REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2020/00054

In the matter between:

BEAVEN DICKSON MUSHETI **APPELLANT**

and

OFFICE OF THE AUDITOR-GENERAL **RESPONDENT**

Neutral Citation: *Musheti v Office of the Auditor-General* (HC-MD-LAB-APP-AAA-2020/00054) [2021] NALCMD 43 (20 September 2021)

CORAM: MASUKU J
Heard: **19 March 2021** (Decided on the papers).
Delivered: **20 September 2021.**

Flynote: Labour Law – Appeal and cross-appeal of an arbitration award – whether the applicant is entitled to remuneration during period of sick leave and dismissal– cross appeal - whether arbitrator misdirected himself in deciding the appellant's dismissal was unfair - consequently whether the appellant is therefor not entitled to back-pay.

Summary: The appellant was discharged by operation of the law, namely s. 24(5)(*a*)(*i*) of the Public Service Act, No. 13 of 1995 from its employ after what the respondent termed as absence from office in excess of 30 working days. He appealed successfully

against the discharge and he was reinstated. After reinstatement, the appellant commenced work and he was assured he would receive his salary for the period that was out of office owing to his ailment and being out of office subsequent to the dismissal. Respondent at a later stage informed the applicant of the days per its own record of appellant's absence and the consequent non-remunerations of 211 days. This communication led to the appellant referring a labour dispute of unfair treatment and withholding of his salary by the respondent. The respondent filed a cross appeal thereafter insisting that the arbitrator's decision on the unfair dismissal and the entitlement to back pay was a misdirection.

Held: that the arbitrator misdirected himself by considering evidence adduced by the respondent's witness, which had not been pleaded in the papers and the respondent was not afforded an opportunity to deal with it during the exchange of papers and during cross-examination.

Held that: In any event, the evidence of the respondent's second witness, which was based on electronic evidence, was not proven to have been properly functioning at the time.

Held further that: the effect of the appellant's discharge was in effect similar to a dismissal, although the latter is by operation of the law. In this regard, the provisions of s 33 of the Labour Act, 2007, with respect to substantive and procedural fairness do not apply in the case of a discharge in terms of the Public Service Act.

Held: that the respondent is not entitled to lodge a cross-appeal as the award issued was in his favour and it appeared to be aggrieved by the reasons of the arbitrator, which are not, in law, appealable.

Held that: the appellant was entitled to be paid the amount due as his salary between the successful appeal and his reinstatement.

Held further that: the *Turquand* rule should apply and prevent the respondent from benefitting from what it refers to be a failure to comply with its internal formalities.

The court accordingly upheld the appeal and concomitantly, dismissed the cross appeal, with no order as to costs.

ORDER

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1. The Appellant's appeal is upheld.
2. The Respondent's cross-appeal is dismissed.
3. The Respondent is ordered to pay the Appellant the amount of N$ 231 909. 75 as compensation for loss of income from the date he was deemed to have been discharged, to the date of his re-instatement.
4. The amount stated in paragraph 3 above is to be paid to the Appellant within sixty (60) days from the date of this order.
5. There is no order as to costs.

JUDGMENT

MASUKU J:

Introduction

[1] The main appeal before court is against an arbitration award made on the 14 September 2020 by the arbitrator Mr. Immanuel Heita. The award was registered with the High Court on the 5 October 2020. The appellant appeals against the arbitrator's decision dismissing his complaint of non-payment for the period August 2016 to July 2017, a period alleged to be 251 days, amounting to N$280 000, alternatively N$231 909.75.

[2] The respondent filed a cross-appeal against the same arbitration award, specifically against the arbitrator's decision that the appellant was unfairly dismissed and that as a consequence he was entitled to back pay. It is important to mention that the arbitrator dismissed the appellant's appeal and there was no order that the respondent should pay the appellant any amount because there was a bigger amount,

namely N$ 305, 615.63, owed by the appellant to the respondent due to the appellant absenting himself from work after he had been reinstated.

The parties

[3] The appellant is Mr. Beavan Dickson Musheti, an adult male of Windhoek. He was in the employ of the respondent but eventually resigned from employment. The respondent is the Office of the Auditor-General, an office established by Article 127 of the Namibian Constitution.

