REPORTABLE

CASE NO: SA 86/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PRESIDENT OF THE REPUBLIC OF NAMIBIA	**First Appellant**
DIRECTOR-GENERAL: NAMIBIA CENTRAL INTELLIGENCE SERVICE	**Second Appellant**
DIRECTOR: NAMIBIA CENTRAL INTELLIGENCE SERVICE	**Third Appellant**
NAMIBIA CENTRAL INTELLIGENCE SERVICE	**Fourth Appellant**
PRESIDING OFFICER: NCIS DISCIPLINARY COMMITTEE	**Fifth Appellant**

and

IMMANUEL KAULINAWA SHIVUTE	**Respondent**

Coram:	SMUTS JA, ANGULA AJA and SCHIMMING-CHASE AJA
Heard:	**11 April 2024**
Delivered:	**14 May 2024**

Summary: This appeal considers whether the High Court could make an order reinstating the respondent to his position within the Namibia Central Intelligence

Service (the NCIS) in an application to set aside his dismissal given the statutory context of the respondent's employment with NCIS.

The facts briefly are that the respondent was employed by the NCIS as a Chief Training Officer. Prior to taking up his position at the NCIS, he was employed by the Ministry of Education (the Ministry). Despite resigning from the Ministry and joining the NCIS, the Ministry continued to pay his salary into his personal bank account for a period of 30 months (which totalled in excess of N$798 000). The Anti-Corruption Commission investigated the matter and criminal charges were brought against him (later withdrawn in the Magistrate's Court on 18 July 2018) and he was also charged internally by the NCIS for misconduct under the NCIS regulations for corrupt conduct, alternatively causing an embarrassment to the Government or the NCIS by virtue of the conduct described in the charges for which he was arraigned on 8 May 2017. In the notice of the disciplinary proceedings, the NCIS informed the respondent of the charges and the date of the hearing and stated that the respondent had the right 'to be assisted or represented by another person (ie a staff member of the NCIS), however legal representation is excluded'. Respondent alleges that he made it clear at the disciplinary proceedings on 18 and 19 July 2017 that he wanted to be represented by his legal practitioner or at least another person not from the NCIS. He stated that the chairperson of the disciplinary proceedings denied him the right to be legally represented at the proceedings in breach of reg 11(13) of the NCIS Regulations of 1998 (the regulations). This allegation is denied by the chairperson of the disciplinary process. Minutes of the proceedings were taken in some detail, confirmed under oath by the presiding officer and are not put in issue except for one minor point. The respondent admitted to receiving a salary from the Ministry, despite his appointment to the NCIS; he further admitted to having been informed during his induction of the obligation to report to the NCIS Human Resource (HR) Division if he receives a salary from a previous employer; he also admits to not reporting this issue to HR. The respondent was found guilty on the alternative charge and the disciplinary panel reasoned that despite being informed to report double salary payments, he failed to inform the relevant officials and had instead used the money. The panel found that his conduct amounted to acting in a disgraceful, improper or unbecoming manner and to be detrimental to the Government and NCIS. The panel further found that there are elements of dishonesty in the respondent's conduct and that the relationship of trust

had broken down as a consequence. The panel recommended that the respondent be discharged from the NCIS. The Director-General of the NCIS proceeded to terminate his services based upon and following this recommendation with effect from 1 May 2018. The respondent exercised his right to appeal against the termination of his employment to the President under reg 11(20) citing a breach of his right to legal representation at the disciplinary proceedings. That appeal was dismissed.

The respondent approached the High Court for declaratory orders relating to the disciplinary proceedings which preceded his dismissal and also sought an order for his reinstatement to his position within the NCIS. The court *a quo* found that the President did not apply his mind and that his decision was based on the wrong facts by disregarding the fact that the theft charges on which the disciplinary proceedings were based on were withdrawn. Further, that that reg 11(13) contemplated legal representation at NCIS disciplinary hearings and that the exclusion of that at the hearing was arbitrary and in breach of that regulation. It found that there was procedural unfairness in this regard and the court further questioned the substantive fairness of the proceedings particularly if the charges upon which the respondent was arraigned were subsequently withdrawn and how that could amount to conduct in a 'disgraceful, improper or unbecoming manner causing embarrassment to the Government or the service'. The court *a quo* found that the respondent was unlawfully dismissed from the NCIS and ordered that the respondent be reinstated. Appellants are appealing against these orders and judgment.

On appeal, this Court must determine whether the court *a quo*'s findings are sound in law and on the facts. The respondent's case is based upon an infringement of his rights under Art 18 of the Constitution. He sought declaratory orders and the setting aside of the decision-making on grounds that it amounted to unlawful action as a matter of public law and on constitutional grounds. Whether the exclusion of legal representation in the notice of the hearing was permissible and, if not, whether it amounted to an illegality and whether it tainted and vitiated the entire proceedings.

Held that, there is no basis in law to order the reinstatement of the respondent to his position. No authority is understandably cited for the approach of the High Court in doing so. Given the particular employment setting of the relief sought, the High Court

would appear to have merely applied principles and remedies contained in the Labour Act 11 of 2007 having repeatedly used the language of that Act in its analysis, notwithstanding their inapplicability, even though this was acknowledged at the outset of the judgment.

Held that, the notice of hearing, by seeking to exclude legal representation from the hearing, was beyond the powers of reg 11(13). That exclusion was not permissible and not authorised by reg 11(13).

Held that, crucial to procedural fairness in respect of administrative action, especially in the context of a disciplinary tribunal of the kind in these proceedings, is the right to be heard – *audi alteram partem*. It is plainly an implicit requirement in decision-making in the administrative process, except where it can be said to be permissibly excluded or if other extraordinary circumstances render its operation untenable. It certainly applied to these proceedings. The respondent was afforded the right to be heard and exercised it.

Held that, the respondent admitted the material facts and he did not show, after being challenged, that he was prejudicially affected by the absence of not being represented by a lawyer, except for an unspecified reference to cross-examination. The issue referred to in oral argument was by no means material and no adverse finding was made concerning the respondent on that score.

The court thus finds that the respondent, on the facts of this case, did not establish that the procedure viewed as a whole did not amount to a breach of procedural fairness nor did it infringe his rights under Art 18, despite the impermissible exclusion of legal representation. The appeal against the orders made by the High Court thus succeeds.

