REPORTABLE

CASE NO: SA 42/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NATIONAL HOUSING ENTERPRISE **Appellant**

And

MAUREEN HINDA-MBAZIRA **Respondent**

Coram: MAINGA JA, DAMASEB AJA *and* HOFF AJA

Heard: **24 March 2014**

Delivered: **4 July 2014**

APPEAL JUDGMENT

MAINGA JA (DAMASEB AJA and HOFF AJA concurring)

[1] This is an appeal against paras 2 and 3 of an order granted by Parker J in the Labour Court on 3 April 2012. The respondent noted a cross-appeal, appealing against the whole judgment.

The background

[2] The sequel to the dispute is the following: the respondent, Ms Maureen Hinda-Mbazira, was an employee of the appellant, National Housing Enterprise (NHE) from 1 December 2002. She was the Regional Manager of the Central

Branch, with her office at Katutura. During November 2007, the respondent was suspended from duty and eventually charged with misconduct on eleven duplicated charges, which read as follows:

‘1. Failing to declare a conflict of interest, more particularly your involvement in an entity by the name of Southern Cross Real Estate CC, before becoming involved in such an entity.

2. Failure to refrain from further involvement in such aforementioned entity or in any manner being associated with such entity after having attempted to declare such conflict of interest and not having received the permission to continue with such entity.

3. Conflict of interest in that you failed to declare that you became qualified as an estate agent and/or registered yourself as an Estate Agent with the Estate Agent’s Board and were as at end 2007 still so registered, before such registration and/or thereafter, which activities are or could potentially be in direct conflict with the business and objects of NHE.

4. Changing of a deed of sale document by trying to create the impression that such document was one of ONK Properties CC, of which entity you are neither a member nor employee, while in fact such document was intended for your interests or the interest of Southern Cross Real Estate CC, in which entity you have an interest and/or attempting to utilize such different entity, namely ONK Properties CC, for purposes of selling property in respect of which the agent’s commission would be payable by the Seller to Southern Cross Real Estate CC of which latter entity you are a member and/or otherwise involved in and also by doing so acting out on the conflict of interest as set out before.

5. Through the actions as set out above falsifying and/or forging the address details of the said ONK Properties CC and utilizing the name ONK Properties CC without authorization. Such actions also result in breach of

trust and reflect negatively on your ethics and reliability pertaining to such expected from you in your position.

6. Failure to follow the policy and procedure for the purpose of granting housing loans, whether first time loans or upgrade loans or both, in that you approved a loan to a certain Ms Kavejandja in respect of Erf 9168, Katutura, which loan was combined in access of N$150 000,00 and whereas such approval should have been done by ALCO after consideration by ALCO and should not have been only considered and approved by you and where in fact ALCO had eventually rejected such loan application and whereas you authorised the builder to proceed to build without the loan having gone through the approval process first.

7. Exposing NHE to financial risk, thereby acting to the detriment or potential detriment of NHE and against the objects and interest of NHE, through the approval as set out in 6 above.

8. Approval of a second loan to a certain Ms Mentor whilst the same person, Ms Mentor, was not properly and regularly servicing her first loan, of which you did know alternatively should have known, thereby exposing NHE to financial risk, and further thereby acting to the detriment or potential detriment of NHE and against the objects and interests of NHE.

9. Exposing NHE to financial risk, thereby acting to the detriment or potential detriment of NHE and against the objects and interest of NHE, through your actions as set out in 8 above.

10. Failure as a result of the aforesaid actions/conduct to discharge the responsibilities and duties associated with your position and/or the performance expected from you in your position and/or not being competent to properly perform the duties and responsibilities of your position as expected from you, resulting also in a breach of the trust relationship with your immediate superiors and company at large.

11. <u>Breach of conditions of suspension</u>

> By attending the offices of NHE on at least two occasions, without having the necessary permission for such. Apart from the suspension letter, accused employee was also orally informed that she was not allowed to NHE's premises without Mr Shimuafeni's permission.'

[3] In his ruling in the disciplinary hearing, the chairperson regrouped the charges, namely, charges 1 – 5 were considered as count 1; 6 and 8 as count 2; 7 and 9 as count 3; 10 as count 4 and 11 as count 5. But notwithstanding the duplication of the charges, the chairperson found the appellant guilty on charges 1 – 3, 6, 7, 8, 9 and 10. Respondent was acquitted on charges 4, 5 and 11.

[4] On 7 April 2009, the Chairperson recommended demotion to a non-managerial level post, alternatively dismissal. He further noted that the respondent had the right to appeal in accordance with the employer's appeal procedure.

[5] In a letter dated 27 April 2009 received by the respondent on 30 April 2009, the Chief Executive Officer (CEO) of NHE dismissed the respondent from the service of NHE. The letter in its entirety reads as follows:

> '27th April 2009
>
> **CHIEF EXECUTIVE OFFICER'S DECISION – DISCIPLINARY HEARING BETWEEN NATIONAL HOUSING ENTERPRISE AND MS M HINDA-MBAZIIRA.**
>
> Having made a thorough review of the documents relating to the disciplinary proceedings in the matter between NHE and Ms M Hinda-Mbaziira, in particular points of argument in mitigation, the ruling and the recommendation by the Chairperson of the Disciplinary Committee, I, in my capacity as a Chief Executive Officer of the NHE, have arrived at the decision stated below:

It is my decision that the services of Ms M Hinda-Mbaziira with NHE be terminated with notice, in line with the alternative recommendation of the Chairperson.

The grounds for my decision are as follows:

1. Ms M Hinda-Mbaziira was found guilty on all major and critical charges that clearly show that she acted in complete disregard and disrespect of the relevant company policy and authority;

2. Ms Hinda-Mbaziira's actions have seriously compromised her integrity and and the trust that the company put in her as a Regional Manager responsible for NHE business operation arm that is responsible for more than 60% of the company's operations;

3. Having considered points in mitigation, there is no distinct show of remorse on the part of Ms Hinda-Mbaziira. I have serious doubts if her behavior, attitude and actions will ever change if put in a different lower position. Also any possible lower position would likewise involve the dealing with issues to the one she has been found wanting in her current position;

4. Due to the sensitivity of the business NHE is involved in, which entail handling public and clients money in the form of financial services NHE renders, the continued presence of Ms Hinda-Mbaziira within NHE's employment (having been found guilty on key corporate governance issues), presents a reputation and trustworthy risk for NHE in the eyes of the public, clients and shareholders of NHE.

Ms M Hinda-Mbaziira has a right to appeal this decision, if she so desires, in line with company policy and rules of natural justice.

signed
Vinson Hailulu
Chief Executive Officer
National Housing Enterprise'

[6] The respondent lodged an internal appeal on 6 May 2009 in accordance with the NHE policy referred to by the CEO. It is common cause that in accordance with the disciplinary code, the board should have rendered its decision within fourteen days from the date the appeal was noted, but it failed to do so. It made its decision upholding the decision of the CEO approximately seven months later on 8 December 2009. Respondent was notified of the failure of her appeal on 9 December 2009. The board also took a decision to decline to compensate the respondent for the period June 2009 up to when its decision was rendered.

[7] While awaiting the decision of the board, the respondent on 1 July 2009 referred a dispute of unfair labour practice against the NHE and/or the board under case no CRWK 455-09 to the office of the Labour Commissioner. In that referral the respondent inter alia sought an order compelling the appellant to render a decision on her appeal. Her referral was upheld on 25 February 2010 and the appellant was ordered to compensate the respondent in the amount of N$110 723,85.

[8] Once she was notified of the failure of her internal appeal, on 7 May 2010, the respondent declared a dispute and referred a further dispute of unfair dismissal and unfair labour practice to the Labour Commissioner. Her case was that the dispute arose on 9 December 2009. The Labour Commissioner initially

referred the dispute for conciliation which failed whereafter, despite objections from the appellant, the arbitrator Ms Tuulikki Mwafufya-Shilongo, assumed jurisdiction, dismissing the appellant's objection of the dispute being filed outside the parameters of s 86(2)(*a*) of the Labour Act 11 of 2007 (the Act). She rendered the award on 9 February 2011 and made the following order:

'a)

- that the respondent reinstates the applicant as of the 1 March 2011;
- that the respondent gives a 6 months written warning to Mrs. Hinda-Mbazira;
- that the respondent also reprimand Ms. Alex and Mr. Shimuafeni on the issue of the Loan to Ms. Kavejandja;
- that the respondent pays to the applicant an amount equal to her 4 months' salary; i.e. N$186 390,12 and
- that the respondent sends the applicant on a refreshing training on matters that the respondent feels applicant needs help.