[4] I will, for ease of reference, refer to Mr. Musheti as ('the appellant'). The Office of the Auditor-General shall be referred to as ('the respondent'). Another party that features prominently in this matter, is Mr. Immanuel Helao Heita, who featured in the proceedings as the arbitrator. He shall be referred to as 'the arbitrator'.

Background

[5] The appellant was employed by the Office of the Auditor General, the respondent. The appellant did not attend to work after he took ill during April of 2016. This absence for more than 30 days, subsequently led to his discharge by the respondent. The discharge was communicated to the appellant by letter dated 15 August 2016. The said letter averred abscondment by the appellant from office in excess of 30 working days.

[6] The appellant avers that he had informed his supervisor of his illness via mobile short text messaging. The issue of appellant's discharge was resolved with his re-instatement on the recommendation of the Public Service Commission on 22 June 2017.

[7] The recommendation by the Commission was '…in terms of section 24 (5) (b) of the Public Service Act, 1995 (Act 13 of 1995) that Mr. Beaven D. Musheti be re-instated in the position in which he would have been had his employment not been terminated. Further, that his period of absence from official duty until his date of re-instatement which is not covered by the medical certificates be covered by vacation

leave with or without remuneration according to his accumulated credit days on his last day of service.'

[8] On 2 August 2017 the respondent issued the applicant with his re-instatement letter, for the applicant to commence work on 4 August 2017.[1] It was further communicated that the applicant's period of absence not covered by medical certificates will be covered by vacation leave with or without remuneration in accordance with the accumulated credit days. In addition, it was disclosed that arrangements had been made for the payment of his salary and allowances retrospectively with effect from the date when his services were terminated.

[9] On 1 September 2017, the respondent issued a communiqué addressed 'To whom it may concern', stating that the remuneration owed to appellant will be in the range of N$280 000.00 and that the respondent would pay the amount due on 20 September 2017. Another communiqué from the respondent, also addressed 'To whom it may concern', confirmed the approximate amount and advised of a delay in payment owing to the payment system at the Ministry of Finance. It also stated that payment was expected by 'end October / November 2017 but not later than December 2017'. The respondent alleges in evidence that the aforesaid letters 1St September 2017 and 20th September 2017 were issued by unauthorised staff members.[2]

[10] On 22 November 2017, the respondent issued the appellant with a letter stating that the appellant was absent from office without the permission of the Permanent Secretary the period 25 April 2016 to 4 August 2017. It further stated that the appellant had, as at 25 April 2016, accumulated 42 vacation leave days; their record indicated absence of 323 days, 70 of which were sick leave days, 42 paid vacation days, and the balance of 211 unpaid leave days.

[11] The appellant vehemently denies having been absent from work in the aforesaid manner alleged. It was his case that he was absent due to sick leave. On 6 February 2018 another letter was issued by the respondent to the appellant, withdrawing the letters noted above. The respondent claimed that the said letters had been sent out by unauthorised staff members. The respondent stated in addition that

[1] Page 113 of the record. Volume 2.

[2] Page 221 of the transcript record.

all the appellant's dues had been paid. On the 14 September 2018, the appellant resigned from the employ of the respondent.

[12] The findings of the arbitrator which have a bearing on both the appeal and cross-appeal are summarised as follows:

(a) The appellant from the 15 August 2016, was not absent from office and he was discharged therefor.
(b) That the appellant received a salary 25 April to October 2016.
(c) The period for remuneration of the loss of income is from November 2016 to July 2017. The appellant being on a salary notch of (N$309 213) is entitled to N$231 909.75.
(d) The appellant was re-instated on 2 August 2017.
(e) The appellant was absent for a period of 251 after re-instatement.
(f) The appellant owes the respondent an amount of N$304 615.63 for unpaid leave.
(g) When appellant resigned, the respondent was supposed to pay out his leave days and *pro rata* bonus, which was withheld, as appellant owes the respondent money because he was paid his monthly salary while absent from work without permission.
(h) The respondent did not file a counterclaim against the appellant, however the fact that the respondent refused to pay out the entitlements (leave days and bonus) shows appellant owes the respondent. Set off therefor applies.
(i) The appellant's matter is dismissed.

