REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-LAB-APP-AAA-2023/00001

In the matter between:

EDWARD TJIPETEKERA JANUARIE **APPELLANT**

and

NAMIBIA PORTS AUTHORITY (PTY) LTD **RESPONDENT**

Neutral citation: *Januarie v Namibia Ports Authority (Pty) Ltd* (HC-MD-LAB-APP-AAA-2023/00001) [2024] NALCMD 7 (7 March 2024)

Coram: SIBEYA J
Heard: **27 October 2023**
Delivered: **7 March 2024**

Flynote: Labour law – Appeal against arbitration award – Test for breaching a suspension condition, and that of bringing the company's name into disrepute – Rule 20 of the Labour Court Rules – Insubordination – Substantive fairness – Fiduciary duty owed to the employer.

Summary: The appellant was employed by Namport as a berthing master. On 31 July 2018, some of the employees of Namport staged a public demonstration and approached the premises of Namport. They carried placards which depicted their dissatisfaction with working conditions. It is contended by Namport that the appellant incited or caused the employees to participate in the said pubic demonstration. Namport further contends that the public demonstration was illegal and unwarranted.

On 9 August 2018, the appellant was served with a notice to attend a disciplinary hearing. The said notice contained the following three charges of misconduct preferred against him: incitement of the employees to participate in an illegal public demonstration; bringing the name of Namport into disrepute; and breach of terms of the suspension.

At the conclusion of the disciplinary hearing, the appellant was found not guilty on the charge of inciting the employees to participate in an illegal public demonstration, but he was found guilty on the two charges of bringing the name of Namport into disrepute and breach of the terms of the suspension. He was dismissed from employment as a result.

The appellant, thereafter, referred a dispute of unfair dismissal to the Office of the Labour Commissioner on 13 November 2019, where the arbitrator dismissed the appellant's claim in an award given on 5 December 2020.

Held: that the significant role played by the appellant in this matter, lays bare the position that he played an instrumental role to cause the public demonstration to occur.

Held that: there was no reasonable explanation for the appellant to approach the premises of Namport contrary to the conditions of his suspension. The appellant, therefore, breached the condition of his suspension which prohibited him from entering the premises of Namport. Similarly, the arbitrator did not err when she found that the appellant was guilty of breaching the condition of suspension.

Held further that: the actions of the appellant, particularly after he was cautioned of the illegality of the intended demonstration and his suspension, is tantamount to being rebellious. Being rebellious to an employer stands in total contrast to one's fiduciary duty towards the employer, and depending on the facts and circumstances of the matter, such rebellious conduct may be dismissible.

The appellant's appeal against the arbitration award is dismissed.

ORDER

---

1. The appellant's appeal against the arbitration award delivered by the arbitrator on 5 December 2022 in as far as it provides that the dismissal of the appellant was substantively fair, is hereby dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

SIBEYA J:

Introduction

[1] Dr James McQuivey of Forrester Research, in a study: How Video Will take Over the World,[1] took a measured approach to calculating the value of a video and remarked, in comparison to the phrase that 'a picture is worth a thousand words', that: 'a minute video is worth 1.8 million words.'

[2] The appellant, an employee of the respondent, was dismissed after being found to have incited other employees to participate in an illegal or unwarranted

[1] Dr James McQuivey of Forrester Research, How Video Will Take Over The World, 17 June 2008.

public demonstration that allegedly caused reputational damage to the good name of the respondent.

[3] The court is seized with a labour appeal filed by the appellant against the arbitration award delivered by the arbitrator on 5 December 2022, on the basis that he was unfairly dismissed. The appellant was dismissed following a disciplinary hearing where he was found guilty of misconduct. Following the dismissal, he lodged a dispute with the Office of the Labour Commissioner where conciliation came to nought. Subsequently, arbitration proceedings ensued, after which, in an award delivered by the arbitrator, the claim for unfair dismissal was equally dismissed. It is this award that the appellant appealed against. The appeal is opposed by the respondent.

Parties and representation

[4] The appellant is Mr Edward TJipetekera Januarie, an adult male resident of Windhoek. The appellant shall be referred to as such.

[5] The respondent is the Namibia Ports Authority (Pty) Ltd, a company established in terms of the Namibia Ports Authority Act 2 of 1994, with its place of business situated at No. 17, Rukambi Kandanga Road, Walvis Bay. The first respondent shall be referred to as ‘Namport’.

[6] Although strictly speaking not a party to the proceedings because of not been cited as such, Ms Maxine Khrone, an adult female was the duly appointed arbitrator who presided over the dispute referred to the Office of the Labour Commissioner. Where reference is made to Ms Khrone she shall be referred to as ‘the arbitrator’.

[7] Where reference is made to the Labour Commissioner, he shall be referred to as such.

[8] No relief is sought against the arbitrator and the Labour Commissioner.

[9] Namport is the only party that opposes the appeal. Where reference is made to the appellant and Namport jointly, they shall be referred to as ‘the parties’.

[10] The appellant is represented by Mr Coetzee, while Namport is represented by Mr Vlieghe. The court expresses its gratitude to both counsel for their detailed and helpful written and oral arguments presented to court.

Background

[11] The appellant was employed by Namport as a berthing master. On 31 July 2018, some of the employees of Namport staged a public demonstration and approached the premises of Namport. They carried placards which depicted their dissatisfaction with working conditions. It is contended by Namport that the appellant incited or caused the employees to participate in the said pubic demonstration. Namport further contends that the public demonstration was illegal and unwarranted.

[12] On 9 August 2018, the appellant was served with a notice to attend a disciplinary hearing. The said notice contained the following three charges of misconduct preferred against him: incitement of the employees to participate in an illegal public demonstration; bringing the name of Namport into disrepute; and breach of terms of the suspension.

[13] At the conclusion of the disciplinary hearing, the appellant was found not guilty on the charge of inciting the employees to participate in an illegal public demonstration, but he was found guilty on the two charges of bringing the name of Namport into disrepute and breach of the terms of the suspension.

[14] The charges on which the appellant was found guilty, read as follows:

'1.2 Bringing the name of Namibian Ports Authority into disrepute: in that on the 31st of July 2018 and at Rikumbi Kandanga Street (in front of the Namibian Ports Authority Head Officer), Walvis Bay between 11:30 and 11:50 AM, you wrongfully and intentionally lead *(sic)* and/or orchestrated and/or initiated and/or incited and/or caused NAMPORT employees to participate in an illegal and/or unwarranted public demonstration (illegal industrial action) in full view of the general public thereby causing reputational damage to the good name of the Namibian Ports Authority.