APPEAL JUDGMENT

SMUTS JA (ANGULA AJA and SCHIMMING-CHASE AJA concurring):

[1] This appeal concerns whether the High Court could reinstate the respondent to his position within the Namibia Central Intelligence Service (NCIS) in an application to set aside his dismissal and also whether that dismissal should be set aside.

[2] Prior to his dismissal, the respondent was employed by NCIS, the second appellant. The respondent approached the High Court for certain declaratory orders relating to the disciplinary proceedings which preceded his dismissal and also sought an order for his reinstatement to his position within NCIS. The High Court set aside the dismissal and ordered his reinstatement. The NCIS, established in terms of the National Central Intelligence Service Act 10 of 1997 (the Act), resorts under the office of the President of Namibia, the first appellant, who together with NCIS and other government appellants cited in the proceedings appeal against that decision.

Factual background

[3] The respondent was employed by the Ministry of Education (the Ministry) prior to taking up his position with NCIS as Chief Training Officer on 1 March 2013. Despite resigning, the Ministry continued to pay his salary into his bank account for 30 months after he joined NCIS. The Anti-Corruption Commission understandably investigated the matter and caused criminal charges to be preferred against the respondent as a consequence.

[4] The respondent was on 8 May 2017 also charged by NCIS internally for misconduct under NCIS regulations for corrupt conduct (in that the conduct specified in the criminal charges constituted misconduct as defined in s 1 of the Act), alternatively causing an embarrassment to the Government or NCIS by virtue of the conduct described in the charges for which he was arraigned.

[5] In its notice of the disciplinary proceedings of 21 June 2017, NCIS informed the respondent of the charges and date of hearing and stated that he had the right 'to be assisted or represented by another person (a staff member of the NCIS), however legal representation is excluded'.

[6] The respondent stated that he made it clear at the ensuing disciplinary proceedings on 18 and 19 July 2017 that he wanted to be represented by his legal practitioner or at least another person not from NCIS. He stated that the chairperson of the disciplinary proceedings, cited as a respondent in the court below, denied him the right to be legally represented at the proceedings in breach of reg 11(13) of the NCIS Regulations of 1998[1] (the regulations).

[7] That allegation is squarely denied by the chairperson of the enquiry. There is also nothing to this effect recorded in the minutes of the proceedings.

[8] The minutes of those proceedings were taken in some detail and confirmed under oath by the presiding officer (who presided over a three person panel). The minutes are not put in issue by the respondent except in one minor respect referred to below.

The disciplinary proceedings

[9] According to the minutes, at the commencement of the proceedings, the presiding officer confirmed the respondent's rights at the hearing and quoted reg 11(13)(a) in full which provides:

[1] Published in Government Notice 118 of 1998 in Government Gazette 1876.

‘At a hearing a staff member charged has the right-

(a) to be personally present, to be assisted or represented by another person, to give evidence and, either personally or through a representative-

(i) to be heard;
(ii) to call witnesses;
(iii) to cross-examine any person called as a witness in support of the charge; and
(iv) to have access to documents produced in evidence.’

[10] The chairperson of the panel also referred to certain further rights set out in reg 11(13) but did so in abridged form by stating that the respondent was entitled to an interpreter and to admit at any time that he is guilty of the charge. The main charge and alternative were put to the respondent and his plea of not guilty was recorded.

[11] The investigating officer first testified that NCIS had appointed an investigating team to investigate the allegations of double salary payments after they were reported to NCIS. It was established that, despite his appointment to NCIS on 1 March 2013, the respondent continued to receive his salary from the Ministry of Education until August 2015. This was admitted by the respondent, both to the investigating team and at the enquiry. The investigating officer also testified (which was admitted by the respondent) that, as part of his induction at NCIS, the respondent and other new recruits were expressly informed by NCIS Human Resources (HR) division that anyone receiving a salary from a previous employer should not use the funds and report the matter to HR so that the recovery of funds can proceed.

[12] It was common cause in both the investigation and at the hearing that the respondent did not inform HR personnel within NCIS of the double salary payments

received at any stage until these were the subject of an investigation. The respondent was requested to make a statement to the investigating team. He confirmed in that statement that he had been informed of that obligation during his induction and that he had at no stage reported anything to NCIS HR on the issue.

[13] In his evidence to the enquiry, the respondent stated that he confirmed receipt of double salary payments after being called in as part of an investigation. He confirmed that he had 'used the money' paid to him by the Ministry (which totalled in excess of N$798 000). He stated that he had however made calls to an accountant at the Ministry's regional office at Outapi, Ms Shivute, to report the salary payments from the Ministry. No specificity is provided as to when those calls were made and how many were made. He said that the salary payments to him were detected after the Ministry had sent auditors to the Omusati Regional office to investigate payments to 'ghost teachers'. He denied using his position for 'gratification'. He said that he had been suspended in February 2017 and charged with misconduct on 8 May 2017 to which he had responded through his lawyer on 7 July 2017.

[14] The respondent confirmed that he was aware of receiving the double salary payments and that 'as a normal human being, anyone who receives money in their account will make use of it' and that he 'did not see that it could be a problem . . . .'

[15] The panel proceeded to find the respondent guilty on the alternative charge. In doing so, the panel referred to the common cause facts of the respondent receiving a monthly salary from the Ministry for 30 months after his departure and his confirmation of being told at induction to report if a previous employer had not stopped salary payments. Despite this, he had failed to inform the relevant officials and had instead

used the money. This conduct was found to amount to acting in a disgraceful, improper or unbecoming manner and to be detrimental to the Government and NCIS.

[16] The initiator and the respondent were then afforded the opportunity to make submissions on sanction. The respondent placed mitigating factors before the panel and the initiator made submissions as to aggravating factors.

[17] The panel found that there were elements of dishonesty in the respondent's conduct and that the relationship of trust had been broken down as a consequence, finding that he could no longer be trusted by NCIS in any given assignment. The panel recommended his discharge from NCIS. The Director-General (D-G) proceeded to terminate his services based upon and following this recommendation with effect from 1 May 2018.

The respondent's internal appeal

[18] The respondent exercised his right to appeal against the termination of his employment to the President under reg 11(20). The main thrust of the respondent's appeal to the President was a breach of a right to legal representation. It was formulated in this way. The respondent quoted reg 11(13) and asserted that the reference to 'another person' included a legal practitioner and that he was denied that right. He contended that this amounted to a 'gross and material irregularity . . . that may vitiate the proceedings against me'.