Or alternatively

b)

- that the respondent pays the applicant's salary from 16 September 2009 to 28 February 2011 i.e. N$46 597,53 x 17 = N$792 158,01;
- plus an amount equal to 12 months for early termination and compensation for the dismissal i.e. N$46 597,53 x 12 = N$559 170,36.

If there have been increments to this position during the period the applicant has been dismissed, the calculations should be adjusted to such increment.

This Arbitration Award is final and binding on both parties and it is enforceable by the law. Interest will accrue on the stated amounts as per the provisions of law on interest.'

[9] The above award was made an order of the Labour Court by Unengu AJ on 25 February 2011.

The High Court Proceedings

[10] The appellant appealed against the award contending amongst other things, that the ruling by the arbitrator that she had jurisdiction to hear the referral was a misdirection given the fact that the dispute had been referred out of time, more than six months after the dismissal of the respondent, contrary to the provisions of s 86(2)(*a*) of the Act.

[11] In its judgment delivered on 3 April 2012, the Labour Court found that the six-month time limit in terms of s 86(2)(*a*) of the Act begins to run after all reasonable steps, including disciplinary hearing and subsequent appeal, have failed to resolve or settle the dispute; and further that in terms of the Act 'dispute' is not synonymous with dismissal for not every dismissal begets dispute in our Labour Law, which a party may refer to the Labour Commissioner in terms of the Act. In other words, according to the Labour Court, on 30 April 2009, when the respondent received the letter of dismissal, no dispute arose between the parties which necessitated a remittal of the dispute to the Labour Commissioner, as the dismissal was subject to the internal appeal to the board of the appellant. The Labour Court thus found that the dispute only arose when the board of the appellant had confirmed the dismissal on 8 December 2009 and communicated to the respondent on 9 December 2009. Accordingly the Labour Court held that the referral was made within the time limit of six months and therefore the arbitrator had jurisdiction to entertain the referral. The Labour Court further found that the

arbitrator misconceived her duty under the reference which was to determine whether the dismissal of the respondent was unfair, a finding she failed to pronounce in terms of s 86(15) and (16) of the Act and therefore the award was invalid. The Labour Court further found that in terms of s 89 of the Act what a party may appeal from is the arbitration award not an order that ensues after being filed in terms of s 87(1)(*b*). Therefore that Court declined to entertain the issue whether the award had become an order of the Court as it was invalid *ab initio.* The Labour Court accordingly made the following order:

> ‘1. The arbitration award under Case No. CRWK 361-10 made by arbitrator Ms T Mwafufya-Shilongo is set aside.
>
> 2. The matter is remitted to the Labour Commissioner and the Labour Commissioner must refer the dispute to arbitration to be conducted by an arbitrator other than Ms T Mwafufya-Shilongo to resolve the dispute.
>
> 3. There is no order as to costs.’

[12] It is against paras 2 and 3 of the order of the Labour Court that appellant now appeals and the entire judgment, the subject of a cross-appeal by the respondent.

The submissions

[13] The appellant argues that the Court *a quo* misdirected itself when it held that the matter had been referred to arbitration within the six month period, and/or that the time period in terms of s 86(2) had not commenced running on the date of respondent’s dismissal, namely, on 27 April 2009, as the wording of s 86(2) is clear

and that the finding by the Court *a quo* flies in the face of the direct, clear and unambiguous wording of s 86(2)(*a*) that defines the relevant juncture as the date of dismissal; that if the legislature intended that the relevant juncture should be the time when all the internal remedies have been exhausted, it would have said so, as the South African Legislature did in s 191(1) of the South African Labour Relations Act 66 of 1995 (LRA)[1], that the old South African LRA, prior to its amendment in 2002, contained a provision similar to that of s 86(2)(*a*) of the Namibian Labour Act, that such provisions were interpreted in a number of judgments[2] to mean that the juncture contemplated by the wording 'date of dismissal' was the time and date when the decision to dismiss was communicated to the employee, prior to any disciplinary hearings or internal appeal; therefore the date of respondent's dismissal was 27 April 2009; that there is no basis in law for the respondent to have exhausted her internal remedies before she could refer a dispute in terms of the provisions of s 86(1), that the respondent should have lodged the appeal and refer the dispute to the Labour Commissioner and inform the NHE board that such step was taken merely to protect herself if the appeal were to be unsuccessful or refer the dispute to the Labour Commissioner and seek a postponement of the hearing until the decision of the NHE board was made available as provided for in the regulations of the Act, that the non-compliance with the six months period as provided by s 86(2)(*b*) rendered the subsequent award made in favour of the respondent a nullity; that the finding that the arbitrator failed to deal with the referral submitted to her was wrong, for the arbitrator did not deal with the referral

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[1] Section 191(1)(*b*)(i) of the South African Labour Relations Act 66 of 1995 provided: 'A referral in terms of paragraph (a) must be made within:
30 days of the date of dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal.'

[2] *Gous v Kommissie vir Versoening, Bemiddeling en Arbitrasie en Andere* (2002) 23 ILJ 1830 (LC); *Edgars Stores Limited and SACCAWU* (1998) 19 ILJ 771 (LAC); *SACCAWU v Shakoane* (2000) 21 ILJ 1963 (LAC).

submitted to her, but failed to make any findings in such arbitration that could substantiate or justify her award, that the setting aside of the arbitration and remitting the matter to a fresh hearing was wrong as s 89(10) of the Act provides that the Court could, where an award is set aside, 'determine the dispute in the manner it considers appropriate'; that as regards the substantive merits of this appeal, given the fact that the entire transcribed record of proceedings was before the Court *a quo* and this Court, that even if the appellant's main argument were to be unsuccessful the question whether the dismissal of the respondent was procedurally and/or substantially unfair should be considered by this Court, and not be referred back for a fresh hearing, that the complaints of the respondent as regards the substantive merits of the appeal are frivolous and vexatious and without merit, that the issues raised by appellant in its appeal are questions of law and not facts as asserted by the respondents, that paras 2 and 3 of the order of the Court *a quo* should be set aside, the dismissal of the respondent as conveyed to the respondent on 9 December 2009 should be confirmed and that the respondent should be ordered to pay the appellant's costs of this appeal as well as the costs of the proceedings in the Court *a quo* under Case No LCA 17/2011.

[14] The respondent's submissions were rather concise. Counsel for the respondent argues and submits that the dismissal of the respondent on 27 April 2009 was subject to appeal, when regard is had to what should be the proper interpretation and construction of the letter of the CEO dated 27 April 2009, that the language of the letter of 27 April, the CEO intended to terminate the employment of the respondent subject to giving the respondent the opportunity to appeal if she so desires in line with the NHE's policy and that the dismissal only became effective,

once the board of the appellant rendered its decision confirming the dismissal, that in fact the board had to decide whether the respondent was to be compensated from the end of June 2009 until its decision was rendered on 9 December 2009 which it declined and therefore it was clearly indicative that the decision of the CEO was subject to the outcome of the appeal and thus the referral to the Labour Commissioner on 7 May 2010 was within the six month period as contemplated in s 86(2)(*a*) of the Act, that the appeal was academic if regard is had to the fact that the arbitration award was made an order of Court before the appeal was filed, and there is no application to set aside the order of Court making the arbitration award an order of Court; that an order of Court of law stands until set aside by a Court of competent jurisdiction and that until that is done, the Court order must be obeyed to even if it may be wrong; that the arbitration award is clear, if there is uncertainty in its meaning this Court was in a position to clarify the anomaly to give effect to the true meaning of the award; that in as much as the appellant did not seek to review the award, the Court *a quo* was not required to consider the rationality of the material facts before the arbitrator as to whether it justified the findings; that the appellant appealed the award on an aspect which could have been clarified under general principles of law, the parties could have sought the correction or clarification of the alternative award whether it could be exercised by the appellant, by approaching the arbitrator in that regard, that this may no longer be necessary as the respondent elects to be compensated, but that this Court has a general discretionary power to correct the patent error or omission that the orders of the arbitrator are in the alternative; and that the appeal should be dismissed with costs including the costs of one instructing and one instructed counsel.