By leading and/or orchestrating and/or initiating and/or inciting and/or causing NAMPORT employees to participate in an illegal and/or unwarranted public demonstration (illegal industrial action) you have made yourself guilty of the offence of Bringing the Name of the Namibian Ports Authority into Disrepute in terms of Section 3(2): Category D of the Disciplinary Policy and Procedure and Section 17 and 22 of the Code of Ethics Policy of the Namibian Ports Authority.

1.3 Breach of Terms of Suspension: in that on the 31st of July 2018 and at the Namibian Ports Authority's premises, you wrongfully and intentionally accessed and/or entered NAMPORT's premises while being fully aware that you are barred from doing so and without first obtaining prior written approval from Manager: Marine Services (Port Captain) and/or the Executive: Human Resources or their duly authorised representatives to do so.

By accessing and/or entering NAMPORT's premises while being fully aware that you are barred from doing so and without first obtaining prior written approval from Manager: Marine Services (Port Captain) and/or the Executive: Human Resources or their duly authorised representatives, you have made yourself guilty of the offence of Breach of Terms of Suspension.'

[15] In the reasons for the verdict, the chairperson of the disciplinary hearing found, *inter alia*, that:

'122. However, what was also clear from the evidence considered, was that Mr. January *(sic)* played a prominent role at the meeting. That includes his participation in determining and recording the agenda, introducing Mr Ampweya (after arriving late), being active and assist MUN in recruiting members at the meeting (filling out membership forms), being nominated as the person to sign notifications of the demonstration on behalf of the employees and being the contact person for the authorities of the planned demonstration.

123. However, I could not find any evidence to support a finding that Mr January *(sic)* actually proposed, motivated or incited the employees to embark upon the planned demonstration.

124. The purpose of the meeting was also clearly to gain support for MUN, to discuss a mass resignation NATAU *(sic)* and to recruit those in attendance to joint MUN.

125. My finding was that the decision to demonstrate was taken collectively by the employees who were frustrated with the way in which their grievance and interest were dealt with.'

[16] The appellant was dismissed from employment by Namport on 19 July 2019, on account of the guilty verdict.

[17] The appellant thereafter referred a dispute of unfair dismissal to the Office of the Labour Commissioner on 13 November 2019. Subsequent to arbitration proceedings, where the parties led evidence including documentary and video evidence, the arbitrator delivered an award on 5 December 2020, where she dismissed the appellant's complaint and found in favour of Namport. Discontented with the award, the appellant lodged the present appeal to this court. It is this appeal that the court is seized with.

Grounds of appeal

[18] In the original notice of appeal dated 3 January 2023, the appellant seeks an order to uphold the appeal and set aside the arbitration award. The said notice contains grounds which have since been amended by the amended notice of appeal dated 6 July 2023. The appellant set out the following grounds on which his appeal is based:

'1. The Arbitrator found that the Appellant's dismissal was substantively fair. Consequently, the question that falls for determination is whether, on the evidence placed before her, the Arbitrator misdirected herself when she concluded that the Appellant was correctly found guilty of and dismissed for bringing the name of the Respondent into disrepute and for breaching the terms of his suspension condition.

2…

2.1 The Arbitrator found that the Appellant on 31st of July 2018 (in front of the Respondent's Head Office), wrongfully and intentionally led and/or orchestrated and/or initiated and/or incited and/or caused the Respondent's employees to participate in an illegal and/or unwarranted public demonstration (illegal industrial action) in full view of the general

public thereby causing reputational damage to the good name of the Namibian Ports authority.

2.2 The Arbitrator erred in law when she found that the Respondent discharged its onus to prove the Appellant's dismissal *(sic)* was substantively fair for the following reasons:

2.2.1 No evidence was led by the Respondent that the Appellant on 31 July 2018 wrongfully and intentionally led and/or orchestrated and/or initiated and/or incited and/or caused the Respondent's employees to participate in an illegal and/or unwarranted public demonstration.

2.2.2 The Arbitrator determined that despite being advised not to proceed with the demonstration, the Appellant had signed, delivered, and given HR letters, handed over the petition, and joined the WhatsApp group.

2.2.3 The content of the WhatsApp messages was not presented at either the disciplinary hearing or the arbitration hearing for the Arbitrator to analyse and draw conclusions, that the Appellant is guilty simply because he is a member of the WhatsApp group.

2.2.4 The Arbitrator concluded that the Appellant and the demonstrators acted in common purpose. The Arbitrator erred in law because the applicant was not accused of participating in the demonstration. The Appellant dissociated himself from the demonstrators due to his absence from the demonstration on 31 July 2019. *(sic)*

2.2.5 The Respondent failed to prove on a balance of probabilities that the Appellant had breached his suspension conditions.

3. There was thus no evidence, the basis on which a reasonable arbitrator could have arrived at this finding that the Appellant was correctly found guilty of bringing the name of the Respondent into disrepute and for breaching the terms of his suspension conditions.

4. The Arbitrator erred in law in that she made findings of fact where the evidence was such that a proper evaluating thereof leads inexorably to the conclusion that no reasonable arbitrator could have come to this finding.'

Grounds of opposition

[19] Namport filed its grounds of opposition to the appellant's appeal. Namport contended that the findings of the arbitrator that, on the evidence, the appellant was guilty of bringing the name of Namport into disrepute and that he further violated the conditions of his suspension, were not perverse, and should not be interfered with. Namport contended further that the offence of bringing its name into disrepute is classified under category D of the disciplinary policy and it provided for a recommended sanction of dismissal. Namport further contends that the breach of suspension, considered collectively with bringing its name into disrepute, justifies dismissal of the appellant.

[20] Namport stated further that the arbitrator did not err, as the appellant played a central role or caused the events of 31 July 2018. The arbitrator further found that the appellant was present at the premises without justifiable reason. Namport contended that the finding of the arbitrator cannot be faulted on the evidence and it prayed for the dismissal of the appeal.

Rule 20 agreement

[21] The parties, in their rule 20 agreement, were *ad idem* that the appellant was a permanent employee of Namport until his dismissal on 19 July 2019. His dismissal followed after the finalisation of the appeal process.