[19] The respondent contended that the chairperson of the proceedings was not entitled to deny him that right. In support of that contention he provided decided cases of this Court concerning the right to legal representation and concerning his right to fair

and reasonable administrative action under Art 18 of the Constitution. The denial of that right, he submitted, vitiated the proceedings.

[20] In the second place, he submitted that the facts did not form a basis to find him guilty and related to 'a simple administrative hiccup' which did not amount to disgraceful, improper or unbecoming conduct causing an embarrassment to the Government or NCIS.

[21] Finally, it was asserted on appeal that even if duly convicted, a dismissal was harsh and was an inappropriate sanction and was 'startlingly shocking and unfair'.

[22] During the period until his appeal was finalised, he was suspended in his position.

[23] After lodging his appeal, the criminal charges were withdrawn against the respondent in the Magistrate's Court on 18 July 2018.

[24] The appeal to the President took some time. In a letter dated 21 April 2021, the President dismissed the respondent's appeal in the following terms:

> 'Kindly be informed that after a thorough assessment of your appeal, herewith attached, I have considered your appeal and regret to inform you that your appeal has been declined. Therefore you are dismissed in whole in terms of Regulation 11(21)(b) of the Namibia Central Intelligence Service Regulations, 1998 Government Notice 118 of 1998. The reason for the dismissal of your appeal are primarily because you failed to exercise your right in terms of Regulation 11(13) of the Namibia Central Intelligence Service Regulations of 1998.' *(sic)*

Proceedings in the High Court

[25] On 20 July 2021, the respondent launched an application seeking three declaratory orders in the High Court. The first was to the effect that the President's decision dismissing his appeal 'was unlawful and setting it aside'. He also sought an order declaring that the decision by the presiding officer denying him his right to be represented by a legal practitioner or any other person other than a staff member of NCIS to be unlawful and *ultra vires* reg 11(13) and 'setting aside all his decisions and recommendations'.

[26] The third declarator sought by the respondent was to this effect:

> 'Declaring the conviction and dismissal of the (respondent) by the Director-General of NCIS as unlawful and invalid, and setting it aside and reinstating the (respondent) in his position.'

[27] The respondent also sought an order 'setting aside all processes that have since been undertaken on the basis of the purported conviction and termination of the (respondent's) employment'.

[28] Although the respondent did not invoke rule 76 (of the Rules of the High Court) and bring the proceedings as a review application, he stated in his founding affidavit that his purpose was to impugn the President's decision to dismiss his appeal as 'unlawful and liable to be set aside and sought the further declaratory and consequential orders, including reinstatement to his position'.

[29] The respondent challenged the President's reason provided for dismissing the appeal (which stated that the respondent had 'failed to exercise' his rights under reg

11(13)) on the grounds that there was no factual or legal basis for it. The respondent contended that the President had misconstrued his appeal and also complained that he did not 'get a hearing on appeal'. He further asserted that the President had failed to apply his mind to the appeal.

[30] In support of the relief sought, the respondent stated that the chairperson of the Enquiry denied him his right to representation under reg 11(13) at the hearing. He said that at the hearing he 'made it clear' that he wanted to be represented by his legal practitioner or at least by another person not from NCIS but that the chairperson 'outrightly' said that this 'was not possible'.

[31] The respondent also contended in his application that the presiding officer had misconstrued reg 11(13) by restricting the respondent to representation by another staff member.

[32] In answer to the application, the D-G of NCIS stated that the respondent had raised no objection at the hearing concerning the notice refusing him legal representation and furthermore that the respondent had at the hearing not sought to be legally represented. This is confirmed by the presiding officer and the minutes of the proceedings. The D-G thus denied that there was any refusal of legal representation on the part of the presiding officer at the hearing as contended for by the respondent.

[33] It was also contended by the D-G that the proceedings were fair and that the respondent was afforded the opportunity to cross-examine witnesses but did not avail himself of that right. It is also stated that the facts were common cause and that the

respondent did not dispute that he received two salaries (for 30 months) after joining the NCIS.

[34] The D-G also noted that, after being found guilty on the alternative charge, the respondent exercised his right to place mitigating factors before the hearing.

[35] The point was also taken in opposition to the application that 'there is no basis upon which the decision (of the President) can be set aside when the (respondent) opted to seek for declaratory reliefs (*sic*) instead of a review'. It was thus contended that there can be no basis to set aside the decision in the absence of a review in terms of the rules.

[36] It was also stated and confirmed by the President in an accompanying affidavit that he had carefully considered the record of the proceedings which did not support the respondent's allegation that he was denied legal representation at the hearing. It was stated that the President noted that the respondent had failed to raise that in any way at the hearing, and that the respondent had failed to exercise his rights to representation under reg 11(13) and that he had been accorded the opportunity to cross-examine witnesses and present his case. It was specifically pointed out that there was no indication that he had been denied his right to be represented by the chairperson of the inquiry. The President had thus in his reasons intended to convey to the respondent that he was the one who had in fact failed to exercise his rights under reg 11(13). The President also observed how the respondent had participated in the hearing and found no evidence of any prejudice to him which meant that the proceedings should be vitiated. The President confirmed that he assessed the appeal and decided to decline it.

[37] The presiding officer, in his answering affidavit, confirmed that the respondent had failed to request legal or other representation at the hearing.

[38] The D-G further disputed the respondent's contention that reg 11(13) included legal representation.

[39] The D-G also took the point that reinstatement relief was not competent. He pointed out that the respondent's certificate issued under s 8(3) of the Act (granting him security clearance as a prerequisite to serve in NCIS) had in the meantime lapsed upon his discharge from NCIS and that such a certification emphasises the importance of trust between NCIS and its staff members. He pointed out that this had also been the basis for the recommendation of dismissal by the panel at the hearing – an irreparable deterioration of the trust relationship. The panel had noted that respondent's value system displayed regarding Government resources 'is not acceptable', especially as a trainer and educator of new intakes of NCIS recruits in his capacity as Chief Trainer with NCIS. The panel found him unfit, unreliable and unethical. It is also stated that another person had, since his discharge, been recruited to the respondent's position in the establishment of NCIS.

Approach of the High Court

[40] In its cursory judgment, the High Court found that the President did not apply his mind to the matter and that his decision was based on the wrong facts by disregarding the fact that the theft charge – on which the disciplinary proceedings were based – were withdrawn.