Relevant legal provisions

[15] The key provisions bearing on this appeal are as follows:

> ‘82. (7) Any party to a dispute may refer the dispute in the prescribed form to–
>
> (a) the Labour Commissioner; or
> (b) any labour office.
>
> (8) The party who refers the dispute must satisfy the Labour Commissioner that a copy of the referral has been served on all other parties to the dispute.
>
> (9) The Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve or settle the dispute, must –
>
> (a) refer the dispute to a conciliator to attempt to resolve the dispute through conciliation;
> (b) determine the place, date and time of the first conciliation meeting; and
> (c) inform the parties to the dispute of the details contemplated in paragraphs (a) and (b).
>
> 86. (1) Unless the collective agreement provides for referral of disputes to private arbitration, any party to a dispute may refer the dispute in writing to –
>
> (a) the Labour Commissioner; or
> (b) any labour office.
>
> (2) A party may refer a dispute in terms of subsection (1) only –
>
> (a) within six months after the date of dismissal, if the dispute concerns a dismissal, or
> (b) within one year after the dispute arising, in any other case.

Variation and rescission of awards

88. An arbitrator who has made an award in terms of section 86(15) may vary or rescind the award, at the arbitrator's instance, within 30 days after service of the award, or on the application of any party made within 30 days after service of the award, if –

(a) it was erroneously sought or erroneously made in the absence of any party affected by that award;
(b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
(c) it was made as a result of a mistake common to the parties to the proceedings.

Appeals or reviews of arbitration awards

89. (1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78 –

(a) on any question of law alone; or
(b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.

(2) A party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on the party.

(3) The Labour Court may condone the late noting of an appeal on good cause shown.

(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award –

(a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption; within six weeks after the date that the applicant discovers the corruption.

(5) A defect referred to in subsection (4) means –

(a) that the arbitrator –

(i) committed misconduct in relation to the duties of an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the arbitrator's power; or

(b) that the award has been improperly obtained.

(6) When an appeal is noted in terms of subsection (1), or an application for review is made in terms of subsection (4), the appeal or application –

(a) operates to suspend any part of the award that is adverse to the interest of an employee; and

(b) does not operate to suspend any part of the award that is adverse to the interest of an employer.

(7) An employer against whom an adverse award has been made may apply to the Labour Court for an order varying the effect of subsection (6), and the Court may make an appropriate order.

(8) When considering an application in terms of subsection (7), the Labour Court must –

(a) consider any irreparable harm that would result to the employee and employer respectively if the award, or any part of it, were suspended, or were not suspended;
(b) if the balance of irreparable harm favours neither the employer nor the employee conclusively, determine the matter in favour of the employee.

(9) The Labour Court may –

(a) order that all or any part of the award be suspended; and
(b) attach conditions to its order, including but not limited to –

(i) conditions requiring the payment of a monetary award into Court; or
(ii) the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.

(10) If the award is set aside, the Labour Court may –

(a) in the case of an appeal, determine the dispute in the manner it considers appropriate;
(b) refer it back to the arbitrator or direct that a new arbitrator be designated; or
(c) make any order it considers appropriate about the procedures to be followed to determine the dispute.'

The issues to be determined

[16] Two issues fall for determination in this appeal. The first is whether the interpretation given to s 86(2)(*a*) by the Labour Court is correct and the second is whether the Labour Court was correct in its finding that the award was invalid *ab*

initio setting aside the same for the reason that the arbitrator misconceived the referral submitted to her and referred the matter for a fresh hearing?

[17] The first question to be determined revolves around when the dispute arose. Did it arise when respondent was dismissed on 27 April 2009 or when her right of appeal was refused on 8 December 2009? The Labour Court, at the risk of being repetitive, found that the six months time limit in terms of s 86(2)(*a*) of the Act begins to run after all reasonable steps including disciplinary hearing and subsequent appeal (i.e. domestic remedies) have failed to resolve or settle the dispute. It further found that what a party may refer to the Labour Commissioner is a 'dispute' not a dismissal simpliciter and nude and that 'dispute' is not synonymous with 'dismissal' for it is not every dismissal that begets a dispute as a matter of course in our Labour Law. The Labour Court reasoned that s 86(2)(*a*) should be read contextually with s 82(7), (8) and (9). The Labour Court referred to s 82(9) which provides that the Labour Commissioner if satisfied that the parties have taken all reasonable steps to resolve or settle the dispute, must refer the dispute to a conciliator to attempt to resolve the dispute through conciliation. That Court took the view that the words 'reasonable steps' in s 82(9) can only mean the employer's domestic remedies (a disciplinary hearing and subsequent appeals where necessary). It further reasoned that the non-exhaustion of domestic remedies would dissatisfy the Labour Commissioner on referral of a dispute. Therefore, so the Labour Court held, the respondent had referred the dispute between the parties to the Labour Commissioner within the period prescribed by s 86(2)(*a*).

[18] In *SACCAWU and Another v Shakoane and Others*[3], a South African Labour Appeal case we were referred to by the appellant's legal representative, Nicholson JA who wrote for the minority stated:

> '[65] In the *Edgars Stores* decision no mention was made of any collective agreement which was binding between the parties. In the affidavit of Sylvester Mofokeng, a regional manager of the respondent, reference is made to a number of documents which were placed before the CCMA at the time of the arbitration. The Interim Recognition and Procedural Agreement dated 19 December 1984 governed aspects of consultation, negotiation and the employment relationship between the respondent, its employees and the first appellant (the union). The agreement provided that parties were to be bound by the terms and conditions of the agreement, subject to statutory and common law restrictions (clause 3.1), and the parties agreed "that it is in their mutual interest to attempt to reconcile any differences which may occur between them through the process of dialogue, discussion, consultation and negotiation *before either party declares a dispute over such differences"* (emphasis added).
>
> [66] The provision for internal resolution of problems is a laudable one, which is consistent with the purpose of the 1995 LRA to promote orderly collective bargaining (section 1) and section 23 which provides that such agreements are binding on the parties, members of registered trade unions and other employees. Such agreements also varies the contract of employment (see section 23(3)). It was not in dispute that the collective agreement retained its full cogency under the 1995 LRA despite being concluded under its predecessor.
>
> [67] The requirement that domestic remedies be exhausted before a court of law is approached has been justified because it is unreasonable for a party to rush to court before his domestic remedies are exhausted; the domestic remedies are usually cheaper and more expeditious than the judicial remedies, and the fact that, until a final decision has been given against an

[3] [2000] 10 BLLR 1123 (LAC) at 1141E-1144A-C.

applicant by a domestic tribunal, any irregularity complained of may still be put right and justice done (see *Shames v SA Railways and Harbours* 1922 AD 228 at 236; *Gora Mahomed v Durban Town Council* 1931 NPD 598 at 613; *Nunn v Pretoria Rent Board* 1943 TPD 24, but see also *Slade v Pretoria Rent Board* 1943 TPD 131, *Semena v De Wet* 1951 (2) SA 444 (T); *Golube v Oosthuizen* 1955 (3) SA 1 (T) at 4; *Colivas v Valuation Court, Pretoria* 1960 (4) SA 34 (T); *Lenz Township CO (Pty) v Lorentz NO en andere* 1961 (2) SA 450 (A); *Bartlett v Munisipaliteit van Kimberley* 1966 (2) SA 95 (G) at 103; *L v Sekretaris van Binnelandse Sake* 1967 (3) (T) at 82; *Frost v Peninsula Rent Board* 1968 (3) SA 303 (C)).

