REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2022/00010

In the matter between:

QKR NAMIBIA NAVACHAB GOLD MINE (PTY) LTD **APPELLANT**

and

MARIANE KWALA **RESPONDENT**

Neutral Citation: *QKR Namibia Navachab Gold Mine (Pty) Ltd v Kwala* (HC-MD-LAB-APP-AAA-2022/00010) [2024] NALCMD 41 (24 October 2024)

Coram: CHRISTIAAN J

Heard: **31 May 2024, 26 July 2024, 06 September 2024**

Delivered: **24 October 2024**

Flynote: Labour Appeal – Labour Act 11 of 2007 – Appeal against an award issued by the arbitrator - Appeal upheld.

Civil procedure – Whether the court is *functus officio* after striking a defective notice from the roll without finality – Does not equate to final determination that would invoke *functus officio.*

Labour Law — Unfair labour practice — Appellant employed on fixed term contract — Contract terminated by effluxion of time — No notice of termination required.

Labour law – Arbitrator's award – Award of monetary compensation – Arbitrator making award based on mathematical calculations whereby amount of compensation was reached by multiplying monthly remuneration of employee with the number of months between date of dismissal and date dismissal adjudged to be unfair by arbitrator – Arbitrator's decision set aside.

Summary: The appellant, being the QKR Navachab Gold Mine, seeks to appeal against an arbitration award given on 10 January 2022. The appellant is not happy with the arbitration award and it accordingly gave notice of its intention to appeal against the whole arbitration award. On 8 February 2022, the appellant launched these proceedings seeking to appeal, against the arbitration award in this Court. The application for appeal is opposed by the respondent. The primary objection of the respondent, is that the notice does not comply with s 89 of the Labour Act, 2007. More specifically, that the grounds of appeal, were not questions of law and that this court is *functus officio.* The respondent contend that the amended grounds of appeal are amended only to such a small extent that any reconsideration of the grounds would be tantamount to the Court going and reconsidering its own previous decision.

Held that the provisions of r 103 of the High Court Rules and the principles laid down in the matter of *Harases v Erongo Regional Electricity Distributors Company (Pty) Lt*d are not applicable under the current circumstances.

Held further that, the striking of a defective notice of appeal from the roll does not equate to a final determination that would invoke *functus officio*. Rather, it leaves open the possibility for the applicant to file a new or corrected notice of appeal addressing the identified defects.

Held further that, in matters of unfair dismissal, the onus lies initially with the employee (respondent) to demonstrate that a dismissal occurred. When the dismissal is disputed by the employer (appellant), the burden shifts, requiring the employee to present sufficient evidence to support her claim of dismissal.

Held further that, a determination of compliance with s 128*C(1)* of the Labour Act, requires an understanding of the legal standards set forth in the statute, as well as an assessment of the evidence presented in relation to those standards.

Held further that, fixed term contracts are permitted when there is a justified reason for their existence, as outlined in the Labour Act. An employer must provide sufficient evidence to establish the legitimacy of using fixed-term contracts instead of indefinite ones.

Held further that, a party alleging unfair labour practice must mention the particular paragraph of s 50*(1)* of the Labour Act, in which the conduct complained of falls and that failure to do so is fatal.

Held further that, the concept of legitimate expectation in the context of fixed-term contracts involves an express promise or the existence of a regular practice that the respondent can reasonably expect to continue. Failure to recognize these principles in the evaluation of the evidence presented, constitutes an error in law that would possibly undermine the arbitration award.

Held further that, the discretion exercised to grant compensation cannot be based on a mathematical calculation, but evidence must be placed before the court to enable the court to consider a fair and reasonable amount of compensation, as this failure renders the decision arbitrary.

ORDER

1. The point *in limine* raised by the respondent is dismissed.

2. The appeal is upheld.

3. The decision and award of the arbitrator, Layhya N Dumeni dated 10 January 2022, is set aside in its entirety.

4. There is no order as to costs.

5. The matter is removed from the roll and regarded as finalised.

JUDGMENT

CHRISTIAAN J:

Introduction

[1] Before me is an opposed labour appeal against the arbitration award by the arbitrator delivered on 10 January 2022 under case number CROM 150 -16.

[2] This appeal serves for the second time before me. On the 20th of June 2023, the appeal was heard. A judgment was delivered on 13 October 2023, in which the objection of the respondent against the defective notice of appeal was upheld with no finality. The notice of appeal was struck from the roll owing to a defective notice of appeal. No ruling was made on the merits.

[3] It now serves before me on what purports to be an amended notice of appeal.

Parties and their representation

[4] The appellant is QKR Namibia Navachab Gold Mine (Pty) Ltd, a company duly incorporated by the company laws of this Republic. Its business is situated at Farm 58, Farm Navachab, in the Republic of Namibia. On the other hand, the respondent is Ms Mariane Kwala, an adult female Namibian who the applicant had employed as a cleaner.