[22] The appellant did not contend that there was procedural unfairness in the proceedings that led to his dismissal, but only that his dismissal was substantively unfair. The parties agreed that the issues to be determined by the arbitrator were:

1. Whether or not the applicant's dismissal was substantively fair; and
2. Whether or not dismissal was the appropriate sanction.

Evidence at arbitration

Namport's evidence

Mr Gehas Shatika

[23] The respondent led the evidence of Mr Gehas Shatika, a Senior Marine Pilot for Namport. Mr Shatika testified, *inter alia*, that the appellant was a berthing master at Namport. He was the appellant's direct supervisor. He stated that by July 2018, the trade union which had an exclusive bargaining agreement with Namport, and therefore, the exclusive bargaining agent of the employees was Namibia Transport and Allied Workers Union (NATAU). The appellant fell within the bargaining unit.

[24] Mr Shatika testified that the Mine Workers Union (MUN) sought audience with the Human Resources Department of Namport before the industrial action. Namport refused to recognise MUN. A notice to receive the petition dated 25 July 2018, signed by the appellant was addressed to Namport Human Resource Officer informing of a peaceful demonstration scheduled for 31 July 2018, at Namport's Head Office in Walvis Bay. There was also a notice of the same date, addressed to all media houses, informing the media of the intention to embark on a peaceful demonstration and to hand over a petition at Namport's Head Office on 31 July 2018 at 11:30. The notice to the media houses, signed by the appellant, was to ensure that the demonstration was publicised. Namib Times, a newspaper, was present at the demonstration, which made national news and which Namport's clients could see. A similar notice signed by the appellant was addressed to the Municipal Traffic Department.

[25] Mr Shatika testified that the essence of the petition was that the workers expressed dissatisfaction with NATAU where they intended to resign from and to join MUN. On 31 July 2018, the demonstration took place. Mr Shatika testified that he was not present when the employees staged a demonstration, in front of Namport's Head Office. He relayed what he observed on the video footage produced at the arbitration proceedings.

[26] Mr Shatika testified that the employees of Namport who participated in the demonstration were dressed in Namport uniforms. The demonstrating employees proceeded to Namport's Head Office. Concurrently, a white motor vehicle belonging to the appellant was stationary at the traffic lights of an intersection which were red from just a few minutes after 11:30 on 31 July 2018. The traffic lights flashed green but the appellant's vehicle was still stationary and it had the hazard lights switched on. Motor vehicles from behind the appellant's vehicle had to move left and right to pass by his vehicle. The appellant's vehicle was stationary at a distance of about 50 meters from the demonstrators. The appellant left after 25 minutes and 46 seconds.

[27] Mr Shatika testified further that the protestors were then stopped at Namport security. By then the entire road was blocked. The petition was not submitted to Namport as the police and the Namport security personnel stopped the demonstration.

[28] Mr Shatika testified further that the appellant was served with a letter of suspension dated 25 July 2018. The suspension letter prohibited the appellant from leaving the municipal area of Walvis Bay during normal working hours without prior approval from his superior or the executive of Human Resources of Namport. The letter provided further that for the appellant to gain access in order to prepare his defence, he was required to first obtain written approval of supervisor. The appellant was further instructed not to interfere or disturb any employee of Namport or potential witness.

[29] Mr Shatika testified that on 31 July 2018, he came across the appellant at the premises of Namport where the appellant requested approval to leave the municipal area of Walvis Bay during working hours. He stated further that the appellant informed him that he came to the premises as he could not reach him due to a faulty cell phone. They exchanged cell phone numbers. Mr Shatika stated further that the appellant was not authorised to enter the premises and there were other avenues available to him that did not involve entering the premises in violation of conditions of the suspension. The appellant could have, for example, contacted the port control landline or switchboard to request the mobile number of his supervisor or the port

captain supervisor, as he claimed that he saved Mr Shatika's mobile number in his cell phone that had fault.

[30] Mr Shatika testified that the employer/employee trust relationship between the appellant and Namport was broken beyond repair. He stated further that the appellant did not accept his wrongdoing nor show remorse even after being found guilty.

Dr Felix Musukubili

[31] Dr Musukubili, who was the head of Human Resources for Namport testified, *inter alia*, that MUN requested to engage the employees of Namport, to which Namport responded that it had an exclusive bargaining arrangement with NATAU. Namport further informed MUN that MUN's constitution did not permit it to have members in the transport and logistics sector where Namport was operating, and, therefore, not allowed in law. He also informed MUN that it was illegal for MUN to demand membership fees from the Namport's employees.

[32] Dr Musukubili testified further that the appellant, on 25 July 2018, personally delivered the notice of the planned demonstration of 31 July 2028, to Namport's Human Resources Department. On the same day, the appellant was cautioned not to proceed with the demonstration but he insisted that it was his constitutional right to peacefully demonstrate. Dr Musukubili responded, in a memorandum addressed to the appellant, that Namport will not receive the petition and further that Namport did not receive a grievance from NATAU as per the conditions of the exclusive bargaining agreement. The appellant was placed on suspension on 26 July 2018.

[33] Dr Musukubili testified further that all media houses received notices of the demonstration and they reported about it. He stated further that the appellant was observed speaking to a group of workers at a building across Namport's offices.

Appellant's evidence

[34] The appellant, a berthing master, testified, *inter alia*, that on 21 July 2018, the employees inquired from MUN whether they could stage a peaceful demonstration. The group collectively resolved at a meeting held on 21 July 2018, to demonstrate and hand over a petition to Namport. This is the only meeting of the employees that he attended. At the meeting, he was chosen to deliver the petition in light of his background of having been a union representative. The appellant confirmed that he always assisted the employees with their grievances even when he was not a shop steward and not part of NATAU. He expressed frustrations on behalf of the employees.

[35] The appellant testified further that he was busy with an examination. A drafting committee was established. He was nominated by the group to be their representative. He contributed to content of the petition. The notices for the demonstration were brought to him for his signature. On 25 July 2018, he signed the petition, the notices to Namport, to the media outlets, NATAU, the Namibia Police and the Traffic Department informing of the planned demonstration and a petition hand over on 31 July 2018. He denied delivering the said notices to the respective addressees.

