REPORTABLE

CASE NO: SA 33/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

LEON JANSE VAN RENSBURG **Appellant**

and

WILDERNESS AIR NAMIBIA (PTY) LTD **Respondent**

Coram: SHIVUTE CJ, SMUTS JA and O'REGAN AJA

Heard: **4 November 2015**

Delivered: **11 April 2016**

APPEAL JUDGMENT

O'REGAN AJA (SHIVUTE CJ and SMUTS JA concurring):

[1] Mr Leon Janse van Rensburg, the appellant, is a commercial air pilot who seeks to overturn disciplinary sanctions imposed upon him by his former employer, the respondent, Wilderness Air (Pty) Ltd. The disciplinary sanctions followed a near accident at the Epacha airstrip in north-western Namibia near Etosha National Park. Mr Janse van Rensburg has appealed to this court, with the leave of this court, against a decision of the Labour Court that upheld his employer's

appeal against an arbitrator's decision that had set aside the sanctions imposed by the employer.

Facts

[2] Mr Janse van Rensburg, was employed as a pilot by Sefofane Air Charters, a predecessor of Wilderness Air (Pty) Ltd, the respondent, in March 2008. His initial contract was for a year, but it was extended at the end of that period. The incident which gave rise to this appeal occurred on 9 May 2010 at the Epacha airstrip.

[3] On that day, Mr Janse van Rensburg flew from Ongava to the airstrip at Epacha to collect some passengers. He arrived just after 13h00. His group of passengers were a little late for their flight. There were apparently three aircraft due to depart the airfield at the same time, and as there are no air traffic controllers at the airfield, the pilots discussed amongst themselves the manner of their departure. They agreed that they would take off in one direction from the runway and that aeroplane V5-MRK, piloted by Michael Brasler, and operated by Desert Air, would depart first followed by appellant in aircraft V5-ELE.

[4] However, as he was making his way to the runway, Mr Brasler changed his mind because the wind direction had changed and he decided to take off in the other direction. He announced this over the radio, but it appears that Mr Janse van Rensburg did not hear the announcement, probably because he was starting his aeroplane's engines at the time. So the appellant, not knowing of Mr Brasler's change of plan, and without visually checking to make sure his way was clear, turned into the runway in front of V5-MRK, just as it was accelerating to take off.

The result was that Mr Brasler had to take evasive action to avoid a collision. After the near collision, both Mr Brasler and Mr Janse van Rensburg completed their planned charter flights. After he had taken off, Mr Janse van Rensburg apologised to Mr Brasler on the radio for his action in causing the near collision.

[5] Mr Janse van Rensburg did not immediately report the incident to his employer, but did so the following day. Just over a month later, on 18 June 2010, the respondent gave him a notice to appear before a disciplinary enquiry. The charges levelled against him were (1) gross negligence, (2) failure to comply with safety regulations, (3) 'any other serious deviation from company policy and standards' and (4) offending clients. Mr Janse van Rensburg pleaded not guilty to the charges.

[6] The chairperson of the disciplinary enquiry found Mr Janse van Rensburg to have been negligent, but not grossly negligent, and so acquitted him on the first charge. He was found guilty of the other three charges. The chairperson of the disciplinary enquiry recommended that Mr Janse van Rensburg be issued with a final written warning for failure to comply with safety regulations and for offending clients. He was also issued with a written warning for a serious deviation from company policy because he had failed to report the serious incident 'within the most expeditious time'. The chairperson of the disciplinary enquiry also recommended that Mr Janse van Rensburg be grounded for three weeks till he had written an examination on Namibian aviation law, and on the safety regulations and standard operating procedures of the respondent. Finally, it was recommended that Mr Janse van Rensburg should for a period of six months after

competing the examinations fly on a PICUS (pilot in command under supervision) basis, with bi-monthly reports on his progress as well as a route check and proficiency check at the end of the six months after which he would return to his ordinary duties.

[7] Mr Janse van Rensburg lodged an internal appeal against the decision of the disciplinary committee but his appeal was dismissed. He then opted to comply with the sanctions recommended by the disciplinary committee. Upon his inquiry before he wrote the examinations, he was informed that the required pass mark in the exams was the industry pass mark, which was 75%. However, Mr Janse van Rensburg did not achieve 75% in either examination, but only 66% and 53%.

[8] Once he did not obtain the prescribed pass mark in his examinations, Mr Janse van Rensburg lodged an unfair labour practice complaint at the office of the Labour Commissioner in terms of the Labour Act 11 of 2007. The complaint had two parts: the first related to the disciplinary sanctions, and the second to an overtime dispute he had with his employer.

[9] The arbitrator upheld appellant’s unfair labour practice complaint, concluding that he had been wrongly convicted on the second, third and fourth charges. In his reasons, the arbitrator stated that the charges were ‘wrongly phrased’ and were not consistent with the respondent’s code of conduct. Nevertheless, the arbitrator concluded that the appellant could not ’completely escape blame because he partially contributed to the incident’. The arbitrator ruled that the respondent needed to be 'updated' with air safety regulations; and also

found him to have been guilty of insubordination in failing to attend a meeting with the respondent. The arbitrator set aside the disciplinary committee recommendations and replaced them with an award stating that:

a) Mr Janse van Rensburg should report for duty on the first working day following the award;

b) within three days after reporting for duty, the appellant's supervisor should complete a counselling session with him regarding compliance with the respondent's safety regulations and Namibian aviation regulations; and

c) within two weeks after the date of the award, the appellant should resume his ordinary flying duties on a PICUS basis for three months, after which, the award stated, the appellant should be subjected to a route check and proficiency check, before returning to his ordinary flying duties.

[10] The arbitrator also found that the appellant was entitled to overtime and ordered the respondent's accountant to meet with the appellant to determine how many hours of overtime the appellant had worked, and accordingly what was due to him.

[11] The respondent lodged a notice of appeal against the entire arbitration award. The grounds of appeal included the following:

a) that the ruling that the appellant had been wrongly convicted of the charges levelled against him was wrong in law given that the appellant had admitted negligence in relation to the near collision on 9 May 2010;

b) that the appellant had accepted the sanctions imposed by the respondent and was therefore not entitled to challenge the disciplinary committee award; and

c) that the arbitrator should not have made the order he did regarding overtime as the appellant had borne the burden of proving the number of hours overtime he had worked, a burden he had not met.

The notice of appeal also included a constitutional challenge to the terms of s 89 of the Labour Act but that challenge was abandoned before the Labour Court.

[12] The appellant opposed the appeal to the Labour Court.

Appeal to the Labour Court

[13] The Labour Court found that the arbitrator had erred in concluding that the appellant had been wrongly found guilty on charge 2, the failure to comply with safety standards, given that he admitted entering runway 11 without first visually checking that the runway was clear, something that the safety rules require. The Labour Court observed that it was difficult to discern from the award of the arbitrator the basis for his conclusion that the sanctions by the disciplinary committee were unfair. The Labour Court itself considered whether the measures

were fair in the circumstances. To do this, the President of the Labour Court undertook two enquiries: first, an objective investigation as to whether the sanctions were reasonable; and secondly a consideration of the process followed. After undertaking these enquiries, the court concluded that the sanctions imposed were not unreasonable. As to the question of overtime, the Labour Court found that the appellant had not met the burden imposed upon him of tendering evidence to establish the payments for overtime that were due to him. The court therefore upheld the respondent's appeal and set aside the decision and award of the arbitrator. No order of costs was made.