[5] The appellant is represented by Mr Dicks and the respondent by Mr Ulrich.

Background

[6] The appellant, being QKR Namibia Navachab Gold Mine, seeks to appeal against an arbitration award issued by the arbitrator on 10 January 2022.

[7] The appellant employed the respondent as a cleaner on a six months fixed-term contract. The first contract of employment was from 6 July 2015 to 17 July 2015.The second contract of employment was from 20 July 2015 to 28 August 2015. The third contract of employment was from 31 August 2015 to 30 October 2015. The fourth employment contract was from 2 November 2015 to 29 January 2016. The fifth contract of employment was from 1 February 2016 to 29 July 2016. The sixth contract of employment was from 1 August 2016 to 31 August 2016. All six contracts was terminated by effluxion of time on the dates stipulated in the fixed term contracts, with the last one terminating on 31 August 2016. Dissatisfied with the termination of the employment contract, she referred a dispute of unfair labour practice, which was substituted to unfair dismissal, to the Labour Commissioner.

[8] The Labour Commissioner appointed an arbitrator to conciliate and arbitrate the dispute. The arbitrator found that Ms Kwala was unfairly dismissed and ordered the appellant to compensate her for 14 months' loss of income as a result for the unfair dismissal. The appellant is not happy with the award and accordingly gave notice of its intention to appeal against the award. On 08 February 2022 the appellant launched these proceedings seeking the following orders: (a) an order that the decision of the arbitrator be set aside; (b) an order that the respondent's fixed term contract terminated by effluxion of time; (c) cost of suit in the event of opposition; (d) further and alternative relief.

[9] The appellant appealed against the whole of the arbitration award made by the arbitrator, under s 86*(15)* of the Labour Act, 2007 on 16 April 2015, holding that the respondent was unfairly dismissed by the applicant and, for that reason, ordered the applicant to compensate the respondent for 14 months' salary. The matter was struck from the roll without finality, owing to a defective notice of appeal. The appellant filed an amended notice of appeal, seeking the following orders: (a) an order that the decision of the arbitrator be set aside; (b) an order that the respondent's fixed term contract terminated by effluxion of time; (c) cost of suit in the event of opposition; (d) further and alternative relief.

[10] The objection of the respondent, is that the appeal is defective and that the amended notice of appeal does not comply with s 89 of the Labour Act, 2007, and that this court is *functus officio*. The respondent contends that the amended grounds of appeal are amended only to such a small extent that any reconsideration of the grounds would be tantamount to the Court going and reconsidering its own previous decision.

Procedural aspects

Arguments by the parties on the amended notice and the doctrine of *functus officio*

[11] The respondent contends that the amendments made by the appellant in the amended notice of appeal are insubstantial and therefore inconsequential in this matter. It is further contended that the appellant has not inserted, or removed, or in any way supplemented the grounds of appeal in a way that would mitigate the defect previously criticised by this court. It is further argued that that the reconsideration of these by the Honourable court would be tantamount to the court going and reconsidering its own previous decision.

[12] The respondent argued that the appellant has arrived at a wrong conclusion in this matter, in that the appellant approached the court on the same grounds of appeal and not under rule 103 of the High Court Rules, which provide for the correction of the judgment. In conclusion, the respondent referred to *Harases v Erongo Regional Electricity Distributors Company (Pty) Ltd*[1], and argued that the application of *functus officio* doctrine to matters which have been struck is final in effect and this court is *functus officio*.

[13] The appellant on the other hand argued that it amended its notice of appeal and maintained that the grounds of appeal are grounds in law. It was further argued that the ruling of this court did not finally dispose of the matter, as the merits of the matter was not considered and can only be considered final if it disposes of the

[1] *Harases v Erongo Regional Electricity Distributors Company (Pty) Ltd* (HC-MD-LAB-MOT-GEN-2021/00221) [2022] NAHCMD 20 (19 April 2022).

matter completely. It was argued that the only way in which the court will determine whether a ground of appeal raises a question of law alone within the meaning of s 89*(1)(a),* is by considering the amended grounds of appeal.

Legal issues

[14] The legal issues that are implicated in this judgment are two-fold. The first issue that this court is tasked to determine is whether this court is *functus officio* following the upholding of a preliminary objection on the defective nature of an amended notice of appeal. The objection was upheld without finality, and the notice of appeal was subsequently struck from the roll and, is thus prevented from **considering the same objection on an amended notice of appeal**. This court will further determine whether the provisions of r 103 of the High Court Rules find application and whether the principles laid down in the *Harases* matter find application. If it is found that the Labour Court is not *functus officio*, the second issue comes to life and that is to address the merits on the main relief sought.

[15] I shall proceed to deal with the first issue, and then outline the legal principles applicable herein.

Legal principles dealing with the aspect of *functus officio*

[16] The legal principles relating to the doctrine of *functus officio* are well-established. According to this doctrine, a person who is vested with adjudicative powers or decision making power may only exercise those powers once in relation to the same matter. Once such decision has been made, it is final and conclusive; it cannot be revoked or varied by the same decision-maker.