Proceedings and evidence

[13] The appellant testified during the arbitration proceedings as a sole witness. He testifies that during the year 2016 he became ill with nerve pain in his right arm. A doctor he saw recommended that he takes sick leave from 25 to 29 April 2016. A medical certificate to that effect was issued. From there he saw multiple doctors and he was issued with further medical certificates. In the beginning he testified, that he submitted the medical certificates up to April 2016. Thereafter he began communicating via cell phone short messaging to Mr. Strauss Elroy, an acting

supervisor in the employ of the respondent, informing the latter that he was still ill and was at home consequently.

[14] It was his evidence that on the 15 of August 2016, the respondent served him with a termination letter. He lodged an appeal to the Public Service Commission and his appeal was successful and he was re-instated effective from 4 August 2017. He testified further that he thereafter received two letters dated 1 September 2017 and 20 September 2017 respectively, from the respondent's office confirming that as a result of his re-instatement , he would be receiving remuneration due to him in the range of N$280 000.

[15] It was his evidence that these letters were later withdrawn, and he was asked to complete leave forms for the alleged leave taken, some days were to be covered by his accrued leave days, those not covered by credited leave, would be leave without pay. He testified that he declined to complete the leave forms, his contention being that he had not taken leave, as he had in fact been dismissed. He testified that he then wrote a letter to object to the penalty. It was his evidence that since his dismissal he did not get any payment. He then referred a dispute to the Labour Commissioner. Finally, he testified that throughout the process he experienced financial hardship.

[16] The respondent, for its part, called two witnesses, one being Mr. Matti Shangadi. He testified that the appellant, after his re-instatement, did not attend to work for a period in excess of 200 days, until his resignation. The appellant's representative objected adduction of this evidence[3].

[17] It is important to point out that this aspect of appellant's alleged absence was only adduced during the evidence in chief of Mr. Shangadi. It did not feature anywhere else in the respondent's case, including in the papers filed by the respondent in respect of the arbitration. The appellant views this adduction of evidence as a fabrication and a ploy by the respondent to deny him of his entitlement to the amount claimed.

[3] Page 234 of the transcript record

[18] It was argued by the respondent that such evidence was led to deal with the quantum of what is allegedly due to the appellant to date of resignation.[4] The appellant maintained that the said evidence was a new issue and did not pertain to the period relating to the claimed non-payment, namely, August 2016 to July 2017. Mr. Shangadi confirmed that appellant was not paid for the period 11th October 2016 to 3 August 2017 simply because there was no sick leave certificates for this period and this was recommended by the Commission[5].

[19] The arbitrator did not pronounce himself on the objection to the said new issue raised. The issue of whether the non-payment is to be considered from July 2016 or the 11th of October 2017 was not settled in evidence[6]. The arbitrator however based on the salary notch the documents provided before him found that the amount due to the appellant was N$231, 909.75. The aforesaid amount is claimed as an alternative amount by the appellant and no specific defence was lodged against the amount by the respondent.

[20] The second witness for the respondent, Mr. Nehemia Ndeshuva, testified under cross-examination to which there was no re-examination[7]: I quote some pertinent aspects of his cross-examination below:

'REPRESENTATIVE FOR THE APPLICANT: After he was discharged, he is no longer an employee of the office of the Auditor-General. Is that correct?

MR NEHEMIA NDESHUVA: I agree yes.
REPRESENTATIVE FOR THE APPLICANT: Yeah. So that is why he also cannot take leave.

MR NEHEMIA NDESHUVA: Yes.

REPRESENTATIVE FOR THE APPLICANT: Mean if you are no longer an employee you cannot take leave.

MR NEHEMIA NDESHUVA: Cannot take leave.'

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[4] Page 240 of the transcript record

[5] Page 247 – 248, 289 of the transcript record

[6] Page 249 of the transcript record

[7] Page 299 of the transcript record

Determination of the main appeal and cross appeal

[21] Both the appeal and the cross-appeal will be dealt with in turn. This is so notwithstanding that the issues that arise in both are somewhat intertwined.