[36] The appellant testified further that on 26 July 2018, he was suspended from work. After the suspension he did not address the employees as he was prohibited to do so by the conditions of the suspension. He was and remained an administrator of a WhatsApp group consisting of the employees that intended to stage a demonstration.

[37] The appellant testified that his child and his fiancée came from Usakos and he had to return them back on 31July 2018, during working hours due to his child's illness. As he was prohibited from leaving the municipal area of Walvis Bay without prior permission, and he could not contact his supervisor as his cell phone number was stored in cell phone that was faulty, he planned to go to the reception area of Namport. His sim card was also not working properly. He had another cell phone with a new mobile number but he could not call his supervisor.

[38] It was his testimony that whilst on the way to Namport, he came across the employees of Namport who were demonstrating. He could not reach the reception as the police blocked the road. His delay at the traffic lights was occasioned by the fact that the entrance to Namport's Head Office was blocked.

[39] The appellant testified further that during the time that his unmarked motor vehicle with tinted windows was stationary at the traffic lights, he did not exit the vehicle, neither did he engage with the employees who participated in the demonstration. During lunch time, he met Mr Shatika at Namport, who had knowledge of the medical condition of his child and they exchanged mobile numbers.

[40] The appellant denied leading, initiating, inciting or causing the employees to participate in a demonstration. He testified that he did not speak to the media house and the Namibian Police about the demonstration.

[41] The appellant testified that he has been unsuccessful with job applications and asked the arbitrator for reinstatement, and payment of the salary that he would have received but for the dismissal.

Analysis

[42] Section 33 of the Act provides as follows:

'33 Unfair dismissal

(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.

(2) …

(4) In any proceedings concerning a dismissal-

(a) if the employee establishes the existence of the dismissal;

(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.'

[43] The said s 33 makes it clear that a dismissal of an employee must be both procedurally and substantively fair. Failure to satisfy any of the said two requirements leads to the dismissal being regarded unfair.

[44] In *casu*, there is no qualm by the appellant regarding procedural fairness, nor is the procedure followed subsequent to his dismissal challenged. The appeal is, therefore, limited to the determination of whether or not the dismissal was substantively fair.

[45] This court in *Windhoek Country Club Resort and Casino v Lukubwe*,[2] stated the following regarding substantive fairness:

'[20] Section 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must be both substantially and procedurally fair.

[21] Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words, the reasons why the employer dismisses an employee must be good and well grounded; they must not be based on some spurious or indefensible ground. This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule. The rule, that the employee is dismissed for breaking, must be valid and reasonable. Generally speaking, a workplace rule is regarded as valid if it falls within the employer's contractual powers and if the rule does not infringe the law or a collective agreement.' (own emphasis)

[46] The active duty of the court is to determine whether or not the arbitrator erred in law when she held that the dismissal of the appellant was substantively fair. In

[2] *Dominikus v Namgem Diamonds Manufacturing* (LCA 4 of 2016) [2018] NALCMD 5 (28 March 2018).

analysing this finding, the court will consider the grounds of appeal against the backdrop of the evidence led at the arbitration proceedings.

The charge of bringing the name of Namport into disrepute

[47] The appellant was found guilty of bringing the name of Namport into disrepute, which is a category D offence, and which is dismissible. Category D specifically provides as follows:

> 'Category D
>
> This is a very serious offence that justifies summary dismissal e g assault, theft, fraud and dishonesty, bringing company name to disrepute, abscondment (unauthorised absence of five (5) working days or more, victimization, intimidation, incitement, malicious damage to property and unauthorised use of company property.'

[48] Parker AJ in *Kakunga v Dundee Precious Metals Tsumeb,*[3] had occasion to consider the approach to a charge of bringing the name of an employer into disrepute and remarked as follows:

> '[8] Mr Kamanja, counsel for the appellant, contends that the arbitrator failed to consider 'the appropriate test to the facts in determining whether the appellant intended to publish fraudulent and false evidence about the first respondent.' The response of Mr Maasdorp, counsel for the first respondent, was that the appropriate test is the objective test. To support his contention, counsel relied on *Gordon Timothy v Nampak* [2010] 8 BLLR 830 (LAC), where Davis J held that an objective evaluation as to whether a reasonable decision maker would find that the employee brought the company into disrepute is required.
>
> [9] In *National Union of Public Service and Allied Workers v National Lotteries Board* 2014 (3) SA 544 the Constitutional Court of South (Africa) had to determine whether union members who were employee(s) of the respondent and who wrote a harsh article about the Chief Executive Office (CEO) to a local newspaper had brought the company's name into disrepute. The Constitutional Court held at para 63 that what one has to decide 'is simply whether anyone reading the contents would think the CEO and the board were not doing

[3] *Kakunga v Dundee Precious Metals Tsumeb* (LCA 67/2015) [2016] NALCMD 37 (29 September 2016) para 8.

their duties properly'. Thus, the Constitutional Court proposed an objective test, and held that the company was entitled to dismiss the employees who did not apologize to the company and its CEO.'

[49] I endorse the above principle that the test to be applied in order to determine whether the conduct of an employee brought the name of the employer into disrepute is an objective test. The objective evaluation of the concerned conduct should, therefore, determine whether such conduct damaged the reputation of the employer or created a negative perception of the employer.

[50] It is, in my considered view, critical to point out that the appellant was not found guilty of participating in the demonstration or illegal strike but rather with bringing the name of Namport into disrepute by causing Namport employees to participate in an illegal strike or unwarranted public demonstration.

[51] It was argued by Mr Cotzee that the wording of the charge preferred against the appellant was that on 31 July 2018 between 11:00 and 11:30 he led, orchestrated, initiated, incited or caused Namport employees to participate in an illegal strike or demonstration in full view of the public and thereby damaged its good name. Mr Coetzee emphasised that the charge must be restricted to the events that occurred on 31 July 2018 between 11:00 and 11:30. Mr Vlieghe disagreed.

[52] The charge is that the appellant caused Namport employees to participate in an illegal strike or public demonstration. It is common cause between the parties that on 31 July 2018 between 11:00 and 11:30 some of the employees of Namport participated in a public demonstration. I understand the charge to mean that the appellant is accused of having caused such demonstration to be realised.

