REPORTABLE

CASE NO: SA 8/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HILYA TAETUTILA NGHIWETE **Appellant**

and

NAMIBIA STUDENTS FINANCIAL ASSISTANCE FUND **Respondent**

Cross-appeal

NAMIBIA STUDENTS FINANCIAL ASSISTANCE FUND **Appellant**

and

HILYA TAETUTILA NGHIWETE **Respondent**

Coram: DAMASEB DCJ, HOFF JA and PRINSLOO AJA

Heard: **20 October 2023**

Delivered: **6 September 2024**

Summary: This is an appeal of certain orders of the Labour Court sitting on an appeal from an award given by an arbitrator, instituted by the appellant who was employed as Chief Executive Officer of the Namibia Students Financial Assistance Fund (NSFAF) from March 2013 until her dismissal on 7 February 2020. Prior to her dismissal and on 16 April 2018, the appellant was suspended from her position pending an investigation into charges for which she was facing a disciplinary hearing. On 6 February 2020, the respondent's Board resolved to dismiss the appellant without finalising the disciplinary hearing, citing delays attributed to the appellants conduct from the date of suspension to the date of dismissal, which according to the respondent made it impossible to bring the disciplinary hearing to finality.

The respondent, dissatisfied with the arbitration award which found in favour of the appellant, appealed to the Labour court which held that the dismissal of the appellant was without a fair and valid reason and without a fair procedure being followed. However, it set aside the arbitrator's award which reinstated the appellant and replaced it with an order directing the respondent to pay the appellant the monthly remuneration she would have received from 8 February 2020 until 15 July 2021.

On appeal to this Court is the finding of the Labour court relating to the order setting aside appellant's reinstatement as well as an order backdating appellant's payment of monthly remuneration to 15 July 2021. The main issue for determination in this Court is whether or not the Board's decision of 06 February 2020 dismissing appellant was null and void on the basis that the Board was not properly constituted in terms of the NSFAF Act, therefore giving rise to other ancillary relief relating to reinstatement and payment of remuneration. The respondent noted a cross- appeal, directed against the court *a quo*'s finding that the dismissal of the appellant was without a fair and valid reason and without a fair procedure being followed. The respondent also attacked the court *a quo*'s decision ordering it to pay the appellant compensation.

Part of the issues raised by the respondent was whether or not the Minister of Higher Education, Technology and Innovation was obliged to state in the appointment letter

of an additional member, the particular purpose for such appointment, and whether an additional member who was statutorily prohibited from voting at board meetings, but who voted to dismiss the appellant resulted in the decision of the Board being unfair and null and void.

Held that, a decision of the majority of the voting members of the board present at a meeting constituted a decision of the board. The fact that a member who was not entitled to vote, voted to dismiss the appellant at a properly constituted board meeting, did not invalidate the votes of the majority of the members entitled to vote at the meeting. The decision taken was therefore validly taken and at a properly constituted board meeting.

Held that, the fact that the purpose for which an additional member had been appointed was not reflected in the letter of appointment did not invalidate the appointment of the additional member and the decision taken to dismiss the appellant cannot for that reason alone be null and void.

The evidence presented during the arbitration proceedings on behalf of the respondent described the relationship with the appellant as ‘unbearable’, acrimonious’, disruptive and uncooperative’, no trust in the leadership of the appellant’. The appellant herself stated that the animosity and hatred towards her by the board were ‘acutely raw’.

Held that, the relationship of trust and confidence between the appellant and the respondent had irretrievably broken down based on substantially the conduct of the appellant in the circumstances of this case, which made the continuation of the employment relationship impossible.

Another issue was whether a medical report was required in addition to a medical certificate in order to determine the appellant’s ability to attend the disciplinary hearing.

Held that, in respect of the medical certificate tendered in support of an application for a postponement of the disciplinary hearing, the employer is not required to confine itself to a medical certificate but is entitled to request a medical report from a doctor as proof of illness, especially in the case where the sick leave has been granted for an extended period. This would apply not only in the case of the employee's physical inability to perform normal work activities but also to his or her mental ability.

Held further that, the respondent acted reasonably and in accordance with its policies by demanding to be provided with a medical report or for appellant to be subjected to an examination by a psychiatrist of its choice, since it was important to establish whether the appellant was genuinely incapacitated and that the medical certificate was not employed as a delaying tactic by the appellant.

Held that, the breakdown in the relationship between the appellant and the respondent provided a valid and fair reason for the dismissal of the appellant and renders the dismissal substantively fair.

Consequently, the appeal is dismissed and the cross-appeal is upheld with costs.

APPEAL JUDGMENT

HOFF JA (DAMASEB DCJ and PRINSLOO AJA concurring):

Introduction

[1] This is an appeal of certain orders of the Labour Court sitting on an appeal from an award given by an arbitrator in favour of the appellant. There is also a cross-appeal in respect of certain orders of the Labour Court.

Background

[2] The appellant who was employed by the respondent as head of the secretariat referred a dispute to the Labour Commissioner for conciliation and arbitration on 17 February 2020.

[3] In her particulars of complaint the appellant alleged that during April 2018 the respondent unlawfully and unfairly suspended her pending the finalisation of a disciplinary process; that the respondent abandoned the disciplinary hearing by unlawfully terminating the appellant's contract of employment without a hearing and in a manner wholly inconsistent with s 33(1)*(a)* and *(b)* of the Labour Act 11 of 2007; that the decision to dismiss her was not taken at a properly constituted Board of Directors of the respondent; and pleaded that her dismissal was unfair, invalid and of no effect in law and is liable to be set aside and substituted with an award directing the respondent to reinstate the appellant into her position and pay her all remuneration from the date of dismissal to the date of reinstatement.

[4] The complaint was referred to arbitration and in terms of rule 20 of the rules relating to conciliation and arbitration of disputes, the parties recorded the following facts not to be in dispute:

(a) The appellant was dismissed by the respondent on 7 February 2020 for conduct which was unrelated to the merits of the charges preferred

against the appellant in 2018 and for which charges she was facing a disciplinary hearing at the time of her dismissal.

(b) The appellant was dismissed without charges and without a disciplinary hearing/enquiry.

[5] The arbitrator after hearing the testimonies of witnesses including that of the appellant found that the appellant's dismissal was both procedurally and substantively unfair, without valid and fair reasons, and that the trust relationship between the appellant and the Board of Directors of the respondent had not been broken down irretrievably. The arbitrator made the following orders:

'1. The applicant's dismissal was both substantively and procedurally unfair and thus set aside;

2. The respondent must reinstate the applicant to the position she held prior to her dismissal with all benefits enjoyed while in employment effective of 01st of September 2021;

3. The respondent must pay the applicant the remuneration she would have received had she not been dismissed on or before 31st of August 2021; and

4. I have not made an order as to costs.'

[6] On appeal, the Labour Court made the following orders:

'1. The dismissal of the first Respondent[1] was without a valid and fair reason and without following a fair procedure.

[1] In the appeal the appellant was the first respondent and the arbitrator the second respondent.

2. The appeal in respect of the first order of the arbitrator, is dismissed and rejected.
3. The appeal against first Respondent's reinstatement succeeds.

4. The Appellant shall pay the first Respondent the monthly remuneration she would have received from 8 February 2020 until 15 July 2021 (subject to statutory deductions).

5. Each party shall bear its own legal costs.'

[7] The appellant did not appeal against orders 1 and 2, but nevertheless stated in her grounds of appeal that the Labour Court should have found that the decision of the respondent's Board of Directors to dismiss her was null and void and of no effect (as if she was never dismissed) as it was amongst others made by Tulimeke Munyika (Ms Munyika), an additional member who was statutorily prohibited from voting at a meeting under s 6(2)*(a)* of the Namibia Students Financial Assistance Fund Act 26 of 2000 (the NSFAF Act).

[8] In respect of the order not to reinstate the appellant, the grounds of appeal were that the court *a quo* did not give sufficient consideration to the fact found by the arbitrator that there was no valid and fair reason to dismiss the appellant; that the court *a quo* relied on 'highly unreliable evidence' of respondent's witnesses that the trust relationship between the parties had broken down, and failed to properly consider appellant's evidence in that regard; and that the court *a quo* failed to consider the fact that it would be unfair and highly prejudicial to the appellant to set aside the reinstatement and only order remuneration up to 15 July 2021 in

circumstances where the court was aware that the arbitrator's order had been implemented with the result that the appellant was until the date of the Labour Court's order (16 September 2022), receiving her monthly remuneration as ordered by the arbitrator. Therefore, to order remuneration only until 15 July 2021 is inappropriate and wholly unjustified.