[17] In *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* [2] the Supreme Court expressed itself on the doctrine of

[2] *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others*
2019 (3) 834 (SC).

functus officio. It again had a later opportunity to do so in *Hashagen*[3], where it expressed in the following terms:

' [28] As Pretorius aptly observes:

The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'(My emphasis).

[18] Further, in the matter of *Beukes and another v President of the Republic of Namibia and Others*[4], the Supreme Court, expressed the following:

'70.The *functus officio* principle, therefor, lends finality to the conduct of proceedings by marking a definitive end point to it. The pinnacle of all judicial proceedings is a valid and final decision, and with finality comes legal certainty. It is essential to have a clear stopping place, a point of no return; otherwise, there would be no end to the case nor any beginning of enforcement.'

[19] It is against this backdrop that I will now proceed to consider the issues placed before court.

Determination

Facts which are common cause

[20] It is common cause that this court made an order on 13 October 2023. This order was made after the court found that the initial notice of appeal was defective,

[3] *Hashagen v Public Accountants and Auditors Board* (SA 57/2019) (2021) NASC (5 August 2021).

[4] *Beukes and another v President of the Republic of Namibia and Others* (SA 41/2021) [2024] NASC 28 (6 September 2024).

and should be struck from the roll, instead of being dismissed. This court found that the grounds of appeal are not grounds raised as grounds in law, as the notice of appeal is not in compliance with section 89 of the Labour Act. This court did so without issuing a final determination on the merits of the appeal itself. The notice of appeal was struck from the roll, effectively rendering it inactive.

[21] I now turn to consider the issue for determination identified earlier.

Whether the provisions of rule 103 of the High Court rules are applicable to the facts of the present matter?

[22] I do not, respectfully, agree with the respondents' submission that r 103 of the High Court Rules, is applicable at all to the facts of the present matter. I say that for the reason that that section deals with 'variation or rescission of order or judgment generally'. My understanding of that phrase is what the court held in *Kamwi v Law Society of Namibia,*[5] that r 103*(1)(a)* only finds application where a judgment was erroneously granted in the absence a party. The court went further and said that in terms of the common law, a court has a discretion to grant rescission of judgment where good cause has been shown.[6] There is currently no application for variation or rescission of this court's judgment, serving before this court. What is before this court is an amended notice of appeal, with grounds on which the appeal is based. For that reason, the provision of r 103 of the High Court Rules is not applicable.

[23] I proceed to consider the second issue identified for determination.

Whether the principles laid down in Harases v Erongo Regional Electricity Distributors Company (Pty) Ltd and the doctrine of functus officio are applicable to the facts of the present matter?

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[5] *Kamwi v Law Society of Namibia* 2007 (2) NR 400 (HC) also see *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 T at 780-781 A.

[6] Also see *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C).

[24] On a proper a reading of the findings in the *Harases* matter, it is clear that this matter concerned the consequences of striking a matter due to inactivity in terms of rule 132*(10)* read with rule 132*(11).*

[25] In the current matter, the preliminary objection that was raised concerned the validity of the amended notice of appeal filed by the applicant. This court upheld this objection but did so without issuing a final determination on the merits of the appeal itself. The notice of appeal was struck from the roll, effectively rendering it inactive. This indicates that the court did not issue a conclusive ruling on the underlying issues of the appeal. The striking of a defective notice of appeal from the roll does not equate to a final determination that would invoke *functus officio*. Rather, it leaves open the possibility for the applicant to file a new or corrected notice of appeal addressing the identified defects.

[26] In any event, I could not think of a cogent reason, except for the one pointed out to me, why the amended notice of appeal cannot be considered in its current format. The appellant amended the notice in the manner they have done, and it is for this court to make a determination, whether the amended grounds of appeal have merit. This can only be done by considering the new or corrected notice of appeal.

[27] It is my view that since the court's ruling was upheld without finality, *functus officio* would thus not arise in these circumstances and the principle laid down in the *Haraseb* matter cannot find application. This court is thus not *functus officio* concerning subsequent proceedings related to a new amended notice of appeal. The court may retain the authority to consider the same objection if it is presented in the context of a new filing that addresses previous concerns.

[28] It is clear from the above authorities that a ruling is only considered final if it disposes of the matter completely. The courts are of the view that if the ruling does not finally determine the issue at hand, the court retains the jurisdiction to reconsider the matter. It is further clear from the facts of the present matter, that what is at stake is a procedural issue, and that this court has the discretion to revisit decisions that are not conclusive.

[29] In view of the reasons and considerations outlined above, it follows therefore in my judgment that the doctrine of *functus officio* does not find application in the present matter. Accordingly, the respondent's argument in that respect is similarly rejected. I will now proceed and address the merits on the main relief sought.

The appeal

The appellant's case

[30] The appellant did not dispute that the respondent was employed as a cleaner on a six month fixed-term contract.