[53] In my view, the charge is that the appellant caused the employees to participate in an illegal strike or public demonstration on 31 July 2018 between 11:00 and 11:30. I, therefore, do not agree with the argument by Mr Coeztee that the appellant was charged incitement that occurred between 11:00 and 11:30 on 31 July 2018. In any event the evidence sheds more clarity as it sets out the role played by the appellant before the demonstration on 31 July 2018.

[54] The evidence established, *inter alia*, that:

(a) The appellant was designated as the spokesperson of the group of employees who sought to demonstrate and was designated to sign the notices about the demonstration and hand over the petition;

(b) The appellant signed the notices about the demonstration addressed to Namport, the Namibian Police, the Municipal Traffic Department, NATAU and the media houses;

(c) The notice to the media houses reads:

'Take notice that the employees at the port hub in Walvis Bay wish to embark on a peaceful demonstration and petition hand over on Tuesday 31 July 2018 at around 11:30 at the NAMPORT head office in Walvis Bay.

Therefore it is requested that you respective offices *(sic)* avail yourselves to make sure that this gathering is covered in all media.'

(d) The appellant delivered the notice of the intended demonstration to Namport;

(e) The motor vehicle belonging to Namib Times, a local daily newspaper based in Walvis Bay, was present at the demonstration;

(f) The demonstration occurred in full view of the public;

(g) The demonstrating employees carried placards expressing unhappiness with their working conditions at Namport;

(h) The appellant, together with all employees were cautioned not to proceed with the planned demonstration for 31 July 2018, and Namport informed the employees that it has Recognition Agreement with NATAU as the exclusive

bargaining agent for the employees within the bargaining unit on all matters, and employees were informed that the intended demonstration is illegal and if proceeded with, the demonstrators will be dealt with;

(i) During the demonstration on 31 July 2018, the appellant was seated in his stationary motor vehicle at a distance of about 50 meters from the demonstrators with hazards switched on, thus, necessitating the vehicles behind his vehicle to bypass him;

(j) The petition contained discontentment with NATAU having a Recognition Agreement as the exclusive bargaining agent over the employees of Namport as they opted to belong to MUN, and further, that Namport was imposing NATAU on them while NATAU no longer represented their interests;

(k) The appellant was an administrator of a WhatsApp group of the employees who participated in a public demonstration, although he stated that this WhatsApp group was created for humour and group discussions;

(l) The video footage reveals that for about five minutes, the appellant sat in his stationary motor vehicle at the intersection controlled by traffic lights with hazard lights switched on, and even when the traffic lights turned green for his motor vehicle to proceed, his vehicle remained stationary right in front of the demonstrators with no hindrance for him to drive away from the said intersection; the video footage lays bare for all to see, better than a picture, that the appellant was interested in the demonstration and literally had to approach the demonstrators in his motor vehicle to observe them while they express a matter of interest to him at close range.

(m) The placards carried by the demonstrators revealed that Namport treated its employees unfairly; that they were unhappy with their working conditions; that they were denied the right to join MUN, a trade union of their choice; some of the placards were written: ‘Viva MUN viva’; ‘Is there

something NATAU is hiding from the nation'; 'Why changing our conditions of employment' etc.

[55] A consideration of the above evidence, coupled with the proven facts that the appellant attended the meeting of the demonstrators; he contributed to the content of the petition; he was nominated as the person to hand over the petition to Namport; he signed the notices informing different institutions including Namport about the intended public demonstration; he signed the invitation addressed to the media houses to attend the demonstration in order to ensure that the gathering is covered in all media despite being cautioned beforehand about the illegality of the gathering; he personally delivered the notice of the intended demonstration to Namport; he associated himself with the demonstrators; and that he was seated in his motor vehicle in close proximity with the demonstrators while being stationary on the road whereas nothing hindered him from driving away as observed from the video footage, in my considered view, leads to the conclusion that the appellant played a significant role to cause the public demonstration to be realised on 31 July 2018.

[56] I find, in light of the above evidence, that the denial by the appellant that he caused the public demonstration to occur is without merit. I am of the view that the significant role played by the appellant in this matter, lays bare the position that he played an instrumental role to cause the public demonstration to occur.

[57] I find that an objective analysis of the evidence reveals that the appellant caused the public demonstration staged on 31 July 2018, to occur, and which demonstration, inclusive of the petition and the placards carried by the demonstrators would cause any reasonable person reading the contents of the petition and the placards, and persons observing the public demonstration to think that Namport was not treating its employees fairly and that the employees were unhappy with their working conditions. On the basis of the above, the reasonable person would think that Namport was forcing its employees to belong to NATAU and not to a union of their choice; that Namport was changing the conditions of employment which they were dissatisfied with. These, in my considered view, would bring the name of Namport into disrepute.

[58] I, therefore,. find that the evidence narrated above supported the guilty finding of the appellant on the charge of bringing the name of Namport into disrepute. Therefore, the arbitrator cannot be faulted for finding that the guilt of the appellant was established on this charge.

Breach of terms on of suspension

[59] As alluded to earlier, the notice of suspension issued to the appellant had conditions attached, which included, *inter alia*, that:

'… 2. You will not be permitted to leave the municipal area of Walvis Bay without NMPORT's permission during normal working hours;

3. Should you require access to the work place for purposes of preparing your defence, you will be required to obtain the prior, written approval of your supervisor, the Port Captain and/or the Executive: Human Resources or their duly authorized representatives;

4. You are equally instructed not to interfere or disturb any employees of the Port of Walvis Bay or potential witnesses irrespective of whether during (sic) or after hours;'

[60] On 31 July 2018, just after 11:30, the appellant drove to Namport's premises and stopped his motor vehicle in front of Namport Head Office.

[61] The appellant's evidence that he entered the premises of Namport on 31 July 2018, to seek approval to leave the municipal area of Walvis Bay in order to take his fiancée and son with a medical condition to Usakos is with respect improbable, and the arbitrator correctly preferred the evidence of Namport as oppose to that of the appellant. The appellant's fiancée was allegedly due to return to Usakos for work and she could not seek alternative transport as their child had an urgent and serious medical condition, yet no explanation appears from the record why the child was not taken to any nearest medical facility.

[62] The appellant explained that he could not telephonically contact Mr Shatika on 31 July 2018, as his sim card and cell phone were faulty. It is for this reason that he

went to Namport to seek permission to leave the municipal area of Windhoek during working hours. The appellant testified that he was in possession of a separate cell phone and a new sim card on 31 July 2018, but that he did not have Mr Shatika's mobile number which was saved in his phone that was faulty. I find the appellant's version to be improbable as the appellant could phone the switchboard or reception from any phone to request for Mr Shatika's mobile number.