[68] A number of exceptions have been laid down where: (1) the tribunal or official appointed to afford the remedy has already prejudged the case; (2) an extrajudicial remedy by way of appeal exists and there has been no such decision at all, or if the decision was fraudulent or was reached otherwise than as the result of valid proceedings; (3) the extrajudicial remedy is not obligatory; (4) the tribunal, the proceedings of which it is sought to bring in review, has acquiesced in the review; (5) the tribunal established to afford the remedy is not authorised to rectify the irregularity complained of. See *Law of South Africa* “Administrative Law” First Reissue at paragraph 88. It does not seem to me that any of these exceptions apply in this matter.

[69] The problems in my view with this Court’s decision in the *Edgars Stores* case relates to the reasons that the rule requiring domestic remedies be exhausted. If a party were to rush off to court after the dismissal and before his appeal was dealt with it would be not only expensive but counterproductive. The dispute under the 1956 LRA had to be sent either to an Industrial Council or a conciliation board where conciliation and settlement was attempted. The duplication of procedures would lead to unnecessary expense. It goes without saying that the domestic remedies are usually cheaper and more expeditious than the judicial remedies.

[70] If an aggrieved employee sought the aid of the Industrial Court in terms of section 43 for his interim reinstatement, that might also be a futile exercise as he might still be successful with his domestic appeal. In fact my own impression is that the employer would have rushed off to the court and

blown the whistle on such proceedings on the basis that it was a waste of money and effort as the appeal might be successful. To argue otherwise would be to suggest that an appeal is a waste of time. The parties certainly did not think so when they spent considerable time and effort devising a fair appeal procedure. My experience reveals that appeals are successful on a number of occasions and are fully justified. To hold that a dispute does not arise until the appeal has been disposed of therefore is fully consonant with the above-mentioned rule of administrative law that, until a final decision has been given against an applicant by domestic tribunal, any irregularity complained of may still be put right and justice done. (My emphasis).

[71] An anomaly was suggested in argument concerning the fact that a dispute arises when the parties lock horns. Were an employee to delay for some years before articulating his opposition to the dismissal, so the argument ran, the dispute would only arise at that time. What this overlooks is that the collective agreement provides that the employee must articulate his dispute in the form of an appeal within a defined period. A court would never come to the aid of an employee who totally eschewed the right to appeal and approached the courts many years later on the basis that the dispute only arose when he decided to oppose.

[72] In the labour arena the requirement that domestic remedies must be exhausted has also been considered. If a dispute arises in an undertaking, the employer or employee should first apply the internal settlement procedure to solve the problem before resorting to external resolution procedures. In the case of *Reckitt and Colman (SA) (Pty) v Chemical Workers Industrial Union* (1991) ILJ 806 (LAC) Harms J (as he then was) stated at 814B-D that where an employer and employee have entered into an agreement regulating discipline they have exhausted these before approaching a court. In *Mthembu v Claude Neon Lights* (1992) ILJ 422 (IC) De Kock M stated at 424E-F

> “The applicants should in the present case have exhausted their internal remedies prior to declaring a dispute. Where the grievance relates to the level of a person’s performance, which is something of which the persons in the company would have intimate knowledge, it

> is preferable to use the grievance procedure rather than to attempt to establish the level of a party's ability through evidence in court".
>
> In *Lashaba v Marburg Manufacturers (Pty) Ltd* (1992) ILJ 1285 (IC) the applicant was of the opinion that the external appeal was irregular – a view which turned out to be erroneous (at 1288D-F). In any event there was no express provision in the disciplinary code that the domestic remedies had to be exhausted. In *Food and Allied Workers Union v Amalgamated Beverages Industries Ltd* (1992) ILJ 1552 (IC) the Industrial Court sounded a warning that internal remedies must be exhausted and that the court would only assist a litigant in exceptional circumstances. See also in similar vein *JH van Staden v Western Platinum Mine* (1991) SALLR 7 2 (5). In *Mkhwanazi v Plasser Railway Machinery (SA) (Pty) Ltd* (1993) ILJ 237 (IC) the court held that an employee's refusal to exhaust internal remedies may be justified. In that case the employee did not know what the case was against him and an appeal was useless in those circumstances (at 240D-G). Cf also *Jockey Club of SA v Feldman* 1942 AD 350; Wiechers *Administratiefreg* 304; Kachelhoffer 1965 *THRHR* 225.'

[19] Appellant argued that the wording of s 86(2)(*a*) is clear and that it does not refer to the date of the finalisation of the appeal pursued following a dismissal, but unequivocally and unambiguously refers to the period ending six months after the date of dismissal and that if the Legislature intended the word dismissal to encompass exhaustion of the domestic remedies it should have said so as was the case in s 191(1)(*b*)(i) of the South African LRA above and that the old South African LRA prior to its amendment in 2002 contained a provision similar to that of s 86(2)(*a*) of the Namibian Labour Act; that the words 'date of dismissal' were interpreted in a number of judgments to mean that the time and date when the decision to dismiss was communicated to the employee, prior to any disciplinary hearings or internal appeal and that such judgment should guide the interpretation of s 86(2)

(*a*). Counsel for the appellant further submitted that there is no basis in law that it was obligatory for the respondent to have exhausted her internal remedies before she could refer a dispute in terms of s 86(1) or that it would be regarded as premature to file a referral pending the hearing of an appeal and that a prudent dismissed employee would clearly without any prejudice to his/her appeal refer a dispute and inform the appeal tribunal that such step was taken merely to protect the employee, if the appeal were to be unsuccessful and on that basis seek a postponement of the referral with the arbitrator.

[20] The suggestion that the respondent should have filed the referral and inform the NHE board which was then seized with her appeal that she took such a step, merely to protect herself and/or seek a postponement of the referral with the arbitrator, highlights the absurdity that will result if we accept the interpretation that counsel for the appellant accords to s 86(2)(*a*) for various reasons: The NHE board could have declined to further entertain the appeal as the dispute had been referred to another tribunal; the Labour Commissioner could have declined the referral as the step would have been in conflict with s 82(9), i.e. a failure to have taken reasonable steps to resolve the dispute, or if he had entertained the dispute, he could have rejected the request for a postponement or if it did, it could not have waited for the period of six to seven months the NHE board took to pronounce itself on the appeal. In terms of s 86(7)(*a*) and (*b*), an arbitrator is obliged to determine the dispute before him expeditiously and with the minimum of legal formalities.

[21] As Nicholson JA correctly stated in the *Edgars Stores* matter above what counsel suggested would result in a duplication of procedures which would lead to unnecessary expense and effort if in this case the appeal would have been successful.

[22] It must have been obvious to the Legislature when the Act was being conceived that if a dispute arises there would be one or more appeals within the institution before resort is had to external resolution procedures. The argument that if the Legislature intended 'dismissal' in s 86(2)(*a*) to mean dismissal after all internal remedies have been exhausted, it should have said so, is equally good and plausible for the reverse argument that 'dismissal' in s 86(2)(*a*) means after all internal remedies have been exhausted. And for the reasons given by the minority in the *Edgars Stores* matter we prefer the latter interpretation. Appeal is part and parcel of the trial or hearing process, if it was not, there would have been no need to appeal. The comparison that counsel draws of s 86(2)(*a*) with a similar provision in the South African LRA above nor the South African decisions interpreting the said provision finds no application nor do the High Court cases[4] counsel referred this Court to. In my opinion in the circumstances of those cases, they were correctly decided. The referrals were filed out of time or had prescribed. In any event, the circumstances in those cases are distinguishable from the case before us. In *Namibia Development Corporation* matter, Smuts J stated that his observations on the point under consideration were obiter.

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[4] *Nedbank Namibia Limited v Jacqueline Wanda Louw*, Case No LC 66/2010, unreported, delivered on 30 November 2010 per Henning AJ, *Namibia Development Corporation v Philip Mwandingi and others*, Case No LCA 87/2009, unreported, delivered on 3 December 2012 per Smuts J, *Standard Bank Namibia v Romeo Mouton*, Case No LCA 04/2011, unreported, delivered on 29 July 2011 per Hoff J.