[31] It was however the appellant's case that the respondent entered into a six month fixed -term employment contract. Furthermore, that, the fixed term contract was not unfairly terminated, they contract was terminated by effluxion of time. The appellant maintained that thy acted fairly in accordance with the provisions of the s 128C*(1)* of the Labour Amendment Act, 2012. The appellant maintained that the respondent was aware that she is employed on a fixed-term contract, and can therefore not claim an expectation for her fixed-term contract to be renewed.

[32] The appellant therefore submitted that it had complied with both the terms of the contract as well as the statutory requirements. The appellant further maintained that the respondent's claim for six years loss of income is not substantiated or without an explanation of what she has done to mitigate her losses, thus the appellant cannot be held liable for the loss of income without justification. The appellant therefore denied that the respondent was dismissed at all. The appellant further denied that it committed an unfair labour practice as alleged by the respondent.

The respondent's case

Unfair dismissal and unfair labour practice

[33] The respondent testified that she was aggrieved after a fixed-term contract of employment she had with the appellant expired and it was not renewed. The respondent maintained that the appellant dismissed her unfairly, for the reason that when her contract came to an end the position was still vacant and that she had an expectation that the contract would be renewed as it was the case since July 2015. It is further the respondent's case, that her contract was terminated without justification. The respondent alleged further that such failure amounted to an unfair labour practice, which was substituted with unfair dismissal in terms of s 33(1) of the Labour Act, 2007.

The arbitrator's award

[34] Having considered the evidence before her, the arbitrator dismissed the appellant's complaint and made an award in favour of the respondent. She found that the appellant's termination of the respondent's fixed term contract was contrary to
s 128 C (1) of the Labour Amendment Act, 2012 and amounts to a dismissal and an unfair labour practice. She further found that the respondent harboured a legitimate expectation that the contract would be extended or renewed. The arbitrator made an award in the following terms:

'a) that the respondent, QKR Namibia (Navachab Gold Mine) Pty Ltd must compensate the applicant, Mariane Kwala fourteen (14) month's salary (N$7 787.30 × 14) = N$109 022.20,

b) that the above-mentioned amount N$109 022.20, must be paid to the applicant by any mode of payment on or before 25th January 2022,

c) that the proof thereof be forwarded to this office simultaneously 25th January 2022,

d) the above amount bears interest from date of this award in terms of s 87*(2)* of the Labour Act

This award is final and binding on both parties and it will be made an order of the Labour Court in terms of s 87*(1)(ii)* of the Labour Act.'

Grounds of appeal

[35] In its amended notice of appeal and the written heads of arguments, the appellant relies on five grounds of appeal; the first ground being that the arbitrator erred in finding that the appellant's termination of a fixed-term contract of the respondent constituted unfair dismissal. The appellant contends that the arbitrator erred in law by failing to assess the evidence concerning the dismissal properly. The applicant's grounds of appeal assert that the arbitrator misapplied legal principles regarding the onus of proof. The second ground is that the arbitrator erred to correctly apply legal standards regarding the justification of fixed-term contracts as provided for by s 128(C)*(1)* of the Labour Amendment Act, 2012.

[36] The third ground is that the arbitrator erred in law by finding that the appellant's non-compliance with s 128C*(1)* of the Labour Amendment Act, amounts to and unfair labour practice, in circumstances where a reasonable arbitrator would find on a proper consideration of the evidence that the appellant duly complied with s 128C*(1)* of the Labour Amendment Act.

[37] The fourth ground is that the arbitrator erred in law in finding that the appellant created an expectation that the respondent's fixed term contract will be renewed as such the respondent had a right to expectation especially when her contract was renewed for 14 months, in circumstances where a reasonable arbitrator would have found, on a proper consideration of the evidence that the respondent relied on hearsay evidence and because she knew that the fixed-term contract would come to an end by effluxion of time.

[38] The fifth and final ground is that the arbitrator erred in ordering that the appellant must pay compensation to the respondent, by failing to exercise her discretion judicially and acted on incorrect legal principles and failed to consider that the respondent did not discharge her onus in proving her damages.

Grounds of opposition by the respondent

[39] **The respondent filed grounds of opposition on 22 August 2022 and filed amended grounds of opposition on 5 April 2022.** It is important to note that the respondents grounds of opposition on the first four grounds of appeal remain the same, namely that the findings of the arbitrator were findings based on all the evidence led, and therefore conclusions based on fact and that it is not a question of law alone as required by s 89*(1)(a)* of the Labour Act.

[40] The respondent further opposes the fifth ground of appeal on the basis that the finding made by the arbitrator is not a question of law, but a discretion, which the arbitrator exercised in terms of the Labour Act.

[41] The respondent further argued that this court is *functus officio*, as it already pronounced itself on the above grounds and found that the grounds are not appealable grounds. Further, that the amendments made are merely underlinings and insertions and does not change the subject of the grounds of appeal in this matter.