The appeal

[22] The respondent argues that the appellant is not entitled to back pay, as there is no issue of unlawful dismissal, appellant was discharged lawfully. This is allegedly premised on section 24 (5) (a) (i) of the Public Service Act, 13 of 1995, which reads as follows:

'(5) (a) Any staff member who, without permission of the executive director of the office, ministry or agency in which he or she is employed -

(i) absents himself or herself from his or her office or official duties for any period exceeding 30 days; or

(ii) ….

shall be deemed to have been discharged from the Public Service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of employment.'

[23] The Labour Act, 11 of 2007 concerning unfair dismissal reads:

'Unfair dismissal

33 (1) An employer must not, whether notice is given or not, dismiss an employee -

(a) without a valid and fair reason; and

(b) without following -

(i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34 (1); or

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.'

[24] The ‘lawful discharge’, in my considered view, had the full effects of a dismissal. Having said this, I am of the view that the provisions of section 33 do not apply in cases of a discharge. I say so for the reason that the termination of the employment results by operation of the law. As such, the requirements of substantive fairness and procedural fairness, do not, in my considered opinion, apply.

[25] There is accordingly no hearing, as the employee discharged will have absented him or herself for a period of 30 days or more. Furthermore, the absence from work for this period on its own, presents a sufficient reason to discharge the employee and that is what the law requires. There is no reason therefor, in the case of a discharge, to comply with the provisions of s 33 of the Act as quoted above.

[26] It was thus established eventually that the appellant’s absence from work was not wilful but was due to ailments. In evidence, the appellant submitted all his medical documents. It was for this reason that his appeal against the discharge succeeded, resulting in his reinstatement.

[27] Mr. Ndeshuva, under cross-examination testified that once discharged, a person is no longer an employee of the respondent and consequently cannot take leave. The arbitrator did not misdirect himself in this regard. I understand the finding of the arbitrator to which the respondent takes issue, it reads under paragraph 28 of the award:

> ‘It is my view that the OPM was supposed to recommend reinstatement together with back pay for a period the applicant was unemployed after he was unfairly dismissed’.

[28] The arbitrator did not order the reinstatement in the award. He proceeded, as recorded above, to find that the appellant was, from the evidence adduced by Mr. Ndeshuva, indebted to the respondent for the period he did not work after his reinstatement. This is an issue that will be addressed below.

[29] As stated previously, the appellant was re-instated on recommendation of the Public Service Commission, the overseer of public servants and under whose jurisdiction the appellant fell. It is not in dispute that the appellant was not paid during the period October 2016 to August 2017. This was adduced in evidence. The

respondent's own witness Mr. Shangadi confirmed that the applicant was not paid during the aforesaid period.

[30] The manner in which the arbitration was conducted and evidence led is that the only issue that was before the arbitrator for determination was whether the applicant was entitled to compensation for loss of income during the period of his dismissal. The arbitrator made this finding in paragraph 29 of the award:

'[29] But on the evidence before me, I have no *iota* of doubt in my mind that on a preponderance of probabilities the applicant has received a salary from 25 April to October 2016. In a nutshell, the applicable period for remuneration for loss of income is from November 2016 to July 2017 and based on the applicant's salary notch (N$ 309 213) at that time, he was entitled to receive an amount of N$ 231, 909.75.'

[31] I start with the finding made by the arbitrator regarding the counterclaim and the alleged application of the set-off. The arbitrator stated the following from paragraph [30] of the award:

'[30] It was revealed during the proceeding (*sic*) by the respondent's witness Mr. Matty Shangadi that after the applicant was reinstated he went AWOL once again until the 14 September 2018 when he decided to resign. I heard that when the applicant was AWOL, he kept receiving his monthly salary until the date he quitted (*sic*) on his own will. In substantiating the above, the respondent submitted into the record a bunch of payslips of the applicant as proof of payment he received while he was absent from work, the said documents were recorded as *Exhibit E.*

[31] Furthermore, the respondent submitted *exhibit F* into the record a document reflecting among other things, that applicant was absent for 251 days since he was reinstated on 02 August 2017, that when he resigned an amount of N$ 33,248 for leave gratuity and prorate (*sic*) bonus was due to him and that he owes the respondent an amount of N$ 304 615. 63 for unpaid leave. It was a (*sic*) testimony of Mr. Shangadi that when the applicant resigned from the respondent (*sic*) was supposed to pay out his leave days as well as the prorate (*sic*) bonus, however, the (*sic*) was not done due to the fact that he owes the respondent a significant large amount of money as a result of him being paid monthly while he was absent without permission.