[9] The respondent cross-appealed against orders 1, 2 and 4 of the court *a quo* on various grounds *inter alia* that the court erred on the facts and in law: in finding that the appellant was dismissed without a valid and fair reason, despite the fact that respondent had put up substantial facts upon which to find a valid reason to dismiss the appellant; by failing to appreciate that the principles of fairness apply equally to the respondent and to the appellant, especially in circumstances where the appellant delayed and ultimately halted the disciplinary process; that the appellant, as an employee, remained obligated to adhere to the provisions of the respondent's internal policies and codes – which required of her to apply for sick leave, and to provide the respondent with a medical report establishing proof of illness and to obtain a second medical opinion if so required by the respondent – regardless of whether or not an independent chairperson was seized with the disciplinary process; and in failing to find that the appellant's conduct towards the respondent and the disciplinary process, since her suspension in 2018, evinced no real intention to testify at the disciplinary hearing – which in itself constituted a repudiation of her contract of employment.

<u>The arbitration proceedings</u>

[10] The issue for determination in the arbitration proceedings was whether or not the appellant had been unfairly dismissed both substantively and procedurally, and the appropriate relief, if applicable.

[11] The respondent called four witnesses, whose evidence I will now summarise: The first witness was Mr Fillemon Wise Immanuel (Mr Immanuel). He is employed by the respondent as company secretary since 16 October 2016 and responsible for governance and compliance issues, legal services, and risk management. He was required to attend board meetings, to consult with the chairperson of the Board, when necessary, and with chairpersons of the various Board committees.

[12] He testified that after the promulgation of the NSFAF Act a decision was taken to detach the institution, the Namibia Students Financial Assistance Fund (NSFAF) from the Ministry of Higher Education, Technology and Innovation which detachment was realised effective from 1 May 2013. The object of the NSFAF is to ensure the provision of financial assistance to Namibian students eligible to study at approved institutions of higher learning, and is fully funded by the Namibian Government.[2]

[13] The management of NSFAF is vested in the Board of Directors[3] and the Board had delegated the day-to-day administration of the affairs of the NSFAF to the head of the secretariat, also referred to as the Chief Executive Officer (CEO). The appellant has been the head of the secretariat since the inception of the NSFAF.

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[2] With an annual budget of about N$1 billion.

[3] Which currently consists of Mr Klemens /Awarab, as chairperson, and as members Mr Stephen Tjiuoro, Mr Ndelipula Hamutumwa, Dr Isak Neema, Ms Adda Angula and Ms Tulimeke Munyika.

[14] The witness testified that when he joined the NSFAF in 2013, his relationship with the appellant as CEO was ‘healthy’ which later deteriorated since disagreements between them emerged regarding which decisions the Board had actually taken (which decisions ultimately had to be taken back to the Board for confirmation); that she leaked information about the Board to the media in respect of the remuneration of board members; and issues on leadership style of the chairperson of the Board.

[15] According to this witness, he wrote to the Board in order to raise issues of governance which would require Board interventions lest the NSFAF found itself in a very compromised position. As a result of that, the appellant proposed that his role should be changed, to which he objected. Consequently, he wrote a formal grievance against the appellant during January 2017.

[16] According to the witness, at some stage there was an exchange between the appellant and himself during which he accused her of bullying him. Subsequently he was served with disciplinary charges that he had insulted her. Their relationship at the end of 2016 was ‘completely unhealthy’ and ‘negative’.

[17] This witness further described the relationship between the Board and the appellant as ‘acrimonious’. The witness was referred to a document, Exhibit ‘B’, dated 20 June 2016, which he identified as a ‘group grievance’ by some ten managers within the NSFAF and addressed to the Board where a number of issues were raised

in respect of the appellant's leadership which they described as an 'unbearable working relationship . . .'.

[18] The witness was also referred to a letter dated 28 October 2016 from the Minister of Public Enterprises, addressed to the then chairperson of the Board, Ms Patty Karauihe-Martin in which the chairperson was informed that the Minister had approved the appointment of a special investigation team in terms of the provisions of the State-Owned Enterprises Governance Act 2 of 2006, to investigate various allegations against the CEO as well as the Board of Directors. With reference to various correspondence the witness testified that the appellant (through her legal practitioner) had during the period of 29 June 2018 until 31 July 2018 been invited no less than five times by the respondent (through its legal practitioner) to participate in the KPMG interview process. The appellant never participated in the interview process.

[19] According to Mr Immanuel, the disciplinary hearing was postponed to March 2019 and thereafter to April 2019 – thereafter the hearing proceeded. At this stage three witnesses, including himself, had testified on behalf of the respondent and one witness was due to testify on specific issues. The last evidence led on behalf of the respondent for that year was during October 2019. The parties then agreed to have the matter postponed to 6 January 2020.

[20] In a letter dated 4 January 2020 (a Saturday) and addressed to the chairperson of the disciplinary hearing, appellant's legal practitioner informed the

chairperson that on 12 December 2019 the appellant attended to a clinical psychologist, and as a result was booked-off on sick leave from 12 December 2019 until 12 March 2020. According to the letter the appellant was strongly advised by the psychologist to take up the prescribed treatment and that appellant would be unable to attend to the disciplinary hearing (set down for 6 January 2020). The legal practitioner requested a postponement of the hearing until after 12 March 2020. The diagnosis on the medical certificate provided, read: 'Psychopathological'. The follow-up visit according to the medical certificate was 'with appointment'.

[21] According to Mr Immanuel, the respondent requested for a medical report from the appellant, however, no medical report was provided as earlier requested by the Board. The Board then sought a legal opinion regarding the issue of the medical certificate and medical report. In a letter dated 7 February 2020 addressed to the appellant, the respondent highlighted the chain of events since the appellant's suspension on 16 April 2018 and the exchange of correspondence between the parties.

[22] Mr Immanuel denied that the decision to dismiss the appellant was not taken by a properly constituted Board or at a properly convened meeting of directors. He testified that if the arbitration forum were to order the reinstatement of the appellant it would result in the 'restoration of chaos'.

[23] According to the witness, the Board acted on the strength of a legal opinion obtained regarding the appellant's refusal to submit a medical report, her refusal to complete a leave form, and her refusal to submit to a second medical opinion – conduct which the Board regarded as disciplinary offences.

[24] In respect of the letter dated 4 January 2020 addressed to the chairperson of the disciplinary hearing in which appellant requested a postponement based on the medical certificate, and as to why the Board became involved in deciding whether or not the appellant should be excused from attending the hearing, Mr Immanuel testified that whilst the chairperson of the hearing may decide whether to postpone or not, it was the prerogative of the respondent (the employer) to decide the issue of sick leave – especially by a person who from the outset was determined to ensure that the disciplinary hearing did not take place.

[25] The second witness, Mr Klemens /Awarab (Mr /Awarab), testified that he was appointed as chairperson of the Board in March 2019, replacing Mr Mutumba. He testified that the appellant had been suspended before his appointment to the Board. He learned about the suspension of the appellant after his introductory meeting with the Minister, Ms Kandjii-Murangi. Subsequently he was presented with documentation of the Board to read, and was also 'updated' by the company secretary.

[26] In respect of the letter dated 8 January 2020 addressed to appellant's legal practitioner, the witness testified that the Board wanted to know the nature and diagnosis of 'psychopathological' since on the medical certificate there was no

explanation as to what it was – it was important for the Board to appreciate the severity of the diagnosis and secondly, to be able to make an assessment regarding the appellant's ability to attend the disciplinary hearing. The witness referred to the respondent's leave policy (para 12.8) which reads as follows:

> 'Should an employee suffer from "frequent sickness" the Department Head in consultation with the Human Capital and Corporate Affairs Department shall seek a second medical opinion at the cost of the NSFAF to determine whether the employee is fit to continue his/her duties.'

[27] Mr /Awarab testified that the Board relied 'heavily' on the policy to guide them in respect of the ultimate decision – the appellant was suspended with full salary and benefits, was still an employee of NSFAF and had to in terms of the policy apply for sick leave.