Appeal to this court

[14] Appellant sought leave to appeal the decision of the Labour Court, which was refused. Appellant then petitioned this court for leave to appeal the decision, which was granted. The grounds of appeal raised by appellant included the following –

a) that the appeal before the Labour Court raised matters of fact, and not law, and therefore the Labour Court should not have entertained the appeal;

b) the Labour Court wrongly found that the arbitrator's finding in relation to the second charge constituted an error of law, as it related to fact only;

c) the Labour Court should not have interfered with the sanctions imposed by the arbitrator because they caused no prejudice to the employer;

d) the Labour Court erred in considering the issue of negligence because it had not been before the arbitrator; and

e) the Labour Court erred in relation to its reasoning relating to the overtime award, on the basis that the arbitrator was entitled to make a declaratory order and require the respondent to determine the amount of overtime owing.

Postponement of the appeal *sine die*

[15] This appeal was originally enrolled for hearing on 20 October 2014, but on that date the Court was informed that counsel for the respondent had suddenly been taken ill and was unable to appear for the respondent. The appeal was thus postponed *sine die* to a date to be arranged with the Registrar. The question of the wasted costs of the appeal hearing was reserved. The appeal was once again enrolled for hearing on 4 November 2015, on which date argument on behalf of both parties was heard. The wasted costs of the appeal hearing on 20 October 2014 are considered at the end of this judgment.

Key submissions on behalf of the appellant

[16] It was submitted on behalf of the appellant that the appeal turns on two key issues. The first is whether the Labour Court erred when it upheld respondent's appeal against the whole arbitration award, given that s 89 of the Labour Act limits appeals in matters of this kind to a question of law alone. The second, if it is concluded that the appeal does turn on a question of law, is whether the Labour Court erred in overturning the decision of the arbitrator. In particular, the appellant

argued that the Labour Court was wrong when it concluded that the arbitrator had erred in setting aside the decision of the disciplinary enquiry in relation to the second charge, and that the Labour Court had also erred in reinstating the sanctions recommended by the disciplinary chairperson as well in its decision in relation to the question of overtime.

Key submissions on behalf of the respondent

[17] The respondent argued that determining the scope of the appeal in the Labour Court, and in particular considering whether that appeal raised questions of law alone, required an examination of the specific grounds of appeal themselves, and should not be based on language in the introductory paragraphs contained in the notice of appeal. A consideration of the grounds of appeal, the respondent argued, indicated that the appeal before the Labour Court had raised questions of law. Secondly, the respondent argued that the Labour Court had not erred in its conclusion in relation to the second charge as the appellant had failed to comply with safety procedures. Thirdly, the respondent contended that the Labour Court had not erred in reinstating the recommendations made by the chairperson of the disciplinary enquiry, which it was contended had not constituted an unfair labour practice. Finally, the respondent argued that the Labour Court had been correct to set aside the arbitrator's award in relation to the computation of the overtime because appellant had not led any evidence to establish the quantum of his claim.

Mootness

[18] Just before the hearing of the appeal on 4 November 2015, the respondent lodged supplementary written heads in which the question of mootness was raised. Respondent argued that because appellant's contract of employment had terminated as a result of effluxion of time on 30 April 2011, no purpose would be served by the court considering this appeal.

[19] We do not consider it necessary in this case to determine whether the matter is indeed moot,[1] for this court has held that the fact that a matter is moot between the parties does not constitute an absolute bar to the determination of an appeal.[2] Accordingly, this court may, in the exercise of its discretion, decide to determine an appeal even if it is moot. The exercise of that discretion will be exercised cautiously as urged by Lord Slynn of Hadley in *R v Security of State for the Home Department, ex parte Salem*:

> 'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'[3]

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[1]For a case in which this court recently rejected an argument on the facts that an appeal was moot or merely 'academic', see *Sasman & another v Chairperson of the Internal Disciplinary Panel of the Windhoek International School & others*, decision of the Supreme Court dated 12 December 2014 at para 37.

[2]See *Prosecutor-General of the Republic of Namibia v Gomes & others,* decision of the Supreme Court dated 19 August 2015, paras 23–24; and see *ES v AC* decision of the Supreme Court dated 24 June 2015 paras 38–39.

[3][1999] 2 All ER 42 (HLE) at 47d, cited with approval in *Prosecutor-General of the Republic of Namibia v Gomes and Others,* id para 24.

[20] In *ES v AC*, this court identified a range of factors to determine when the discretion should be exercised.[4] Those factors echo the approach advised by Lord Slynn. They include the nature and extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; and the fullness or otherwise of the argument advanced.[5] This case raises the ambit of the appellate jurisdiction of the Labour Court, a matter of great importance not only to the Labour Court but to all litigants dissatisfied with the outcome of arbitral proceedings conducted in terms of s 86 of the Labour Act, which are appealable in terms of s 89(1)*(a)* of the Act. Moreover, this court has heard full argument on these issues. These considerations make it plain that, on the approach adopted in *ES v AC,* even if the dispute in this case properly construed were to be held to be moot between the parties, it would nevertheless be an appropriate case in which to determine the appeal. In the circumstances, a full consideration of the mootness argument raised by the respondent is not necessary.

Issues for consideration in the appeal

[21] The following issues arise for consideration:

a) whether the appeal before the Labour Court raised issues of law alone within the meaning of s 89(1)*(a)* of the Labour Act, 2007?

b) whether the Labour Court erred in setting aside the arbitrator's award on the basis that the arbitrator committed a misdirection in not considering the

[4] See *ES v AC*, cited above, n 2 paras 38–39.

[5] Id para 38, citing with approval the decision of Langa CJ in the South African Constitutional Court, *MEC for Education: Kwazulu-Natal & others v Pillay* 2008 (1) SA 474 (CC), para 42.

appellant's admitted failure to check the runway visually before entering it in relation to charge 2, the failure to comply with safety regulations?

c) whether the Labour Court erred when it reinstated the corrective sanctions recommended by the chairperson of the disciplinary enquiry?

d) whether the Labour Court erred in concluding that the arbitrator should not have made the award he did in relation to overtime, given that the appellant did not tender evidence as to the quantum of overtime that was due to him? and

e) the question of costs, including the wasted costs of 20 October 2014.

Preliminary issue – security for costs

[22] Before turning to these issues, one preliminary issue arises. At the hearing of the appeal, without notice, counsel for the respondent pointed to the fact that the appellant had not furnished security for costs of the appeal in terms of rule 8 of the Rules of this court. In response, counsel for the appellant argued that security for costs was not required in this appeal, given the provisions of rule 3(6) of the Rules.