[63] Mr Coetzee argued that the fact that Mr Shatika confirmed exchanging mobile numbers with the appellant at Namport corroborates the version of the appellant. I disagree. The confirmation of exchange of mobile numbers does no more than confirm that the parties exchanged mobile numbers. The reason for the exchange of numbers advanced by the appellant was not corroborated by Mr Shatika. Besides, I hold the view that the reason proffered by the appellant regarding his cell phone and sim card being faulty is improbable. Therefore, nothing turns on the exchange of mobile numbers.

[64] To put this matter to rest, the cell phone records for the appellant's mobile number were produced at arbitration proceedings and they revealed that the appellant's mobile number was active and in use during the whole day of 31 July 2018.

[65] It follows, in my view, that there was no reasonable explanation for the appellant to approach the premises of Namport contrary to the conditions of his suspension. The appellant, therefore, breached the condition of his suspension which prohibited him from entering the premises of Namport. Similarly, the arbitrator did not err when she found that the appellant was guilty of breaching the condition of suspension.

Was the dismissal substantively fair?

[66] Mr Coetzee argued that the breach of the suspension alleged was not of such a serious nature that it warranted dismissal. He argued that the appellant did not interfere with any potential witness or disturb any of Namport's employees. None of the witnesses for Namport testified to any form of interference with witnesses and therefore to dismiss the appellant on the basis of this charge would be unfair. Mr Coetzee referred to the finding by the chairperson of the disciplinary hearing who found that the appropriate sanction for breaching a suspension condition would be a final written warning.

[67] Mr Vlieghe, in his main heads of argument, conceded that a breach of a suspension condition will not necessarily justify dismissal from employment. In the supplementary heads of argument filed later, Mr Vlieghe had a change of heart and submitted that dismissal was justified for violating a condition of the suspension as it constituted insubordination. He argued that it is possible for an employer to impose a sanction that is more severe than the recommended sanction. Hence, the dismissal meted out against the appellant was in order, so he argued.

[68] It is imperative to take note that indeed the chairperson of the disciplinary hearing found that the appropriate sanction for breach of a suspension condition was a final written warning, while dismissal would be appropriate for the charge of bringing the name of Namport into disrepute.

[69] The arbitrator did not distinctively determine the chairperson's recommendation of a final written warning to be imposed in respect of the breach of a suspension condition.

[70] Our labour law was settled by the Supreme Court on whether the employer is bound by the policies when it considers the appropriate sanction. In *Namdeb Diamond Corporation (Pty) Ltd v Gaseb*,[4] Hoff JA who wrote for the court remarked as follows at para 77:

[4] *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) at 1026 para 77.

'I agree with the observation[5] that a "court should guard against an elevation of a disciplinary code into an immutable set of commandments which have to be slavishly adhered to". I also agree that where there is a departure from such a code it should not be to the detriment of an employee.'

[71] The Supreme Court made it clear in *Namdeb (supra)* that a disciplinary code cannot be catapulted to a commandment which must be adhered to at all costs. The Supreme Court went further and stated that as much as a policy may be departed from, such departure should not be to the detriment of the employee.

[72] In *casu*, the disciplinary policy of Namport does not specifically provide for breach of a suspension condition. Mr Vlieghe argued that the charge of breach of a suspension condition is tantamount to insubordination, as the appellant refused to obey a lawful instruction when he violated a condition of his suspension. I accept that a breach of a lawful condition of the suspension results in failure to obey a lawful instruction from the employer. This, therefore, fits hand in glove with what constitutes insubordination. To bring this issue home, I find that when the appellant breached the condition of his suspension he committed misconduct in the form of insubordination.

[73] Namport's disciplinary policy divided offences of misconduct in four categories. They range in a file of how Namport views the seriousness of the offences and what the appropriate sanction a transgression. Category A lists offences which attract a verbal warning on first transgression. Category B lists offences requiring a first written warning for first offenders. Category C lists offences requiring a final written for first offenders. Category D lists offences that justify dismissal.

[74] Insubordination is listed amongst the offences provided for in category C of Namport's disciplinary policy, which provides for a sanction of a final written warning for a first offender. The appellant was a first offender when he was found guilty for breaching a condition of his suspension (insubordination). On the facts of this matter, I find that the offence of breaching a condition of the suspension is not dismissible. In

[5] Johan & Ronell Piron *Managing Discipline and Dismissal* at 200E.

my view the appropriate sanction to be meted out against the appellant, who was a first offender, on a charge of insubordination is one that is provided for in category C, and it is a final written warning. The appropriate sanction for insubordination should therefore be a final written warning.

[75] Mr Vlieghe, however, had another arsenal in his sling. He argued that the breach of suspension must be viewed in the context of the matter as a whole and which when considered together with the charge of bringing the name of Namport into disrepute justifies dismissal. Mr Coetzee argued contrariwise. I hold the view that context or not, the charge of insubordination is specifically provided for in category C and the sanction for such transgression is a final written warning for a first offender. This is also the law that the appellant is expected to have knowledge of that if he is found guilty of insubordination, the sanction to be meted out is that of a final written warning. I, therefore, do not agree with Mr Vlieghe that the context of the offence in question elevates it to be worthy of a sanction of dismissal above what is provided for in the policy.

[76] The chairperson was, therefore, acting within the purview of Namport's disciplinary policy when he recommended a final written warning on the charge of breach of a condition of suspension.

[77] The arbitrator did not pronounce herself on the specifically on the sanction applicable to the charge of breaching a condition of suspension. She only found that the dismissal was for a valid and fair reason and dismissed the appellant's claim of unfair dismissal after considering all both charges.

[78] I therefore proceed to consider whether dismissal was appropriate in respect of the charge of bringing the name of Namport into disrepute.

[79] The offence of bringing the name of Namport into disrepute is classified as a very serious offence, warranting dismissal as provided for in category D of Namport's disciplinary policy. In my view, it is not in every conceivable element of bringing the name of dispute that should lead to the dismissal of the employee. This position resonates with the principle cited above from the *Namdeb* matter, that a disciplinary

code should not be elevated to an immutable commandment. The facts and circumstances of each transgression must be assessed in order to determine whether or not the dismissal of the offending employee will be justified.