[23] I fully associate myself with the sentiments of Nicholson JA above and in my opinion Chapter 8 of the Act, particularly s 82(9), is consistent with the observations of Nicholson JA, the prime purpose of dispute resolution in Namibia and it is in that regard the Namibian Labour Act differs from that of South Africa.

[24] Section 86(2)(*a*) when read together with s 82(9) leaves no doubt that a referral can only be considered by the Labour Commissioner once all internal remedies in an undertaking have been exhausted. In *Floors Johannes Nel v Shinguadja BM and Others*[5], Geier J correctly found that the use of the word 'must' in s 86(5) and (6) of the Act is not directory but peremptory as an interpretation of the word to be directory would defeat the aims and objectives of first preventing disputes through conciliation[6]. The learned judge went on to say: -

> '(8) The use of the word "must" in my view, demonstrates that the Legislature intended to lay down the requirement of conciliation, as a peremptory precondition, which has to be met before any dispute would be allowed to proceed to arbitration.'[7]

[25] The argument that s 82(9) could not be read together with s 86(2)(*a*) because it was seated in Part B while s 86(2)(*a*) was in Part C of the Act, has no merit, as Part A, B, C and D are clustered under Chapter 8 headed 'Prevention and Resolution of disputes'. Conciliation is but the second port of call, from the employer's disciplinary enquiry in the hierarchy of decision-making forums and I fail to see how the provisions related thereto could be read in isolation to the

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[5] Case No LCA 29/2013, unreported delivered on 20 November 2013 per Geier J.
[6] Para 60, see also paras 51 – 59.
[7] Para 61.

provisions related to arbitration. In dispute resolution conciliation is stage one and arbitration stage two, they are inseparable. Section 86(5), (6) and (11) provides:

> '(5) Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.
> (6) If the conciliation attempt is unsuccessful, the arbitrator must begin the arbitration.
> (11) If the parties to the dispute consent, the arbitrator may suspend the proceedings and attempt to resolve the dispute through conciliation.'

[26] It is very clear on reading the dismissal letter by the CEO that he did not purport to have the final say on the dismissal of the respondent. He dismissed the respondent subject to an appeal. He was not even the person who should have made the decision on whether the respondent should have been paid for the period the board took to consider the appeal, that was a prerogative of the board. The affairs of the NHE are managed and controlled by a board of directors. Section 5(1) of the National Housing Enterprise Act 1993[8] (NHE Act) provides:

> '5(1) The affairs of the NHE shall be managed and controlled by a board of directors, which may exercise the powers and perform the duties of the NHE with due regard to the provisions of this Act.'

[27] Section 22 of the Act which provides for the exercise of powers by NHE and submission of powers by the board to the Minister was amended by the National Housing Enterprise Amendment Act 2000[9] and subsec 4 was inserted and it provides:

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[8] Act No 5 of 1993.
[9] Act No 32 of 2000.

> ‘(4) The Minister may at any time require the board to submit to him or her a report relating to –
>
> (a) the achieving of the objects of the NHE;
>
> (b) the exercising of the powers of the NHE;
>
> (c) the management, including the financial management of the NHE; and
>
> (d) any other matter contemplated in this Act as the Minister may deem expedient.’

[28] It goes without saying, therefore, that it is the view of this Court that the NHE board which is entrusted with the management and control of the NHE affairs had the final say on the dismissal of the respondent, which dismissal the CEO made subject to the appeal to the board.

[29] The conduct of the respondent in an attempt to resolve the dispute can be said to have been prompt at all levels of the dispute. It was the appellant’s board of directors that conducted itself inconsistently with its own disciplinary code and procedure. That divergence from its disciplinary code was correctly found to have constituted an unfair labour practice. The board caused the very issue which appellant so passionately argued before this Court.

[30] Therefore, the Court *a quo* was correct in the interpretation it accorded to s86(2)(*a*), that is, the six months time limit in terms of s 86(2)(*a*) of the Act, begins to run after all reasonable or all internal remedies have been exhausted and failed to resolve or settle the dispute. Such an interpretation does not violate or offend

the intention of the legislature in its use of the words ‘dispute’ and ‘date of dismissal’ in s 86(2)(*a*).

[31] It thus follows necessarily that the respondent was finally dismissed on 8 December 2009 and the arbitrator had jurisdiction to hear the dispute and any argument to the contrary is without merit.

[32] I now turn to consider the second question. This concerns the order of the Court *a quo*, setting aside the award by the arbitrator and referring the dispute back to the Labour Commissioner for a fresh hearing by an arbitrator other than Ms T Mwafufya-Shilongo. The Court *a quo* gave the reason for the order as a misconception on the part of the arbitrator of the terms for the referral of the dispute. When the dispute was referred to the Labour Commissioner the issue that the arbitrator had to determine was whether the finding of guilt and dismissal of the respondent was procedurally and substantively fair. The Court *a quo*, expressed itself in this regard as follows:

> ‘The arbitrator has, thus, in my view misconceived his duty under the reference, which is to determine whether the dismissal of the first respondent is unfair; and if she found it to be unfair to make an appropriate order in terms of section 86(15) and (16) of the Labour Act. Although the arbitrator had delivered an award, embodying certain orders, I hold that the award is invalid because the arbitrator’s decision does not bring an end to the dispute as to whether the first respondent was unfairly dismissed.’

[33] The appellant successfully applied for leave to appeal to this Court against the referral of the dispute back to the Labour Commissioner and the order of no

costs, while the respondent was granted leave to appeal the entire judgment. The appellant argued that the Court *a quo* had all the facts and evidence before it, that is, the proceedings of the disciplinary enquiry and the arbitration proceedings. Appellant made reference to s 89(10) of the Act which provides that, where an award is set aside, the Court could 'determine the dispute in the manner it considers appropriate' and argued that the Court *a quo* should therefore have considered the issues before it and recorded its own judgment, rather than referring the matter to be heard *de novo* before a new arbitrator. Appellant submitted that the Court *a quo* erred in that regard and that it failed to consider the substantial prejudice to the appellant if proceedings, facts and events that eventuated during and before April 2009, approximately five years ago, would have to be rehashed in an entirely new hearing. The respondent argued that if there was doubt in the correctness of the award ordered by the arbitrator, it could be clarified on application by any party to the dispute and that this Court was in a position to clarify the anomaly to give effect to the true meaning of the award; that the respondent elects the alternative remedy, namely, compensation.

[34] I interpose here to say, the back and forth of dispute resolutions defeats the purpose of resolving disputes expeditiously. In terms of s 86(7)(*a*) and (*b*) an arbitrator is obliged to determine the dispute before him or her in a manner that the arbitrator considers appropriate and expeditiously and with the minimum of legal formalities. In as much as I accept that s 86(7) is not a carte blanche to an arbitrator to ignore the rules of evidence, in actual fact s 86(8) – (18) suggest how the arbitrator should conduct a dispute before him or her. Courts of law, to borrow the words of Lyster AJ, will have to understand that, 'the sorts of people who are

called on in industry, commerce and government on a daily basis to conduct disciplinary inquiries are departmental heads, managers and IR officers. They are not legally trained and they are of necessity dispense an informal and robust form of justice which is tolerated within the parameters of our law system. One of the primary reasons why this is tolerated and indeed tolerable is because the LRA has numerous provisions which allow the disaffected employees to pursue his/her rights further, to the CCMA, bargaining council, the Labour Court and the Labour Appeal Court.'[10]

[35] In *County Fair Foods (Pty) Ltd v CCMA & Others*[11] Ngcobo AJP as he then was stated:-

> 'I agree with Conradie JA that the Commissioner should be held not to have applied his mind to a particular facet of the matter merely because it is not explicitly dealt with in the award. Though desirable it may be, it is not expected of Commissioners to write well researched and scholarly awards. Awards must be brief and the proceedings before Commissioners must be dealt with expeditiously.'