Determination

[42] In the matter before me it is clear that the respondent lodged a complaint of unfair labour practice to Labour Commissioner and that the conciliation meeting failed to resolve the dispute and the dispute was accordingly referred to arbitration. At arbitration the dispute was substituted with unfair dismissal.

[43] It is further important to point out that evidence was led during the arbitration proceedings by the appellant and the respondent. The arbitrator makes the following finding after considering the facts placed before it:

FINDINGS?

[44] The legal principles relating to appeals to the Labour Court are well established. In *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd,*[7] the Supreme Court held *inter alia* the following:

'[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.'

[45] In *Germanus v Dundee Precious Metals Tsumeb*,[8] the following was held:

'(b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal being an inferior tribunal. The Labour Court as an appeal court will not interfere with the arbitrator's findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).

(c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on fact if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion, it must uphold the trier of fact. (See *Nathinge v Hamukonda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014.)

(d) Principles justifying interference by an appellate court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-1).) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have gone the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555). See

[7] *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (2) (33 of 2013) [2016] NASC 3 (11 April 2016).
[8] *Germanus v Dundee Precious Metals Tsumeb* 2019 (2) NR 453 (LC) at par [4].

Edgars Stores (Namibia) Ltd v Laurika Olivier and Others (LCA 67/2009) [2010] NAHCMD 39 (18 June 2010) where the Labour Court applied *Paweni and Another* and *Powell*.

(e) Respondent bears no onus of proving that the decision of the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong. See *Powell v Stretham Manor Nursing Home*. If the appellant fails to discharge this critical burden, he or she must fail.'

[46] It is against this backdrop that I will discuss the grounds of appeal.

Ground 1

[47] In deciding whether the arbitrator's finding is correct, the question that this court has to decide on is, whether the respondent discharged the onus in proving that she was dismissed by the appellant and whether the termination of the respondent's fixed- term contract amount to an unfair dismissal and/or unfair labour practice?

[48] It was argued on behalf of the appellant that in matters involving fixed-term contracts, the onus is upon the employee to first establish that he or she had been dismissed and that the contract did not simply terminate by effluxion of time. Such employee then has the duty to commence with the adducing of evidence. If the employee fails to discharge the onus, that the employer assumes no onus to prove that such termination was substantially and procedurally fair.

[49] It was further argued that the appellant denied that the respondent was dismissed, but that the fixed-term contract terminated with effluxion of time.

[50] In the matter of *Benz Building Suppliers v Stephanus and Others,*[9] this court per Parker AJ put the position regarding who bears the onus in labour proceedings as follows:

[9] *Benz Building Suppliers v Stephanus and Others* (LCA 18/2013) [2013] NALCMD 40 (19 November 2013)

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

[51] From reading the above legal positions, it is clear, particularly in matters of unfair dismissal, the onus lies initially with the employee (respondent) to demonstrate that a dismissal occurred. When this dismissal is disputed by the employer (appellant), the burden shifts, requiring the employee to present sufficient evidence to support her claim of dismissal.

[52] The learned author, Parker commenting on the *Hailulu* judgment at p. 125 of his work, *Labour Law in Namibia* states that: 'where a fixed-contract is governed by statute, the discretion is exercised properly where the requirements of the statute have been complied with'. In *Overberg Fishing (Pty) Ltd v Docampo,*[10] the appellant similarly contended that he had been unfairly dismissed when the fixed-term contract terminated by effluxion of time and was not renewed. The court dismissed the appeal and expressed itself in the following words at para 11:

'I have demonstrated previously that *Docampo* was not dismissed by *Overberg*. *Docampo's* fixed term contract of employment terminated by effluxion of time; and in a fair manner, *Overberg* informed *Docampo* timeously why his fixed term contract would not be renewed upon expiration of the fixed term'.

[53] It was argued on behalf of the appellant, that the respondent misidentified the issue for consideration, by finding that the issue in dispute was whether the dismissal was substantially and procedurally fair, thereby misplacing the onus on the appellant and absolving the respondent from the onus of first proving that she had in fact been

[10] *Overberg Fishing (Pty) Ltd v Docampo* 2012 (1) NR 283.

dismissed. It is argued that arbitrator misplaced the onus, and expected the appellant to commence with the adducing of evidence, constitutes a gross irregularity.

[54] It is clear from the record of proceedings that the appellant denied that the respondent was dismissed, but that the respondent's contract terminated by effluxion of time. The appellant concluded and maintained that the respondent failed to discharge the onus that she was dismissed as her fixed-term contract terminated by effluxion of time.

[55] The respondent on the other hand argued that the arbitrator's finding was a finding based on all the evidence led, and therefore a conclusion based on facts. It is not a question of law alone as required by s 89*(1)(a)* of the Labour Act.

[56] The assertion that once the appellant disputed the dismissal, the onus shifted to the respondent is a question of law. A reasonable arbitrator should recognize that the burden of proof is a critical legal element that directly impacts the outcome of an unfair dismissal claim. Thus, if the arbitrator failed to acknowledge this shift, it constitutes a legal error.