[80] Mr Vlieghe argued that the appellant was fairly dismissed because he breached a fiduciary duty towards Namport, which is an obligation not to work against the employer.

[81] This court in the *Namibia Protection Services (proprietary) Limited v Humphries*[6] considered whether or not an employee owes a fiduciary duty to his or her employer and stated the following at para 108:

'I state without fear of contradiction that an employee has a fiduciary duty or a duty of trust towards the employer and this includes the obligation not to work against his employer's interest. Such fiduciary duty is well established in labour law. *Smuts J*, in *Novanam v Willem Absalom & others*[7] quoted a passage with approval from *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks & others*[8] at 462G-463A where it is stated that:

> "There is in most, if not all contracts of service, whether it be an employment contract or a contract of agency, an implied fiduciary duty on the part of the employee or agent towards the employer or principal as the case may be. In *Premier Medical and Industrial Equipment (Pty) Ltd v Winkl.er & another* 1971 (3) SA 866 (W) at 867, Hiemstra J, quoting with approval Hawkins J in *Robb v Green* [1895] 2 QB1 at 10-11, said as follows at 86H-868A:
>
> > "There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in

[6] *Namibia Protection Services (proprietary) Limited v Humphries* (HC-MD-CIV-ACT-DEL-2018/01888) [2019] NAHCMD 509 (20 November 2019) para 108.
[7] An unreported judgment of the labour court delivered on 30 April 2014 in the case no's LC 101/2013 and LCA 47/2013.
[8] *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks & others* 2004 (4) SA 458 (C).

the contract of employment to that effect. It is stated thus in the leading case of *Robb v Green* (1895) 2 QB 1, *per* Hawkins J at 10-11:

> "I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters not appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service."'

[82] It is a well-established principle of our law that an employee owes a fiduciary duty towards an employer, and that he or she must always act in the best interest of the employer. This, therefore means that an employee must not work against the interests of the employer.

[83] I find that it does not necessarily follow as night follows day that when an employee acts against the interests of the employer or when an employee breaches a fiduciary duty, then the sanction to be meted out against him or her is dismissal. Sanctions for transgressions should not be meted out mechanically. The appropriate sanction must conform to the prevailing facts and circumstances of each particular matter. Depending on the seriousness of the transgression and the facts and circumstances of each matter, different sanctions may be applied. The more serious the facts and circumstances of the offence, the more it is likely to attract a severe sanction and the less serious the facts and circumstances of the offence the more likely that the offender may escape the severe sanction.

[84] In *casu*, although I have found, on the evidence on record, that the appellant was correctly found guilty of bringing the name of Namport into disrepute, it is critical to examine the nature of the applicable disrepute in order to appreciate the appropriateness of the sanction imposed.

[85] The disrepute involved in this matter is that the public and the customers of Namport could view Namport in low-esteem that it does not treat its employees fairly and that the employees were unhappy. The disrepute could also be that Namport forces its employees to belong to NATAU and not to a trade union of the choice of the employees being MUN. The disrepute could further be that Namport changes the terms of conditions of employment of its employees unfairly and at will.

[86] In order to better appreciate the magnitude of the disrepute, I have opted to also address what happened to the demonstrators.

[87] It is common cause that the employees who participated in the public demonstration were all disciplined by Namport. The employees were charged and found guilty of the following charges: 1. Participating in an illegal industrial action without the grievance procedure; 2. Insubordination by participating in an illegal public demonstration despite being cautioned not to do so by Namport; and 3. Bringing the name of Namport into disrepute by participating in an illegal pubic demonstration in full view of the public.

[88] At the disciplinary hearing, the chairperson recommended the sanction of a final written warning to six of the employees, and dismissal with notice, alternatively payment in lieu of notice in respect of 86 employees. As a result, 86 employees were dismissed from employment on 17 May 2019.

[89] The said 86 dismissed employees launched internal appeals against their dismissal. After hearing each appeal, separately, the appeal committee resolved that 53 employees be reinstated subject to certain reformative conditions, as they admitted guilt and showed remorse for their action. The reinstatement of the 53 employees was accepted by Namport despite the fact that the said employees were found guilty of, *inter alia*, an offence of bringing the name of Namport into disrepute listed in category D where the sanction provided for is dismissal. The admission of guilt by the said employees and remorse shown placed them in a different category. The other dismissed employees persisted in their innocence and showed no remorse for their actions and were therefore not reinstated. This, in my view, supports the finding that the sanction provided for in the policy is not cast in stone.

[90] I return to whether or not dismissal was a fair sanction to the appellant after being found guilty of bringing the name of Namport into disrepute.

[91] It appears to me that a possibility exists that the appellant would have been treated differently and would have received a lesser sanction had he admitted guilt and showed remorse. This appears from how the 53 employees were treated, although as will become apparent herein below, the appellant seems to have played a pivotal role to ensure that the demonstration is realised.

[92] Having listed the envisaged disrepute that the appellant put the name of Namport into, in the eyes of the public and the customers of Namport where they could view Namport in low-esteem that it does not treat its employees fairly and that the employees were unhappy; that Namport forces its employees to belong to NATAU and not their preferred union (MUN); and that Namport changes the terms of conditions of employment of its employees unfairly and unilaterally, I hold the view that the allegations are very serious and could have a severe negative impact to the good name of Namport.

[93] It is common cause that although peaceful, the public demonstration was carried out against the law as there was an existing exclusive bargaining agreement between Namport and NATAU which was not followed even after the appellant and demonstrators were cautioned against proceeding with the public demonstration. The appellant, who has experience as a union representative, and who should be better informed on labour matters than an employee with no labour relations experience, participated in a meeting convened to stage a public demonstration contrary to the law. The appellant contributed to the content of the petition which he was nominated to deliver on behalf of the demonstrators and which nomination he accepted. The appellant signed the invitations to the media, the police and the municipal traffic to attend to the demonstration, as well the notice to Namport. The appellant was placed on suspension with conditions. Despite being cautioned by the Namport of the illegality of the intended demonstration and being suspended with conditions including being prohibited from accessing Namport premises, the appellant was unmoved, he participated in causing the demonstration to proceed, he went to close proximity with the demonstrators to observe them on a matter of

interest to him, he accessed Namport premises in breach of a suspension condition and with no justifiable reason. The appellant blocked flow of traffic.

