposition to the review, the first respondent has raised a number of points *in limine*. They will firstly be addressed *seriatim*.

<u>The underlying issue: was the first respondent entitled to 'suspend the applicant without pay' in the first place?</u>

[7] This question was then also labelled by counsel for the applicant as 'the first issue' that the court should determine.

[8] Reliance was placed in this regard on *National Union of Metalworkers of SA and Nu-Fibre Form Plastics SA (Pty) Ltd* (2005) 26 ILJ 204 BCA, at p 206, the fourth par, where it was essentially held that an employer may suspend an employee without pay if the contract of employment provided therefore and where the position was described as follows:

'Suspension may occur in two accepted forms, namely, as a 'holding operation' pending disciplinary action, or as a form of sanction. In this instance it is clear that the suspension of the applicant falls into the first type of suspension. Preventative suspension is

accepted, and is not deemed to be punitive, where the employer bona fide believes that such action is necessary in order to properly investigate the complaints against the employee. The essence of suspension pending a disciplinary hearing is that a finding has not been made against an employee and thus the action is not intended to be a punitive measure, but an administrative one. An employer may suspend an employee without pay only where the contract of employment or collective agreement provides for such action to be taken, …'
(emphasis added)

[9] This was echoed in *Sappi Forests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2009) 30 ILJ 1140, at p 1142, par [8], where it was held that an employer could suspend an employee without pay if legislation or an agreement provided therefore and that:

'… the position at common law has always been that an employer who suspends an employee without pay commits a breach of the contract of employment. An employer may suspend without pay if the employee so agrees or legislation or a collective agreement authorizes the suspension.' …

[10] The underlying legal position was then underscored with Professor Grogan's summary as set out in *John Grogan, EMPLOYMENT RIGHTS*, 1st ed., at page 131, the second par, where the learned author states:

'Whatever the reason an employer may have for suspending an employee, that act does not relieve the employer of its contractual duty to pay the employee, even when the employee has requested a postponement of disciplinary action against him … At common law the employer may suspend an employee without pay only if the parties have contracted to that effect, either when the contract was first concluded or if a collective agreement or regulation provides for that penalty, or if the employee is faced with dismissal and agrees to unpaid suspension as an alternative penalty.'

[11] In an obvious effort to sidestep these clear legal obligations the first respondent initially took the stance that the relevant letter of employment, despite an express provision to the contrary, entitled the first respondent to suspend the applicant without pay. This untenable stance was apparently adopted on the advice of previous counsel, but then, subsequent to further advice received, it was realized

that the original advice was flawed as it was based on an obvious incorrect interpretation of the governing clause 10.6 in the letter of employment.[1]

[12] In this regard applicant's counsel however pointed out that, throughout, the first respondent has been legally represented by numerous instructed- and instructing counsel and that the first respondent's legal representatives where provided with the relevant legal authorities on three separate occasions,[2] but that the employer despite such clear authority to the contrary, persisted with its unlawful actions without sufficient ground – ie on the clearly untenable interpretation that the said clause 10.6 authorised suspension without pay. It was mainly on this basis that the applicant also sought a punitive costs order in these proceedings.

[13] Having thus conceded the applicant's entitlement to suspension with pay, in principle, the first respondent however continued to resist to pay the applicant his salary. It did so on the following bases:

a) The applicant delayed the finalisation of the disciplinary hearing from October 2017 until 8 November 2018;

b) The first respondent has advanced the applicant a N$4 million loan which the applicant was obliged to repay in instalments of N$40,000 per month which he failed to do since April 2017 despite receiving his full salary until September 2017;

c) The whole outstanding amount in terms of the loan agreement has become due and payable as a result of the applicant's breach;

d) The applicant is not entitled to bonus payments in terms of the employment agreement and is, in any event, within the discretion of the first respondent based on performance.

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[1] Compare : "10.6 In order to investigate a complaint of breach of contract or misconduct, the Company is entitled to suspend you on full pay for so long as the Board considers it appropriate in order to carry out and conclude an investigation and/or hearing." *(emphasis added)*

[2] Founding Affidavit, p 9, par 34.

[14] Ms Bassingthwaighte, who acts for the first respondent together with Mr Ravenscroft-Jones, firstly, and in support of this resistance, referred to paragraph 12.3.4 of the answering affidavit where the first respondent had quantified the amount, that on its version, should be deducted from the applicants claim and from which it appeared that in actual fact, after those deductions, it was the applicant that owes the first respondent and not vice versa. It was pointed out that the applicant's reply thereto[3] stated in most instances merely that the first respondent's version was incorrect, as it was either based on an incorrect understanding of the law, the facts, or the rule 20 report of the parties and that none of the issues raised by the first respondent would affect the applicant's claim in any way, and, that, more particularly, all the postponements were in any event caused either by agreement, or pursuant to a formal application and that it was the first respondent who had requested a stay of the hearing that was to start in February 2018. As far as the loan was concerned it appeared that it was the applicant's case that the loan had no effect on his claim for unpaid remuneration and that the calculation contained in the said paragraph 12.3.4 of the first respondent's answering affidavit was thus incorrect and misconstrued. It was finally pointed out in this regard that the applicant had also adopted the stance that the first respondent had misinterpreted the rule 20 report by submitting that further evidence was necessary despite the fact that the parties had agreed that the matter must be determined on the basis of the agreed facts contained in the rule 20 report and that the issues to be determined were thus simple legal issues.

[3] from paragraphs 7, 8, 9, 10, 11, 12 and 13 of the replying affidavit.

[15] Counsel for the first respondent then argued that they would illustrate that the applicant's response in reply did not effectively gainsay the respondent's version as, on the facts before the Court, there was a dispute as to the actual amount payable to the applicant per month, or what would be due to him in total. In this respect the applicant had stated that his gross monthly salary was N$112,000.00 and that he was thus seeking payment of this amount per month. He relies on annexure "C". As it was however evident from annexure "C" that there were deductions from his salary and that he was actually only paid a net salary of N$40,329.00 per month - as an amount of N$31,590.00 was deducted in respect of income tax and another amount of N$40,000.00 was deduced as "Other", the applicant's claim was not correct. In this regard one should consider the first respondent's case from which it appeared that the N$40,000.00 was actually an instalment in repayment of the said loan which the first respondent was entitled to deduct from the applicant's salary in terms of the loan agreement between the parties. As the instalment of N$40,000.00 was not deducted from the applicant's salary for the period April 2017 to September 2017 and as the applicant had not paid the full outstanding balance, which had become due and payable as a result of such breach, the first respondent was entitled to set-off this balance against the amount due and owing by it to the applicant.

[16] In addition it was pointed that there was nothing in the applicant's letter of employment which showed his entitlement to a thirteenth cheque every December and where it was the first respondent's case that the thirteenth cheque, a bonus payment, was payable at its discretion, depending on the applicant's performance; not as an entitlement, something the applicant had not gainsayed.

[17] In regard to the defence based on the postponements it was submitted that it was common cause, as this was agreed between the parties, as recorded in the rule 20 report, that the disciplinary hearing was postponed from 19 February 2018 to 8 November 2018 at the request of the applicant.

[18] It was submitted in conclusion that on these facts, this Court could not grant the relief sought in prayers 2 and 3 (as amended in the heads of argument).