[28] Regarding the letter dated 12 January 2020 addressed to the respondent's legal practitioner, the witness referred to paras 4.1 and 4.2 of the policy which reads *inter alia* as follows:

> '4.1 The granting of leave remains the prerogative and discretion of NSFAF and it is subject to the provisions of the Labour Act, the employment contract and other employment legislation and regulations.
>
> 4.2 The granting of leave will be subject to the mutual agreement by both parties with due consideration to the efficient and effective continuation of the NSFAF operations.'

[29] During cross-examination the witness testified that the appellant was dismissed because she committed a disciplinary offence, namely that she refused to abide by policy provisions and refused to obtain an alternative medical opinion. The appellant had however not been charged with these offences, because the decision not to charge her was informed by the fact that the disciplinary process was not honoured, and so as a consequence, charging her again would not be in the interest of the company because it would also have had the same consequential delays. According to him the Board found the actions of the appellant disruptive and uncooperative.

[30] Mr /Awarab was referred to para 11.3.2 of the policy document (NSFAF Employee Relations Policy) which deals with the circumstances under which a disciplinary hearing may be held in the absence of an employee. He conceded that the chairperson of the disciplinary hearing in terms of their policy document was competent and authorised to decide the issue whether or not the appellant had a valid reason to avoid attending the hearing.

[31] The witness was referred to para 10.1 of the disciplinary code which provides that:

> ‘No employee may be dismissed without being granted a formal hearing or enquiry, unless circumstances such as the employee either absconded or being unwilling to return to work render this impossible.’

and confirmed that the appellant did not abscond – she was on suspension.

[32] The third witness was Mr Kennedy Kandume (Mr Kandume) who testified that he was the acting CEO of the NSFAF for almost three years at that stage (when the witness testified on 14 April 2021), and first assumed the position on 16 April 2018. He was employed by the NSFAF since 2014 as Senior Manager: Operations. In that capacity he reported to the CEO, ie to the appellant. He was a member of the Executive Committee.

[33] The witness testified about a grievance document, dated 20 June 2016, signed by ten managers including himself regarding the leadership style and stewardship of the appellant. Prior to the compilation of this document there was a meeting called by the management committee to discuss issues the middle management had been experiencing.

[34] The appellant was initially also in attendance during this meeting, but left after questions were posed to her. The management committee members felt that the appellant had not addressed the issues they wanted to raise with her – issues relating to the day-to-day management of the institution; that the institution had been characterised by gossip; disrespect of management; members feeling undermined in areas of their own expertise; confidential information regarding the performance of managers somehow reaching junior staff and people outside the institution; victimisation and abuse.

[35] The witness was referred to the minutes of the special board meeting held on 6 February 2020 where the decision was taken to dismiss the appellant, and he testified that the decision was not taken by voting but that there was a discussion and thereafter the resolution was taken by consensus.

[36] In those minutes reference was made to the high costs incurred in the protracted disciplinary hearing. These costs related to the investigation by KPMG, the legal costs, costs relating to the chairperson of the disciplinary hearing, and the monthly salary to the CEO whilst she was on suspension, which costs were calculated (at that stage) to be more than N$8 million.

[37] The witness confirmed that Ms Munyika was an additional member who does not in terms of the NSFAF Act have the right to vote, however she could participate in the discussions during meetings.

[38] Regarding the question of reinstating the appellant, the witness testified that since he started at NSFAF there were issues regarding the leadership style of the appellant, and that in his view it would have serious implications as far as the functioning and the operation of the institution is concerned – that it is not in the best interest of the institution to reinstate the appellant.

[39] During cross-examination responding to a question whether in terms of the policy, NSFAF has the power not to serve charges on an employee, the witness answered in the affirmative and referred to s 10.1 of the policy, which according to

this witness governs a situation where an employee makes it impossible for a hearing to take place.

[40] The witness testified that since the appellant had been dismissed by the Board there was no need to continue with the disciplinary hearing, as the process had been frustrated by the appellant, and that the appellant was making it impossible for the disciplinary hearing to continue and to be concluded.

[41] The fourth witness, Percy Mukondja Tjahere (Mr Tjahere), testified that he is employed at NSFAF as Senior Manager: Marketing and Communications since 2 May 2013 and that he reported to the appellant as well as to Ms Koopman and a Mr Nico Kangunga.

[42] He testified that a group grievance document dated 20 June 2016 was drafted by middle management because they were dissatisfied with the CEO (the appellant). He confirmed that he signed the document. The issues were the same as testified by the previous witnesses. The witness viewed the working relationship with the appellant as unbearable.

[43] He testified about an incident where he was summoned by the appellant who informed him to see the Minister who wanted certain information regarding the number of students funded and their respective fields of study. He subsequently collected the information and provided it to the appellant who instructed him to

provide the information to the ‘Observer’ newspaper which then ‘reconstructed this information completely different’.

[44] The group grievance document was submitted to the Board. He testified that there was a prior meeting with the appellant about their grievance but appellant did not listen to them and left the meeting. The witness testified that the company secretary was not involved in the process of drafting the group grievance document since he had his own grievance against the appellant.

[45] Regarding reinstatement of the appellant, he testified that he had no trust in the leadership of the appellant and reinstating her would put the institution back to the previous environment which prevailed when the appellant was the CEO.

[46] Ms Hilya Nghiwete (Ms Nghiwete) testified that she was employed as CEO of NSFAF since March 2013 until her dismissal on 7 February 2020. She is the appellant in this matter.

[47] She testified that on the evening of 30 April 2018 she was served with unsigned charges which she refused to sign. On 2 May 2018 signed charges were served on her which had been predated to 30 April 2018. On 7 May 2018, the first day of the disciplinary hearing, the NSFAF requested a postponement because a forensic audit report was not ‘ready’.

[48] She testified that on that day she did not request for a postponement in order to obtain the services of a legal practitioner. According to the appellant, during February 2019 she was on compassionate leave because her father passed away, but she did not complete a compassionate leave form. Her experience was that employees were not required to complete such leave forms.

[49] In respect of the sick leave certificate dated 12 December 2019 she testified that she had been booked-off by Dr Joab Mudzanapabwe (Dr Mudzanapabwe) for three months. Dr Mudzanapabwe is a psychologist. She testified that she was determined to attend the disciplinary hearing despite the fact that she was booked-off. She went back to Dr Mudzanapabwe in January 2020 for a follow-up. This was before 4 January 2020. The doctor then strongly advised that she would be fit to go back to work after she had completed the treatment in March 2020.

[50] According to the appellant, by April 2019 she had been on suspension for a year but had not applied for annual leave since it did not make sense to apply for leave whilst on suspension. She further testified that she had never been diagnosed with a psychiatric ailment. According to her the NSFAF had never in correspondence explained why she had to subject herself to psychiatric examination.

[51] The appellant further testified that when she received the letter of dismissal on 7 February 2020 she was totally devastated. She had expected the chairperson of the disciplinary hearing to make a ruling (on the request for a postponement).She denied that she had been frustrating the disciplinary process because the delays came from

both sides. She testified that when she received the group grievance document she requested for (supporting) evidence which was not forthcoming.

[52] The appellant testified that the Board in response to the group grievance, appointed the auditing firm Ernst & Young to conduct an enquiry. She objected to Mr Immanuel, the company secretary, being the co-ordinator of the enquiry because he had also drafted a grievance against her. According to her no evidence was led during the enquiry to the effect that she had victimised employees at the NSFAF. She testified that she had charged the company secretary, Mr Immanuel, during 2017 for committing an offence in terms of the policy. He was convicted and the chairperson recommended a dismissal.

[53] Subsequently she heard from a board member, that they were cautioned by the Minister not to ‘elbow’ people out of the NSFAF. The Board then did not approve the recommendation.

[54] The appellant testified that the company secretary misrepresented her true character when he spoke of her alleged misconduct. In the same vein, what he testified about was a lie since he had a personal vendetta against her. She denied that she ever had a bad relationship or adverse encounter with the acting CEO. She testified that the view expressed by the acting CEO in respect of reinstatement was influenced by the company secretary.