[32] The applicant's representative tried unsuccessfully to object (*sic*) the said evidence from being submitted into the record as inadmissible evidence and his reasoning was that such evidence was never put to the applicant when he was being cross-examined by the respondent's representative, therefore the evidence is irrelevant and should not be accepted.

[33] I tend to agree with the applicant's (*sic*) (this should be respondent) submission, the evidence of Mr. Shangadi is very much relevant to the issue at hand. Even if the applicant was not confronted with the said evidence when he was cross-examined, that does not make the evidence inadmissible and neither irrelevant. The point that Mr. Vaatz (applicant's representative) failed to comprehend is that it was his duty together with his client (applicant) to rebut and discredit the respondent's evidence, which they failed to do in this regard.

[34] It is obvious that the applicant was paid by the respondent for a year without being at work. I am aware that the respondent did not make a count claim (*sic*) against the applicant, but the fact that the respondent refused to pay out the applicant entitlements (leave days and bonus) when he resigned, it portrays that the applicant was paid erroneously and as a result he owes the respondent. In my view, it will be injustice to order the respondent to compensate the applicant while it is a fact that the applicant owes the respondent significant (*sic*) amount of money than what he is claiming.

[35] It is my respectable (*sic*) view that the respondent is entitled to recover the money paid to the applicant erroneously from the money due to the applicant, therefore I see no reason why the principle of set-off cannot be applied.'

[32] I am of the considered opinion that the arbitrator was grossly wrong in overruling the objection by Mr. Vaatz, who appeared for the appellant during the arbitration proceedings. The incorrectness of his approach and ruling was problematic at two levels. First, trial by ambush, is not allowed in Namibia. This applies with equal force to proceedings in the labour field and before the Offices of the Labour Commissioner, which includes arbitrations.

[33] It is for this reason that pleadings, whatever formal state they take, as provided in the rules, are filed. Litigants are thus compelled to place the basis of their claims and defences, respectively in writing to enable the opposite party to plead thereto and to marshal the necessary evidence in support of the claim or the defence as the case may well be.

[34] The ruling made by the arbitrator, allowed the respondent to litigate a defence successfully that it had not previously canvassed in the papers. As the arbitrator properly held, there was no counterclaim filed by the respondent and as such, it was legally wrong to deny the appellant of his claim based on a counterclaim that was never pleaded at any stage. Even the doctrine of set-off, which the arbitrator purported to invoke, cannot be ordered in the absence of a proper counterclaim having been pleaded and proved in evidence.

[35] At the second level, and where the case for the party has been properly pleaded, it is elementary that a party must put its case to the opposite party in cross-examination. This alerts the party giving evidence what the cross-examiner's client will testify when his or her turn to take the witness box comes.

[36] The rationale for this approach was stated with absolute clarity and devastating candour by the timeless words spoken in the judgment of *small v Smith*[8], which emanated from this jurisdiction. The court, per Claassen J, expressed itself thus in this connection:

'It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be, inform him, if he has not been given notice, thereof that other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair to and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is entitled to assume in the absence of notice to the contrary that the witness's testimony is correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.'

[37] It is accordingly clear that the arbitrator was eminently wrong in not upholding Mr. Vaatz's objection, which was meritorious. The approach by the arbitrator, allowed the respondent, for the first time in its evidence-in-chief, to introduce evidence that had not been put to the appellant. As such, he had not ways or means to controvert it for

[8] *Small v Smith* 1954 (3) SA 434 (SWA), at 438 E-H.

two reasons. First, the counterclaim was not pleaded and secondly, he was not cross-examined about it. Whatever explanations he may have given, were locked out by the dismissal of the objection.