[23] Rule 8(2) provides that where the execution of a judgment is suspended pending appeal, the appellant shall furnish security for the respondent's costs of appeal. Counsel for the appellant points out however that in this case, the appellant had to obtain leave to appeal from this court, and that rule 3(6) regulates the question of security for costs in such cases. Rule 3(6) provides that when this

court grants leave to appeal, it shall stipulate a time for the lodging of the appeal record and ‘may order the appellant to find security for the costs of appeal’. Rule 3(7) provides further that the Registrar shall not enrol an appeal, where this court has granted leave to appeal, until proof has been furnished that security ordered under rule 3(6) has been furnished. Appellant noted that in this case, when granting leave to appeal on 2 April 2013, this court did not order the appellant to furnish security for the costs of the appeal, and therefore appellant submitted that no security for costs was required in this appeal.

[24] Counsel for the respondent drew this court’s attention to the fact that the notice of appeal lodged by the appellant states that the appeal is being lodged in terms of rule 5(2), and suggested that accordingly rule 8 is applicable to this appeal. However, a reference in the notice of appeal to rule 5(2) cannot determine the question whether security for costs is required in this appeal. That question must be determined by the rules of court, not by the notice of appeal.

[25] In the view of the court, no security for costs was required in this appeal. Rule 3(6) is a specific provision regulating the provision of security for costs in circumstances where this court grants leave to appeal. It clearly provides that this court, when deciding to grant leave to appeal, should decide also whether security should be furnished by the appellant. Rule 8, on the other hand, is a general provision regulating security in the case of appeals and it imposes a general duty to provide security in certain circumstances. Rule 8 regulates the question of the duty to furnish security differently to rule 3(6). Given that rule 3(6) refers specifically to cases where leave to appeal is granted by this court, it is of

application to this case. It is also clear in this case that when leave to appeal was granted to this court, no condition requiring the payment of security by the appellant was imposed. Accordingly, respondent's argument that appellant was obliged to furnish security in this appeal is rejected.

The legal framework

[26] The jurisdiction of the arbitrator and of the Labour Court are regulated by the Labour Act and it will be helpful to provide a brief description of the applicable legal framework relevant to this appeal before considering the issues that arise in the appeal.

[27] Unfair disciplinary action against an employee is regulated by s 48 of the Labour Act. That section provides that the provisions of s 33 of the Act, which apply to unfair dismissal, shall, 'read with the necessary changes, apply to all other forms of disciplinary action against an employee by an employer' and s 48(2) states that disciplinary action taken against an employee in contravention of s 33 constitutes an unfair labour practice.

[28] Briefly stated, s 33(1) provides that an employer may not dismiss an employee without 'a valid and fair reason' and without following a fair procedure.[6] Accordingly, in assessing whether disciplinary action constitutes an unfair labour

[6]Section 33(1) provides as follows: '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 s 34, if the dismissal arises from a reason set out in s 34(1); or
(ii) subject to any code of good practice issued under s 137, a fair procedure, in any other case.'

Section 34 relates to dismissals arising from collective termination or redundancy.

practice for the purposes of s 48(2), the key questions are whether the disciplinary action was imposed without a valid and fair reason or without following a fair procedure.

[29] An employee who considers that disciplinary action that has been imposed upon him in contravention of s 33 may refer the unfair labour practice to the Labour Commissioner in terms of s 51 of the Act. A copy of the notice must be served on the employer. The Labour Commissioner must then refer the dispute to an arbitrator to resolve the dispute in terms of Chapter 8, Part C of the Act.[7]

[30] The Act requires the arbitrator who has been appointed to resolve the dispute, first to attempt to resolve it by conciliation,[8] and if that fails, to commence the arbitration.[9] Subject to any rules promulgated in terms of the Act, the arbitrator has the power to 'conduct the matter in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly' and the arbitrator 'must deal with the substantial merits of the dispute with the minimum of legal formalities'.[10] Within thirty days of concluding the arbitration proceedings, the arbitrator must issue an award giving 'concise reasons'.[11]

[31] Given the statutory provisions outlined above, the key questions for an arbitrator to determine in a dispute concerning alleged unfair disciplinary action will be whether there was a valid and fair reason for the disciplinary action and

[7]See s 51(3) of the Act.
[8]See s 86(5) of the Act.
[9]Section 86(6) of the Act.
[10]See s 86(7) of the Act.
[11]Section 86(18) of the Act.

whether a fair procedure was followed in imposing the disciplinary action. If the arbitrator finds that there was no valid or fair reason for the disciplinary action, or that the process followed was unfair, the arbitrator will uphold the unfair labour practice challenge.

[32] A party dissatisfied with an arbitration award made in terms of s 86 of the Act (save in the case of disputes of interest relating to essential services) may appeal to the Labour Court on any question of law alone.[12]

The scope of the appeal in the Labour Court: issues of law alone?

[33] Counsel for the appellant argued that the Labour Court had erred in entertaining the appeal, because the appeal did not raise questions of law alone. Section 89(1) of the Labour Act provides as follows:

> 'A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of s 86, except an award concerning a dispute of interest in essential services as contemplated in s 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 s 7(1)*(a)*, on a question of fact, law, or mixed fact and law.'

[34] To address appellant's argument, we need to consider the proper interpretation of s 89(1)*(a)* of the Labour Act, which limits an appeal to the Labour Court to questions of law alone. Counsel for the appellant submitted two main

[12]Section 89(1) of the Act.

arguments in this regard. First, he argued that that 'questions of law alone' encompassed a very narrow class of issues, none of which were raised in this appeal. Secondly, he argued that because the notice of appeal purported to lodge an appeal against the 'entire' arbitration award, that even if it raised questions of law alone, properly construed, the Labour Court should not have entertained the appeal because it was not an appeal directed at questions of law alone. These two arguments will be dealt with separately.

The proper ambit of 'questions of law alone'

[35] Section 89(1)*(a)* limits the jurisdiction of the Labour Court to appeals that raise questions of law alone. That provision contrasts with s 89(1)*(b)*, which grants a broader appellate jurisdiction to the Labour Court over 'questions of fact, law, or mixed fact and law'. That broader appellate jurisdiction arises in relation to disputes concerning rights entrenched in Chapter 3 of the Constitution as well as disputes concerning discrimination or harassment, or a breach of freedom of association.[13] It is common cause that the broader jurisdiction does not apply in this case.

[36] The contrast between s 89(1)*(a)* and *(b)* provides guidance to courts in determining the proper meaning of s 89(1)*(a)*. In particular, it makes plain that the ambit of appellate jurisdiction under s 89(1)*(b)* is different and more extensive than that under s 89(1)*(a)*. Yet the distinction does not, without more, determine the nature and ambit of appeals that fall within s 89(1)*(a)*. This is because determining what constitutes a 'question of law' is not a simple task. Many common-law

[13]See s 7(1)*(a)* of the Act, read with ss 5 and 6 of the Act.

jurisdictions employ the distinction between questions of law and fact in many areas of the law 'to distribute decision-making power and responsibility'.[14] Yet, just how to distinguish questions of law from questions of fact has been a recurring challenge for both courts and academic commentators.[15] Professor Endicott described the approach of courts to the problem in the following memorable paragraph:

> 'Looking at the devices courts have used to address the problem is like looking into the average toolbox. There is a lot of clutter that should have been cleared out long ago. There are one or two baffling gadgets with no readily identifiable function. And there are a few old, sturdy and serviceable tools that do all the work. It would be a mistake to think that the toolbox is useless, just because it is messy.'[16]

[37] What constitutes 'a question of law' has bothered Namibian courts too. For example, in *Rumingo & others v Van Wyk* 1997 NR 102 (HC), the High Court was concerned with the interpretation of s 21(1)*(a)* of the Labour Act 6 of 1992, a statutory predecessor to the Labour Act. That provision stipulated that a party to proceedings before 'the Labour Court may appeal … on any question of law against any decision or order of the Labour Court . . . '.