[57] This ground raised by the appellant predominantly highlight errors in the application of legal principles rather than mere factual disputes. They emphasize the critical role of the burden of proof and the legal requirements for establishing dismissal in unfair dismissal claims. The failure of the arbitrator to appropriately apply these principles constitutes an error in law, which undermines the validity of the award.

[58] For the reasons outlined, I find that the arbitrator's finding that the respondent was dismissed and that his contract did not expire by effluxion of time in terms of the statutory provisions and the terms of contract was not correct and is perverse. This ground of appeal has merit and is therefore allowed to stand.

Ground 2 and 3

[59] Ground 2 and 3 will be discussed together. The question this court has to answer is whether the appellant complied with s 128C*(1)* of the Labour Act by employing the respondent on a fixed term contract and whether the termination of the respondent's fixed-term contract amounted to unfair dismissal or unfair labour practice?

[60] Section 128C*(1)* of the Labour Act outlines specific obligations that must be fulfilled by employers. A determination of compliance with this section requires an understanding of the legal standards set forth in the statute, as well as an assessment of the evidence presented in relation to those standards.

[61] It is trite that fixed-term contracts are permitted when there is a justified reason for their existence, as outlined in the Labour Act. An employer must provide sufficient evidence to establish the legitimacy of using fixed-term contracts instead of indefinite ones.

[62] It was argued on behalf of the appellant that the arbitrator came to the wrong conclusion by ignoring the evidence tendered, that the appellant had not complied with s 128C*(1)* of the Labour Act. It was further argued that the appellant provided justification for employment and tendered evidence in that regard.

[63] The respondent contended that the finding of the arbitrator was based on evidence led and therefore a conclusion based on facts. It was further argued that it is not a question of law alone as required by s 89*(1)(a)* of the Labour Act.

[64] Grounds 2 and 3 raised by the appellant highlight significant legal issues regarding the interpretation of s 128C*(1)* and the assessment of compliance. The arbitrator's conclusion that non-compliance amounted to unfair labour practice,

despite evidence suggesting otherwise, reflects a legal error that undermines the integrity of the arbitration award.

[65] It is evident from the appellant's policy that the primary aim of employing people on a fixed term contract will be to engage employees for a particular period or for the completion of a specific project. It was further clear from the fixed-term contract signed by the respondent with the appellant that the justification for her employment was that a certain Ms Neumbo was on sick leave and due for maternity leave and for the December/January holidays in the absence of full-time employees and, as a temporary employee at SHE and EXCO departments. It becomes evident that all fixed term contracts signed by the respondent had reasons why her services were retained on a fixed-term basis. I find that the appellant therefore complied with the provisions of s 128C*(1)* of the Labour Act and that no reasonable arbitrator would find that he appellant failed to establish a justification for a fixed-term contract. The appellant argues that, upon proper consideration of the contracts, every reasonable arbitrator would have found sufficient justification.

[66] In the matter of *City of Windhoek v Katuuo*[11], Justice Parker held that:

> 'The list of conduct constitute unfair labour practice is prescribed in the Labour Act under section 50*(1)(a)-(g),* and that the list is exhaustive. That a party alleging unfair labour practice must mention the particular paragraph of s 50*(1)* in which the conduct complained of falls and that failure to do so is fatal.'

[67] The finding by the arbitrator that the non-compliance with s 128C*(1)* amounts to an unfair labour practice or unfair dismissal under the circumstances of the current matter, is perverse. The arbitrator failed to consider under which particular paragraph of s 50(1) such conduct falls, and this constitute an irregularity that entitles the court to intervene and set aside the arbitrator's decision. The arbitrator failed to appropriately assesse the evidence presented. If the contracts signed by the

[11] *City of Windhoek v Katuuo (LCA 47/2015) [2016] NALCMD 11 (17 March 2016).*

respondent contained clear justifications for their fixed-term nature, then a reasonable arbitrator should have reached the conclusion that the appellant had, in fact, established justification.

[68] For the reasons outlined, I find that the arbitrator's decision was flawed due to errors in legal interpretation concerning the compliance with s 128C*(1)* of the Labour Act. This ground of appeal has merit and is therefore allowed to stand.

Ground 4

[69] The question this court has to answer is whether the respondent had a legitimate expectation that the fixed-term contract would be extended?

[70] This ground of appeal involves the arbitrator's finding that the appellant created a legitimate expectation for the renewal of the respondent's fixed-term contract. The appellant contends that this finding represents an error in law, asserting that a reasonable arbitrator, upon proper consideration of the evidence, would have reached a different conclusion. The arbitrator's findings on legitimate expectation must align with established legal principles regarding contract interpretation and evidentiary standards.