[38] In the light of the above finding, I am of the view that the appeal by the appellant in this case has merit. The overruling of the objections occasioned unfairness to the appellant and simultaneously, granted the respondent a counterclaim by default and which the appellant was never given a proper and fair opportunity to engage. This constitutes a misdirection that this court is in duty bound to correct. The appellant's appeal should, on that basis alone succeed.

[39] It bears mentioning that the basis upon which the appellant's claim was dismissed was that of set-off. The doctrine was dealt with in *Schierhout v Union Government*[9] in the following manner:

'When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensation* by bringing the facts to the notice of the Court – as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.' See also *Treasurer General v Van Vuuren*[10]

[40] It is quite apparent in the instant case, that the question of set-off was never raised in the pleadings, nor does it appear to have been properly introduced in evidence. Certainly, the appellant never had an opportunity to deal with it in his evidence at all, both in chief and under cross-examination. There was no proper evidence that the appellant owed the respondent such that a set-off could be held to apply. This accordingly makes the finding by the arbitrator that set off applied in the circumstances, bizarre indeed.

[41] I may mention in passing that there are red flags that fly sky high as a result of the admission of the electronic evidence accepted by the arbitrator regarding the times

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[9] *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289-290.

[10] *Treasurer General v Van Vuuren* 1905 TS 582 at 589.

when the appellant was alleged to be absent, per Exhibit 'E'. There was no expert evidence regarding how the system worked and whether it was functioning properly. The appellant would have been entitled to call an expert witness, if he wished, to cross-examine the relevant witnesses regarding the admissibility of the said evidence. I say this merely *en passant,* as indicated earlier.

[42] There is no indication at all that the provisions of the Electronic Transactions Act[11] which stipulate, for instance in s 25(1) that for computer generated evidence to be admissible, it must be authenticated by means of admissible evidence. The evidence authenticating a printout must be evidence of (i) the steps that have been taken to create the printout (ii) the software that has been used to create the printout or demonstration; (iii) if the steps referred above require any special expertise, the nature of the qualifications or experience of the person who performed those steps; (iv) particulars of any alterations made in order to create such printout or demonstration, and if no such alteration has been made, a statement to that effect. The evidence would not, for that reason have been admissible, it would seem to me. See *The State v Nghixulifa*[12]

The cross-appeal

[43] I am not certain if the respondent is even entitled in this case to file a cross-appeal. I say so in view of the award, which appears on the record.[13] There the arbitrator said:

'Having reached the above conclusions, I have no hesitation in making the following order:

1. That the matter is hereby dismissed.
2. That no order as to costs is made.'

[44] It is thus clear that the appellant's case was dismissed. Conversely, this meant that the respondent's defence to the appellant's case succeeded. I see no order issued in the award, which went against the respondent or its interests to entitle it to

[11] Electronic Transactions Act No. 4 of 2019.

[12] *The State v Nghixulifa* (CC 02/2014) [2021] NAHCMD 312 (24 June 2021).

[13] Volume V of the record of proceedings, p 414, under 'Award'.

note a cross-appeal. It would appear that the only reason that the respondent filed a cross-appeal, was that the arbitrator made certain findings and conclusion that the appellant does not agree with but which, it must be stated, did not find their way into the order.

[45] If authority is needed for the proposition that a party is entitled to appeal against the order issued by a court, and in this case by the arbitrator, and not the reasons, it is *Neotel (Pty) Ltd v Telkom and Others*[14] where the Supreme Court of Appeal of South Africa endorsed the view that a party is, in terms of the applicable law, not entitled to appeal against a decision but the 'order' or 'judgment'. The latter was held to refer 'to a substantive judgment or order in terms of which the court granted or refused the relief sought.[15] See also *Serengeti Rise Industries (Pty) Ltd v Aboobaker NO*[16]

[46] I have no reason to doubt that the position in Namibia would be any different. I say so proper regard had to the relevant legislation, namely, the Labour Act, 2007. That legislation, in s 89(1) grants a dissatisfied party the right to appeal 'against an arbitrator's award made in terms of section 86 . . .' It does follow that the award does not refer to the reasons or given but the order eventually issued by the arbitrator in question.