[19] The advanced entitlement to reduce the applicants claim commensurate with the delays occasioned to the disciplinary hearing allegedly caused by the applicant

where firstly countered by Mr Heathcote SC, as assisted by Mr Jacobs, in the following way:

'The employee's response to the employer's bald allegation that he delayed the disciplinary hearing is particularly significant, and, because it is dispositive of the bald allegation, it is quoted in full:

> "8. The conclusion in para 12.2 that I could lawfully be suspended without pay is based upon the misconstrued basis set out in the subparagraphs. Clause 10 of my letter of appointment does not make provision for suspension without pay as alleged by Desert Fruit in para 12.2.1; and I have certainly not unduly delayed the finalisation of the disciplinary hearing as alleged in para 12.2.2, and in this regard, <u>all postponements were either agreed to or granted by the chairperson, without any conditions.</u>
>
> 10. Not a single one of the issues dealt with under para 12.3 affect my claim for unpaid remuneration in any way as suggested and the law of Namibia is trite in this regard as I have already explained. The only instance where suspension could lawfully be without pay, during a period of a postponement of a disciplinary hearing, is in law either by agreement; or if unpaid suspension is a condition to the granting of a postponement. Neither of these occurred during the disciplinary hearing. All the postponements of the disciplinary hearing referred to in para 12.3.1 were duly sanctioned by the chairman of the disciplinary hearing, Advocate Geoff Dicks, either by agreement between the parties or pursuant to a formal application on which he made a ruling. Even though the cause of the delays is irrelevant, the director of Desert Fruit, Mr Holmes, attempts to create an illusion that I have been deliberately causing the delays of the disciplinary hearing to be finalized, which is simply not true. This is evidenced by the e-mails between my attorney, Dirk Kotzé of Dirk Kotzé Attorneys and Mr Martin Strydom of ESI. These e-mails are annexed hereto marked as annexure "WS1". These e-mails show that Desert Fruit requested a stay of the disciplinary hearing, contrary to the illusion that I delayed it, yet I am blamed."

With respect to the principles applicable to payment of remuneration for the periods during which a disciplinary hearing is postponed, *John Grogan, EMPLOYMENT RIGHTS*, *1st ed., at page 131*, *the second par*, states:

> 'Whatever the reason an employer may have for suspending an employee, that act does not relieve the employer of its contractual duty to pay the employee, even when the employee has requested a postponement of disciplinary action against him …'
> (Own Emphasis.)

The contention by the employer that the amount due by it to the employee must be reduced because there were postponements is flawed on a multi-layered level: No allegation is made by the employer that the employee obtained a postponement in an unlawful manner. With respect, the law has never allowed deductions or enforced payments for lawful actions. It is inevitable that disciplinary proceedings may be postponed from time to time. Obviously the chairman of the disciplinary proceedings must determine whether a postponement will be granted. The employer does not even state that the chairman ever allowed a postponement unlawfully or because of the deliberate default or fault of the employee.

The employer's submissions are based upon its incorrect understanding of the case law as set out in paragraph 49 of the founding affidavit:

> '49. In respect of point (e) (i.e. that it is somehow a right of an employer to suspend an employee without pay), Desert Fruit relies on an article written by Hugo Pienaar and Prinoleen Naidoo of Cliffe Decker Hofmeyr attorneys in South Africa, and the two cases referred to in the article. The article is not authority for the proposition advanced.
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> > "49.1. In the MEIBC matter of SAEWA obo Members and Aberdare Cables [2007] 2 BALR 106 (ME/BC) case, the employee sought a postponement of the disciplinary hearing and the employer agreed thereto on condition that the period of the postponement would be unpaid suspension. The case is therefore simply authority for the principle that the employer and employee can agree on suspension without pay.
> >
> > 49.2. In the Msipho v Plasma Cut matter, the arbitrator does not cite a single authority for the finding he makes which has also not, as far as my legal practitioners could ascertain, been followed in any subsequent cases or adopted in either a South African or a Namibian Court, in the more than 14 years since it was made. The award is therefore no more than an arbitrator's views unsubstantiated by any law.

> 49.3. In the second to last paragraph of the article itself, the authors put their reliance on the above cases into context. They clearly state that: *"It is important that the employers amend their disciplinary code or policies and procedures to allow for the remedy of suspension without pay in the case of undue delays in the disciplinary enquiry caused by an employee."*
>
> 49.4. The article is therefore authority that suspension without pay remains unlawful if not provided for in the employment contract and the disciplinary code."

It was submitted that the above disposes of the employer's contention.'

[20] Three aspects emerge immediately: the first being that the first defence, that is the first respondent's entitlement to withhold part-payment of the applicant's salary, commensurate with any of the requested postponement(s), is misconceived and cannot be upheld as this was never agreed to, or authorised by any disciplinary code, or ordered by the chairperson of the disciplinary proceedings, in respect of which also no other entitlement was shown which would have relieved the first respondent of this contractual obligation. Secondly it seems strange, and this was not explained, why the N$ 40 000.00 deduction – labelled as 'Other' – was not deducted for the period April to September 2017 during which the applicant was still paid his salary, if it then was an automatic deduction, like that for income tax, as alleged, and, thirdly, that it seems indeed so that the 13th cheque, in all probability, was a discretionary bonus payment, to which the applicant holds no automatic entitlement in all probability.

[21] What is then to be made of the first respondent's claimed 'set-off defence' in respect of which it is common cause that a loan was advanced to the applicant, which is seemingly repayable.

[22] This issue between the parties had been formulated in their case management report as follows:

> '10. For the second defence the employer alleges (and the employee disputes) that the unpaid remuneration due to the employee must be reduced with a loan of NAD 4 million which is due and payable.[4]

[4] Answering Affidavit, p 6 – 7, par 12.3.2 – 12.3.3; 12.3.4 (c).

11. In this regard the employee denies that in law – and without judicial recourse – the loan can simply be deducted from the unpaid remuneration.[5]'

[23] The applicant's simple answer to this defence was based on the provisions of section 12 of the Labour Act 2007, the relevant parts of which provide:

'12 Deductions and other acts concerning remuneration

(1) An employer must not make any deduction from an employee's remuneration unless-

(a) the deduction is required or permitted in terms of a court order, or any law;

(b) subject to subsection (2), the deduction is-

(i) required or permitted under any collective agreement or in terms of any arbitration award; or

(ii) agreed in writing and concerns a payment contemplated in subsection (3).

(2) The deductions made in terms of subsection (1)(b) must not in aggregate exceed one third of the employee's remuneration.

(3) A deduction referred to in subsection (1)(b)(ii) may be made only in respect of the payment of-

(a) …

(b) …

(c) a loan advanced by the employer;

(d) …

(e) … '.

[24] With reference to this section it was then simply submitted that:

' … There is no court order, or any law, or any collective agreement, or any arbitration award which permits the deduction. Furthermore, the employee has not agreed in writing to the deduction. In these circumstances, no deduction is permitted…'

and that this would dispose of the first respondent's contention/defence.

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[5] Replying Affidavit, p 3, par 11.

[25] It was conspicuous that no counter-argument was mustered in this regard. While it may very well be that the first respondent has a claim for the repayment of the loan and that it is unknown, at this stage, whether the applicant would have a valid defence to any such claim, it is also clear that these issues will require determination in any action that may very possibly have to be instituted in this regard.

[26] Important however for the determination of this second defence, and what has also emerged on the facts, is that the first respondent has not brought its 'set-off defence' within the ambit of the deductions allowed in terms of section 12 of the Labour Act 2007. In such premises this defence - to the effect that the unpaid remuneration due to the applicant must be reduced with the outstanding balance of the loan of NAD 4 million - cannot be granted in these proceedings.

[27] As far as the third defence is concerned the issues pertaining thereto where formulated as follows:

'12. For the third defence the employer alleges (and the employee disputes) that before the amount of unpaid remuneration can be determined further evidence is needed.[6]

13. In this regard the employee denies that further evidence is necessary and states that such a stance is impermissible in the face of the rule 20 report in which the parties had agreed in writing that the issues must be determined on the basis of the agreed facts set out in therein (and without any evidence).[7]'

[28] Here it was submitted crisply by counsel for the applicant that:

'The rule 20 report[8] disposes of the employer's contention. The only relevant facts are that the employee was suspended without pay and his monthly remuneration was N$ 112,000. No other facts are relevant.'

[29] The arguments raised on behalf of the first respondent where more extensive and where it was first pointed out that:

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[6] Answering Affidavit, p 7 – 8, par 12.4 – 12.5.

[7] Replying Affidavit, p 3 – 4, par 13.