[55] The appellant testified that she did not complete the leave form because she was determined to attend the hearing if the chairperson had ruled on the hearing. The appellant testified that the policy of her employer does not explicitly require that a person on suspension should complete a leave form.

[56] The appellant testified that the Board was being insensitive towards her difficult circumstances – she was going through stress the Board subjected her to and that unfair and bogus charges were levelled against her. She testified that she could not understand why the Board wanted to know whether she would be fit to return (to her employment) when the doctor said that she would be able to resume work after 12 March 2020, and that the employer could have waited until 12 March 2020 to see if she was going to come back for the hearing.

[57] The appellant testified that the reason why she never offered to undergo an examination for a second medical opinion, was because that opportunity was never offered to her by her employer. The appellant testified that the group grievance was a result of instigation by the company secretary and that even the Minister was influenced by the company secretary.

[58] It was put to the appellant that nobody knew what ‘psychopathological’ meant, nevertheless she travelled internationally during September whilst being treated for a medical condition which made her unfit to travel – an allegation which she has never addressed. In reply to the question why she has never addressed the allegation, the appellant answered: ‘because they were not comparing apples to apples’.

[59] In her founding affidavit at page five (dated 13 March 2019) in her review application in the High Court the appellant stated the following:

> '. . . Over the years I have been subjected to unfair and continued victimisation by the First Respondent's Board[4] on spurious and unfounded allegations. It has always been clear that the Second Respondent's[5] previous and current Board were at all material times determined to unfairly and unlawfully terminate my employment. The animosity and hatred towards me are acutely raw.'

[60] The appellant testified that since her dismissal she had not applied for employment. The appellant concluded her evidence and did not call any witnesses.

The judgment of the Labour Court

[61] The Labour Court held that the onus to prove a fair dismissal was on the respondent;[6] that the respondent without prior termination of the disciplinary enquiry, without formulating additional charges, and without giving an opportunity to the appellant to make submissions concerning dismissal, summarily dismissed the employee without applying a fair procedure.

[62] It found that the basic requirement of fairness towards the employee required the NSFAF to oppose the appellant's application for a postponement on health reasons within the confines of the ongoing scheduled disciplinary hearing; that for the respondent to submit that there was no admissible evidence on the medical condition

[4] The first respondent was the Minister of Higher Education, Technology and Innovation.
[5] The second respondent was the Namibia Students Financial Assistance Fund.
[6] The appellant in the Labour Court.

of the appellant, was premature; that there was nothing in the respondent's disciplinary code to give the Board authority and competence to adjudicate and pronounce on evidentiary matters; and that the circumstances of this case evidenced an inopportune arrogation and exercise of powers by the Board.

[63] It held that there was no vitiating misdirection or irregularity by the arbitrator when she found that the dismissal of the appellant was substantially invalid and unfair and that the procedure followed was also unfair.

[64] On the evidence tendered during the arbitration proceedings, including the evidence of the appellant, the court concluded that another arbitrator or court acting reasonably would have come to a different conclusion, ie not to order reinstatement due to the fact that the employment relationship and trust between the parties had broken down – thus it found that the evidence presented during the arbitration proceedings militated against reinstatement.

Submissions on appeal

On behalf of the appellant

[65] It was submitted on behalf of the appellant that the Labour Court erred in that it should have found that the dismissal of the appellant was not only unfair but also null and void and of no effect as if the appellant was never dismissed, as it was amongst others, made by Ms Munyika, an additional member, who was statutorily prohibited from voting at a meeting of respondent's Board of Directors under s 6(2)*(a)* of the NSFAF Act.

[66] It was submitted that the Labour Court erred in not dealing with the above aspects and not making a finding notwithstanding that it was at all times a live issue and where a finding on such an aspect would have had a positive and favourable effect on the appropriate remedy, in particular whether or not the appellant should be reinstated and as to what remuneration she must receive for the period of her dismissal.

[67] This Court was referred to the provisions of s 6(2)*(a)* which provide that the Minister may appoint a board member 'for a particular purpose', and which section expressly prohibits an additional board member from voting at meetings of the Board.

[68] It was submitted that no particular purpose was stated in the appointment letter of Ms Munyika, and that despite the statutory prohibition, Ms Munyika participated and voted for the dismissal of the appellant. The involvement of Ms Munyika, it was submitted, not only made the dismissal unfair, but actually made it null and void as if it did not occur.

[69] The consequences of the dismissal having no effect in law, it was submitted, are also relevant to the question of reinstatement because in the eyes of the law the appellant was never dismissed – reinstatement was thus unavoidable given the vitiating irregularities.

[70] It was submitted that the Labour Court in spite of finding in its judgment that it was ‘unable to find an irregularity in the arbitrator’s award concerning the first respondent’s reinstatement and order of backpay’, nevertheless interfered with the arbitrator’s discretionary order of reinstatement since, *inter alia*, the Labour Court did not give sufficient consideration to the fact that it had found that there was no valid and fair reason to dismiss the appellant. It was submitted that the discretionary decision by the arbitrator could only have been upset on appeal in confined and exceptional circumstances.

[71] It was further submitted that the respondent’s cross-appeal was not properly before this Court. It was submitted that in view of the fact that the respondent had been dissatisfied with its unsuccessful appeal in the Labour Court in respect of the appellant’s dismissal, it was under an obligation to file an appeal within 21 days provided for under rule 7(1).

[72] In view of the fact that the respondent did not appeal against the findings of the Labour Court on appellant’s dismissal, it must follow that the respondent ought to have filed its appeal (not cross-appeal) within 21 days, which it failed to do. The respondent was therefore not entitled to rely on the cross-appeal provisions of the Rules of this Court.

On behalf of the respondent

[73] It was submitted that crucial to the respondent’s case on appeal was the conduct of the appellant during the period of 30 April 2018 (when she was charged)

and 7 February 2020 (when she was dismissed), a period three months shy of two years.

[74] Regarding appellant's submission that the Board's decision of 6 February 2020 to dismiss the appellant was null and void on the basis that it was not properly constituted in terms of the NSFAF Act, it was submitted that this submission ignored the applicable provisions of the State-Owned Enterprises Governance Act 2 of 2006 (the Governance Act). In this regard, it was submitted, that if regard is had to the actual wording of the letter of appointment of Ms Munyika, it should be clear that her appointment was effected in terms of both the NSFAF Act and the Governance Act.

[75] In terms of the provisions of the Governance Act, it was submitted that where there is a conflict between NSFAF Act and the Governance Act, the provisions of the Governance Act takes precedence. In the alternative, it was submitted that the Board took a valid decision since such decision was by the majority of the board members.

[76] It was submitted that the duty in terms of the provisions of s 33(1) of the Labour Act 11 of 2007 to hold a disciplinary enquiry is not an absolute requirement. In this regard this Court was referred to the respondent's Employee Relations Policy Clause 10.1 which provides that:

> 'No employee may be dismissed without being granted a formal hearing or enquiry, unless circumstances such as the employee either absconded or being unwilling to return to work render this impossible.'

[77] It was submitted that the code anticipates a situation where the particular circumstances of the matter renders it impossible to hold a formal enquiry.

[78] It was submitted with reference to case law,[7] and the International Labour Organisations Convention on Termination of Employment 158 of 1982,[8] that fairness must be evaluated having regard to both the interest of the employee as well as that of the employer – which involves competing and conflicting interests.

[79] It was submitted that the evidence established that the appellant sought to avoid testifying and subjecting herself to cross-examination at the disciplinary hearing and instead chose to delay and stall the process for as long as possible, contrary to the Employee Relations Policy which provides that disciplinary action must be taken as soon as possible after an infringement of rules and regulations.

[80] The respondent in its heads of argument refers to the sequence of events since 16 April 2018 (when appellant was served with a notice of suspension) until 7 February 2020 when she was dismissed in order to demonstrate the alleged delaying tactics engaged in by the appellant.

[81] Counsel for the respondent referred to the 'medical delay' in the disciplinary hearing submitting that the medical certificate, for the purpose for which it had been tendered, was 'wholly inadequate' since it provided no explanation whatsoever of appellant's condition and her ability to participate in the disciplinary hearing, or the

[7] *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA).
[8] Article 7.

degree to which the diagnosis then existed or might have persisted after 12 March 2020. It was submitted that where an employee like the appellant in this matter, is booked-off for three months, it was important for the respondent to know not only the medical condition of the employee but also to enable the respondent to be aware of the prognosis.