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[14]See Timothy Endicott 'Questions of Law' (1998) 114 *Law Quarterly Review* 292 at 294.

[15]The issue has been considered by courts in the United Kingdom, the United States of America, Canada, Australia and South Africa. The case law is voluminous and the literature is vast. For interesting discussions in the literature, see Endicott, cited in the previous note; Mureinik 'The Application of Rules: Law or Fact?' (1982) 98 *Law Quarterly Review* 587; Craig *Administrative Law* 7 ed (2012: Sweet & Maxwell) para 9-019*;* MJ Beazley 'The Distinction between questions of fact and law: A Question without Answer?' (2013) 11 *The Judicial Review* 279 – 310; ET Lee 'Principled Decision-making and the Proper Role of Federal Appellate Courts: the Mixed Questions Conflict' (1991) 64 *Southern California Law Review* 235 – 291; JW Smith 'The Analytic Distinction between Questions of Fact and Questions of Law' (2009) 34 *Australian Journal of Legal Philosophy* 69 – 102; and Bernard Schwartz 'Mixed Questions of Law and Fact and the American Procedure Act' (1950) 19 *Fordham Law Review* 73.

[16]Endicott, cited above n 14, at 297.

[38] In deciding what constituted a question of law for the purposes of appeal, the High Court cited with approval a decision of the South African Appellate Division, *Secretary for Inland Revenue v Geustyn, Forsyth & Joubert*.[17] That case concerned the interpretation and application of s 86(2) of the South African Income Tax Act 58 of 1962 which provided that although no appeal lay against a decision of the Income Tax Special Court on questions of fact, an appeal could be noted to a provincial division on the basis of the decision of the Special Court 'being erroneous in law'. The Appellate Division held that this provision meant that an appeal on 'what in reality is a question of fact' may only succeed if the appellant shows that the decision on the facts is one that could not reasonably have been reached.[18]

[39] It is important to pause here and to consider what is meant by a 'mixed question of law and fact, a phrase that is used in s 89(1)*(b)*. This is a concept that is also employed in other jurisdictions,[19] and like the distinction between questions of law and questions of fact, it is often used to distribute decision-making power. Yet, it too is a concept that is contested and uncertain. Endicott described it as follows:

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[17] 1971 (3) SA 567 (A) at 572H–3A. See, also *Morrison v Commissioner for Inland Revenue* 1950 (2) SA 449 (A) at 457. This approach is not dissimilar to the approach taken in England and Wales under s 21 of the Employment Tribunals Act 1996 c. 17, which provides that appeals lie to the Employment Appeals Tribunal against decisions of the Employment Tribunals 'on any question of law'. The test as to the circumstances in which a factual finding by an Employment Tribunal will constitute a question of law was considered in *Yeboah v Crofton [*2002] EWCA Civ 794, where it was held that '[s]uch an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal on a proper appreciation of the evidence and the law could have reached.' (Para 93)

[18] See *Secretary for Inland Revenue v Geustyn, Forsyth & Joubert* cited above note 17 above, and *Rumingo & others v Van Wyk* 1997 NR 102 (HC) at 105 (also cited in para 37). See also *Willcox & others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 601H.

[19]See Schwartz, cited above n 15, Endicott, cited above n 14 and ET Lee, cited above n 15.

> 'Here is one of the baffling gadgets in the judicial toolbox: questions of application are often called mixed questions of fact and law. . . . The nature of the mixture is unexplained, and it seems that "mixture" is actually a rather unhelpful low-voltage metaphor: a question of application does not *mix* fact and law, it asks the decision-maker to apply the law to the facts.'[20]

[40] It is clear from what has been said that the phrase 'a question of law alone' has no firm and invariable content. Similarly, nor has the phrase 'a mixed question of law and fact'. The proper construction of these phrases in any legislative framework in any case needs to be guided by the values of the Namibian Constitution, by the legislative context in which the phrases appear, and the legislative purpose for which the phrases are employed. The interpretive exercise thus needs to include an assessment of the legislative context and function, an analysis of the legislative goals that underpin the legislation, all within the framework of Namibia's supreme Constitution. The context and function of the appellate jurisdiction of the Labour Court have been described in paras [26] – [32] above. Briefly, disputes arising from a range of employment disputes may be referred to the Labour Commissioner, who in turn refers them to arbitration. The arbitration process is designed to be speedy, inexpensive and informal and appeals lie to the Labour Court on questions of law alone.

[41] If we consider the legislative goals that inform s 89(1)*(a)*, one is of particular importance. It is the laudable goal of ensuring the expeditious and inexpensive resolution of employment disputes. Yet this goal, important as it is, needs to be construed within the context of the values stipulated in the Namibian Constitution. Article 1(1) of the Constitution provides that:

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[20]See Endicott cited above n 14, at 300.

> 'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.'

[42] The constitutional principles of the rule of law and justice for all require at the very least a dispute resolution system that eschews arbitrary, irrational or perverse decision-making, so that is one in which both employers and employees have confidence. In interpreting s 89(1)*(a)*, therefore, it is important to bear in mind both the legislative goal of the speedy and inexpensive resolution of labour disputes, as well as the constitutional values of the rule of law and justice for all.

[43] I now turn to the language of s 89(1)*(a)*. First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr Janse van Rensburg enter Runway 11 without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record[21] and may not be the subject of an appeal to the Labour Court.

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[21]The word 'perversely' was used by Lord Brightman in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 (HL) 518 where he said: 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body, and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely'. See also *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 29, per Viscount Simmonds, a court will intervene where a decision maker 'has acted without any evidence or upon a view of the facts which could not reasonably have been entertained'. This approach is similar to the approach adopted in *Yeboah v Crofton [*2002] EWCA Civ 794 in the context of employment appeals. See n 17 above.

[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperilled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed,[22] and it echoes the approach adopted by appellate courts in many different jurisdictions.

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

[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary

[22] See above paras [37] – [41].

sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)*(a)* and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1)*(a)* as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.

[48] Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.

[49] The advantage of the approach outlined above is that it seeks to accommodate the legislative goal of the expeditious and inexpensive resolution of employment disputes, without abandoning the constitutional principle of the rule of law that requires labour disputes to be determined in a manner that is not arbitrary or perverse. It limits the appellate jurisdiction of the Labour Court by restricting its jurisdiction in relation to appeals on fact and on those questions of fairness that admit of more than one lawful outcome to the question whether the decision of the arbitrator is one that a reasonable arbitrator could have reached. Other appeals may be determined by the Labour Court on the basis of correctness. In outline, then, this is the approach that should be adopted in determining the scope of appeals against arbitration awards in terms of s 89(1)*(a)*.