[71] It was argued on behalf of the appellant that legitimate expectation would have been created if there was an express promise or an existence of a regular practice that the respondent can reasonably expect to continue. It was further argued that the respondent relied on hearsay evidence when she testified that her supervisor informed her that her contract would be renewed. In this regard, the appellant contend that the respondent failed to provide admissible evidence that these conversations occurred and there was just no proof that an express promise was made to her.

[72] The appellant fiercely contended that there was no regular practice of renewal that might have created a legitimate expectation. It was argued that although the contract was renewed for 14 months, the contract was renewed each time after it

was terminated by effluxion of time, and that the offer of temporary employment was made when the necessity arose, which was occasioned by the absence of full time employees. The appellant argued that no adverse decision was taken against the respondent because her fixed-term contract came to an end by effluxion of time.

[73] On this ground, the respondent argued that the ground of appeal does not meet the requirements of s 89*(1)* of the Labour Act, and is not a question of law alone, as the arbitrators findings were based on all the evidence led, and therefore amounts to conclusions based on facts. It is argued that the appellant points to facts in setting out this ground of appeal.

[74] The Supreme Court in the matter of *Free Namibia Caterers CC v The Chairperson of the Tender Board of Namibia & 3 others,*[12] had the following to say about the doctrine of legitimate expectation:

'[43] I now move to consider the doctrine of legitimate expectation. In determining whether the appellant had a legitimate expectation, it is helpful that I set out some of the authorities on the issue. One such authority is the celebrated English case of *Council of Church Services C v Minister of the Civil Service*[13] where it was stated that legitimate expectation arises either from an expressed promise on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

[44] In a judgment of this Court,[14] relied upon by the appellant for the submission based on legitimate expectation, O'Regan AJA stated to the same effect that a legitimate expectation of consultation ordinarily only arises where there was an established practice of consultation, or where a promise or representation had been made that consultation would occur.

[45] In *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and others*,[15] the High Court observed that the test for legitimate expectation is whether the demand for procedural fairness required such a hearing before the decision was taken. In dealing with the concept,

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[12] *Free Namibia Caterers CC v The Chairperson of the Tender Board of Namibia and Others* (44 of 2015) [2017] NASC 30 (28 July 2017).

[13] *Council of Church Services C v Minister of the Civil Service* [1984] 3 All ER 935 (HL).

[14] *Minister of Mines and Energy and others v Petroneft International Ltd and others 2012* (2) NR 781 (SC).

[15] *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and others*2009 (2) NR 670 (HC).

the court approved the approach adopted in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[16] where it was stated that the question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depended on whether, in the context of that case, procedural fairness required a decision-making authority to afford a hearing to a particular individual before taking the decision.'

[75] It is clear from the above mentioned that the concept of legitimate expectation in the context of fixed-term contracts involves an express promise or the existence of a regular practice that the respondent can reasonably expect to continue.

[76] The grounds raised by the appellant underscore significant legal questions about the concept of legitimate expectation, the admissibility and evaluation of evidence, and the interpretation of contractual terms. If the arbitrator erred in recognizing these principles or in evaluating the evidence presented, it constitutes an error in law that would possibly undermine the arbitration award.

Hearsay evidence

[77] I am acutely aware that the sphere of labour law is one where the strict application of the rules of evidence and civil proceedings, is generally relaxed. This is so for sound reasons of policy with which I cannot and do not quibble. In this case, however, the respondent in a bid to show that an express promise was made to her, which created a legitimate expectation for renewal of the contract, tendered evidence based on what she was told by a certain Mr Kahimise, that the contract would be renewed. This is a matter where Mr Kahimise could be called as witness to confirm the testimony of the respondent. This is so because what she testified about could not be verified and a court or tribunal relying on such evidence, particularly where the case is that of unfair dismissal, that might result in the appellant paying compensation, is disconcerting.

[78] I particularly say so for the reason that there is no evidence that the person who could testify to those very important issues were not available to be called. They

[16] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 216.

were all employees of the appellant, who were in a position to testify about the matter within his knowledge. In this regard, reliance on the evidence of the respondent, in the peculiar circumstances of this case, is dangerous.

[79] Further to the abovementioned, it is clear that the respondent when she signed the fixed-term contract acknowledged that it is a fixed-term contract and that there is no guarantee for further employment at the end of the contract. Therefore, it is safe to conclude that there is no proof that an express promised was made that could create an expectation of indefinite employment or that the contract would be renewed again.

Existence of a regular practice

[80] On this aspect, the arbitrator found that because the contract was renewed for a period of 14 months, the respondent had a legitimate expectation of renewal. From the evaluation of the evidence placed before this court, it is clear from the testimony of the respondent that her basis for relying on legitimate expectation was because she hoped that at the end of the period the contract would be renewed.