[82] The respondent submitted that in view of her conduct, the appellant demonstrably failed to appreciate that a fair disciplinary process is also required to be fair to the employer.

[83] It was submitted that the respondent's decision to dismiss was also based on a fiduciary duty and to act in the interest of the respondent, and that a valid and fair reason for dismissal is founded on facts, conduct, or circumstances which independently, made the continuation of the employment relationship impossible.

[84] It was submitted that the arbitrator's reasoning that because the appellant was not found guilty of any misconduct, there was no proof that the employment relationship had irretrievably broken down, was a misdirection because the arbitrator failed to deal with any of the evidence relating to the breakdown of the trust relationship.

[85] It was submitted that the arbitrator erred and misdirected herself by ordering compensation; that the arbitrator failed to take into account that appellant's own conduct contributed to her dismissal; and that on appellant's own version, she as a

well-qualified individual, subsequent to her dismissal, made no effort to obtain alternative employment.

Evaluation

[86] Mr Namandje at the inception of his address informed this Court of an appeal heard two weeks prior to the hearing of the present appeal by this Court, then differently constituted, in *Koopman v Acting Chief Executive Officer: Namibia Students Financial Assistance Fund*[9] in which the interpretation of the provisions of s 6(2)*(a)* and s 9(5) of the NSFAF Act was argued and which judgment was at that stage still pending.

[87] It is indeed correct that in *Koopman supra,* heard on 4 October 2023, the applicability of the provisions of s 6(2)*(a)* of NSFAF Act was also raised.

[88] In that matter, the relief sought, *inter alia*, included a declarator that the appointment of Mr Kandume (the acting CEO) was unlawful and *ultra vires* the provisions of s 6(2)*(a)* of the NSFAF Act since the Board by virtue of a round robin resolution, appointed Mr Kandume as acting CEO, in circumstances where Ms Munyika as additional board member and who was statutorily prohibited from voting, voted during such round robin procedure.

[89] The judgment in that matter was handed down on 7 December 2023. It was not necessary for this Court in that matter to deal with the interpretation of s 6(2)*(a)*.

[9] *Koopman v Acting Chief Executive Officer: Namibia Students Financial Assistance Fund & others* 2023 (4) NR 1142 (SC).

This was so since the basis of the appellant's application was that the decision to appoint the acting CEO was premised on the contention that such a decision was taken by way of a round robin resolution, whilst in fact it was found that not only did the Board not take a decision by round robin resolution, but that Ms Munyika actually did not attend the board meeting where such a decision was taken.

[90] Implicit in this argument by Mr Namandje, is the real possibility that the same court could have come to two divergent views on the same subject matter – that has been put to rest by the judgment handed down on 7 December 2023.

[91] I shall first deal with the ground of appeal that the Labour Court ought to have found that the dismissal of the appellant was not only unfair but also null and void and of no effect.

[92] Section 6 of the NSFAF Act deals with the constitution of the Board and reads as follows:

> '(1) The Board shall, subject to subsection 2(a) consist of five members appointed by the Minister, and who shall –
>
> (a) . . . .
>
> (b) . . . .
>
> (2)(a) . . . if he or she deems it expedient, for a particular purpose and on such terms and conditions and for such period as he or she may determine, but subject to

subsection (5),[10] appoint one other fit person as an additional member of the Board, but such additional member shall not have the right to vote at meetings of the Board;

(b) having regard to subsection (1), appoint an alternate member to every member of the Board appointed under that subsection.

(3) An alternate member appointed under subsection 2(b) shall act as a member of the Board only when the member to whom he or she is alternate is for any reason absent or unable to perform his or her functions on the Board.'

[93] It is common cause that Ms Munyika was part of the decision to suspend the appellant on 16 April 2018 and on 6 February 2020 she voted in favour of dismissing the appellant.

[94] The provisions of s 6(2)*(a)* are unambiguous – the language used clearly restricts the voting of an additional member but not his or her participation in board meetings. In my view, to find otherwise would have defeated the purpose of appointing an additional member and would have restricted not only the right to vote but would have prohibited such a member from participating in discussions and debate during board meetings.

[95] In appellant's heads of argument it was submitted that the Minister 'purportedly' appointed Ms Munyika in terms of s 6(2)*(a)* of the NSFAF Act since no 'particular purpose' was stated in her letter of appointment and as a result, Ms Munyika ended up acting as if she was a voting and ordinary member of respondent's Board. These factors combined with the fact that Ms Munyika participated in and

[10] Subsection 5 deals with the remuneration of members of the Board including alternate and additional members who are not in the full-time employment of the State.

voted for the dismissal of the appellant did not only make the dismissal unfair but actually made it null and void as if it did not occur, it was submitted.

[96] In support of the afore-mentioned contention the appellant referred this Court *inter alia* to the decision of *Crouwcamp v Civic Independent & others*[11] as well as to *Village Hotel (Pty) Ltd v Chairperson of the Council for the Municipality of Swakopmund & others*[12].

[97] Section 6(2)*(a)* provides that the Minister *may*[13] for a particular purpose appoint an additional member of the Board. This implies that the Minister has a discretion to appoint. In my view, the wording of the section does not lend itself thereto that the Minister is obliged to state the particular purpose for which such additional member had been appointed in the letter of his or her appointment.

[98] Section 15 of the State-Owned Enterprises Governance Act in terms of which Ms Munyika was also appointed regulates the procedure for the appointment of board *members* and *alternate* members of State-Owned Enterprises. Subsection (7) provides that the portfolio Minister[14] must cause notice to be given in the *Gazette* of the appointment of members of the Board of a State-Owned Enterprise and of the date and period of their appointment. Nowhere in the Governance Act is there any reference to *additional*[15] members, or that an additional member should be appointed

[11] *Crouwcamp v Civic Independent & others* (416/2013) [2014] ZASCA 98 (31 July 2014).
[12] *Village Hotel (Pty) Ltd v Chairperson of the Council for the Municipality of Swakopmund & others* 2015 (3) NR 643 (SC).
[13] Emphasis provided.
[14] The Minister of Higher Education, Technology and Innovation.
[15] Emphasis provided.

for a particular purpose. In my view, the provisions of s 15 regarding the appointment of additional members also do not support the contention that the purpose of an additional member's appointment must appear in the appointment letter – it is silent.

[99] In my view, in order to give effect to the phrase 'for a particular purpose' one would have expected that the Minister should have at least informed the employer, ie the NSFAF Board or the additional member herself by way eg of a letter of the purpose of the appointment. The fact that the purpose for which an additional member had been appointed was not reflected in the letter of appointment did not invalidate the appointment of the additional member and the decision taken to dismiss the appellant cannot for that reason alone be null and void.

[100] I shall turn to the provisions of s 9 of the NSFAF Act which deals with meetings and decisions of the Board. Section 9(4) provides that a decision of the majority of the voting members of the Board present at a meeting shall constitute a decision of the Board, and in the event of an equality of votes the chairperson shall have a casting vote in addition to his or her deliberative vote.

[101] Section 9(5) reads as follows:

> 'No decision or act of the Board or act performed by authority of the Board shall be invalid by reason only –
>
> (a) of the existence of a vacancy on the Board; or

(b) of the fact that a person who was not entitled to sit as a member of the Board sat as such a member at the time when the decision was taken or the act was performed or authorised, if the decision was taken or the act was performed or authorised by the requisite majority of the voting members of the Board who were present at the time and entitled to sit as such members.'

[102] Counsel on behalf of the respondent submitted that the provisions of s 9(5)*(b)* would cover an instance, as the present one, where Ms Munyika who was prohibited from voting, voted, but because of the majority vote, the decision of the Board to dismiss the appellant is to be considered a valid and lawful decision, whilst counsel on behalf of the appellant submitted that the provisions of s 9(5)*(b)* are not applicable. I agree with appellant's counsel. This must be so because the section deals with a situation where 'a person *who was not entitled to sit as a member . . .*[16] *sat as a member* . . .' Ms Munyika, as an additional member, was indeed entitled to sit as a member during board meetings – therefore the provisions of s 9(5)*(b)* cannot be applicable to a person in her position.

I shall now turn to the case law relied upon by the appellant. *Crouwcamp* is distinguishable on the facts.