[47] In this regard, reference is made to Black's Law Dictionary[17], who describes as award as 'a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.' It is thus plain that an award in this context, refers to the judgment or decision made by an arbitrator and not necessarily the reasons behind the said order or judgment.

[48] If a party was entitled, simply because there has been some adverse reasoning or finding made against him or her, including one relating to credibility, but which does not eventually find expression in the order granted, a multiplicity of floodgates of

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[14] *Neotel (Pty) Ltd v Telkom and Others* (605/2016) [2017] SAZCA 47 (31 March 2017).

[15] *Ibid* p. 9, para 13.

[16] *Serengeti Rise Industries (Pty) Ltd V Aboobaker NO* 2017 (6) SA 581 (SCA) para 12. There the court said, 'Apart from the trite principle that an appeal lies against an order of court and not the reasons, the practical reality is that only the order granted would be served or executed by the Sheriff and not the conclusions appearing in the judgment of the court below.

[17] Black's Law Dictionary, 3rd Edition, 2006.

appeals would thus be opened. This would result in the appellate courts having to deal with reasons and findings that are inconsequential in so far as the relief or order sought and granted, is concerned. That would inhibit the cause of the administration of justice, taking up judicial time and resources of cases where there is a concrete finding, expressed in the order that could be legitimately challenged.

[49] To the extent that the respondent is entitled at law to have noted a cross-appeal, which I am of the strong considered view that it is not, I will thus entertain the cross-appeal merely for purposes of completeness and for no other reason.

[50] I am of the considered view that that cross-appeal should still fail. I say so for the reason that when one properly characterises the appellant's claim, it had to do with money due to the appellant during the time that the appellant could not work because he had been effectively discharged, but wrongly because the discharge was subsequently set aside, and he was reinstated.

[51] The considered opinion I hold is that it would be unjust to punish the appellant by withholding his pay for the period when he could not attend work because the discharge operated against him then. He did not attend work not because he had absented himself at that stage. Even if he had tendered to work, the discharge would have rendered it improper and impossible that he should work for the respondent and earn a salary at the time.

[52] Once the reinstatement was granted, the appellant would in all fairness be entitled to be paid for the period where he could not tender his services, not because he had played truant as the respondent previously believed, but because he had been discharged from the service, which as I have said, amounts in effect, to a dismissal and plainly a prohibition for him to work for the respondent.

[53] It is I think, important to deal with the effect of a deeming provision. In *R v Rosenthal*[18] the court dealt with the nature and import of the word deemed as follows:

'The words 'shall be deemed' are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, e.g., a person, thing, situation or matter, shall be regarded or accepted for the purpose of the statute as being of a particular,

[18] *R v Rosenthal* 1980 (1) SA 65 (A) para 75-76.

specified kind, whether or not the subject matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following: that which is deemed shall be regarded or accepted (i) as being exhaustive of the subject matter in question and this excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrary thereto as being merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive.'

[54] In this regard, what is plain is that deeming provision appears to be provisional in nature. The onus then rests on the person deemed, within a reasonable time, to rebut the presumption.[19] If he or she does so successfully, then the effect of the deeming provisions ceases to have effect. In the instant case, once the appellant filed his appeal, which succeeded, it meant that the deeming provision would not be effective, and this would go back to the date when the discharge would ordinarily have taken place. In this regard, the appellant would be entitled to be paid the money from the date he was deemed to have been discharged, to the date of his reinstatement.

[55] I am of the considered view that the arbitrator was on the right track until came Mr. Shangadi, who led him down what at first blush seemed to be the garden path. It was a path that was unbeknown to him, strewn with legal landmines and he succumbed, hence the dismissing of the main appeal. Had the dubious evidence not been led, the arbitrator would have found, and correctly, in my view, for the appellant. It was the so-called set-off that scuppered the award in favour of the appellant.

[56] The argument advanced on behalf of the respondent that the appellant is not entitled to remuneration during the period he was dismissed because he and no-pay principle does not apply to the present facts and circumstances.