[50] Before turning from this question, one last argument needs to be considered. In support of his argument that 'question of law alone' should be given a very restricted meaning, counsel for the appellant cited the following *dictum* from the Canadian Supreme Court decision in *Canada (Director of Investigation and Research) v Southam Inc*:[23]

> 'Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.'[24]

[51] Counsel for appellant suggested, on the basis of this *dictum*, that s 89(1)*(a)* should be interpreted to mean that the Labour Court's jurisdiction is limited to

[23] [1997] 1 SCR 748.
[24] Id at 766–767.

questions of law, and does not extend to questions of fact or mixed questions of law and fact, as defined by Iacobucci J in *Canada v Southam*.

[52] Before assessing counsel for the appellant's argument, it will be helpful to consider the issues that arose for decision in *Southam's* case. In that case, the court was concerned with the standard of review that should be applied in an appeal against the decision of the Competition Tribunal, and in particular, the level of deference that should be paid to that decision. In answering this question, the Supreme Court reaffirmed that the appropriate standard of review in a statutory appeal against the decision of an expert tribunal 'is a function of many factors'[25] and that the standard of review will be placed on a continuum between 'correctness, at the more exacting end of the spectrum, and patently unreasonable, at the more deferential end'.[26] One of the factors that needed to be considered in determining the standard of review, the Court held, was the nature of the issue or issues in an appeal.

[53] In assessing this question, the Court noted that s 12(1) of the Canadian Competition Tribunal Act RSC 1985 c. 19, identified three types of issues that could arise for decision before a Competition Tribunal: questions of law, questions of fact and mixed questions of fact and law.[27] Section 12 established these categories to determine the role of different members of a Competition Tribunal. Section 12(1)*(a)* stipulated that judicial members would determine the questions of law, while all the members of the tribunal would determine questions of fact and

[25]At 765.
[26]Id.
[27]Id at 766.

mixed questions of fact and law. The quotation explaining the distinction between the three categories upon which appellant relies (and which is set out above), is a précis provided by the court of these three statutory categories.

[54] There are several reasons to conclude that the appellant's reliance on *Southam's* case is misplaced. First, it is clear that the threefold classification in the Canadian case hinges on a statutory classification in the Canadian competition legislation drawn for a purpose different to the statutory purpose that underlies the category of 'questions of law alone' in s 89(1)*(a)*. The Canadian statutory classification is drawn to determine the special role of judicial members of competition tribunals. In contrast, the purpose of s 89(1)*(a)* is to determine the scope of appellate jurisdiction. Secondly, the definition of what constitutes a mixed question of fact and law provided by the Canadian Supreme Court in *Southam's* case will have been determined, in part, by the purpose for which the distinction was made, and should not therefore automatically be understood to be applicable in other contexts.

[55] Were the definition of mixed questions of fact and law, as defined by the Canadian Supreme Court, to be applied to the scope of the Labour Court's appellate jurisdiction in Namibia, the consequence would be that the application of the law to the facts found by the arbitrator could not form the subject matter of an appeal. The only question that could form the subject matter of an appeal would be questions about what the correct legal test is. While one can understand that it makes sense to afford the judicial members of a Competition Tribunal the jurisdiction to determine questions of law, it does not follow that such a narrow

definition of ‘question of law’ is appropriate in determining the scope of appellate jurisdiction. For the result would be that a perverse error in the determination of the facts by an arbitrator would not be subject to an appeal, which would undermine the rule of law which abhors arbitrariness of that sort.

[56] On the approach to s 89(1)*(a)* outlined at paras [43] – [47] above, the distinction between the appellate jurisdiction under s 89(1)*(a)* and*(b)* can clearly be discerned. In the latter case, an appeal lies against a decision of arbitrator in relation to questions of law, questions of fact and mixed questions of law and fact. The appellate court will determine not whether the arbitration award is one a reasonable arbitrator could have reached, but will consider the matter *de novo* on the record. In the case of an appeal in terms of s 89(1)*(a)*, appeals that relate to decisions on fact will only be entertained where the arbitrator has made a factual finding on the record that is arbitrary or perverse, in the sense that it could not reasonably have been reached. In relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where however the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, the standard of review on appeal will be correctness.

[57] In order to assess whether a particular ground of appeal raises ‘a question of law alone’ within the meaning of s 89(1)*(a)* on the approach prescribed here will require a consideration in each case of the ground of appeal. This is an issue

which will be dealt with later in this judgment when the grounds of appeal raised by the appellant are considered.

The effect of the overbreadth of the notice of appeal

[58] The next question that arises in this appeal is the proper interpretation to be afforded to s 89(1)*(a)*, to the extent that it stipulates that an appeal lies on 'any question of law *alone'* (my emphasis). In this regard, appellant relied on the Labour Court decision in *Shoprite Namibia (Pty) Ltd v FM Paulo & another* (a decision of the Labour Court dated 7 March 2011). In that case, the Labour Court held, by implication, that the inclusion of the word 'alone' in s 89(1)*(a)* meant that the court is entitled to consider a question of law 'alone without anything else present'[28] and that an appellant is therefore not entitled to rely on any grounds of appeal other than questions of law alone. In that case, as in this case, the appellant had lodged a notice of appeal which identified five grounds of appeal, all of which began by asserting that the 'arbitrator had erred on the law and/or on the facts in finding on the material before her . . . '. The Labour Court held that the formulation of the notice of appeal was inconsistent with the provisions of s 89(1) *(a)* and that the formulation of the notice of appeal constituted a matter of substance, not mere form, and the court dismissed the appeal on this basis without any further consideration of the merits of the appeal.

[59] In this appeal too, appellant pointed out, the notice of appeal purported to appeal against the whole of the arbitrator's award, including questions of law and fact. The notice of appeal was drafted in this manner in apparent disregard of the

[28]Para 3.

language of s 89(1)*(a)*, which provides that appeals to the Labour Court are only competent in respect of questions of law alone. To the extent that the notice of appeal sought to broaden the scope of the appeal beyond questions of law alone, this was not permissible. Does it follow, however, that because the notice of appeal was formulated in such broad terms, that grounds of appeal identified in the notice of appeal that properly construed raise questions of law may not be considered because the notice of appeal also improperly raises questions of fact?

[60] In enacting s 89(1)*(a)*, the legislature sought to regulate the appellate jurisdiction of the Labour Court. According to counsel for the appellant, the court in *Shoprite* held that s 89(1)*(a)* should be construed as stipulating that the jurisdiction of the court on appeal shall be determined by the manner in which the notice of appeal is drafted, so that where a litigant pursues the right of appeal too broadly and includes grounds of appeal that do not fall within the court's jurisdiction, the court's jurisdiction on questions of law that may also be raised in the notice of appeal will fall away. Appellant's proposed construction focuses on the inclusion of the word 'alone' in s 89(1)*(a)* and suggests that if grounds of appeal are raised that are not questions of law, alongside grounds of appeal that are questions of law, then the court's appellate jurisdiction in relation to the questions of law will fall away.

[61] Although, as a matter of textual construction, this approach may be a possible interpretation of s 89(1)*(a)*, in the view of this court, that approach is not the proper approach to the interpretation of the subsection. For the consequence of such an approach would be that if an appellant were in its notice of appeal

mistakenly to include questions other than questions of law, then the court would have no jurisdiction.