[41] The High Court also held that reg 11(13) contemplated legal representation at NCIS disciplinary hearings and that the exclusion of that at his hearing was arbitrary and in breach of that regulation. The court held that whether or not the respondent sought legal representation at the hearing was neither here nor there and found that there was procedural unfairness.

[42] The court also questioned the 'substantive fairness' of the proceedings, expressly questioning how being arraigned on charges which were subsequently withdrawn could amount to conduct in a 'disgraceful, improper or unbecoming manner causing embarrassment to the Government or the service'.

[43] The court concluded that the respondent was unlawfully dismissed from NCIS.

[44] As to the appropriate remedy, the court found that there was no proven element of dishonesty and no reason why the respondent should not be reinstated. The court further held that the withdrawal of the respondent's s 8(3) certificate did not constitute a bar to his reinstatement. The court proceeded to make the following order:

> '1. Applicant's dismissal from NCIS is declared unfair and unlawful and is hereby set aside.
>
> 2. Second respondent is ordered to reinstate applicant to the position at NCIS that he occupied prior to his dismissal, or a comparable position, with effect from the date he was effectively dismissed.
>
> 3. Second and third respondents are ordered to take all the necessary steps to effect applicant's reinstatement, including but not limited to issuing a security certificate if necessary.'

[45] The court also directed that the government respondents in the application pay the applicants/respondents' costs.

Submissions on appeal

[46] The appellants argued that the court below erred on both the facts and the law in making its findings and orders.

[47] As for the factual findings, the appellants pointed out that the hearing was conducted on 18 and 19 July 2017 and that the respondent was found guilty on 19 July 2017 (and not 20 April 2018 as stated by the court). The respondent's appeal to the President in May 2018 was in fact prior to the withdrawal of the criminal charges against him on 18 July 2018. The appeal record which served before the President would have contained no reference to that fact.

[48] The appellants submitted that the High Court erred in finding that the President erred in disregarding the withdrawal of the charges as that fact had not served before him.

[49] The appellants further submitted that the withdrawal of the charges would in any event not preclude a hearing or a finding of misconduct.

[50] Counsel for the appellants also contended that the principle of substantive fairness was complied with by NCIS in the disciplinary proceedings and pointed out that the provisions of the Labour Act in any event did not apply to NCIS and that service in the NCIS is governed by the (NCIS) Act and the regulations.

[51] It was also argued on behalf of the appellants that the charges and proceedings against the respondent were in accordance with regulations 10 and 11 and that the alternative charge was duly established and that the proceedings were procedurally fair.

[52] It was contended that the respondent had not on the facts established that the presiding officer had denied him legal representation and that the respondent was not entitled to the declaratory, relief sought to that effect. Counsel argued that the appellants' denial that representation was refused at the hearing is supported by the minutes and is to be accepted on the established approach to disputed facts in motion proceedings in the absence of a referral to oral evidence.[2]

[53] The appellants also challenged the order directing reinstatement and contended that it is 'not the primary remedy for a dismissed employee'. It was submitted that it was in any event not apposite, given the respondent's conduct of receiving a salary from a government Ministry for 30 months without effectively addressing that issue compromised the respondent's 'integrity, honesty and reliability' and undermined trust in him.

[54] The respondent took the point that the appellants' notice of appeal was not in compliance with the rules in that it failed to set forth concisely and distinctly the findings of fact and conclusions of law to which the appellants object.

[2] As set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 635C-D.

[55] It was argued on behalf of the respondent that the High Court's findings are unassailable and that it was correct in granting the declaratory orders sought by the respondent concerning his service with NCIS.

[56] Respondent's counsel also submitted that reg 11(13) meant that respondent was entitled to representation of his choosing at a disciplinary hearing – including legal representation – and that it was not open to the presiding officer to preclude legal representation. Respondent's counsel contended that the denial of legal representation in the notice vitiated the entire process.

[57] Respondent's counsel also submitted that the High Court was correct in ordering the reinstatement of the respondent. When pressed for authority in support of that order, counsel relied on *Kashela v Katima Mulilo Town Council & others*.[3]

[58] Counsel for the respondent also argued that there was no proof of a breakdown of trust to preclude reinstatement. As to the merits of charges, counsel accepted that it was common cause that the respondent received the double salary payments for 30 months, did not inform NCIS and did not pay anything back until after steps were taken against him. Counsel however contended that the problem lay with the Ministry which was the 'wrongful party' and that the respondent had not been guilty of misconduct.

The appellants' notice of appeal

[59] The respondent takes the point that the appellants' notice of appeal is incompetent and does not comply with rule 7 of the Rules of this Court. It is contended that the failure to set forth concisely and distinctly the findings of fact and conclusions

[3] *Kashela v Katima Mulilo Town Council & others* 2018 (4) NR 1160 (SC) para 68-72.

of law to which the appellants object and the particular respects in which the variation of the judgment or order is sought renders the notice irregular. It is also asserted that for the large part, the grounds raised amount to an attack on the reasons for the judgment. It is correctly contended that no appeal lies against the reasons for a judgment as only the judgment and order can be appealed against.

[60] Rule 7(3) requires in peremptory terms that a notice of appeal must set forth concisely and distinctly the specific grounds of appeal and, in respect of each ground, identify the finding of fact and conclusions of law objected to.

[61] The appellants' notice of appeal is an unyieldy and rambling document. It is indeed more than twice the length of the High Court judgment appealed against. It is also unduly argumentative, mostly in the form of longwinded submissions, instead of concisely and distinctly setting out the grounds of appeal and findings of fact and conclusions of law objected to. It also lacks coherence.

[62] This Court has repeatedly stressed that practitioners who practise in this Court should properly acquaint themselves with the Rules of this Court. The manner in which the notice of appeal is formulated would indicate that the practitioner had not bothered to be acquainted with rule 7(3) or, if acquainted, had disregarded its clear proscriptions.

[63] Despite these adverse features and shortcomings in the notice, when carefully scrutinised some grounds of appeal can eventually be sufficiently discerned from it as well as some references to findings of fact and conclusions of law which are objected to.

[64] The shortcomings in the notice of appeal are not sufficient to set it aside. Considerable judicial time was however unnecessarily expended in trawling through the unduly long and convoluted notice to discern grounds of appeal and certain findings of fact and conclusions of law that are objected to.