[103] In *Crouwcamp* the appellant was elected as the first respondent's first president. The first respondent was a political party registered in terms of the applicable legislation in South Africa. At a meeting during March 2011 certain members were elected as the executive committee including the appellant. On 18 September 2011 at a special National Conference the members of the National

[16] Emphasis provided.

Executive Committee (NEC) were confirmed and it was resolved that the NEC elections would be held every four years.

[104] The NEC held what purported to be a meeting on 2 May 2012, and in the absence of the appellant, a proposal of no confidence in the appellant was unanimously adopted removing him as president of the party. Subsequently, a disciplinary hearing took place in the absence of the appellant resulting in appellant being expelled from the party. This in turn led to litigation in the High Court, instituted by the first respondent, (the party) in an attempt to restrain and interdict the appellant from continuing to act as president. The appellant opposed the application. It was explained that the gravamen of appellant's opposition was the legality of various meetings purportedly held by the NEC, which were neither quorate nor held in terms of the first respondent's constitution – resulting in the conclusion that no lawful decision could have been taken at those meetings.

[105] The appellant's submission on appeal was that one Damons who was not a member of the NEC proposed the motion of no confidence at the meeting on 2 May 2012 where appellant was removed as president. Damons, it was held by the court, was not a legitimate member of the NEC and had no right to attend its meetings and to participate thereat. He was not elected in terms of first respondent's constitution.

[106] The appeal court described Damons as essentially a 'stranger' and concluded that the decision in question was not a legitimate NEC decision and that the meeting could not take valid decisions on behalf of the NEC or the first respondent. It was held

that this was in line with the principle of legality – that any conduct that fell outside the purview of the Constitution (of the first respondent) was therefore *ultra vires* and invalid.

[107] The appeal court observed that 'strangers to an organisation are not allowed to participate in its affairs. This is primarily because they have no privity of interest with the organisation and can therefore not be held accountable for their actions'.

[108] Damons who was a so-called stranger to the NEC when the decision was taken was instrumental to the demise of the appellant. On the contrary Ms Munyika was validly appointed as an additional member of the Board who was entitled to participate in the deliberations of the Board and had a privity of interest with the Board and the Fund.

[109] Of interest is the question: If Ms Munyika had voted against the dismissal of the appellant, whether the appellant would still have relied on the same objection. This was unfortunately not canvassed with the appellant's legal practitioner.

[110] In *Village Hotel*, the issue for consideration was *inter alia* whether the unauthorised relaxation of building restrictions by an official of the Municipality could have been ratified by a meeting of the council. This Court held that the admitted wrongful grant of the relaxation of the building height (in contravention of the Town Planning Scheme) was *ultra vires* and a nullity, which was incapable of ratification.

[111] In para 20 of *Village Hotel* (*supra*) reference was made to *Neugarten & others v Standard Bank of South Africa Ltd*[17] where this principle that *ultra vires* and void actions are incapable of ratification was confirmed and where Kumleben JA referred, *inter alia*, to *Schierhout v Minister of Justice*[18] where it was stated that such action 'is not only of no effect, but must be regarded as never having been done'.

[112] In my view, the judgment in *Village Hotel* is no support for the contention that Ms Munyika's vote resulted in the decision of the Board being null and void, of no effect as if the appellant had never been dismissed. This must be the case since five of the voting members supported the decision to dismiss – there is no attack on the validity of their right to vote. This is not an instance where the vote of Ms Munyika was determinative of the outcome of the decision to dismiss. It is not an instance where the Board had to ratify, if it is accepted for the sake of argument, an unlawful decision taken by Ms Munyika. Section 9(4) of the NSFAF Act clearly provides that a decision by the majority of the voting members of the Board shall constitute the decision of the Board as in this instance. The decision taken was unanimous.

[113] Section 9(5)*(b)* regulates those instances where a non-member sat as a member, in my view, a situation akin to the so-called stranger referred to in *Crouwcamp*. In such an instance a decision taken by the majority of board members is not invalidated merely by the fact that such a person sat as a board member.

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[17] *Neugarten & others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A).
[18] *Schierhout v Minister of Justice* 1926 AD 99 at 109.

[114] Ms Munyika was entitled to sit as board member at meetings, but not entitled to vote. In my view, it would be folly to argue that no legal effect should be afforded to legitimate majority votes and to regard the decision of the Board itself as of no effect, null and void and as never having been taken.

[115] The ground of appeal that the Labour Court should have found that the decision of the respondent's Board of Directors to dismiss the appellant was null and void and of no effect (as if the appellant was never dismissed), must fail.

[116] I shall now turn to the order of the Labour Court that the dismissal of the appellant was without a valid and fair reason and without following a fair procedure – a ground of appeal raised by the respondent in the cross-appeal.

[117] I shall consider this ground of appeal from the premise of the provisions of s 33(4) of the Labour Act which presumes that a dismissal has been unfair where the existence of a dismissal has been established, as in this matter. The respondent is saddled with the burden to rebut this presumption on a preponderance of probabilities. The respondent must also prove that the dismissal was for a valid and fair reason.

[118] The legislative framework is that an employee may be dismissed where there is a valid and fair reason to do so, and where a fair procedure had been followed during a disciplinary enquiry. However, do the legal principles permit the dismissal of

an employee for a valid and fair reason in a situation where no disciplinary enquiry was held? Stated differently, is there an exception to hold a disciplinary enquiry?

[119] In order to consider this question one should be guided by precepts outside the Labour Act embodied for example in employee relations policies, international instruments, and in case law.

[120] The respondent's Employee Relations Policy para 10.1 provides as follows:

> '10.1 No employee may be dismissed without being granted a formal hearing or enquiry, unless circumstances such as the employee either absconded or being unwilling to return to work render this impossible.'

[121] This paragraph envisages a situation where it is impossible to hold a formal enquiry due to the conduct of an employee. It is clear from the use of the words 'such as' that abscondment and unwillingness to return to work are but examples of instances where an employee may be dismissed without holding a disciplinary enquiry. This paragraph, in my view, on a proper interpretation envisages that there may be other circumstances which may render the holding of a disciplinary enquiry, impossible.

[122] In similar vein Art 7 of the International Labour Organisation's Convention on Termination of Employment 158 of 1982 provides:

> 'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided with an opportunity to defend himself against allegations made, unless the employer cannot reasonably be expected to provide this opportunity.'

[123] Again, this article foresees circumstances where employment may be terminated where it cannot reasonably be expected of an employer to comply with the *audi alteram partem* principle.

[124] The concept of fairness in Labour relations requires that it is fair to both the employee and the employer. This was held in *Old Mutual Life Assurance Co SA Ltd v Gumbi*.[19] In this matter the employee did not contend that the employer lacked a fair reason to dismiss him. The focus was on the employee's right to a pre-dismissal hearing under the common law where a disciplinary hearing was held in the absence of the employee. It was held[20] that:

> 'The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness.'

[125] In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others*[21] it was stated that it would be undesirable to lay down any universally applicable test for

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[19] *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA).
[20] Para 8.
[21] *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (A).

deciding what is fair. It was pointed out that in judging fairness a court applies a moral or value judgment to established facts and circumstances.

[126] In *Peace Trust v Beukes*[22] the appellant dismissed the respondent after two abortive attempts to hold a disciplinary hearing. The respondent's representative frustrated the process by raising several unmeritorious technicalities.

[127] It was pointed out in *Peace Trust* that it is settled law that a breakdown in the relationship between the employer and employee can lead to the dismissal of the employee provided that the employee is the substantial cause of such breakdown. The dismissal is based on the ground of incompatibility. In such an instance an employer would have a valid and fair reason for dismissing the employee.

[128] In *Kahoro & another v Namibia Breweries Ltd*[23] the appeal turned on whether, on the facts of that case, the respondent had proved on a *preponderance of probabilities*[24] that there was a valid and fair reason for the dismissal of the appellants.

[129] The court explained in *Kahoro* that the rationale for the rule in *Kamanya & others v Kuiseb Fish Products Ltd*[25] 'is that a valid and fair reason for a dismissal is one which justifies dismissal of the employee and is independent of the procedure followed before a dismissal is carried out. A valid and fair reason for a dismissal is

[22] *Peace Trust v Beukes* 2010 (1) NR 134 (LC).
[23] *Kahoro & another v Namibia Breweries Ltd* 2008 (1) NR 382 (SC).
[24] Emphasis in original text.
[25] *Kamanya & others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC).

founded on facts, conduct or circumstances which, independently, make the continuation of the employment relationship impossible.'