[62] Moreover, as explained above, determining what constitutes a question of law is an issue that continues to trouble courts and accordingly it will continue to trouble litigants. Given that difficulty, to read s 89(1)*(a)* to oust the jurisdiction of the Labour Court because an appellant has failed correctly to identify a question of law would be inequitable. Instead, s 89(1)*(a)* should be properly construed to limit the appellate jurisdiction of the Labour Court to questions of law. Where grounds of appeal are raised that are not questions of law, the Labour Court should simply dismiss them as improperly raised, but any ground of appeal that does raise a question of law should be addressed on the merits.

[63] This approach does not absolve litigants of their responsibility to take care in framing their notices of appeal. Good practice requires litigants to be aware of the scope of their right to appeal and to draft notices of appeal with knowledge of and attention to the governing statutory provisions.

[64] Counsel for the appellant pointed to the notice of appeal lodged in the Labour Court, which stated that the appellant in the Labour Court, the respondent in this appeal, ‘gives notice of its appeal against the entire Arbitration Award issued by the arbitrator’. The notice of appeal continued by stating that ‘the questions of fact and/or law appealed against in the arbitrator’s award, . . . , are as encompassed by the grounds of appeal set out below’. The grounds of appeal included the following:

a) that the arbitrator's ruling that Mr Janse van Rensburg 'was wrongly convicted of the relevant charges . . . is wrong in law';

b) that the arbitrator's order setting aside the disciplinary committee verdict and recommendation 'is wrong and could in law not have been made by the arbitrator';

c) that the arbitrator 'failed to deal with his jurisdiction in that appellant contends that the arbitrator had no jurisdiction or powers to override the decision of the accountable manager of the appellant' in relation to Mr Janse van Rensburg's engagement in flying;

d) that the arbitrator could not have made the order he did given that Mr Janse van Rensburg 'provided no evidence to prove when and how many hours he . . . worked overtime';

e) that the arbitrator erred in making the ruling on overtime 'since the arbitrator had no jurisdiction to make such a ruling'; and

f) the arbitrator failed to appreciate that Mr Janse van Rensburg bore the burden of proof in relation to overtime.

[65] The notice of appeal should not have stated that the appeal was against the 'entire' arbitration award, and that the appeal was against 'questions of fact and/or

law'. Nevertheless, the fact that it did so did not oust the jurisdiction of the Labour Court to consider those grounds of appeal that, properly construed, did purport to raise questions that fell within the jurisdiction of the Labour Court.

Was the Labour Court correct in concluding that the arbitrator erred in finding that the appellant had been wrongly found guilty of the second charge, the breach of safety procedures?

[66] It is necessary now to turn to consider the merits of the appeal. The key issue raised by counsel for the appellant in relation to the disciplinary enquiry was whether the Labour Court had erred in concluding that the arbitrator was wrong in law to set aside the conviction on the second charge. The second charge was that the appellant had breached safety procedures on the morning of 9 May 2010 at Epacha airstrip. In making this argument, counsel for the appellant pointed to the notice of the disciplinary proceedings received by the appellant. That notice, in relevant part, read as follows:

> 'The charges against you are the following:
> Charge 1: Gross negligence.
> Incident 1: Taxiing aircraft V5- ELE onto the runway at Epacha with guests on board on 9 May 2010 without ensuring that the runway was clear and that it was safe to do so.
> Charge 2: Failure to comply with safety regulations.
> Incident 2: Fail to announce intentions of entering the runway at Epacha on 9 May 2010 on the correct radio frequency.
> Charge 3: Any other serious deviation from company policy and standards.
> Incident 3: Fail to report the incident to the Flight Safety Officer or Chief Pilot until being instructed to do so.

> Charge 4: Offending client.
> Incident 4: The near collision on 9 May 2010 between V5-MKR and V5-ELE caused shock (trauma) to the pilot and passengers of V5-MKR. Loss of confidence in Sefofane Air Charters by the client (Desert Air), as a result of failing to appear for a meeting on 14 May 2010 with the client regarding the incident.'

[67] Counsel for the appellant argued that because charge 2, which related to failure to comply with safety regulations, only expressly referred to incident 2 (failure to announce intentions of entering the runway over the correct radio frequency), the Labour Court erred when it took the failure of the appellant to check that the runway was clear before entering the runway into account in relation to charge 2.

[68] The first thing that should be noted is that there is no dispute of fact that is relevant to this question. It is common cause between the parties that the failure to check the runway was clear was a breach of safety regulations. It was also common cause that the appellant failed to check that the runway was clear before entering the runway and that that failure was a material cause of the near-accident. The question for consideration on appeal is simply whether the Labour Court erred in concluding that the arbitrator misdirected himself when he failed to take into account the appellant's admitted failure to check the runway. This is a legal question, not a factual question, and therefore one that falls within the scope of jurisdiction of the Labour Court as provided for in s 89(1)*(a)* of the Labour Act.

[69] Counsel for the appellant argued that because the notice of the disciplinary hearing limited the issue of the appellant's failure to check the runway to charge 1

(the charge of gross negligence), the arbitrator was correct not to take that issue into account in relation to charge 2 (failure to comply with safety regulations), even though it was common cause that the appellant's conduct in this regard was in breach of safety regulations.

[70] In his findings on charge 2, the chairperson of the disciplinary proceedings found that the Civil Aviation Regulations 91.06.12 (11) required any pilot entering a runway to ensure before entering that the runway is clear, which the appellant did not do. The chairperson found that there was no excuse for Mr van Rensburg not having made the necessary visual check. Accordingly the chairperson found him to have violated both the respondent's Standard Operating Procedure and the Civil Aviation Regulations and concluded that Mr van Rensburg did not comply with all the applicable safety regulations, and that if he had done so, the incident would not have occurred.

[71] The arbitrator limited his investigations under charge 2 to the question whether the appellant had broadcast his intention to enter the runway on the correct radio frequency, which was the incident that the disciplinary notice referred to in relation to charge 2. The Labour Court found that the arbitrator erred in law in this respect and that the arbitrator should have considered the appellant's admitted failure to check the runway into account in assessing whether he had been properly convicted of failure to comply with safety procedures.

[72] In this regard, it is important to note that disciplinary proceedings are not criminal proceedings, and are accordingly not governed by the rules of criminal

procedure. The guiding principle for disciplinary proceedings is that they must be conducted fairly.[29] The South African Labour Court has described the obligation of fairness as follows:

> 'When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process . . . requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee.'[30]

[73] Fairness thus requires that an employee be given proper notice of and an opportunity to respond to the factual issues relevant to the disciplinary proceedings. There is no doubt in this case that the appellant was given fair and appropriate warning in the notice for the disciplinary enquiry that the question whether he had visually checked the runway before entering it was an issue in the disciplinary proceedings.

[74] The key issue is thus whether the Labour Court erred in concluding that the arbitrator misdirected himself in failing to consider the appellant's admitted failure to check the runway before entering it in relation to charge 2, something that the disciplinary chairperson had taken into account in finding the appellant guilty on

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[29] A similar approach was taken by the South African Labour Court in *Williams v Gilbeys Distillers and Vintners* (1993) 2 LCD 327 (IC).