[8] Founding Affidavit, Annexure, p 83.

'The parties agreed in the rule 20 report that the application for a stay should be decided on the facts set out in the first respondent's affidavit, the applicable legal principles and the applicant's notice on a point of law. Thus, for purposes of the application for a stay, the second respondent had to accept that the facts alleged by the applicant were common cause;[9] The applicant's dispute would only be dealt with if the application for a stay was dismissed.'

[30] It was further argued that:

'The applicant seeks to review the second respondent's decision in the following circumstances and context:
The second respondent decided the "stay application" on the first respondent's affidavit alone and in the absence of any answering affidavit by the applicant;

The second respondent has not decided the issues in the applicant's dispute yet;

The applicant in prayers 2 and 3, seeks to have his dispute determined, by this court, as a court of first instance, in a review application. In effect, the applicant is asking this court to usurp the function of the Labour Commissioner/arbitrator;

The issues for determination in this application are to be determined on the facts in the affidavits (with annexures) placed before it;

A factual dispute arises on the papers with regard to the quantum payable to applicant, whether any amount should be deducted in relation to the loan agreement, whether the applicant is entitled to a 13th cheque in December, whether the applicant caused a delay in the finalisation of the disciplinary process and whether such delay can be taken into consideration in determining the quantum payable to the applicant;

The disciplinary process has been finalised. The applicant has referred a dispute to the Labour Commissioner for conciliation or arbitration. The applicant's dispute regarding his unpaid salary during the period of suspension was effectively only stayed pending finalisation of the internal disciplinary process. It can now be heard by the arbitrator together with his dispute for unfair dismissal. [10]

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[9] Annexures 7 par 1-4.

[10] Rule 16 of the Conciliation and Arbitration Rules.

The arbitrator clearly appreciated that there remains a dispute of fact on the issues mentioned above and that despite the agreement between the parties in the rule 20 report, he could not make a determination of the issues without hearing oral evidence. The arbitrator is not bound by the agreement between the parties. An arbitrator has the discretion to conduct an arbitration in a manner he deems appropriate in order to determine the dispute fairly and quickly. He must also deal with the substantial merits of the dispute with the least amount of legal formalities. [11]

The applicant is asking this court to make a decision in circumstances where several material factual disputes exist and, more importantly, where the second respondent is still seized with the matter, best suited and indeed quite able, to determine these disputes in the normal course of an arbitration hearing.'

[31] That there is veracity in the stance taken on behalf of the applicant is borne out by the Rule 20 report in which the parties expressly agreed[12] that the application for stay, and if refused, the main dispute, should also be determined with reference to the further agreed facts as set out in paragraph 5 of the report and on the parties' respective contentions of the law.[13] This is the crucial aspect which the arguments raised on behalf of the first responded failed to taken into account. This is then also the reason why the so-called 'third defence' cannot be upheld. This finding then also means that the unpaid remuneration issue can be determined also in these proceedings with reference to the said paragraph 5 [14], should this court find for the applicant.

[32] Having dealt with the underlying issues it now becomes incumbent to turn to- and consider the main issues, ie. the grounds of review and the grounds of opposition thereto.

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[11] See section 86(7) and (10) of the Labour Act, Act 11 of 2007.

[12] This appears from the relevant introductory portion to paragraph 5 of the report, which reads: " IN THE EVENT OF THE APPLICATION FOR STAY TO BE DISMISSED, THEN THE PARTIES SHALL DEAL WITH THE MAIN DISPUTE AS FOLLOWS: In terms of rule 20(a) the following facts are common cause: …'.

[13] Founding Affidavit, p 8, par 23 – 27; Answering Affidavit, p 13 – 14, par 24.

[14] Where it was expressly agreed that it was common cause that : 'On 30 September 2017, the complainant received his last gross salary payment of N$ 112 000.00 per month, from the respondent, as per the payslip attached as "E".

The grounds of review

[33] These grounds where summed up in the case management report :

'**The review grounds:**

28. The employee contends that the arbitrator thought he had no jurisdiction and he then exercised a discretion to grant the stay which is a discretion that he does not have. The arbitrator determined the unpaid suspension issue in favour of the employee but then allowed it (the unpaid suspension) and its effect (the non-payment) to continue pending the finalisation of the disciplinary hearing. For those reasons the arbitrator abdicated his jurisdiction in favour of the chairperson of the disciplinary hearing.[15]'

[34] The respective stances adopted by the parties in this regard and the issues between them where conveniently summed up by counsel for the applicant in their written submissions:

'The employee contends that the arbitrator exceeded his power and committed misconduct and various irregularities in the proceedings and also that the award was improperly obtained. The employee contends that the irregularity causes the employee prejudice to the extent that it negated a fair hearing and denied the employee a fair hearing; the irregularity amounts to a substantial miscarriage of justice; the irregularity undermined and negated the employee's rights to a fair trial and violated the employee's rights under the Act and Art 12(1)(a) of the Constitution; the irregularity defeated the legislative intent that arbitrations be conducted summarily, with minimum formalities and minimum delay; the arbitrator acted arbitrarily and oppressively and most irregularly; the arbitrator's mishandling of the case amounts to substantial injustice to the employee and is extremely unfair; the arbitrator completely disregarded the employee's legitimate expectation to be allowed a fair hearing; the arbitrator's actions are high-handed and mistaken and prevented the employee from having his case fully and fairly determined; the rules of natural justice have been breached with the result that the employee did not have his case fully and fairly determined; as a result of the irregularity, the employee did not have his case fully and fairly determined as contemplated in section 89(5)(a)(ii) of the Act; as a result the employee's dispute has not been expeditiously resolved, which is one of the driving reasons behind the enactment of the Act and is the duty of the Labour Commissioner to assist with this; the arbitrator's actions are inconsistent with the adjudicative process as the arbitrator did not fulfil his function of

[15] Founding Affidavit, p 17, par 57 – 59.

adjudicating the dispute; the arbitrator failed in his duty to assist in a fair manner with the resolution of the employee's dispute in the most cost-effective and expeditious manner. [16]

In this regard the employer contends that the review grounds are meritless.[17]'

[35] After referring the Court to *Atlantic Chicken Co (Pty) Ltd v Mwandingi and Another* 2014 (4) NR 915 (SC) where the Court held:

'[31] … the legislative intent that arbitrations be conducted summarily, with minimum formalities and minimum delay. On the other hand, is the equally important consideration that justice must not become a chimera by allowing arbitrators to act arbitrarily and oppressively.

[32] It is trite that an arbitrator is entrusted with the foremost task of determining the facts. …'.

The applicable test as to what constitutes a reviewable irregularity was cited:

'{38} It is, I accept, not every irregularity committed by an arbitrator that meets the standard of a gross irregularity, but it is essential that the irregularity causes prejudice.[18] It must be an irregularity that constitutes a negation of a fair trial. That approach accords with dicta from South Africa and Namibia[19] as regards what constitutes a gross irregularity in the conduct of arbitration.[20] An arbitrator commits a gross irregularity within the meaning of s 89(5) if his or her conduct denies a party a fair hearing. Such conduct may consist in the breach of the well-trodden tenets of natural justice (audi alterem partem or being judge in one's own cause) [21] or, as stated in Halsbury's [22] — 'such a mishandling of the arbitration as is likely to amount to some substantial injustice . . . or appear to be unfair'.

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[16] Founding Affidavit, p 17 – 18, par 60 – 60.13.

[17] Answering Affidavit, p 16, par 35.

[18] *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 359.

[19] *Strauss v NIMT and Others* (LC 94/2012) [2013] NALCMD 38 (6 November 2013) at 18, para 35. Now reported as *Strauss v Namibia Institute of Mining & Technology, Arandis Campus and Others* 2014 (3) NR 782 (LC) — Eds.

[20] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) ((2007) 28 ILJ 2405; 2008 (2) BCLR 158; [2007] 12 BLLR 1097; [2007] ZACC 22) in para 266.

[21] Parker op cit at 212 – 213.