[65] Practitioners in this Court are again cautioned that the failure to comply with the dictates of rule 7(3) will be visited with appropriate consequences.

[66] The court's displeasure with the notice of appeal will be reflected in the cost order to be given by this Court. Neither the unsuccessful party nor the client in question (the State) should be required to pay the full measure of the costs for such shoddy workmanship.

Absence of review proceedings?

[67] The appellants raised a preliminary point against the application, persisted with on appeal, that it was not competent to seek to set aside the decision-making in the absence of a review application. The point is taken, as I understand it, that the respondent elected to seek declaratory relief and not a review and thus could not move for decisions to be set aside.

[68] The declaratory relief sought was formulated to declare the president's decision to dismiss the internal appeal, the presiding officer's decision purportedly denying him representation (by a legal practitioner or a person other than a NCIS staff member) and the D-G's decision to dismiss him as unlawful and in each instance also seeking to set aside the respective decision.

[69] The respondent did not invoke rule 76 of the Rules of the High Court and brought an application in terms of rule 65 in seeking declaratory relief which would have as a consequence, if successful, that the impugned decision-making would be set aside on the basis of infringing the respondent's rights under Art 18 of the Constitution and on the basis of the principle of legality or *ultra vires*. The respondent was in possession of the record of the disciplinary proceedings which served before the President and D-G and elected to approach the High Court for relief without invoking the benefits an applicant enjoys under rule 76. He set out his complaints in his founding affidavit and the government respondents in the application had the full opportunity to join issue with the case he advanced and did so.

[70] Whilst the respondent could have pleaded his relief and cause of action with greater clarity rather than the conflated relief sought in each paragraph seeking declaratory orders in the notice of motion and the setting aside of the respective decision, the case was rightly considered on its merits by the High Court and this Court will also do so.

[71] Point taking of this precise nature has rightly been described as propounding 'no more than sterile formalism'.[4]

The High Court's order for reinstatement

[72] The High Court judgment begins with the sentence:

> 'This is essentially a claim for reinstatement'.

[4] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) 663D.

[73] In the very next sentence the court however acknowledges that the Labour Act 11 of 2007 does not apply to the dispute (as is expressly stipulated in s 2(2) of that Act).

[74] The unfair dismissal regime under the Labour Act and its predecessor[5] including remedies for unfair dismissal do not apply to the respondent's employment in NCIS.[6] Notwithstanding this, the court proceeded to approach the matter as if the unfair dismissal regime provided for in labour legislation applied, in finding that the disciplinary proceedings were procedurally unfair and also lacked substantive fairness, concluding that it was 'satisfied that the applicant was unlawfully dismissed from NCIS'. Turning to the question of reinstatement, the court concluded 'I can see no reason why (the respondent) should not be reinstated in the position he occupied when his dismissal took effect, or a similar position'. There was no reference in the judgment to Art 18 and its requisites – the basis of the application.

[75] The court proceeded to grant reinstatement and further ordered NCIS to issue a security clearance, if necessary.

[76] No authority is provided in support of the reinstatement order.

[77] In assessing this order, the starting point is to consider the constitutional and statutory context of this application and the respondent's service with NCIS.

[78] In the introductory portion of the application, the respondent makes it clear that the basis for seeking the relief contained in it is the doctrine of legality, the principle of

[5] Act 6 of 1992 in Part VI read with Part IV.
[6] As in the case in respect of employment in the Namibia Defence Force, Namibian Police Force and Correctional Service in terms of s (2) of Act 11 of 2007.

ultra vires and Art 18 of the Constitution. Given the statutory context of the respondent's employment with NCIS, the decision-making relating to his discharge amounts to administrative action for the purpose of Art 18. Article 18 in turn provides:

> 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[79] The respondent's cause is based upon an infringement of his rights under Art 18. In essence, the respondent sought the declaratory orders and setting aside of the decision-making on grounds that it amounted to unlawful action as a matter of public law and on constitutional grounds (being in conflict with his right to fair and reasonable administrative action under Art 18).

[80] The respondent did not apply for a mandatory interdict but merely sought an order reinstating him to his position. In oral argument, it was suggested by the respondent's counsel that a compensatory order order may be considered by this Court if a reinstatement order were not apposite. The default remedy for decision-making in conflict with those rights would ordinarily amount to a court setting aside the decision(s) in question. In judicial review of administrative action, the courts are after all concerned with the legality of a decision-making process. Although consequential declaratory orders may follow that, the fundamental purpose of judicial review is 'not compensatory but to uphold the rule of law and ensure effective decision-making processes'.[7] Setting aside a decision may be coupled with an order declaring that administrative action to be invalid or for a declaration of rights, depending upon the circumstances.

[7] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 28.

[81] When pressed for authority for reinstatement relief of this nature in this public law context, respondent's counsel argued that this Court should fashion a remedy in line with the approach adopted by this Court in *Kashela v Katima Mulilo Town Council & others*,[8] where it was held:

> 'It could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts; for where there is a right, there must be a remedy to be fashioned by the court seized with the matter. The remedy will depend on how the matter is pleaded, the evidence adduced in support and generally the circumstances of the case. Also to be placed in the scale is the extent of the interference, the dislocation and the improvement brought about on the land.'

[82] The application of that principle articulated in *Kashela* is to be understood within the confines and context of that case. The appellant in that matter established a right under schedule 5(3) of the Constitution to a customary land right allocated to her which was violated. This Court was required to grapple with the need to fashion or tailor a remedy to give effect to the appellant's right under schedule 5(3) in the absence of a statutory remedy at that time.[9] Those considerations do not remotely arise in these proceedings. The remedies where unlawful administrative action is established are well developed. The remedy for the respondent, if successful, would be to have the decision-making set aside and have the matter referred back to NCIS.

[83] There is no basis in law to order the reinstatement of the respondent to his position. No authority is understandably cited for the approach of the High Court in doing so. Given the employment setting of the relief sought, the High Court would appear to have merely applied principles and remedies contained in the Labour Act

[8] *Kashela v Katima Mulilo Town Council & others* 2018 (4) NR 1160 (SC) para 70.
[9] *Id* para 69.

having repeatedly used the language of that Act in its analysis, notwithstanding their inapplicability, even though this was acknowledged at the outset of the judgment. The Labour Act 11 of 2007 and its predecessor[10] were after all enacted to introduce an unfair dismissal regime where the statutory remedy of reinstatement was introduced and provided for.