[57] The perspective from which that argument is presented, is misleading having regard *to Paulo v Shoprite Namibia (Pty) Ltd and Others.*[20] The appropriate context revolves around whether or not the applicant was prevented from rendering his

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[19] *Mwoombola v Simaata* (HC-MD-LAB-MOT-REV-2017/00020 [2020] NALCMD 2 (23 January 2020), para 39.

[20] *Paulo v Shoprite Namibia (Pty) Ltd and Others* (LC-2011/40) [2012] NALC 17 (01 June 2012).

services, as stated by Damaseb JP in paragraph 16. In this case the appellant was 'discharged' and was as such not allowed to render any services to the respondent.

[58] The arbitrator also found that the appellant was absent without leave until his resignation 14 September 2018. From the record the evidence surrounding this evidence was hazy and it pointed to alleged days of absence which do not fall in the period claimed for loss of income by the appellant. The arbitrator went on a frolic of his own and decided to deal with an issue that was not before him for determination.

[59] The cause of complaint was specific to compensation during the period when the appellant was deemed discharged to the date of his re-instatement. The issue of his absence at any other period in time, raised only during the evidence of the respondent's evidence in chief is trial by ambush. Adjudicators should always have in the backburner, ever flicking, '… the principle that in a civil case a presiding judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. . .'.[21]

[60] The findings of the arbitrator both factual and in law, have to be considered in totality of the evidence presented, and the question is, would a reasonable arbitrator based on the evidence come to the same conclusion? Hoff J (as he then was) in *House and Home v Majiedt and Another*[22] para 8 put it well:

> '[8] The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances.'

[61] I do wish for the sake of completeness also advert, albeit briefly, to the issue regarding the letters written by the respondent regarding the appellant's dues. The letters, referred to above, and addressed 'To whom it may concern' are now sought to be discarded by the respondent on the basis that they were not authored by the authorised officers. The doctrine of estoppel appears to also find application in this matter, in the alternative.

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[21] *Ardea Investments (Proprietary) Limited v Namibian Ports Authority and Others* (SCR-2013/4) [2017] NASC 9 (28 March 2017)

[22] *House and Home v Majiedt and Another* (LCA-2011/46) [2012] NALC 31 (22 August 2012)

[62] I am of the view that the *Turquand* rule[23] which stipulates that persons should be protected from being affected by a company's internal formalities, pertaining to authority of its representatives should apply to the present matter. I am of the view that there is no reason why this doctrine should not apply in the instant case. The issue of the proper officer to write the letters in question, is an internal matter to the respondent's administration and should not work against the appellant, who had nothing to do with the letters from the evidence before the court.

Conclusion

[63] Having said that, the appeal court's job is to deliver the appropriate ruling, which the arbitrator ought to have delivered, considering the totality of the facts and evidence properly placed before him or her. The arbitrator ought to have found for the appellant, as that was the only claim properly before him. To dismiss the applicant's claim on the basis of a counterclaim that was neither pleaded nor properly adjudicated, was grossly wrong. As such, an appropriate order, ought to have been made in terms of section 86 (15) (*e*) of the Labour Act, 11 of 2007 concerning the remuneration of the applicant.

Order

[64] Having regard to all the issues canvassed above, the following order commends itself as the most appropriate in the circumstances, namely:

1. The Appellant's appeal is upheld.
2. The Respondent's cross-appeal is dismissed.
3. The Respondent is ordered to pay the Appellant the amount of N$231 909. 75 as compensation for loss of income from the date he was deemed to have been discharged, to the date of his re-instatement.
4. The amount stated in paragraph 3 above is to be paid to the Appellant within sixty (60) days from the date of this order.
5. There is no order as to costs.
6. The matter is removed from the roll and is regarded as finalised.

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[23] *Royal British Bank v Turquand* (1865) 6 E&B 327.

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T. S. Masuku

Judge

APPEARANCES:

APPELLANT:	Mr. A Vaatz Of Andreas Vaatz and Partner
RESPONDENT:	Mr. H R Ketjijere Of Office of the Government Attorney