[22] Halsbury 4 ed vol 2 para 649.

{39} The fact that the arbitrator has discretion to determine the procedure of an arbitration in terms of s 86(7) of the Act does not justify an arbitrator completely disregarding the legitimate expectation of parties to be allowed procedural rights which are commonly associated with a hearing before a 'tribunal' as envisaged in art 12 of the Constitution. It is trite that arbitration is a tribunal contemplated in art 12.[23] To call witnesses, to present evidence and to challenge the evidence of the opposing party — all within reason (ie without the hearing being converted into a full-blown prolonged adversarial contest) — are procedural rights which should be accorded to the parties, unless there is a cogent reason, which must be apparent from the record, to depart therefrom or the parties either waive their rights or agree otherwise. The discretion to determine procedure is certainly not a warrant for an arbitrator to act arbitrarily or oppressively towards the parties.'

[36] The court was further referred to the adoption of what had been said in this regard in *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) as found persuasive by Ueitele J in *Strauss v Namibia Institute of Mining & Technology, Arandis Campus and Others* 2014 (3) NR 782 (LC) :

'From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof. This appears clearly from the following dictum of Mason J in Ellis v Morgan; Ellis v Dessai 1909 TS 576 at 581:

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.' (See also, for example, R v Zackey 1945 AD 505 at 509.)[24]"

[37] In *Strauss v Namibia Institute of Mining & Technology, Arandis Campus and Others* the court went on to state :

'{46} … One of the driving reasons behind the enactment of the Labour Act, 2007 is the expeditious resolution of labour disputes … The office of the Labour Commissioner has a duty to assist in the expeditious resolution of labour disputes and must live up to that mandate.'

And that:

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[23] *Purity Manganese (Pty) Ltd v Katzao and Others* 2012 (1) NR 233 (LC) at 240C – E, para 21, and Roads Contractor Company supra at 724F – G, para 31; Labour Act s 85(1).

[24] *Bester v Easigas* at 42J – 43A.

'{50} The hallmark of arbitration is that it is an adjudicative process. …'

And:

'{51} … The approach taken by the Labour Commissioner is inconsistent with an adjudicative process and a clear negation of the applicant's rights enshrined in art 12(1)(a) of the Namibian Constitution. Section 86(7)(b) of the Labour Act, 2007, and rule 18 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner do not mean that the Labour Commissioner must ignore the basic requirements of fairness, such as giving a party an opportunity to controvert evidence given against it. The role of the Labour Commissioner is to assist in a fair and impartial manner with the resolution of labour disputes in the most cost- effective and expeditious manner.'

[38] It was then contended with reference to these authorities that:

'After the arbitrator determined the factual dispute in favour of the employee, which he did by finding that no matter the outcome of the disciplinary hearing, the applicant will be entitled to his unpaid remuneration ("… Either way, he will be entitled to the remuneration from the period he was suspended …"[25]), he should have made an award putting an end to the unlawful suspension, by ordering that the unlawfully withheld remuneration be paid. What the arbitrator was not entitled to do was to refuse to make an award, which he did, by finding "I decline to interfere with the ongoing disciplinary hearing …".[26]'

[39] Finally it is apposite to return to the introductory portion of the applicant's heads of argument, which puts the entire argument in context and where it was submitted that:

'The relief sought in the arbitration is aimed at bringing an end to the employee's unlawful suspension without pay. To do so the employee seeks to be paid his arrears remuneration which was not paid during the unlawful suspension,[27] and also to be paid his salary "henceforth" until the end of the suspension. The arbitrator's finding that he could not determine such relief until the (unrelated) disciplinary hearing has been completed brings an end to the relief sought and is clearly final. The arbitrator himself held that:

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[25] Founding Affidavit, Annexures p 241.

[26] Founding Affidavit, Annexures p 241.

[27] Founding Affidavit, Annexures, p 5.

"This order is final and binding…"[28]

(Own emphasis.)

…

The arbitrator accepted the proposition that:

> "… An employer may suspend an employee without pay only where the contract of employment or collective agreement provides for such action to be taken, …"

The arbitrator rejected the argument that the relief sought could not be determined until after the disciplinary hearing has been finalised by finding:

> "… I am not persuaded by the respondent's argument that this decision should be held over until the outcome of the disciplinary hearing, as this is a matter that pertains to the period prior to the disciplinary hearing and does not affect the outcome in any way."

The arbitrator then made the following award:

> "(1) The applicant is entitled to his remuneration for the duration of his suspension, regardless of the outcome of the disciplinary hearing.
>
> (2) The above amount is to be paid to the applicant by 30 November 2004."

It is submitted that the arbitrator had to decide the unfair suspension issue. The arbitrator's refusal to decide the unfair suspension issue until after the disciplinary hearing was finalised is an abdication of his jurisdiction and his final decision in the matter.[29] The result thereof is to deny and deprive the employee of his right to a fair hearing (to have his case fully and finally determined in respect of payment due while under suspension) entrenched by Article 12 of the Namibian Constitution. Such an irregularity is reviewable, and the review application is therefore not premature. See *S v Bushebi 1998 NR 239 (SC) at par 243 B/C* where it was held:

> 'However, where the error is fundamental in the sense that the lower court has declined to exercise the function entrusted to it by the statute the result of which is to deny a party the right to a fair hearing, the matter is reviewable (see Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD

[28] Founding Affidavit , Annexures, p 241.

[29] Founding Affidavit, p 17, par 56 – 59.

551 at 559560; Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C) at 42IJ; Coetser v Henning and Ente NO 1926 TPD 401; S v Mwambazi 1991 (2) SACR 149 (Nm) at 15513).” (at 241I–242A)’

The arguments on behalf of the first respondent

[40] After reminding the Court that a superior court, (here the Labour Court), should be slow to intervene in undetermined proceedings pending in a lower court (here the arbitration tribunal), and this only in exceptional circumstances, particularly as the merits of the applicant’s complaint had not yet been dealt with it was submitted that the relief sought in prayer 1 became moot and academic in nature[30]; and the second and third prayers were simply not - in the circumstances of this application – properly sought in the Labour court.

[41] More particularly the written argument then ran as follows:

‘The applicant dedicates paragraph 50 to 68 of its founding papers attempting to satisfy the requirements of section 89(5) of the Act. However, it fails to do so.

Paragraph 50 concerns a question of law, i.e. whether the arbitrator could, in law, grant a stay or postpone the hearing pending the finalization of the disciplinary process;

The first “gross irregularity” the applicant complains of is the fact that the first respondent relied on evidence not part of the stated case and a finding that certain facts were common cause. This is a reference to the loan agreement. There is no irregularity. The applicant did not file an answering affidavit. Thus, the facts in the first respondent’s affidavit were uncontested. The parties had agreed in the rule 20 report that the application for stay should be determined on the facts set out in the first respondent’s affidavit; [31]

Secondly the applicant complains that the arbitrator committed a gross irregularity by

[30] Courts should and ought not to decide issues of academic interest only. That much is trite. Irrespective of whether the arbitrator could (or did grant a stay) by default, such stay was clearly intended to only be pending finalization of the internal disciplinary process which has now been finalized. The matter can now be heard by the arbitrator.

[31] Annexures p 79 par 40, p 57 par 11 of the affidavit in support of the application for a stay where the agreement is alleged.

apparently determining the case on perceived relief never asked by him. The arbitrator at that stage only dealt with the stay application (and declined to deal with the applicant's dispute) the complaint in this regard simply does not make any sense; [32]

It is clear that the arbitrator, has not dealt with "the main arbitration" yet. To suggest otherwise is incorrect.