[36] This matter has its origins in the letter of 14 March 2008 notifying the respondent of a disciplinary enquiry against herself. Six years down the line, the matter is still in our courts. Imagine the delay if the parties had agreed to start *de novo* before another arbitrator, possibly another appeal to the Labour Court and possibly to this Court. As the appellant argued, it is highly prejudicial to the parties particularly the employee who may possibly be without a job if it is a dismissal like in this case and use strained resources to fund a legal representative. It is my view

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[10] *Chamane v The Member of the Executive Council for Transport, Kwazulu-Natal & Others* [2000] 10 BLLR 1154 (LC) at 1160 C-D.
[11] [1991] 11BLLR 1117 (LCA) at 1128 I-J.

that unless the arbitrator misconducted himself/herself (see s 89(5) of the Act) in conducting the proceedings, the present is a proper case for the Labour Court and this Court to determine the dispute itself in terms of s 89(10)(*a*).

[37] The Court *a quo* ordered this case to be heard *de novo* before an arbitrator other than Ms Tuulikki Mwafufya-Shikongo for the only reason as set out earlier in this judgment. But on the reading of the arbitrator's judgment it becomes apparent, in layman's language, that the disciplinary enquiry, including the appeal to the appellant's board and the dismissal, was procedurally and substantively unfair when regard is had to para 7 headed 'Comments' which reads:-

> '**7. Comments**
> As an Arbitrator, I have the following observations to make:-
> This whole case has been full of irregularities from the beginning coming from both parties.
>
> - 1st the period that it took the NHE to conclude this matter was too long. There are prescribed periods in the Company rules during which events must take place, but these were not honoured; It is inhumane to charge someone, and to fail to conclude the process for over a period of up to over one whole year. Justice delayed, is justice denied.
> - It is understandable that there was a need to investigate the matter, but it does not take a competent investigation authority months to investigate a matter such as this;
> - Upon the conclusion of investigations, it took again some time before the charges could be laid, and it took unnecessary long time for a disciplinary hearing and the appeal hearing committees to finalize their findings. All these do not count positively for NHE's competency of dealing with issues, of which Mrs Hinda-Mbazira was a part to.

Coming to real issues on which the Applicant was found guilty, on the first issue of the Applicant's failure to declare a conflict of interest, the Respondent could not prove to the Arbitration proceedings that in deed Mrs. Hinda-Mbazira used her position or influence to favour a Company or firm in which she has an interest, therefore I have a reason to believe that she might not have found a reason to declare any interest as her registered company was dormant.

On the second issue of a loan of Ms Kavejandja, I do not understand why Ms. Alex who added the extra amount of N$50 000 was not taken to task. I am further puzzled by this kind of action of adding something to an already signed document. I normally see other Institutions drawing zigzag lines to cover the open space so that nothing else is added to the document. I strongly suggest that this should also be practiced at NHE to avoid similar situations.

The legal department also needs to pull up its socks so as not to allow further irregularities to occur.

Ms. Alex testified that she informed Mr. Shimuafeni about the additional amount of N$50 000 that she added immediately after she did, and that they had several discussions on the matter, and that he reassured her that it was not a big problem and that the error could be corrected, a discussion he also acknowledged.

This statement shows that even Mr. Shimuafeni knew there was a problem, but just not big, and an error, but could be corrected. Why were the two i.e. Ms. Alex and Mr. Shimuafeni also not be probed further on this?

Ms Hinda-Mbazira was/is also not totally clean in this matter. The statement which states that 'the only thing Mrs. Hinda-Mbazira did was to give authority for the builder to proceed. This was after the bond on the house was registered for the total loan of N$185 082,00. At the time this was done, Mrs Hinda-Mbazira was oblivious of the fact that the bond amount may not have been approved'. Why would she give authority for the builder to proceed while she is/was oblivious of the fact that the bond amount may not have been approved? And why didn't she ask as to why the amount was N$185 082,00 instead of N$135 082,00?

> On the third issue of an extra/additional loan to Ms. Mentor, I tend to agree with the Respondent that there was no need to approve an additional loan to a client who failed to service her original loan. I however, do also understand Mrs. Hinda-Mbazira's reasoning that the client had failed to pay back simply because she had lost her job and the time Mrs. Hinda-Mbazira approved her loan, she acquired a job with the GRN and that she fully settled her account. But the fact that one has a job should not always be made a reason to give an extra loan because there are many people who fail to settle their accounts notwithstanding the fact that they are employed.
>
> In conclusion, I would state here that mistakes have been done from both sides, as they are all human beings. I, at the same time do not believe that the relationship between the Respondent and Applicant was damaged beyond repair. I have noticed the statement of the Respondent that "the dismissal is so long back that to reinstate the Applicant will cause disruption and that the person appointed in Applicant's previous position, must be dismissed from such position – a situation clearly untenable and not to be favoured". I have this to say: NHE knew that there was a case of unfair labour practice and later, unfair dismissal opened against the Company, therefore, the Respondent should have thought of employing someone temporarily, while waiting for the outcome/conclusion of the said case. On the issue of trust, if NHE still trust Ms. Alex and Mr. Shimuafeni, I strongly believe that it can also afford to trust Mrs. Hinda-Mbazira, and just look into the issue of perhaps giving her a warning.'

[38] The above is stated very simply and I read that part of the award to mean a conflict of interest was not proved. Ms Alex added the extra N$50 000 and Ms Hinda did not approve the N$185 082,00 as alleged in the charge-sheet, although she should have established whether the amount was approved. Ms Alex and Mr Shimuafeni should also have been answerable to that charge, so is the legal department. Ms Hinda should not have approved the loan to Ms Mentor but had a reason why she approved the loan. Without saying the dismissal was unfair, she said both parties committed errors and she granted the order in the alternative,

giving Ms Hinda a choice to return to NHE or take the compensation for the unlawful dismissal.

[39] The question which arises is whether, having regard to the facts and the circumstances of the case, the guilt and dismissal was procedurally and substantively fair.

[40] In *NAMPAK Corrugated Wadeville v Khoza*, Ngcobo JA said the following:

> ‘33 The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly, a court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable. In judging the reasonableness of the sanction imposed, courts must remember that:
>
> > “There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take another view. One would quite reasonable dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him” *(British Leyland UK Limited v Swift* [1981] IRLR 91 at 93 para 11).
>
> 34 It seems to me that the correct test to apply in determining whether a dismissal was fair is that enunciated by Lord Denning MR in *British Leyland UK Limited v Swift (supra)* at 93 para 11, which is:

> "Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair".[12]'

[41] In *Computicket v Marcus NO & Others,* Brassey AJ stated:

> '17 The question of sanction for misconduct is one on which reasonable people can readily differ. One person may consider that dismissal is the appropriate sanction for an offence, another that something less, such as a warning, would be appropriate. There are obviously circumstances in which a reasonable person would naturally conclude that dismissal was the appropriate sanction, for example if there had been theft of a significant amount of money, fraud or other untrustworthy conduct on the part of the third respondent. The examples can be multiplied but there is no purpose in doing so here. There are obviously circumstances in which dismissal would not be warranted. I take for instance the circumstances of an employee who is five minutes late for work in circumstances in which such misconduct has no prejudicial consequences for the employee. Between those two poles there is a range of possible circumstances in which one person might take a view different from another without either of them properly being castigated as unreasonable.'[13]

[42] Applying the above test, I cannot hold that it was reasonable for NHE to dismiss Ms Hinda. Ms Hinda as set out earlier in this judgment was the manager of NHE's Central Regional Office. By a letter of 14 March 2008, she was notified of a disciplinary hearing against herself in that she contravened the disciplinary code of the Company in the manner detailed in the charges as in para [2] above.

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[12] [1991] 2 BLLR 108 (LAC) at 113 F-I.
[13] [1991] 2 BLLR 131 (LC) at 134 J-I 135 A-B.

[43] I have had no privilege to see the disciplinary code, as it did not form part of the appeal record. I assume, for the purpose of this judgment, that the two of the three charges that have crystallised as the bone of contention in the dispute, namely, the authorisation of a loan in excess of what Ms Kavejandja qualified for and approval of a second loan to Ms Mentor when she failed to service the first loan are chargeable offences. Without the privilege of having had access to the disciplinary code my gut feeling is that the two charges appear to me to be errors that any employee may make in a working environment. Take for example the loan of Ms Mentor; Ms Hinda authorised the loan but Mr Shimuafeni rejected the authorisation, but why was it an offence?