[130] The court held that where 'the court is faced with the situation that, because of the absence of a fair procedure, it cannot determine one way or the other that there was a valid and fair reason for the dismissal, the employer who bears the *onus* has failed to discharge the *onus*.'

[131] It further held that the absence of a fair procedure could in certain circumstances impact upon the validity and fairness of the reason for a dismissal eg where the reason and the process are inextricably linked.

[132] The court in *Kahoro* referred with approval to *Unitrans Zululand (Pty) Ltd v Cebekhulu*,[26] where it was said *inter alia* regarding substantive fairness, that '*if the evidence placed before the court establishes a fair reason to dismiss which was present at the time of the dismissal, the dismissal is substantively fair.*'[27]

[133] Although it was recorded in terms of rule 20 (of the rules relating to conciliation and arbitration of disputes) that it was not disputed that the appellant was dismissed for conduct unrelated to the merits of the charges faced by her in the disciplinary hearing, the conduct by the appellant applying for a postponement of the disciplinary hearing for approximately three months on the strength of a medical certificate, must be considered within the context of the disciplinary process and its history.

[26] *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC).
[27] Emphasis in original text.

[134] It is also necessary in order to determine whether the respondent had a valid reason to dismiss the appellant to consider the appellant's conduct, as well as that of the respondent, and the facts and circumstances which were present at the time of the dismissal. The facts which are largely common cause, are as follows:

(a) On 16 April 2018 the appellant was served with a written notice suspending her with immediate effect and with full pay.

(b) On 26 April 2018 the chairperson of the respondent's Board wrote a letter to the appellant informing her that it required additional time to conduct a forensic investigation into more complex allegations and offered the appellant additional three weeks in which to prepare her defence once all the charges had been served. The appellant did not in spite of an invitation to respond, bother to reply to this letter. In the light of appellant's failure to respond, limited charges on the available evidence were served on the appellant on 30 April 2018.

(c) On 2 May 2018 appellant wrote to the respondent indicating that she did not recognise the charges on the basis that they had not been signed. This was despite the fact that respondent had indicated that it would present appellant with another hard copy to sign. As Mr Immanuel testified, there was no policy requirement that the charges be signed. The charges against the appellant were very serious in nature.

(d) The hearing was scheduled for 7 May 2018. There was a disagreement regarding the reason for the postponement of the hearing. The respondent was of the view that it was at the request of the appellant in order to obtain legal representation, whilst the appellant denied this.

(e) On 29 June 2018 the appellant was informed that the forensic investigators wished to interview her as part of their investigation process and the respondent requested her to make herself available for the interview on 4 July 2018.

(f) Instead of complying, on 4 July 2018 the appellant, through her legal practitioner, requested time until 12 July 2018 to discuss the ‘legality’ of availing herself to the investigating team. The appellant, however, failed to revert on 12 July 2018. The respondent, through its legal practitioner wrote a further letter to appellant’s legal practitioner on 17 July 2018. The appellant’s legal practitioner replied on 18 July 2018 which contained an ultimatum that, unless the appellant was provided with ‘the full terms and references of the KPMG team and any contract entered into by and between such team’ and the respondent, she would rather ‘reserve all her rights and opt not to avail herself for an interview’. On 21 July 2018 the requested information was provided to appellant’s legal practitioner.

(g) On 1 August 2018, after a reminder letter on 31 July 2018, the appellant's legal practitioner requested that the respondent make available 'details as to what procurement process was followed to appoint KPMG, if any' and to provide documents, resolutions and minutes in relation to such appointment'.

(h) The appellant's legal practitioner suggested that they needed such documentation in order to enable them to respond to the respondent's query as to whether or not the appellant would avail herself for an interview with KPMG. I must state that this request had absolutely nothing to do with the appellant's obligation to co-operate with the investigation.

(i) On 8 August 2018 the legal practitioner of the respondent informed appellant's legal practitioner, by way of a letter, that given that the information regarding KPMG was already provided as early as 21 July 2018 it would appear that the recent request for the same information is simply a ploy to delay and/or frustrate the conclusions of the forensic investigation which as previously advised required the input of the appellant. The appellant's legal practitioner was advised that the KPMG team was available until 16 August 2018 to interview the appellant. The appellant never participated in the investigation.

(j) The respondent took the view that the investigation was an opportunity for the appellant to clear her name on the charges. I agree.

(k) On 20 September 2018, and subsequent to the conclusion of the forensic investigation, the respondent served additional charges on the appellant.

(l) On 2 October 2018, a day before the disciplinary hearing was scheduled to resume the appellant raised a point *in limine* claiming that the respondent's Board was improperly constituted because members of the Board had been appointed in terms of an Act of Parliament which was not yet in force.

(m) After hearing submissions on 3 October 2018 on the point raised *in limine*, the chairperson of the disciplinary hearing on 9 October 2018 ruled on the point *in limine*, dismissing it, and postponed the hearing to 11 October 2018.

(n) On 11 October 2018 the appellant threatened to launch an urgent application to interdict the continuation of the disciplinary hearing pending the outcome of an application in which the point *in limine* (*supra*) was to be determined on an urgent or semi-urgent basis in the High Court as agreed between the parties. The appellant subsequently

filed an application in the normal course in the Labour Court which did not have the jurisdiction to determine the point.

(o) On 13 October 2018 the respondent, through its legal practitioner, wrote to the appellant to record the breach of the agreement by her, and to cancel the agreement. The appellant was informed that the disciplinary hearing would proceed on 14 January 2019. On this day the legal practitioner of the appellant was not present so the chairperson gave the parties one week in which to agree to further dates.

(p) In a letter dated 28 January 2019 the chairperson of the disciplinary hearing informed the parties, since there was no agreement he scheduled the hearing to continue on 12 February 2019 stating that there was an extraordinary delay in finalising the matter. Until this stage no evidence was heard.

(q) In a letter dated 30 January 2019 the appellant's legal practitioner indicated that an urgent application would be launched in the High Court to interdict the disciplinary hearing from proceeding. The application was set down for 11 February 2019 but struck from the roll for lack of urgency.

(r) After the ruling on 11 February 2019 the appellant's father passed away and she requested on compassionate grounds that the hearing be postponed which was granted.

(s) The disciplinary hearing eventually resumed in April 2019. The respondent led the evidence of three witnesses with the last session being held in October 2019. During September 2019, the parties had agreed for a continuation of the hearing during the period of 6 to 10 January 2020, when the final two witnesses of the respondent were due to testify. It was anticipated that the proceedings would be concluded on 7 February 2020.

The medical delay

[135] The medical delay concerned the application for a postponement of the disciplinary hearing on the basis of a medical certificate provided by the appellant and referred to hereinbefore.

[136] On 8 January 2020 the respondent's legal practitioner wrote a letter to appellant's legal practitioner placing various issues on record, *inter alia* that the sick leave certificate was wholly inadequate, that no explanation is provided for the appellant's condition, requesting a medical report be made available accompanied by a formal application for sick leave and it was proposed that the disciplinary hearing stood down until 15 January 2020 in order for the respondent to consider the leave application as well as Dr Mudzanapabwe's report.

[137] On 12 January 2020 the appellant's legal practitioner responded by contending firstly, that respondent could not insist on a medical report as it was not required in terms of respondent's 'practices or policies', and secondly, that the appellant was under no obligation to complete the leave form. In response to the request for a full medical report, the appellant refused to provide the respondent with one.

[138] In the light hereof, the respondent by way of a letter dated 21 January 2020 demanded that the appellant agree, in writing, to a medical examination by a psychiatrist of the respondent's choice. On 24 January 2020 appellant's legal practitioner responded to the aforementioned demand by questioning the basis upon which the appellant should be examined by a psychiatrist of respondent's choice. No commitment was given to be examined by a psychiatrist.

The legal principles regarding medical certificates

[139] I first need to state that the appellant remained an employee of the respondent whilst under suspension. Where an employee has been suspended pending the outcome of an investigation into alleged misconduct, as in this case, it does not preclude the possibility that the suspension may be lifted by the employer after the conclusion of the investigation.