[30] See *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* 2006 ZALC 44.

this charge. It is clear that the appellant was given reasonable notice that the issue of his failure to check the runway before entering formed a key issue in the disciplinary proceedings, that he was given an opportunity to provide his account of that issue and that he admitted that he had failed to check the runway. The only question is whether the formulation of the notice of the disciplinary hearing, which linked the question of the failure to check visually before entering the runway to the first charge meant that the arbitrator was correct not to consider it, even though the chairperson of the disciplinary proceedings had considered it.

[75] In considering this question, the following should be noted. First, the arbitrator provided no explanation as to why he did not consider the failure visually to check the runway in relation to the charge of failure to comply with safety regulations. Any consideration of why he did not consider the appellant's failure to check the runway before entering is therefore largely speculative. At no stage did the arbitrator expressly state that he considered the chairperson of the disciplinary enquiry to have acted unfairly in taking it into account. The arbitrator appears to have proceeded on the basis that he did not need to consider the reasons given by the chairperson of the disciplinary enquiry for the disciplinary action that was imposed. The key issues the arbitrator had to decide were whether there was a valid reason for the disciplinary sanctions, and whether there was a fair disciplinary process. The arbitrator's failure to provide reasons why he did not consider the admitted non-compliance with safety procedures to constitute a breach of safety procedures remains unexplained.

[76] Secondly, disciplinary proceedings in the workplace exist, in part, to ensure corrective discipline is applied where necessary. Assessing whether corrective discipline is required thus requires a broad overview of the relevant events and should accordingly not be too narrowly confined to avoid the risk that the purpose of corrective discipline will be undermined. It is of importance to note in this case that the chairperson of the disciplinary proceedings recommended corrective discipline. The purpose of that corrective discipline was to ensure that the appellant was familiar with the stipulated safety procedures in order to protect passengers and pilots.

[77] Thirdly, no material unfairness was caused to the appellant by the approach of the disciplinary chairperson. The appellant had been informed that his failure to check the runway was an issue in the disciplinary proceedings, and he was given an opportunity to present his version on this issue. The appellant admitted that he had failed to check the runway, an admission that ineluctably established his failure to comply with the safety regulations.

[78] Fourthly, the case concerned a pilot who had failed to comply with a fundamental rule of safety procedure, that is, checking that it was safe to enter a runway before doing so. The risk of grave, if not fatal, personal harm to the pilot, passengers and others, if such safety procedures are not followed is self-evident, as is the risk of enormous financial harm. The appellant, a pilot bound to comply with civil aviation regulations to protect his safety and that of other pilots and passengers, is in effect seeking to avoid the consequences of his admitted failure

to comply with safety regulations by relying on the manner in which the notice for the disciplinary proceedings was drafted.

[79] The last three considerations mentioned all support the conclusion that it cannot be said that the Labour Court as a matter of law erred in concluding that the arbitrator should have taken into account the appellant's admitted failure to comply with safety procedures in his decision, and should accordingly not have set aside the recommendation and decision of the disciplinary chairperson. The appellant's submissions cannot therefore be accepted.

[80] The Labour Court thus overturned the decision of the arbitrator in relation to its misdirection on charge 2 and having done so, concluded that the disciplinary sanction recommended by the chairperson of the disciplinary proceedings did not constitute an unfair labour practice.

The Labour Court's reinstatement of the recommendation of the chairperson of the disciplinary enquiry regarding corrective sanctions

[81] Appellant argued that the sanctions recommended by the disciplinary committee chairperson were unfair and unreasonable and that the Labour Court erred in finding otherwise and reinstating them. It will be recalled that the chairperson imposed a final written warning for failure to comply with safety regulations (charge 2) and for offending a client (charge 4), as well as a written warning for a serious deviation from company policy because he had failed to report the serious incident 'within the most expeditious time' (charge 3). Here it should be noted that in the Labour Court, the respondent conceded that the

appellant had not been correctly found guilty of charge 3, and that warning was not an issue in this appeal. In addition to the written warnings, the chairperson recommended that the appellant be grounded for three weeks until he had passed an examination on Namibian aviation law, and on the safety regulations and standard operating procedures of the respondent. Finally, the chairperson recommended that the appellant should for a period of six months after competing the examinations fly on a PICUS (pilot in command under supervision) basis, with bi-monthly reports on his progress as well as a route check and proficiency check at the end of the six months after which he would return to his ordinary duties.

[82] The arbitrator set aside the findings of the chairperson of the disciplinary enquiry in relation to charges 2, 3 and 4, which in effect meant that he found the appellant not to have been guilty of any of the charges that had been brought against him. One would have expected that the consequence would have been that the corrective discipline would have entirely fallen away. However, that did not happen. Instead, and without explanation, the arbitrator proceeded in his ruling to state that:

> 'Applicant cannot completely escape blame because he partially contributed to the incident. I must also indicate it is clear that applicant needs to be update with Air Law Safety and Regulations.'

[83] Having reached this conclusion, the arbitrator then imposed a range of sanctions on the appellant, similar to but less severe than those recommended by the chairperson of the disciplinary enquiry. They included an order that the

appellant be counselled on Namibian aviation regulations, that the appellant resume flying duties but that he should fly PICUS for a period of three months.

[84] As the Labour Court noted, there is no reasoning in the arbitration award dealing with the question whether the disciplinary sanctions recommended by the chairperson of the disciplinary enquiry constituted an unfair labour practice. Nor is any explanation provided by the arbitrator as to why he substituted sanctions for those of the chairperson of the disciplinary enquiry, nor is there any explanation for the differences between the sanctions he imposed and those that had been recommended by the chairperson of the disciplinary committee.

[85] Section 86(18) of the Labour Act requires the arbitrator to provide concise reasons for his decision within 30 days of the conclusion of the arbitration. At the very least, those reasons should provide a brief explanation for the arbitrator's award. The failure by the arbitrator to provide any explanation for his decision to set aside the disciplinary sanctions and to substitute similar but less severe sanctions constituted a material misdirection by the arbitrator in relation to his obligations under the Act. In the circumstances, the Labour Court cannot be said to have erred in seeking to assess as a legal question on appeal whether the original disciplinary sanctions did constitute an unfair labour practice and to assess whether they should have been set aside by the arbitrator.

[86] Counsel for the appellant raised two further challenges to the disciplinary sanctions. The first was based on the six-week delay between the incident and the initiation of disciplinary proceedings and the second was based on his assertion

that other employees of the respondent subjected to disciplinary proceedings had been treated differently and more leniently than the appellant.

[87] Appellant thus argued that the disciplinary sanctions recommended by the chairperson of the disciplinary enquiry were unfair because of the six-week delay between the incident on 9 May 2010 and the initiation of the disciplinary proceedings. There can be no doubt that the delay in the initiation of disciplinary proceedings is not desirable, but it was not so excessive as to be unfair to the appellant. Moreover, it does not follow that, because there was a delay in initiating the enquiry, the disciplinary sanctions recommended by the chairperson of the disciplinary enquiry constituted unfair labour practices. The fact that the appellant had been permitted to fly in the interim did not estop the respondent from properly investigating the disciplinary charges and determining an appropriate and fair sanction for them. The appellant's submission to the contrary cannot therefore be accepted.