If one turns to consider the statements in paragraphs 55.1 to 55.9.9 of the affidavit the applicant exaggerates matters. The arbitrator may have erred in his assessment of the facts, but such errors can by no means be regarded as a gross irregularity. Rule 28(5) of the conciliation and arbitration rules provides that a party who opposes an application must file an answering affidavit with its notice to oppose within 7 days. In addition, the rule sets out[33] what must be contained in the answering affidavit. This includes a point of law;

The applicant having failed to file an answering affidavit, it is not unreasonable for the arbitrator to have thought there is no longer opposition considering what is required of a party who opposes an application;

The applicant in paragraphs 56 and 57 argues that the arbitrator committed a gross irregularity because he made his ruling thinking he was functus officio and therefore did not have the power to deal with the applicant's dispute. Whilst one can argue that the arbitrator erred in law in this regard it is somewhat far-fetched to characterise this as a gross irregularity;

In any event, it is clear that the arbitrator declined to deal with the applicant's dispute at that stage because on the facts before him (as contained in the first respondent's affidavit) there was a dispute as to the amount due to the applicant, whether the loan must be deducted or set off against the amount due to him and, as a result, he needed all the facts and evidence to decide the issue properly.

It was in the circumstances of this case, where he was informed that the disciplinary hearing is near finalisation, not unreasonable for him to stay / postpone the hearing of the dispute which could very well have been resolved in the disciplinary hearing or where the same parties may return with a further dispute which may overlap with those in the applicant's

[32] We accept that the arbitrator did say that he declined to interfere in the arbitration. Despite his unfortunate use of language, it is clear that he simply meant that he would not deal with the applicant's dispute whilst the disciplinary process is still ongoing, thus effectively granting the stay as applied for by the first respondent.

[33] Conciliation and Arbitration Rule 28(4)(a) to (g).

dispute regarding the suspension without pay;

At paragraph 58 of the founding affidavit the applicant tries to suggest that the arbitrator had determined the “main arbitration” in his favour. It is clear from a consideration of the arbitrator’s ruling that he never dealt with the “main arbitration”. He simply stated that whatever the outcome of the hearing, the applicant would be entitled to remuneration (not the remuneration as claimed), but this must be understood in the context of the fact that he was conscious of the allegation regarding the loan that has to be paid back;

It is quite difficult to understand how, upon a consideration of the arbitrator’s ruling that he indeed “abdicated his jurisdiction” in favour of the chairperson of the disciplinary hearing as stated in paragraph 59. This conclusion simply does not flow from the reasoning in the ruling;

The applicant goes on to complain that the “irregularity” has prejudiced him to the extent that it negated the hearing and denied him a fair hearing, amounts to a substantial miscarriage of justice, violated his rights under the Act and Article 12(1)(a) of the Constitution and defeated the legislative intent that arbitrations be conducted summarily, with minimum formality and minimum delay. The arbitrator was at the time informed that the disciplinary hearing is near completion. In the context of that, it was not unreasonable to grant the stay and the irregularities complained of do not arise;

The Arbitrator merely exercised his discretion to determine the best way to deal with, what appeared to be, a much greater dispute between the parties, apart from the applicant’s dispute regarding his unpaid salary. It is clear that he was of the view that it would make more sense to deal with the matter holistically once the disciplinary process had been completed. This approach is reasonable considering that it was clear that the outcome of the disciplinary hearing would give rise to more disputes. At the time that the application was being considered, the disciplinary process was near completion; a fact which must also have informed his ruling.

Therefore, it becomes clear that the second respondent is not guilty of any misconduct; he has not committed any gross irregularity and has not exceeded his powers especially in circumstances where the “main arbitration hearing” has not been conducted.

At best for the applicant, the arbitrator erred in law but whilst such error could entitle the applicant to an appeal, it does not justify a review.

It is clear that what the applicant seeks to do is to have this court determine his dispute as a court of first instance, seemingly in an attempt to side step having to deal with (and lead evidence on) the issue of quantum before the second respondent – or at all.

However, even if the court were to find that the decision of the arbitrator should be reviewed and set aside, the appropriate order would be to refer the matter back to the second respondent for determination of the applicant's dispute.'

Resolution of the review

[42] When it comes to the consideration of the afore quoted arguments it seems apposite to firstly comment in general on some of the arguments raised on behalf of the first respondent in respect of which :

a) it surely cannot be said that that *' … it was reasonable for the arbitrator to have thought there was no longer any opposition considering what is required of a party who opposes an application …'*, given the clear manner in which the Rule 20 report had regulated how the application for a stay would be dealt with and where it was expressly recorded that such application would be 'opposed by the respondent on a point of law which would be fully set out in a notice to be furnished in due course …' and in any event where it appears from the award that this was only his initial impression;

b) it was not correct to submit that *' … it is clear that the arbitrator had not dealt with the main arbitration" yet and that to suggest otherwise is incorrect …'*, in circumstances where it should have been quite clear that it is the applicant's complaint that the arbitrator should have done exactly that;

c) the submission that ' *… the arbitrator declined to deal with the applicant's dispute at that stage because on the facts before him (as contained in the first respondent's affidavit) there was a dispute as to the amount due to the applicant, whether the loan must be deducted or set off against the amount due to him and, as a result, he needed all the facts and evidence to decide the issue properly …'* is not really borne out by the award in which the arbitrator simply states *' … I tend to concur with the submissions by the respondent that I need all the facts and evidence before I can interfere with the ongoing disciplinary process …"*.

[43] Be that as it may. It seems to me that the crux of this review lies in the determination of whether or not the arbitrator committed an irregularity which is reviewable, (this is also what was centrally disputed), because the applicant was denied his right to a fair trial, which includes the right to a fair hearing and thus to have his case fully and fairly- and thus finally determined in respect of the payment due to him while on suspension in respect of which it is contended, in opposition, that the arbitrator merely exercised a reasonable discretion rather that abdicating his jurisdiction .

[44] In my view the key to the resolution of these central issues is indeed to be found in the cited *Bushebi* decision from which it appears that a reviewable irregularity also occurs if a lower court has declined to exercise the functions entrusted to it by a statute, the result of which is to deny a party the right to a fair hearing. The functions relied upon in this instance are the functions as identified by Mr Justice Ueitele in *Strauss v Namibia Institute of Mining & Technology* on the basis of which it is convincingly contended that the arbitrator, the second respondent herein, essentially failed to deal with the case before him in accordance with the functions and objects of the Labour Act [34], ie. those which require the expeditious resolution of labour disputes from arbitrators and which impose on arbitrators the duty to assist in this regard[35] as well as the obligation to 'live up to that mandate'. Importantly it appears also from the relied upon judgment that arbitrators employed at the Office of the Labour Commissioner are duty bound to assist in a fair and impartial manner with the resolution of Labour disputes and that this should be done in the most cost effective and expeditious manner.[36]

[45] Can it thus be said that when the arbitrator found that *"… Either way, he (the applicant) will be entitled to the remuneration from the period he was suspended …',* he should have proceeded to deal with the unfair suspension issue and make an award – and - that his final refusal: *'I decline to interfere with the ongoing disciplinary hearing'* and the further pronouncement that *'this order is final and binding …'*,

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[34] *Strauss v Namibia Institute of Mining & Technology* op cit. at [46] : 'the driving reasons' as the learned Judge put it.

[35] Compare : *Strauss v Namibia Institute of Mining & Technology* op cit at [46].

[36] Compare: *Strauss v Namibia Institute of Mining & Technology* op cit at [51].

amounted to an abdication of his jurisdiction and the declination to exercise the functions entrusted to him by the Labour Act, i.e. in terms of which he was actually obliged to resolve the application before him in the most cost- effective and expeditious manner and not decline to do so and that this declination, in turn, resulted in a situation in which the applicant was denied the right to a fair hearing?

[46] I believe that this is indeed what can be said of this matter as it would seem that counsel for applicant have a point when they consequentially submitted that in the circumstances the arbitrator should have gone on to make the award that would have ended the applicant's financial plight by ordering the unlawfully withheld remuneration to be paid, especially after he had already pronounced himself positively on that score. It was surely immaterial in this regard that the disciplinary proceedings where *'… at an advanced stage …'* as this was an aspect that could have been easily accommodated in any order for payment that could have been made then. Important in this regard is also that the Rule 20 report catered precisely for this eventuality. The Rule 20 report expressly contemplated the possible dismissal of the application for a stay and the report thus always put the arbitrator in the position to immediately continue to deal with the payment claim on the basis of the agreed facts.