[84] Quite apart from there being no basis in law for the order of reinstatement in the absence of the application of the Labour Act, I cannot in any event agree with the court's approach to reinstatement upon employment principles (which in any event do not arise in this matter) on the basis of its conclusion that there was 'no proven element of dishonesty here' and 'no reason why (the respondent) should not be reinstated' to his position or a similar one.

[85] The circumstances of the respondent's receipt and then use of his salary from the Ministry for 30 months, after being expressly enjoined at his induction to report such a matter to NCIS and his seniority as Chief Training Officer within NCIS, certainly call into question his integrity and the confidence and trust a national intelligence service could have in him. This conduct indeed in my view involves a level of deceit and dishonesty. This was also understandably expressly raised and pointed out by the panel in their assessment of an appropriate sanction, yet so summarily brushed aside by the court below. This Court has in the context of employment recognised that where conduct involves misrepresentation or deception, it would not be fair to compel an employer to retain an employee in whom it has justifiably lost all confidence.[11]

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[10] Act 6 of 1992.

[11] *First National Bank of Namibia v Nghishidivali Ltd* 2021 (4) NR 1125 (SC) para 66 following *BMW (SA) (Pty) Ltd v Van der Walt* 1993 (1) SA 523 (A) para 13.

[86] It follows that the High Court erred in ordering the respondent's reinstatement.

Should the High Court have set aside the decision-making?

[87] In determining this and other issues raised in this appeal, it is to be stressed at the outset that in motion proceedings the affidavits constitute both the pleadings and evidence and that parties need to ensure that all the evidence in support of their case is contained in their affidavits. In challenges to the legality of administrative action, parties are required to raise review grounds in their founding affidavits. They are assisted in review applications by rule 76 which requires decision-makers to produce the record which should include reasons.[12] In this matter, like in *Nelumbu* the respondent at his peril elected not to proceed in terms of rule 76 and did not require the complete record and reasons when launching his application so that his review grounds or challenges to the decision-making can be amplified.

[88] Whilst the respondent claims that the notice of the disciplinary proceedings seeking to exclude representation by a legal practitioner is an illegality and beyond the powers (*ultra vires*) of reg 11(13), the main basis of his complaint concerning the procedure was that he was denied legal representation at the hearing by the chairperson of the panel. That is also the thrust of the alleged irregularity raised in his internal appeal to the President. That is also how the application is pleaded, although it is also claimed that the terms of the notice excluding legal representation vitiated the entire proceedings.

[89] This primary ground (denial of legal representation by the chairperson at the hearing) is not supported by the record of those proceedings. On the contrary, the

[12] *Nelumbu & others v Hikumwah & others* 2017 (2) NR (SC) paras 40-45.

chairperson does not refer to or quote the notice at the commencement of the hearing but instead quoted reg 11(13)(a) in full which contains no reference to excluding representation by a legal practitioner and in fact stated that the respondent was entitled to representation 'by another person'. The respondent does not dispute the correctness of the record in reply, even though this express statement formed part of it. His assertion of raising the matter at the hearing is also squarely denied by the chairperson. The respondent did not seek a referral to evidence of this important aspect of his case. The version of the appellants supported by the record whose correctness was unchallenged is to be accepted on the basis of the approach to disputed facts in motion proceedings.

[90] The respondent accordingly did not establish that he sought legal representation at the hearing which was then denied to him. On the contrary, the court accepts the version of the appellants that it was not raised at the hearing.

[91] The question arises as to whether the exclusion of legal representation in the notice of the hearing was permissible and if not whether it amounted to an illegality and whether it tainted and vitiated the entire proceedings.

[92] Regulation 11(13)(a) provides for representation 'by another person' in NCIS disciplinary hearings conducted pursuant to that regulation. The phrase 'by another person' in this context (of representation at disciplinary proceedings) would enjoy a wide meaning. Had the drafters of the regulations intended to restrict representation or exclude legal representation, they would have clearly done so. And they could have done so, given the acceptance by our courts that there is not an absolute right to legal representation in *fora* other than courts of law. In *Namibia Tourism Board v*

Kauapirura-Angula,[13] the Labour Court followed *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others*[14] to this effect and cited with approval para 11 of that judgment:

> '. . . There has always been a marked and understandable reluctance on the part of both legislators and the courts to embrace the proposition that the right to legal representation of one's choice is always a *sine qua non* of procedurally fair administrative proceedings. However, it is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. In saying this, I use the words "administrative proceeding" in the most general sense i e to include, *inter alia*, quasi-judicial proceedings. Awareness of all this no doubt accounts for the cautious and restrained manner in which the framers of the Constitution and the Act have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness.'

[93] The court in *Hamata* found in the context of an internal disciplinary enquiry that a rule reading:

> 'The student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon . . .'

meant that it granted an absolute right of representation by a student or staff member and to deny an absolute right to representation by a lawyer of one's choice but to allow the disciplinary committee in the exercise of its discretion to permit representation by a lawyer.

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[13] *Namibia Tourism Board v Kauapirura-Angula* 2009 (1) NR 185 (LC) para 9.
[14] *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others* 2002 (5) SA 449 (SCA). See also *CCMA v Law Society, Northern Provinces* 2014 (2) SA 321 (SCA) para 19.

[94] The court decided upon this meaning after interpreting the rule in the context of the other rules which included a provision that hearings are to be held *in camera*. In reaching this conclusion, the court noted the understandable desire of Pentech 'to conduct domestic disciplinary proceedings within the family, as it were, and the need, because of the exigencies of a particular case, to allow outside legal representation in order to achieve procedural fairness . . . . '.[15]

[95] The court in *Hamata* further explained the implications of its interpretation in the following paragraph:

> 'That does not mean, of course, that permission to be represented by a lawyer who is neither a student nor a member of the staff of Pentech is to be had simply for the asking. It will be for the IDC to consider any such request in the light of the circumstances which prevail in the particular case. Such factors as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers among the student or staff body of Pentech, the fact that there is a legally trained 'judicial officer' presenting the case against the student and any other factor relevant to the fairness or otherwise of confining the student to the kind of representation for which the representation rule expressly provides, will have to be considered. In doing so, Pentech's legitimate interest in keeping disciplinary proceeding 'within the family' is of course also to be given due weight, but it cannot be allowed to transcend all else no matter how weighty the factors in favour of allowing of 'outside' legal representation may be.'