[88] Appellant's argument that other employees had been treated differently also does not assist him. Each case needs to be considered on its own merits. It is not possible without being in possession of the full facts of other cases to assess whether the sanctions imposed in those cases were fair or not. What is important is to assess the sanctions imposed in this case on the basis of the facts of this case and to decide whether the sanctions imposed were fair. As stated above, the sanctions imposed constituted forms of corrective discipline. They were tailored to ensure that the near-accident that occurred on 9 May 2010 as a result, at least in part, of non-compliance with safety regulations by the appellant did not occur

again. It cannot be said that it was misguided as a matter of law to impose corrective discipline in the circumstances of this case, nor that the sanctions that were imposed were unfair or unreasonable.

[89] Accordingly, I conclude that the appellant has not established that the Labour Court erred in reinstating the recommendations of the chairperson of the disciplinary committee, and the appeal must fail in that regard.

Did the arbitrator err in relation to the award made regarding overtime?

[90] The next question for consideration is whether the Labour Court erred in concluding that the arbitrator should not have required the respondent to establish the quantum of the appellant's overtime claim. The appellant led no evidence before the arbitrator to establish the number of hours that he had worked overtime, but simply asserted that he had done so, and that the respondent should have records to establish how many hours overtime he had worked.

[91] The claim for unpaid overtime was a separate claim from the unfair labour practice claim relating to the disciplinary proceedings against the appellant. A claim for overtime arises under s 17 of the Labour Act, read with ss 38 and 86 of that Act. In brief, s 17 provides that an employer should pay an employee one and one-half times his or her ordinary hourly rate per hour of overtime worked from Monday to Saturday and at twice his or her hourly rate for overtime worked on a Sunday or public holiday.[31] Section 38 provides that any dispute regarding the non-

[31] Section 17 of the Labour Act provides in relevant part:
'(1) Subject to any provision of this Chapter to the contrary, an employer must no require or permit an employee to work overtime except in accordance with an agreement, but, such agreement must not require an employee to work more than 10 hours overtime a week, and in any case, not more

payment of overtime may be referred to the Labour Commissioner who may refer the matter to arbitration, which will then be conducted in terms of s 86 of the Labour Act. A claim for overtime is thus a claim based on ss 17, 38 and 86 of the Labour Act. As a matter of law, the claimant will bear the burden of proof of establishing the claim. The appeal against the arbitrator's award, which raised the question whether the arbitrator has properly applied the burden of proof, thus raised a question of law within the meaning of s 89(1)*(a)*.

[92] In his summary of dispute, the appellant asserted that he had been compelled to work overtime on weekends and public holidays to a total amount of 120 days, but that he had only been paid normal pay for those days. No further quantification of the claim was provided. Appellant was asked during his evidence in chief in the arbitration as to how he calculated the period of 120 days overtime, and he responded that the number of days claimed was 'incorrect' because, he said, 'obviously you don't fly in the evenings so it can't be full days worked'. He was then asked how much overtime he had worked and he stated that 'I would really have to go calculate that to see'. His counsel asked him if he had done the calculation and he admitted he had not. On questioning by the arbitrator, the appellant stated that he had worked overtime since he had started with the respondent in 2008. Later, during cross-examination, the appellant was once again asked if he had calculated the correct number of days' overtime that he claimed, and he indicated that he had not.

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than three hours' overtime a day.
(2) An employer must pay an employee for each hour of overtime worked at a rate of at least one and one-half times the employee's hourly basic wage but, when an employee who ordinarily works on a Sunday or public holiday, works overtime on that Sunday or public holiday, the employer must pay that employee at a rate of at least double the employee's hourly basic wage.'

[93] In his award, the arbitrator found that the appellant had worked overtime and that he was entitled to overtime payment, but that the precise quantum of the amount payable had not been established. The arbitrator ruled that 'Applicant is entitled to overtime: therefore it is ordered that applicant and the respondent's accountant shall meet within ten (10) days of the date hereof in order to determine how many hours worked overtime' are due to applicant. The respondent appealed against this award on the basis that the appellant had borne the burden of establishing the quantum of overtime due to him. The Labour Court found, in effect, that the arbitrator had erred in not appreciating that the burden of proof in relation to overtime lay on the appellant and that he had not discharged that burden.

[94] It is trite that a person who claims payment must ordinarily establish his or her legal entitlement to that payment. Arbitration proceedings under the Labour Act are designed to be less formal and less onerous than proceedings in a civil court.[32] Nevertheless, arbitrators are required to determine legal claims, and to do so fairly. The incidence of the burden of proof in such claims is a legal question. In this case, appellant claimed unpaid overtime from the respondent. The quantum of that claim was never precisely defined either in the Summary of the Dispute annexed to the referral to arbitration, nor in the testimony given by the appellant. It is clear from his testimony in the arbitration proceedings that the appellant had made no diligent attempt to quantify the overtime claim.

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[32] Section 86(7) of the Labour Act provides that: 'Subject to any rules promulgated in terms of this Act, the arbitrator (a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and (b) must deal with the substantial merits of the dispute with the minimum of legal formalities.'

[95] While it may be appropriate in some circumstances for an arbitrator to order an employer to assist with the calculation of remuneration due to an employee who is claiming unpaid remuneration, the legal principle that the employee bears the burden of identifying and quantifying the claim should not be ignored. Accordingly, it is not appropriate to make such an order unless an employee has demonstrated good cause for his or her inability to quantify the claim. In the absence of good cause, an employee should at the very least demonstrate that he or she has exercised reasonable diligence in seeking to calculate the quantum of the claim. In this case, the appellant admitted that he had not made any effort to calculate the overtime claim. In the circumstances, the Labour Court's conclusion that the arbitrator erred on the law in relation to the overtime claim cannot be faulted.

[96] Accordingly, appellant's claim in relation to overtime also fails.

Costs

[97] The appellant's appeal has failed. Although s 118 of the Labour Act provides special rules for costs in relation to matters before the Labour Court, this court has held that those rules do not apply in this court.[33] Accordingly, the ordinary rule relating to costs should apply and the appellant should be ordered to pay the respondent's costs on appeal, on the basis of one instructed and one instructing counsel.

[33]See *Namibia Broadcasting Corporation v Kruger & others* 2009 (1) NR 196 (SC) para 66.

[98] However, a separate question arises in relation to the wasted costs of the appeal hearing on 20 October 2014. As mentioned above, due to the sudden illness of respondent's instructed counsel, the hearing of the appeal had to be postponed *sine die* on that date. Given that the appeal was postponed at the last minute at the instance of the respondent, it is fair that the respondent should be required to pay appellant's wasted costs of the hearing on that date.

Order

[99] The following order is made:

1. The appeal is dismissed.

2. Subject to paragraph 3 below, the appellant is ordered to pay the costs of the respondent in the appeal in this court, on the basis of one instructed and one instructing counsel.

3. The respondent shall pay appellant's wasted costs of the hearing of 20 October 2014, on the basis of one instructed and one instructing counsel.

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O'REGAN AJA

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SHIVUTE CJ

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SMUTS JA

APPEARANCES

APPELLANT:	B Ford Instructed by Hohne & Co
RESPONDENT:	C J Mouton Instructed by Koep & Partners