[47] It so appears, as was also generally argued, that the compliance with the said functions and obligations imposed on the arbitrator by the Labour Act would have resulted in the most cost- effective and expeditious way to determine this particular dispute between the parties as clearly the grant of the claimed award for payment would have been in line with these functions and obligations imposed on him by the statute, which functions and obligations he then abdicated when he ruled : '*I decline to interfere with the ongoing disciplinary hearing'.* This stance was also and in any event erroneously adopted as, clearly, no such interference would have occurred, as the issues serving before the chairperson of the disciplinary hearing where totally different. This abdication and the failure and refusal to exercise the entrusted functions and to assist in this regard clearly denied the applicant a fair hearing and amounted to a prejudicial miscarriage of justice, resulting in reviewable irregularities.

[48] In such circumstances it also appears that the submission that *'the arbitrator merely exercised his discretion to determine the best way to deal with, what*

appeared to be, a much greater dispute between the parties, apart from the applicant's dispute regarding his unpaid salary and that it was clear that he was of the view that it would make more sense to deal with the matter holistically once the disciplinary process had been completed' cannot be upheld. In any event these submissions are also not borne out by the award where the arbitrator motivated his stance by stating: *'… I need all the facts and evidence before I can interfere in the ongoing disciplinary process …'*. This approach was in any event also not reasonable, already from the point of view that there would have been no such interference. In addition, and even if it was foreseeable to the arbitrator that the outcome of the disciplinary process would give rise to more disputes, as was contended on behalf of first respondent, this was not really relevant to the case serving before him, which he had to determine expeditiously and cost-effectively on the facts agreed for this purpose in the Rule 20 report

[49] Finally I should also mention that I could not ascertain on which basis it was contended by counsel for the first respondent that the relief sought in prayer 1 of the notice of motion was moot and academic. No further argument was advanced in this regard. In any event it would seem that such prayer continues to be central and necessary to the review relief pursued by the applicant in this instance. Accordingly I cannot detect any mootness and this submission will thus not be accorded any weight.

[50] The above findings then ultimately also mean that I do not uphold the submissions that *' … the second respondent is not guilty of any misconduct; that he has not committed any gross irregularity and has not exceeded his powers especially in circumstances where the "main arbitration hearing" has not been concluded.* It also follows from my findings and conclusions that I consider that the applicant was legitimately entitled to invoke review proceedings.[37]

[51] It will also have emerged from these conclusions and findings that I will uphold the review.

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[37] Compare in any event also : *Shaama v Roux* 2015 (1) NR 24 (LC) at [21] – compare also generally *Le Roux v Minister of Justice and Others* 2015 (1) NR 131 (HC) at [10] to [17] as it was also contended on behalf of first respondent that at best the issues complained of by the applicant should have been raised on appeal.

[52] In such circumstances the next question arises, namely whether or not the court should refer the matter back to the arbitrator.

Should there be a referral back?

[53] Also in this regard the parties are not *ad idem*. The applicant takes the view that this is a proper case in which not to do so whereas the first respondent wishes to have the matter referred back.

[54] On behalf of the applicant it was submitted in this regard that :

'The learned authors of *Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed., 1997, at p 959*, state the law thus:

> "Although the court will, in the case of a successful review, generally refer the matter back to the particular body entrusted by the legislature with certain or special powers rather than make the decision itself, it will not do so when the end result is a foregone conclusion and a reference back will merely waste time, when a reference back would be an exercise in futility, or where there are cogent reasons why the court should exercise its discretion in favour of the applicant and substitute its decision for that of the respondent."
> (Own emphasis.)

It is submitted that the matter should not be referred back in the light of circumstances set out in the papers,[38] and particularly for the reasons stated in paragraph 60 of the founding affidavit, and also the following:

'61. With respect, it is quite clear that my suspension without pay is unlawful and that I suffer severe financial prejudice. Desert Fruit has not paid me for 23 months and owe me N$ 2,8 million.

62. It would serve no purpose to refer the matter back to the arbitrator or even another arbitrator. All the facts are before this Court and it is in as good a position to put an end to my unlawful suspension as would be any arbitrator. As this Court is enjoined to make any order which it deems *"just and expedient"*, I respectfully submit that this Court should put an end to my unlawful suspension without pay, by setting aside the arbitrator's ruling and by

[38] Founding Affidavit, p 14 – 17, par 53 – 59.

ordering Desert Fruit to pay me my outstanding salary. I again point out that the outstanding capital alone amounts to N$ 2,8 million as at end August 2019. The capital includes the December bonuses. Interest at the rate of 20% annually is due on each and every monthly outstanding amount, calculated from the first day of the month following.

63. If I do not get this money urgently I will be completely ruined. I am already in arrears with almost every payment I have to make and I have borrowed money where I could.'

It is submitted that this is a proper case for this Honourable Court to decide the matter itself and not refer it back to the Labour Commissioner.'

[55] The first respondent's stance in this regard was presented as follows:

'However, even if the court were to find that the decision of the arbitrator should be reviewed and set aside, the appropriate order would be to refer the matter back to the second respondent for determination of the applicant's dispute.

The applicant states that no purpose would be served in referring the matter back to the arbitrator or another arbitrator because this Court is in as a good a position to put an end to his suspension and to order the first respondent to pay his salary.[39] On the facts before this court:

The applicant's suspension has come to an end. Therefore his dispute regarding the suspension without pay can now be determined;

The applicant has been dismissed and a dispute regarding his dismissal is pending before the Labour Commissioner which can be heard together with his dispute regarding the suspension without pay. Such an approach would be cost effective;

There is a dispute as to the amount payable to the applicant as his salary per month or what is due to him in total. Applicant states that his gross monthly salary is N$112,000.00 and thus seeks payment of this amount per month. He relies on annexure "C".[40]

It is evident from annexure "C" that there were deductions from his salary and that he was only paid a net salary of N$40,329.00 per month. An amount of N$31,590.00 was deducted in respect of income tax and an amount of N$40,000.00 was deduced as "Other". We know

[39] Founding affidavit: p18-19 par 62.

[40] Founding affidavit: p4 par 14.

from the first respondent's case that the N$40,000.00 was an instalment in repayment of a loan which the first respondent was entitled to deduct, (based on an unconditional and irrevocable agreement from applicant) from the applicant's salary in terms of the loan agreement between the parties.[41]

The instalment of N$40,000.00 was not deducted from the applicant's salary for the period April 2017 to September 2017 nor did the applicant pay the instalment to the first respondent despite the fact that he received his salary in breach of his obligation to do so if not deducted from his salary.[42]

As a result of such breach, the full outstanding amount has become due and payable which amount the first respondent is entitled to set-off against the amount due and owing to the applicant in terms of the provisions of the loan agreement.[43]

There is nothing in the applicant's letter of employment which shows that he was entitled to a thirteenth cheque every December. The first respondent's case is that the thirteenth cheque, the bonus payment, was payable at its discretion depending on the applicant's performance; not as an entitlement.[44] *The applicant has said nothing in reply to gainsay this.*

It was agreed by the parties in the rule 20 report that the disciplinary hearing was postponed from 19 February 2018 to 8 November 2018 at the request of the applicant;[45]

We submit that on these facts, this Court cannot grant the relief sought in prayers 2 and 3 (as amended in the heads of argument).

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[41] Answering Affidavit: p6 par12.3.2; Annexure "SJH4" p13 clause 8.1 where the applicant irrevocably and unconditionally agreed to the amount being deducted from his monthly salary.

[42] Annexure "SJH4" p 14 clause 9.

[43] Annexure: "SJH4" p18 clause 11 – in terms of this clause the amount owing in respect of the loan agreement can be set off against any amount due and owing to the applicant from whatsoever cause and howsoever arising. That would include the amount due in respect of the unpaid salary now claimed.