[94] The seriousness of the offence of bringing the name of Namport into disrepute, on the facts and circumstances of this matter, coupled with the above-mentioned actions of the appellant to cause the public demonstration to be realised, in my view, calls for the most severe sanction to be meted.

[95] I also find that the above actions of the appellant breached the fiduciary duty that he owed to the employer. The appellant had a duty to act in the best interest of his employer, Namport at all material times. In this matter, I find that the actions of the appellant, particularly after he was cautioned of the illegality of the intended demonstration and his suspension, is tantamount to being rebellious.Being rebellious to an employer stands in total contrast to one's fiduciary duty towards the employer, and depending on the facts and circumstances of the matter, such rebellious conduct may be dismissible.

[96] In view of the above conclusions, I find that proportionate to the nature and circumstance of the present offence of bringing the name of Namport into disrepute.

The notice of appeal

[97] For completion, I have opted to address the status of the notice of appeal.

[98] It is common cause that the appellant, in the notice of appeal and amended notice of appeal sought the relief to have his dismissal set aside, but he did not seek any other remedy that should follow after setting aside his dismissal.

[99] The court, after hearing oral arguments, requested the parties to file supplementary heads of argument on what approach the court should take if it finds that the appellant was unfairly dismissed for lack of a valid and fair reason for the dismissal. Mr Coetzee argued that the appellant seeks a reversal of the award and he also prays for further and/or alternative relief in the notice of appeal, therefore, the court should award an appropriate remedy to the appellant. He further argued that

during arbitration proceedings, the appellant sought reinstatement and compensation which relief was dismissed by the arbitrator. Considering that in the present proceedings, the appellant seeks the setting aside of the award it follows that the appellant seeks reinstatement and compensation.

[100] Mr Vlieghe argued the contrary. He argued that in this appeal, reinstatement and compensation do not form part of the grounds of appeal. He argued that some of the grounds raised in argument should not be entertained on appeal as they do not form part of the grounds set out in the notice of appeal.

[101] The appellant appears to have claimed reinstatement and compensation at conciliation and arbitration. I find that the appellant may have asked to be reinstated and/or to be compensated during conciliation or arbitration proceedings, but that is neither here nor there as this court is sitting as an appeal court guided by the notice of appeal. What the appellant sought at conciliation or arbitration is, therefore of no moment in this appeal if same finds no trace in the notice of appeal.

[102] Parker J in *Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo and Another*[9] at para 3, remarked as follows regarding the necessity to specify grounds of appeal in the notice of appeal:

> 'It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is "not a matter of form but a matter of substance … necessary to enable appeals to be justly disposed of (*Johnson v Johnson* [1969] 1 W.L.R. 1044 at 1046 *per* Brandon J). The *locus classicus* of a similar proposition of law by the Court is found in *S v Gey Van Pittius and Another* 1990 NR 35 at 36H where Strydom AJP (as he then was) stated, "The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues". That case concerned a criminal appeal, but I see no good reason why the principle enunciated by the Court should not apply with equal force to appeals in terms of the Labour Act.'

[9] *Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo and Another* LCA 02/2010, delivered on 7 March 2011 para 3.

[103] The purpose of setting out the grounds of appeal is well established in our law that it is to apprise the interested parties of the issues that are central to the appeal; to alert the court and the respondents and interested persons of the issues to be ventilated on appeal and to prepare accordingly within the circumference of the grounds of appeal raised. The said grounds also limit the preparation and define the extent of the contestation in the matter.

[104] Failure to set out grounds of appeal in the notice of appeal denies the appellant the right to venture in issues that do not form part of the grounds of appeal. Attempts to consider issues that do not form part of the grounds of appeal prejudices the parties involved, the respondents included as well as the court. Such an attempt, in my considered view, offends against the doctrine of notice and fairness. It negatively affects interested parties involved. In this matter, I find that the attempt to engage in the issues that do not form part of the grounds of appeal offends against Namport's rights to a fair hearing.

[105] Mr Coetzee invited the court to consider reinstating the appellant and/or awarding him compensation under the relief of further and/or alternative relief stated in the notice of appeal.

[106] I find that reinstatement and/or compensation are not the only remedies available to an employee that was dismissed unfairly. It is, therefore, imperative that the employee must clearly set out the remedy that he or she seeks in order for the other parties to prepare and address the court fully on the viability and reasonableness of the remedy sought. In the present matter, Namport was denied the opportunity to address the remedy belatedly sought in the appellant's supplementary heads of argument.

[104] I find that the relief of further and/or alternative relief is not available to an appellant who seeks a substantive and independent relief and who is duty bound to set out the details of the relief sought for the benefit of the other parties involved and the court. I find, as a result, that the argument by Mr Coetzee to consider reinstatement and compensation under the wings of the relief of further and/or

alternative relief is unconvincing and without merit. Reinstatement and/or compensation, in my view, are distinctive in form, nature and texture from further and/or alternative relief. Further and/or alternative relief in this matter is not strictly-peaking ancillary to the main relief sought to set aside the arbitration award. It will be unfair to the adversary and constitute a travesty of justice if reinstatement or compensation is awarded as a matter of course to the appellant under the guise of further and/or alternative relief.

Conclusion

[105] In view of the above conclusions and findings, I am of the view that the appellant was correctly found guilty on the preferred charges and the arbitrator cannot be faulted thereby. I further find that the sanction of dismissal meted out against the appellant is fair in light off the facts and circumstances of this matter. The arbitrator can, therefore, not be faulted for finding that the dismissal of the appellant was for a valid and fair reason.

105] In the premises, I find that the appeal falls to be dismissed.

Costs

[106] In view of the provisions of s 118 in the Act, and considering that none of the parties sought costs from the other in the event of succeeding, no costs will be awarded.

Order

[107] In view of the foregoing findings and conclusions, I make the following order:

1. The appellant’s appeal against the arbitration award delivered by the arbitrator on 5 December 2022 in as far as it provides that the dismissal of the appellant was substantively fair, is hereby dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

_____

O S Sibeya
Judge

APPEARANCES

FOR THE APPELLANT:	E Coetzee Of Tjitemisa & Associates, Windhoek
FOR THE RESPONENT:	S Vlieghe Of Koep & Partners, Windhoek