[96] The approach in *Hamata*, was correctly followed by Hoff J in the Labour Court, and demonstrates that the approach contended for by counsel for the appellants – that reg 11(13) excludes representation by legal practitioners – is entirely untenable. Whilst there can be compelling reasons to keep disciplinary hearings confidential within NCIS, reg 11(13) cannot by any stretch of imagination be interpreted to provide for a

[15] *Id* para 20.

blanket exclusion of legal representation in its present formulation when authorising representation by ‘another person’. It would however be open to NCIS to cause its regulations to be amended along the lines found to be permissible in *Hamata*.

[97] It follows that the notice of hearing by seeking to exclude legal representation from the hearing was beyond the powers of reg 11(13). That exclusion was not permissible and authorised by reg 11(13). Did this impermissible refusal of legal representation in the notice mean that the proceedings were unfair and thus vitiated the proceedings? This question is to be determined on the facts of this matter.

[98] At the hearing itself, that form of exclusion was not persisted with. The right to representation – by another person – was stated at the commencement by the presiding officer. It was open to the respondent to exercise his right to representation by another person. On the proper approach to disputed facts, he did not do so and decided to represent himself.

[99] In assessing whether the respondent established that his right to fair and reasonable administrative action was infringed by the notice of hearing impermissibly excluding legal representation and whether the proceedings are to be set aside for that reason, the proceedings as a whole are to be considered.

[100] This enquiry, as was stated by Chaskalson CJ in the South African Constitutional Court, in the context of procedural fairness boils down to:

> 'Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it. '[16]

[101] The centrality of procedural fairness to fair and reasonable decision-making in administrative action was summarised by Plasket JA in a recent illuminating article:[17]

> 'The importance of procedural fairness in official decision-making has been emphasised again and again, usually with reference to famous dicta in oft-quoted cases: "the history of liberty had largely been the history of the observance of procedural safeguards", said Frankfurter J in *McNabb v United States*;[18] it is "not merely of some importance but it is of fundamental importance", Lord Hewart CJ (the author of *The New Despotism*,[19] a vitriolic attack on administrative discretion) proclaimed in *R v Sussex Justices, ex parte McCarthy*,[20] "that justice should not only be done but should manifestly and undoubtedly be seen to be done", the "path of the law is strewn", according to Megarry J in *John v Rees & others; Martin & another v Davies & others; Rees & another v John*,[21] "with examples of open and shut cases which somehow were not; of unanswered charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fix and unalterable determinations that, by discussion, suffered a change"; and that the duty to an act fairly, in the words of Lord Loreburn in *Board of Education v Rice & another*,[22] "is a duty lying upon everyone who decides anything".
>
> Similar sentiments have been expressed by South African courts. In *President of the Republic of South Africa & others v South Africa Rugby Football Union & others*,[23] the Constitutional Court stated that the cornerstone of any fair trial and first legal system is the impartial adjudication of disputes which come before the courts and the tribunals, whether they are criminal, or quasi-judicial and administrative proceedings.'

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[16] *Minister of Public Works & others v Kyalami Ridge Environmental Association & another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) para 101, as cited in *Namibia Tourism Board* para 14.
[17] Clive Plasket *Procedural fairness, executive decision-making and the rule of law* (2020) 137 SALJ 698 at 699.
[18] 318 US 322 (1953) 347.
[19] Rt Hon Lord Hewart of Bury *The New Despotism* (1929).
[20] [1924] 1 KB 256 at 259.
[21] [1970] Ch 345 at 402D-E.
[22] [1911] AC 179 (HL) 182.
[23] 1999 (4) SA 147 (CC) para 35.

[102] In her oral argument, respondent's counsel suggested that Art 12 was also engaged because the disciplinary board of enquiry constituted a tribunal established by statute. This submission is incorrect. Whilst it is correct that the board of enquiry is established by reg 13, it does not constitute a tribunal established by law for the purpose of Art 12. Neither the empowering statute (the Act) nor the regulations provide that boards of enquiry in the regulations are established as tribunals for the purpose of Art 12. If the lawgiver intended to do so, this could have been provided for in the Act or regulations, as is provided for in s 85 of the Labour Act in respect of arbitration tribunals under that Act. As this Court has made clear,[24] proceedings in tribunals for the purpose of Art 12 could not as a consequence of being designated a tribunal for the purpose of Art 12 constitute administrative action for the purpose of Art 18. As was explained in *Swartbooi*:[25]

> 'This is because the Act envisages that the proceedings before an arbitrator under s 86 would amount to those before a competent tribunal affording redress as contemplated by Art 12. The exercise of that adjudicative function of a court or tribunal under art 12 would not constitute an act of an administrative body or official under Art 18, just as legislative decision-making making of a deliberative elected legislative body, whose members are accountable to the electorate, would not constitute administrative action for the purpose of Art 18. Article 18 cannot thus prize the confined review grounds stipulated in s 89 any wider. Mr Hinda, on behalf of the third respondent, correctly conceded that Art 18 does not apply to proceedings before arbitrators constituted under s 85.'

[103] The respondent was at the time Chief Training Officer at NCIS. At the hearing he stated that when he received the charge of misconduct from NCIS on 8 May 2017, he had consulted a lawyer who had responded to it on 7 July 2017. Prior to his lawyer's response, he had also received the impugned notice of hearing dated 21

[24] *Swartbooi & another v Mbengela NO & others* 2016 (1) NR 158 (SC) para 33.
[25] Paragraph 33.

June 2017. It can be accepted that he obtained legal advice in relation to the charge and the procedure as well as the notice of 21 June 2017. It was open to him to challenge that notice on the basis of the exclusion of legal representation was not authorised by reg 11(13) and enforce his right to legal representation. That would have been self-evident to any legal practitioner. No such challenge was forthcoming before the hearing or even at it. Instead, it is not disputed that the presiding officer no longer persisted with that exclusion and reg 11(13) was referred to which had no such express exclusion.

[104] It is clear from the uncontested record of the disciplinary proceedings that his right to representation by another person was read to him at the outset. He pleaded not guilty to the charge and was afforded the opportunity to cross-examine. It is recorded that he did not cross-examine, indicating that he was in agreement with what was stated by the investigating officer. That was indeed the case. The material facts were all common cause and undisputed throughout – the payment of double salaries for 30 months and being told at induction to report such a matter to HR at NCIS so that it could be rectified.