[81] I cannot find that a practice existed that created a legitimate expectation. From a close look of the contracts that were renewed over the 14 months, it is clear that they were renewed based on the need of the appellant, during staff shortages. It has been held that not every expectation is worthy of protection. The expectation would be worthy of protection, where it is legitimate. It is legitimate if a representation is made and such representation is clear, unambiguous and devoid of relevant qualification.[17]

[82] For these reasons, I find that the arbitrator's decision was flawed due to legal errors in the interpretation of the concepts surrounding legitimate expectation and the evaluation of the evidence presented. It follows therefore that the arbitrator's

[17] *Minister of Defence & Others v Dunn* 2007 (6) SA 52 (SCA) at [31].

finding in this regard cannot stand and is perverse. This ground has merit and is allowed to stand.

Ground 5

[83] The question this court has to answer is whether the respondent discharged the onus in proving her damages?

[84] It is argued on behalf of the appellant that the respondent failed to substantiate her claim or how she had mitigated her loss. It was further argued that the arbitrator erred in law, and failed to exercise her discretion judicially and acted on incorrect legal principles when she ordered the appellant to pay compensation to the respondent. It was argued that no evidence was led by the respondent regarding her efforts made to find alternative employment as well as the actual damages suffered.

[85] The respondent on the other hand argued that the arbitrator's decision on the amount to which the respondent is entitled to as losses/compensation is the exercise of a discretion.

[86] In the matter of *Africa Personnel Services (Pty) Ltd v Ndero and Another*[18] Justice Parker held as follows:

'[4] In the instant matter, the arbitrator ordered monetary compensation by merely multiplying first respondent's remuneration by 32, that is, the number of months between the date of his dismissal and the date on which the arbitrator adjudged the dismissal to be unfair. Granted, the arbitrator exercised a liberum arbitrium in the making of the award (see *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 33 (7 August 2014)); but such exercise of judicial discretion is not based simply on mathematical calculations without more.

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[18] *Africa Personnel Services (Pty) Ltd v Ndero and Another (*HC-MD-LAB-APP-AAA2020/00068)
[2021] NAHCMD 49 (11 November 2021)

In *Shilongo v Vector Logistics (Pty)*, para 18, based on the authorities, I set out the principles which a court or tribunal ought to take into account when considering the amount of monetary compensation that is fair and reasonable in terms of the Labour Act 11 of 2007 ('the *Shilongo* principles').

[5] In the instant matter, as I have found, the arbitrator's decision is based simply on mathematical calculations. No evidence was placed before the arbitrator to enable him to consider a fair and reasonable amount of compensation. The fact that appellant (the employer) ought to know first respondent's remuneration (see *Pep Stores Namibia (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC)), as Mr Coetzee, counsel for first respondent, submitted, is not enough. No evidence, as Mr Van Zyl submitted, was placed before the arbitrator to enable him to consider a fair and reasonable amount of compensation, based on such principles as the *Shilongo* principles.

[6] The arbitrator acted plainly arbitrarily. The decision he took is based on wrong principles (Paweni). The decision is perverse; for, no reasonable arbitrator or tribunal, 'on a proper appreciation of the evidence and the law, would have reached.' (*Janse van Rensburg)*.'

[87] In the instant matter, the arbitrator ordered monetary compensation by merely multiplying the respondent's remuneration by 14, that is, the number of months between the date of his dismissal and the date on which the arbitrator adjudged the dismissal to be unfair. It is clear from the abovementioned legal principles that the exercise of the arbitrator's discretion was based on a mathematical calculation. It is clear that no evidence was placed before the arbitrator to enable him to consider a fair and reasonable amount of compensation, making her decision arbitrary.

[**88] It is further trite that an employee seeking losses has a duty to mitigate such losses.**[19] I therefore find that for the arbitrator to grant compensation in the amount of for 14 months, is unfounded in the face of any evidence how the respondent mitigated her losses. This is a grave legal error and perverse. No reasonable arbitrator would have reached such a decision under the circumstances.

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[89] For these reasons, I find that the arbitrator's decision was flawed due to errors in the application of legal principles concerning the awarding of compensation. This ground has merit and is allowed to stand.

Conclusions

[90] In terms of s 89*(10)* of the Labour Act, if an award is set aside, the Labour Court may, in the case of an appeal, determine the dispute in the manner it considers appropriate. In this instance, it would be appropriate to set aside the entire award of the arbitrator.

[91] The respondent addressed me on costs and argued that this court grants costs against the appellant on an attorney and client scale, claiming that they have acted in a frivolous and vexatious manner. It is apparent that neither party acted frivolous and vexatious during these proceedings, hence I see no reason why this court should deviate from the general principle regarding the issue of costs.

[92] In the result, I make the following order.

6. The point *in limine* raised by the respondent is dismissed.

7. The appeal is upheld.

8. The decision and award of the arbitrator, Layhya N Dumeni dated 10 January 2022, is set aside in its entirety.

9. There is no order as to costs.

10. The matter is removed from the roll and regarded as finalised.

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P CHRISTIAAN
Judge

APPEARANCES

FOR THE APPELLANT:	G Dicks Of Kőpplinger Boltman van Greunen Windhoek
FOR THE RESPONDENT:	Mr Ulrich of Angula Co. Incorporated, Windhoek