[44] Be that as it may, turning to the facts of this case, the evidence reveals that the so-called conflict of interest and the approval of the two loans bred the other seven charges. In the course of his judgment the Chairperson of the disciplinary enquiry found the charges to have been duplicated or split and grouped them as stated earlier on in para [3] of this judgment. Notwithstanding the finding that they were at most four counts, the Chairperson went ahead and convicted the respondent individually on all charges except on the three she was acquitted on. It was argued that there was no substance or merit in the contention that Ms Hinda was convicted and punished twice for the same misconduct and that the complaint relating to the procedural unfairness was cured in the arbitration proceedings. In my opinion it was the conviction on split charges that influenced the sanction of dismissal. Splitting of charges has the consequence that an accused is convicted and sentenced for more than once for the same offence which is prejudicial to the accused. That was the case here. In actual fact charges 4 and 5 had nothing to do

with the interests of NHE but she was nevertheless charged. Take for example charges 7 and 9, without a finding that they have been proved by evidence, the chairperson stated:

> 'Charges 7 and 9 in my opinion are very closely interlinked with charges 6 and 8. Due to the finding of guilt on charges 6 and 8 I have to find the accused (sic) guilty of exposing NHE to financial risk, thereby acting to the detriment or potential detriment of NHE (charges 7 and 9).'

[45] Charges 7 and 9 should have been part and parcel of charges 6 and 8 and to have split them is unacceptable. The arbitrator being a lay person the splitting of charges did not arise to her. The argument has no merit.

[46] But in his recommendation the Chairperson stated:

> 'I further agree with Mr Louw that the disciplinary code under paragraph 3.5.7 does not provide for inter alia exposing the employer, to financial risks and failing to execute the responsibilities associated with a position and duties.'

[47] But why was she charged on infractions that do not form part of the disciplinary code?

[48] The only evidence on the conflict of interest was that Ms Hinda registered as an estate agent and her involvement with an entity by the name of Southern Cross Real Estate CC. Mr Jongh who did the investigation against Ms Hinda on behalf of NHE conceded during cross-examination that he could not find any evidence that Southern Cross Real Estate was operational, particularly there was

no evidence that there was money received on behalf of the Estate Agency. Ms Hinda testified that before she wrote the examination of the Estate Agents' Board she had approached the HR Department so that NHE could fund the expenses involved. She was encouraged to write the examination as it would enhance her knowledge at work. She had approached Mr Shimuafeni on the issue of a conflict of interest and he informed her that he thought there was a conflict of interest. She later applied to the CEO to be allowed to operate the Estate CC but she received no reply. The crux of her evidence was that except for the registration of the Southern Cross Real Estate CC it was dormant.

[49] It was argued that and that is the allegation in the first charge, that the infraction of Ms Hinda of the conflict of interest was her failure to declare a conflict of interest before becoming involved in Southern Cross Real Estate CC. Long before she was suspended she applied and sought permission to operate the entity but received no reply. In any case, except for the registration of the CC, there is no evidence that it was operative or that there was any conflict with NHE. I agree with the arbitrator that this offence was not proved. In fact the Chairperson in his 'recommendation' stated:

> 'I have to consider the categories of offences as per the disciplinary code which does not make provision for getting involved in private business and subsequently creating a conflict of interest. It is however common practice that employers disallow such practice unless the written approval has been granted.'

[50] The chairperson or anybody in NHE for that matter, could not manufacture charges that are not provided for in the disciplinary code or any other instrument of the NHE. At the very least here ought to be prior warning by the employer to the

employee that certain specified conduct is disapproved and that any infraction will be visited with disciplinary action. Fairness demands that.

[51] As regards the charge relating to the approval of a bond for Ms Kavejandja, appellant relies on the arbitrator's comments above against Ms Hinda and submitted that the arbitrator's observations suggest the inherent fairness of the dismissal. I do not agree. The arbitrator stated that Ms Hinda should have enquired how the amount of N$135 028,00 she approved had increased to N$185 082,00. That may be so, but her explanation was that she ordered the builder to proceed on the strength of the bond of N$185 082,00 registered over the property. As I understand the evidence, the legal department before registering the bond should have picked up the error. She then accepted that Alco must have approved the excess bond of N$50 000. There is no evidence to the effect that if it was not for the instruction to the builder to proceed, the bond of N$185 082,00 would have been de-registered. The Chairperson of the disciplinary hearing in his judgment had remarked: 'I tend to agree with Mr Louw that it is strange that the request to register a bond is made before the loan application has been approved'. Mr Shimuafeni testified that he enquired from both Ms Hinda and Ms Alex and requested them to prepare a submission for Alco why the loan had been approved but they failed to do so. That and the fact that Ms Hinda did not establish whether the procedure to upgrade Ms Kavejandja was followed, is in my opinion, a different offence to that she was charged with. Ms Alex testified that Mr Shimuafeni assured her that it was a minor error it would be rectified and she was surprised that he turned around and made a case against Ms Hinda on that very issue. In my opinion it was Ms Alex and the legal department who should have been answerable for that

offence. Ms Hinda did not authorise an amount in excess of N$135 082,00. Ms Alex testified that she inserted the amount of N$50 000 after Ms Hinda had authorised N$135 082,00. The legal department before registering the bond of N$185 082,00, should have picked up that Ms Hinda had no authority to authorise an amount in excess of N$150 000. Mr Shimuafeni was asked why Ms Alex and the legal department were not charged on this offence but he could not offer an explanation. It shows naked prejudice towards Ms Hinda. In actual fact there is evidence that the then head of the legal department is now the head of the department vacated by Ms Hinda on her dismissal. There is no evidence that the authorisation of N$185 082,00 exposed NHE to a financial or potential financial risk; to the contrary there is evidence that Ms Kavejandja paid off the loan within two years. At the very least the evidence should have shown that the recipient of the loan was in arrears or had difficulties to service the loan. Therefore this charge too was not proved against Ms Hinda.

[52] The last of the allegations against Ms Hinda is the approval of the second loan to Ms Mentor when she failed to service the first loan. My quarrel with this offence is the fact that Mr Shimuafeni testified that he was alerted of this loan by the department of finance and he stopped the approval there and then. Ms Hinda testified that Ms Mentor could not service the first loan because she was laid off/retrenched in her previous employment. She had at the time she applied for a second loan secured a job with the government and received a government subsidy. Ms Mentor’s brother was going to buy her house and she was going to settle the outstanding amount on her first loan. Once Mr Shimuafeni had stopped or rejected the approval, why was it a chargeable offence? As it commonly

happens in a working environment, the senior employee may reject or halt what his/her junior may have thought is right. Ms Hinda, after investigation and establishing Ms Mentor's financial capabilities, as her legal representative in the disciplinary hearing correctly argued, used her discretion to authorise the second loan, but Mr Shimuafeni halted the approval or did not agree with her. Without the insight of the disciplinary code, it is my opinion that it is doubtful whether this offence was chargeable. Even if I were to presume in favour of NHE, that it was a chargeable offence, the approval which was halted did not expose NHE to any potential or financial risk. The Chairperson in his judgment stated that if it was not for Mr Shimuafeni the risk would have occurred. That is pure conjecture and speculation. There is no evidence that Ms Mentor would have failed to honour her obligations under the loan.

[53] In these circumstances the guilt and dismissal of Ms Hinda was substantively and procedurally unfair. The guilt and dismissal leaves one whistling in amazement. Ms Hinda was nine years in the employment of NHE; she was a first offender, none of the offences caused NHE any financial or potential financial loss for that matter. The alleged potential financial risk was based on absolute speculation. No reasonable employer would have charged, let alone dismiss Ms Hinda in the circumstances. The chairperson in his recommendation stated: 'No warnings, either written warnings or a final written warning had been submitted by the employer during aggravation.' Mr Louw in mitigation made reference to the conditions of employment, paras 3.7.1 to 3.7.4, and it is apparent that dismissal is reserved for repeat offenders given final warnings and that the offences with which

Ms Hinda was convicted of were not one of those contained in the conditions of employment.