[105] The respondent furthermore proceeded to give his own evidence, confirming those material facts which he had also not disputed when he made a statement to the investigating officer. The only divergence was that he stated that he had contacted Ms Shivute at the Ministry's Outapi Office about the issue and not vice versa as asserted by the investigating officer. Cross-examination on this hearsay allegation made by the investigating officer has little or no bearing on the issue of the respondent's guilt on the alternative charge as he continued to retain and use the salary payments until the

matter was investigated, particularly in view of his statement ‘as a normal human being, anyone who receives money in their bank account will make use of it’.

[106] Closing arguments were heard and noted. The panel adjourned and provided a reasoned ruling for its finding of guilty on the alternative charge. An adjournment followed to afford the parties the opportunity to present mitigating and aggravating factors. The respondent made representations in mitigation of sanction. A finding was made that the misconduct involved elements of dishonesty and that, as a result, trust had broken down in the employment relationship and that NCIS may not trust him in any given assignment. The respondent’s discharge was recommended.

[107] The respondent did not in his founding papers allege how not being legally represented had prejudiced him at the hearing. When challenged in the answering papers, the respondent merely states that cross-examination as a process was foreign to him. He does not however state what factual matter he would have wanted to be addressed in cross-examination. This was understandable because all the material facts were common cause and not disputed by him. In oral argument, his counsel pointed to the difference between what was attributed to Ms Shivute by the investigating officer and his version. This divergence is however not material, and assuming in his favour as to the correctness of his vague and unspecified evidence of contact with her, it was not explained how this could have had any bearing on the finding concerning his guilt on the alternative charge and the breach of trust in view of his failure to report the matter to NCIS until it was investigated and his attitude to making use of that money.

[108] At the heart of procedural fairness in respect of administrative action, especially in the context of a disciplinary tribunal of the kind in these proceedings, is the right to be heard – *audi alteram partem*. It is plainly an implicit requirement in decision-making in the administrative process, except where it can be said to be permissibly excluded or if other extraordinary circumstances render its operation untenable.[26] It certainly applied to these proceedings. The respondent was afforded the right to be heard and exercised it. He also stated at the enquiry that he had consulted a legal practitioner concerning the charges prior to the hearing and would also appear to have taken legal advice in lodging his internal appeal, given the extensive citation of relevant authority in his notice of appeal.

[109] Did the blemish in the notice of appeal stating that representation excluded legal representation render the proceedings viewed as a whole to be procedurally unfair in the context of the impugned disciplinary proceedings. In my view, not. The respondent admitted the material facts and he did not show, after being challenged, that he was prejudicially affected by the absence of not being represented by a lawyer, except for an unspecified reference to cross-examination. The issue referred to in oral argument was by no means material and no adverse finding was made concerning the respondent on that score. It would seem that his direct evidence was in any event accepted. As stated, that aspect had no bearing on the finding of guilt on the alternative charge in view of the admitted facts and his own version.

[110] The respondent on the facts of this case did not in my view establish that the procedure viewed as a whole amounted to a breach of procedural fairness and

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[26] *National Director of Public Prosecutions & another v Mohamed NO & another* 2003 (4) SA 1 (CC) para 37.

infringed his rights under Art 18, despite the impermissible exclusion of legal representation stated in the notice of hearing (but not reiterated at the hearing).

[111] Nor did the respondent establish that the decision-making was unreasonable in breach of Art 18. He did not establish that the panel's reasoned ruling with reference to both the finding of guilt on the alternative charge and its recommendation on sanction were unreasonable. On the contrary, both the finding of guilt on that charge and the recommended sanction would seem to be eminently reasonable on the facts of this matter.

[112] As for the President's dismissal of the appeal, the High Court summarily set aside that decision on the grounds of disregarding the fact that criminal charges were withdrawn against the respondent on 18 July 2018. It is common cause that the internal proceedings and the noting of the internal appeal preceded that date. That fact never served before the President. It is thus incorrect to find that it had been disregarded and to conclude that there was a failure to apply the mind as a result.

[113] The rather clumsy formulation of the reason for the President's dismissal of the appeal is explained in the answering affidavits. The President had intended to state that the respondent had not invoked his right to representation under reg 11(13) and not shown it had been breached after carefully considering the notice of appeal together with the record of the proceedings. Once that formulation is explained and read with the President's statements concerning his consideration of the issues raised in the notice of appeal, it cannot be said that the respondent established that the President's decision-making was unfair and unreasonable in breach of Art 18.

[114] It follows that the appeal against the orders made by the High Court should succeed.

Costs

[115] The appellants have succeeded with this appeal and the costs would ordinarily follow the result of the appeal, except with regard to the notice of appeal and subject to what is stated below. As a mark of this Court's displeasure at the failure to properly adhere to rule 7(3), the appellants should be deprived of two-thirds of the costs relating to the preparing and finalising the notice of appeal and the legal practitioner who prepared that notice is likewise deprived of two-thirds of his charges to his clients for that work.

[116] As far as the proceedings in the High Court are concerned, the respondent did not establish his entitlement to relief and the application should have been dismissed. Although the application was misconceived, the respondent was however vindicated in his interpretation of reg 11(13) which was vehemently opposed both in the court below and in this Court. Much time was spent on that aspect. Given that vindication and the context of the application and in which the respondent asserted his constitutional right to fair and reasonable administrative action, I would consider that it would be fair and just that he only be liable for 50 per cent of the appellants' costs – both in the High Court and on appeal.

Order

[117] The following order is made:

1. The appeal succeeds.

2. The order of the High Court is set aside and replaced with the following order:

> ‘(a) The application is dismissed.
>
> (b) The applicant is to pay 50 per cent of the respondents’ costs, to include the costs of one instructing and one instructed counsel.’

3. The appellants are deprived two-thirds of the costs relating to the notice of appeal.

4. The appellants’ instructed legal practitioner is precluded from charging two-thirds of the costs relating to preparing and finalising the notice of appeal.

5. Subject to para 3 of this order, the respondent is to pay 50 per cent of the costs of appeal, to include the costs of one instructing and one instructed counsel.

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SMUTS JA

_____

ANGULA AJA

_____

SCHIMMING-CHASE AJA

APPEARANCES

APPELLANTS:	D Khama Instructed by Office of the Government Attorney
RESPONDENT:	V Kauta Instructed by Ndaitwah Legal Practitioner