[44] Answering affidavit: p7 par 12.3.4 (b).

[45] The first respondent alleges that the applicant is responsible for the delay in the finalization of the hearing from October 2017 to 8 November 2018 – Answering affidavit p5 par 12.3.1. the applicant does not dispute the delay from October 2017. He merely provides emails in support of his contention that the first respondent suggested a postponement from 19 February 2018. The emails show that the applicant's legal representative suggested that such postponement be for 3 months

The relief sought in prayers 2 and 3 is in any event pending for determination before the arbitrator now that the disciplinary hearing has been finalised. There is simply no good reason for the Court to interfere and basically usurp the function of the arbitrator in these circumstances.

We submit that the Labour Court will not easily exercise its jurisdiction to deal with a matter which is pending before an alternative forum.

The powers of the Labour Court as set out in section 117 of the Act do not presuppose the Labour Court exercising its jurisdiction in this regard in respect to a matter (or processes) in another forum.

In this case it is clear that the applicant is entitled to (and able) to get substantial redress before the arbitrator.

If, however, this court was indeed inclined to deal with prayers 2 and 3 of the notice of motion, it is submitted that this court would need to do so on the strength of the papers before it, namely the founding, answering and replying affidavits, together with annexures thereto. As alluded to earlier there is clearly a dispute of fact on these papers.

The dispute of fact, in the absence of the applicant having referred these issues to oral evidence and in accordance with the Plascon-Evans approach will be determined in the first respondent's favour.

If regard is had simply to the loan repayment calculation annexed to the first respondent's answering affidavit[46], and the court accepts that the first respondent is entitled to set off the amount due and owing, it is clear that as at 31 October 2019, the applicant owed the first respondent an amount of N$4,800,617.14. According to the applicant, first respondent owed him N$2,800,000.00 (this amount does not take into account the tax that needs to be deducted and included the thirteenth cheque which the applicant is not entitled to), presumably as at September 2019 when the affidavit was signed. If the debt to first respondent is set off against that of the applicant, the applicant would in fact owe the first respondent over N$2million.

[46] Annexure "JSH5" – which applicant did not deal with properly except to say that the calculations are incorrect – and which must for this reason be accepted as correct.

It is also worth noting that although the applicant criticises the first respondents position adopted during the stay application and it reliance on SAEWA obo Members and Aberdare Cables [2007] 2 BALR 106 (MEIBC) as well as Msipho and Plasma Cut (2005) 26 ILJ 2276 (BCA) – which we readily concede are obviously not in the least binding in this jurisdiction – what the applicant misses is that in those matter the arbitrators noted that employees suspended pending disciplinary action are normally entitled to their full pay. However, that to apply that principle to situations where suspension is extended at the request of the employee would be unfair to employers. We submit that this is nothing more than a commonsense and equitable approach, which is in line with the purpose of the Act which amongst others is: "to entrench fundamental labour rights and protections". (Emphasis added)'

[56] The key to the resolution of this incidental dispute must be the confirmed entitlement of the applicant to be paid his remuneration, for the full period of his suspension – as now also confirmed by this court - and the Rule 20 report - which was designed to facilitate the resolution of this aspect during the arbitration and the corresponding relief sought in this regard, as recorded in paragraph 8.1 of the report, should the application for a stay be dismissed. The report and the common cause facts recorded there will thus essentially determine whether or not a referral back would be warranted in this case.

[57] In this regard I also believe that the contention, raised on behalf of the first respondent, that *' … the powers of the Labour Court as set out in section 117 of the Act do not presuppose the Labour Court exercising its jurisdiction in this regard in respect to a matter (or processes) in another forum …'*, does not preclude the granting of the sought relief in this court given the further general provisions and wide powers conferred on this court by sections 117(g), (h) and (i).[47]

[47] Compare : (1) The Labour Court has exclusive jurisdiction to-

(a) …

(b) review-

(i) arbitration tribunals' awards in terms of this Act; and

(ii)

…..

(g) determine any other matter which it is empowered to hear and determine in terms of this Act;

(h) make an order which the circumstances may require in order to give effect to the objects of this Act;

(i) generally deal with all matters necessary or incidental to its functions under this Act

[58] What are then the governing portions of the report in respect of which it will already have been noted that the parties agreed how the main dispute, that is the dispute regarding the unpaid remuneration while on suspension, would have to be resolved. Here it is to be kept in mind that, on behalf of the applicant, it was contended in response to the first respondent's second *in limine* defence that *'the only relevant facts (in this regard) are that the employee was suspended without pay and his monthly remuneration was N$ 112 000.00. No other facts are relevant.'* Is this then indeed the case?

[59] The contents of the Rule 20 report indeed bear out the submissions made on behalf of the applicant. This means that this court would indeed be in the position to grant the sought relief itself, particularly in circumstances where it would certainly be a waste of time to refer this matter back to the arbitrator, which would obviously cause a further delay, which in turn would prolong the applicant's financial plight even more. While I am not oblivious to the first respondent's allegations regarding the loan, I also take into account that the determination of the remuneration issue in this case does not leave the first respondent without remedy in that regard. It may even be that the applicant has a defence to such claim. In any event it will already have emerged that I will also not grant the two claims for the 13th cheque, for the reasons already given above and in respect of which I have found that the applicant's entitlement thereto is doubtful.

[60] Given these considerations I believe that there are cogent reasons for this court to exercise its discretion in favour of the applicant and I will thus grant the remainder of the relief sought in this regard in these proceedings and not refer the matter back.

The costs issue

[61] Also in this regard the parties were at loggerheads.

[62] The stance on behalf of the applicant was motivated as follows :

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concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.'

> ‘With respect to costs section 118 of the *Labour Act, 2007*, provides:
>
> “118. Despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.”

In *National Housing Enterprise v Beukes and Others* 2009 (1) NR 82 (LC) at 87E-H, this Court held:

> ‘The question arises: what does it mean to say that a party has 'acted frivolously or vexatiously'? In Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) Nicholas J, as he then was, while dealing with an application to stay proceedings which were alleged to be vexatious or an abuse of the process of the court, said this (at 1339F):
>
> “In its legal sense, "vexatious" means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant (Shorter Oxford English Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; abuse connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive.’
>
> It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it is the conduct or actions of the party sought to be mulcted in costs that should be scrutinised. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent.”
>
> (Own Emphasis.)

The employer has clearly – knowing that there is no lawful basis to do so – suspended the employee without remuneration to, through financial pressure, force the employee into an unfair compromise.[48] We emphasize the following extract from the founding affidavit:

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[48] Founding Affidavit, p 3, par 8.

'8. I am financially ruined. To survive I have had to borrow money from family members and friends. Desert Fruit aims to ruin me financially to force me into accepting and signing a proposed written agreement to sell the 51% shares, which I hold via the Wayne Smith Trust, in Olive Ridge Farming (Pty) Ltd ("Olive Ridge") to Desert Fruit for less than its value. To obtain the 51% shares in Olive Ridge at less than its value is the vindictive ulterior motive of Desert Fruit. Note: Desert Fruit holds 49% of the issued shares in Olive Ridge, which owns a farm property currently occupied and used by Desert Fruit for its date farming business. The main shareholder and controlling mind of Desert Fruit is its director, Jeroen van der Nieuwenhuyzen, a European millionaire, who controls Desert Fruit via his Mauritian based company, Metecho Holdings.'

The employer's response to the above paragraph further illustrates that it is acting in a vexatious and frivolous manner.

Moreover, the employer has throughout been legally represented by numerous instructing and instructed counsel. The employee's legal representatives have provided the relevant authorities to the employer's legal team on three separate occasions,[49] and despite the clear authority, the employer has persisted with its unlawful actions without sufficient ground – ie the clearly untenable interpretation of clause 10.6 to include suspension without pay.

Not only should the employer be ordered to pay the employee's costs, these costs should also be on a punitive scale.'