[54] Even if one were to accept that the offences were chargeable, the appropriate sanction should have been a warning and training as the arbitrator had found. The dismissal sanction was highly unreasonable. The feeling that someone in the NHE wanted Ms Hinda out is irresistible.

The cross-appeal

[55] I now turn to the cross-appeal. As stated earlier on in this judgment, the respondent (Ms Hinda) was granted leave by Parker J to cross-appeal against the entire judgment. The grounds of appeal resorted under three issues, namely, that, save for the question of jurisdiction, appellant's all other grounds of appeal to the Labour Court are questions of fact contrary to s 89(1)(*a*) which provides that an appeal to the Labour Court against an arbitrator's award is confined to a question of law alone; the Court *a quo* erred when it considered the appeal against the arbitrator's award when the award was made an order of Court before the appeal was filed and where no application was made to have the order set aside first; and the Court *a quo* erred when it found that the arbitration award was invalid *ab initio.* Respondent directed no argument to the first ground of appeal and in my opinion it will be futile to canvass the issue and especially in light of the conclusion I arrive at on appellant's case. The order of invalidity of the arbitration award has been dealt with in the determination of the second question above. The only question to be determined was phrased by the appellant as follows: whether this appeal is competent, bearing in mind that the arbitration award was made an order of court

before the appeal (in the Court *a quo*) was filed, and there is no application to set aside the order of Court making the arbitration award an order of Court.

[56] The question as phrased by the appellant misunderstands the provision of s 89(1)(*b*). Section 87(1)(*b*) provides that:

> '(1) An arbitration award made in terms of this Part –
>
> (a) . . .
>
> (b) Becomes an order of the Labour Court on filing the award in the Court by-
>
> (i) Any party affected by the award; and
>
> (ii) The Labour Commissioner.'

[57] In terms of s 87(1)(*b*) the Labour Court is not required to make the award an order of Court. The award becomes an order of the Labour Court on the mere filing of the award in Court. Section 87 is consistent with the other provisions in Chapter 8 of the Act of resolving labour disputes with minimal legal formalities. The filing of the award resulting in the order of the Labour Court is purely practical measure to facilitate execution. Section 87 is different from s 158(1)(*c*) of the South African Labour Relations Act, 1995 which provided, that:

> 'The Labour Court may make an arbitration award or any settlement agreement, other than a collective agreement, an order of Court.'

[58] Our view of the matter is that the provision enabling the person in whose favour an arbitrator makes an award is borne of the practical reality that without it

being so made an order of court, execution thereon would be impossible. Had such a provision not existed, the awardee would have had to approach a court to make it binding on the party against whom it was awarded and to give it the legal force necessary for the awardee to enforce it through execution.[14] Thus, in the absence of s 87 of the Labour Act, an award of an arbitrator under the Labour Act would be no different from that by an arbitrator under a private arbitration in terms of the Arbitration Act 1965[15]. It is trite that in order for an arbitration award under the Arbitration Act to be enforced, it requires an order of court making it binding on the parties.[16] The reason for s 87 is to eschew the need for a party approaching a court to enforce an award. It clearly was not intended to have the effect contended for by the Respondent.

[59] Accordingly, there is no merit in the respondent's argument that the appellant first had to set aside the order of court before it could pursue an appeal against the award made by the arbitrator.

[60] Appellant's argument would have been valid if s 87 was worded similarly to s 158(1)(*c*) of the LRA. Section 87 should be read together with s 89 and 90. Both sections make reference to an arbitration award, in other words, even where the award has become an order of the Labour Court, in terms of s 87(1)(*b*) it remains the arbitration award. If it were an award made in terms of s 158(1)(*c*) of the South

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[14] *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 339 at 369.
[15] 42 of 1965.
[16] *Stocks & Stocks (Cape) (Pty) Ltd v Gordon NO* 1993(1) SA 156(T); *Irish & Co (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA623 (W); *Gerolemou/ Thamane Joint Venture v AJ Construction CC* [199] 3 ALL SA 74(T).

African Labour Relations Act, its weight would have been no different from the weight that any other order of Court bears[17].

[61] Therefore, when Unengu AJ purported to make the arbitration award an order of Court, he did so without jurisdiction making that order invalid and since Parker J had jurisdiction to hear the appeal it was competent for the appellant to raise at that forum the concerns concerning the legitimacy or otherwise of the award.

The relief

[62] This leads me to the question of relief. The respondent is not seeking reinstatement or re-employment but only compensation. This, in my opinion, should be determined on the basis of the salary and perks Ms Hinda enjoyed at the time of her dismissal plus a severance package as ordered by the arbitrator. From the record it appears that the respondent earned her salary until the end of April 2009 when it is alleged she was dismissed. She also earned a two month salary notice of May and June 2009. Respondent had referred an unfair labour practice dispute to the Labour Commissioner with success, granted on 25 February 2010 in the amount of N$110 723,85 which is half the amount she had claimed for the period 1 May to 9 December 2009 when her right of appeal was refused. In that period the arbitrator had deducted the salary for May and June 2009. It is not clear from the award on the unfair labour practice whether the respondent was paid the period 1 May to 9 December 2009 as she had claimed. What compounds that confusion is the fact that the arbitrator who heard the referral of the guilt and

[17] See *DartProps (Pty) Ltd v CCMA & Others* [1991] 2 BLLR 137(LC) at 139 C-I.

dismissal of the respondent made her order for compensation in favour of the respondent with effect from 16 September 2009, why that date, it is not clear from the award. Given what I find to be a confusion, it would be safe to depart in one instance from the order as granted by the arbitrator, i.e. 16 September 2009 to rather 1 July 2009 until 28 February 2011 with interest thereon in terms of s 87(2) of the Act, including bonuses, salary increments and any other benefits that the respondent would have been entitled to within the period of the order; minus the N$110 723,85 if it was paid.

Costs

[63] Before I turn to the order, a brief word on costs. Ordinarily no costs would have been ordered, but in the circumstances of this case, the appellant in terms of s 86(16)(*a*), should be ordered to pay respondent's costs of this appeal and that of the High Court. The issue of the six months time limit in s 86(2)(*a*) which occupied a greater part of appellant's argument in this Court was appellant's own creation when the appellant's board instead of considering the respondent's appeal as per the time limit in their own disciplinary code, took almost half a year to consider the appeal. When respondent declared a dispute at that point in time appellant then raised the issue of a failure to comply with the time limit in s 86(2)(*a*) which appellant raised in the other two instances before this Court. That is a conduct of a party desirous to benefit from its wrongdoing and it should not be tolerated. The extracts from the Chairperson's judgment and recommendation leave no doubt that the charges leveled against Ms Hinda are not embodied in the disciplinary code. It follows that they were created, multiplied and labeled 'serious' to have Ms Hinda out of NHE.

[64] In the result I make the following order:

1. The appeal is dismissed.

2. The cross-appeal is allowed.

3. The determination and order made by the Labour Court is altered to read:

   3.1 The dismissal of the respondent, Ms Hinda, was procedurally unfair.

   3.2 The appellant, NHE, is ordered to pay the respondent a salary and benefits she was earning at the time she was dismissed, from 1 July 2009 to 28 February 2011, including bonuses, salary increments/adjustments and any other benefits respondent would have been entitled to within the period of 1 May 2009 to 28 February 2011, minus the N$110 723,85 if it was paid.

   3.3 The appellant is ordered to pay an amount equal to 12 months for termination and compensation for the dismissal calculated at the salary respondent was earning at the time of her dismissal.

3.4 In terms of s 87(2) of the Act, appellant is ordered to pay interest on the amounts in 3.2 and 3.3 above at the rate of 20% per annum from 28 February 2011 until the date of payment.

4. The appellant is to pay the costs of the respondent of this appeal and the Labour Court which costs includes the costs of one instructing and one instructed counsel.

_____
MAINGA JA

_____
DAMASEB AJA

_____
HOFF AJA

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