[63] The counter arguments ran as follows :

'The applicant, in its head of argument seeks to vary his notice of motion with respect to the cost order to be granted. The applicant argues that the first respondent should be ordered to pay punitive costs.

Section 118 of the Labour Act provides that the "Labour Court must not make an order of costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings."

In the case of Namibia Estate Agent Board v Steen & Another[50] the court considered the meaning of the words, frivolous and vexatious and said the following:

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[49] Founding Affidavit, p 9, par 34.

[50] (HC-MD-LAB-MOT-REV-2017/00019) [2018] NALCMD 33 (14 December 2018).

'[19] To answer this question, I can do no better than rehearse, what is stated in *Onesmus v Namibia Farm Workers Union,* [51] at para 27 - 28, regarding the meaning to be attached to the words vexatious and frivolous as employed in the Act. The court stated as follows in that case:

> [27] Before I answer that question, it must be mentioned that courts have given meaning to the words vexatious and frivolous in previous judgments. In this regard, I do not have to try to re-invent the wheel, so to speak. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others,*[52] the court gave the following meaning to the words in question:
>
> > 'In its legal sense, "vexatious" means "frivolous, improper" instituted without sufficient ground, to serve solely as an annoyance to the defendant . . .' See also *Namibian Seaman and Allied Workers Union v Tunacor Group Ltd* and the recent Supreme Court judgment in *Permanent Secretary of the Judiciary v Ronald Mosementla Somaeb and Another*.[53]
>
> [28] In other words, it occurs to me that these words mean that the party allegedly acting vexatiously or frivolously must act in a manner that is in all the circumstances of the case without pure and honourable motive; one that is entirely groundless; without proper foundation and singularly designed to trouble, irritate, irk, incense, anger, provoke, pique and serve to disturb and vex the spirit of the other party'.

[20] In *National Housing Enterprise vs. Beukes and Others* [54] it was stated that the purpose of the s. 118 is similar to its predecessor s. 20 of the repealed 1992 Labour Act, it was held:

> 'It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often-inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it is the conduct or actions

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[51] *Onesmus vs Namibia Farm Workers Union* (LC 3/2013) [2018] NALCMD 17,

[52] 1979 (3) SA 1331 (W).

[53] SA 14/2018 (SC) delivered on 2 July 2018, at paras [12] and [13]. 2009 (1) Nr 82 LC p 88

[54] 2009 (1) NR 82 LC, p 88.

> of the party sought to be mulcted in costs that should be scrutinized. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent'."

The first respondent, upon our advice no longer persists in the position it held regarding the interpretation of clause 10 of the letter of employment. It opposes the application on valid grounds, not to annoy the the applicant. This much is clear from what appears above. There is thus no basis for the court to act contrary to section 118 of the Labour Act and certainly not to grant costs on a punitive scale where such is only sought in the heads of argument.'

[64] For purposes of determining the cost issue it would seem on analysis that the high- watermark of the first respondent's stance against a punitive costs order is encapsulated in the last-quoted submission. While it is indeed laudable - and also more than proper - that the first respondent has now heeded the advice of its current legal team and that it continued to oppose the application on other perceived valid grounds, something that would not, in the normal course, have caused the first respondent's actions to lose the protective shield afforded by section 118 against a costs order in general, I believe however that it is the first respondent's obstinate and unlawful insistence on an obviously misconceived- and patently wrong interpretation of the letter of appointment, despite having been provided on three separate occasions with legal authority to the contrary, that requires censure. Such stance must have caused 'annoyance'.

[65] The first respondent's persistence on an untenable stance proves that – at least in part and for a certain period – the first respondent has acted 'frivolously and vexatiously' in its opposition to the applicant's complaint, in the sense that it did so obviously without sufficient ground.

[66] It is for these reasons that I will accede to the request to grant a punitive costs order, in part, that is up to- and inclusive of the 16th of July 2020, the date on which the first respondent's heads of argument where filed herein, which is then also the date on which it was indicated that counsels' advice in regard to the untenable stance adopted in respect of clause 10.6 of the letter of appointment was no longer persisted with.

[67] In the final equation I will thus grant the review and accordingly I make the following resultant orders:

1. The orders made by the 2nd respondent under case number SRKA-15-18 on 8 August 2019 are hereby reviewed and set aside.

2. The 1st respondent is ordered to make payment to the applicant as follows:

    2.1 N$ 112,000.00, together with interest thereon calculated from 1 October 2017 at the rate of 20% per annum;

    2.2 N$ 112,000.00, together with interest thereon calculated from 1 November 2017 at the rate of 20% per annum;

    2.3 N$ 112,000.00, together with interest thereon calculated from 1 December 2017 at the rate of 20% per annum;

    2.4 N$ 112,000.00, together with interest thereon calculated from 1 January 2018 at the rate of 20% per annum;

    2.5 N$ 112,000.00, together with interest thereon calculated from 1 February 2018 at the rate of 20% per annum;

    2.6 N$ 112,000.00, together with interest thereon calculated from 1 March 2018 at the rate of 20% per annum;

    2.7 N$ 112,000.00, together with interest thereon calculated from 1 April 2018 at the rate of 20% per annum;

    2.8 N$ 112,000.00, together with interest thereon calculated from 1 May 2018 at the rate of 20% per annum;

    2.9 N$ 112,000.00, together with interest thereon calculated from 1 June 2018 at the rate of 20% per annum;

2.10 N$ 112,000.00, together with interest thereon calculated from 1 July 2018 at the rate of 20% per annum;

2.11 N$ 112,000.00, together with interest thereon calculated from 1 August 2018 at the rate of 20% per annum;

2.12 N$ 112,000.00, together with interest thereon calculated from 1 September 2018 at the rate of 20% per annum;

2.13 N$ 112,000.00, together with interest thereon calculated from 1 October 2018 at the rate of 20% per annum;

2.14 N$ 112,000.00, together with interest thereon calculated from 1 November 2018 at the rate of 20% per annum;

2.15 N$ 112,000.00, together with interest thereon calculated from 1 December 2018 at the rate of 20% per annum;

2.16 N$ 112,000.00, together with interest thereon calculated from 1 January 2019 at the rate of 20% per annum;

2.17 N$ 112,000.00, together with interest thereon calculated from 1 February 2019 at the rate of 20% per annum;

2.18 N$ 112,000.00, together with interest thereon calculated from 1 March 2019 at the rate of 20% per annum;

2.19 N$ 112,000.00, together with interest thereon calculated from 1 April 2019 at the rate of 20% per annum;

2.20 N$ 112,000.00, together with interest thereon calculated from 1 May 2019 at the rate of 20% per annum;

2.21 N$ 112,000.00, together with interest thereon calculated from 1 June 2019 at the rate of 20% per annum;

2.22 N$ 112,000.00, together with interest thereon calculated from 1 July 2019 at the rate of 20% per annum;

2.23 N$ 112,000.00, together with interest thereon calculated from 1 August 2019 at the rate of 20% per annum;

2.24 N$ 112,000.00, together with interest thereon calculated from 1 September 2019 at the rate of 20% per annum;

2.25 N$ 112,000.00, together with interest thereon calculated from 1 October 2019 at the rate of 20% per annum;

2.26 N$ 112,000.00, together with interest thereon calculated from 1 November 2019 at the rate of 20% per annum; and

2.27 a proportionate amount together with interest thereon calculated from 1 December 2019 to 11 December 2019 at the rate of 20% per annum;

3. The 1st respondent shall pay to the applicant his legal costs up to and inclusive of the 16th of July 2020 which shall include the costs of two instructed- and one instructing counsel on the legal practitioner and own client scale.

H GEIER

Judge

APPEARANCES

APPLICANT:	R Heathcote, SC with him (SJ Jacobs) Instructed by Koep & Partners, Windhoek
RESPONDENT:	N Bassingthwaighte with her (JP Ravenscroft-Jones) Ellis Shilengudwa Inc., Windhoek