[140] Clause 12.4 of the respondent's leave policy provides that:

> 'The NSFAF is not required to pay an employee for sick leave if the employee has been absent from work for two (2) or more consecutive days and fails to produce a medical certificate by a medical practitioner. The employer reserves the right to request for a medical certificate or *proof of illness*[28] at any time and for any duration of such sick absence.'

[141] This, in my view, implies that the employer is not required to confine itself to a medical certificate but is entitled to request a medical report from a doctor as proof of illness, especially in the case where the sick leave has been granted for an extended period. This would apply not only in the case of the employee's physical inability to perform normal work activities but also to his or her mental ability.

[142] On the issue of medical certificates, Nicholsen JA expressed himself as follows in the matter of *Mgobhozi v Naidoo NO & others*[29] at paras 25, 27 and 28:

> '[25] In fields as esoteric as the workings of the mind and the effects on daily life – more especially the ability to instruct attorneys or bring proceedings on one's own – the courts are reliant upon the views of the medical profession. In this context psychologists and psychiatrists usually provide the evidential material necessary for the court to decide the issue. For the appellant to convince the Labour Court that he was mentally and/or physically incapable of bringing proceedings in that forum he had to have the evidence of such professionals.
>
> [27] The absence of any such explanation is viewed in a most serious light. The cynic might observe that medical certificates are available for anyone paying the appropriate fee. If perceptions of the abuse of medical certificates are widespread – as I believe they are – it strengthens the need for courts to be especially vigilant against their misuse. One inference to be drawn in this application is that the medical

[28] Emphasis provided.
[29] *Mgobhozi v Naidoo NO & others* (2006) 27 ILJ 786 (LAC) (18 November 2005).

practitioners were not prepared to go on oath to defend their certificates. Another is that they were not prepared to spare time to explain their very truncated and laconic comments.

[28] The absence of affidavits from the doctors means that the court is deprived of any elaboration of the widely and vaguely stated symptoms attributed to the appellant. The nature of the medication and the efficacy thereof are also not explained.'

[143] Although *Mgobhozi* was determined in the context of the failure to bring a review application timeously, and where failure to do so was explained on the basis of medical certificates, the principles referred to, are of application in the present matter.

[144] The approach of the Supreme Court of Appeal is in the same vein in *Old Mutual Life Assurance* at paras 17 to 18 where Japhta JA stated:

'[17] Returning to the medical certificate, I agree with the finding by Somyalo JP that little evidential value can be attached to it. It does not reflect an independent medical diagnosis of the illness or an opinion as to the fitness of the employee to perform his normal work, let alone his fitness to attend a disciplinary hearing. The certificate appears to be in standard form containing printed and handwritten parts. It reads . . . .

[18] As was found by Somyalo JP with whose finding I agree, as I have said, the chairman of the enquiry justifiably doubted the reliability of the medical certificate and inferred that the employee was malingering. The question whether the employee was really so ill that he could not attend the hearing must also be assessed against his entire conduct towards the enquiry. I have already found that both his conduct and that of his representative at the hearing established clearly that he intended to prevent the hearing from being held . . . .'

[145] It was held that a mere production of a medical certificate, was not, in the circumstances of that case, sufficient to justify the employee's absence from the hearing.

[146] The stance taken by the appellant, through her legal practitioner, that the respondent could not insist on a medical report, is contrived and self-serving, in view of the provisions of clause 12.4 that the respondent was entitled to request proof of her illness at any time. The condition of 'psychopathological' as it appears on the medical certificate provided no explanation for the respondent to understand the nature of the illness, the anticipated impact on appellant's work and the prognosis for the future.

[147] The respondent was in the circumstances reliant on the views of Dr Mudzanapabwe to understand not only the appellant's request for a postponement but also her ability to continue her future employment at the respondent. And as was stated in *Old Mutual Life Assurance* (*supra*) the medical certificate did not reflect an independent medical diagnosis as to the appellant's fitness to attend a disciplinary hearing.

[148] In view of appellant's refusal to provide a medical report, the respondent was under the circumstances justified to endeavour to obtain a second opinion, since as testified by Mr /Awarab and Mr Kandume it was important for the respondent to be appraised of the real reason for the appellant's inability to participate in the hearing.

[149] In *Booysen v Minister of Safety and Security & others; Provincial Commissioner Petros NO v Joubert NO & another*[30] the employee suffered from post-traumatic stress disorder. The South African Labour Court referred to a judgment of the Employment Appeal Tribunal in *O'Cathail v Transport for London*[31] which applied the matter of *Teinaz v London Borough of Wandsworth*[32] where it held that:

> '. . . Where an employee's presence is needed for a fair hearing, but he is blamelessly unable to attend because of a medical condition, the tribunal should usually grant an adjournment. The tribunal is entitled to be satisfied that the inability was genuine and the onus is on the employee to prove the necessity of the adjournment.'

[150] In my view, it is fair that an employee should be saddled with such an onus since it is a practical and logical one in view of the fact that the employer is not privy to medical information available only to the employee and the medical practitioner, as in this instance.

Was the dismissal unfair or not?

[151] The fairness or otherwise of the appellant's dismissal has to be determined on the basis of the specific facts of this matter.

The delays

[152] There was a delay by the respondent in starting with the disciplinary hearing. This delay was foreseen by the respondent and was explained to the appellant –

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[30] *Booysen v Minister of Safety and Security & others; Provincial Commissioner Petros NO v Joubert NO & another* (2012) 33 ILJ 1132 (LC).
[31] *O'Cathail v Transport for London* Appeal no UKEAT/024/11/MAA (unreported 13 January 2012).
[32] *Teinaz v London Borough of Wandsworth* [2002] IRLR 721; [2002] ICR 1471.

namely the sheer number of the complaints to be investigated as well as the complexity of those complaints.

[153] The co-operation of the appellant in this investigation was important since it could have reduced the charges eventually preferred against the appellant. It could also have absolved the appellant from any wrongdoing, and most importantly, it could have reduced the period of time, to conclude the investigation by KPMG – resulting in cost saving for the respondent which would have served the interest of the employer. The appellant with no plausible reason refused to participate in these investigations.

[154] The appellant through court processes attempted to terminate the disciplinary hearing with the concomitant delays which all came to naught.

[155] The delays as a result of the appellant's father passing away and that of the company secretary who also had to attend a funeral were inevitable, and no blame can be apportioned to either person.

[156] In my view, the respondent acted reasonably and in accordance with its policies by demanding to be provided with a medical report or for appellant to be subjected to an examination by a psychiatrist of its choice, since it was important to establish whether the appellant was genuinely incapacitated. The appellant, as testified by the chairperson of the NSFAF, severely frustrated and compromised the disciplinary hearing by deliberate delays and subsequent refusal to apply for sick leave or to be subjected to a medical examination.

[157] The appellant was aware of the fact that the disciplinary hearing had been postponed to 6 January 2020, that witnesses and the chairperson would return earlier from the recess during the festive season in order to proceed with the hearing. Contrary to her denial, she indeed waited until the last moment (ie on Saturday 4 January 2020) to inform the chairperson and her employer that she had been booked-off for three months. The appellant knew this since 12 December 2019. In my view, in these circumstances, there is a reason to believe that the respondent suspected the appellant had abused the sick leave.

[158] Appellant's medical doctor was prepared, according to the appellant, to provide the medical information sought by the respondent, only 'under camera'. This implies that the respondent must launch court proceedings, unnecessarily, incurring costs and a further delay in the finalisation of the disciplinary hearing, in order to obtain the necessary information.

[159] The appellant, according to her medical certificate, was diagnosed with 'psychopathological' which incapacitated her from attending the disciplinary hearing for an extended period of time. Yet while suffering from the very same illness the appellant was fit enough to travel to Finland in order to attend to private business. The appellant could offer no explanation at all for her conduct when confronted during cross-examination. In my view, in these circumstances, it can reasonably be inferred that the appellant was malingering by requesting a further postponement of the disciplinary hearing.

[160] The appellant's conduct in refusing to provide the details of her medical condition, as she was obliged to do; her refusal to complete a leave form; and her refusal to subject herself to further medical examination demonstrates her unreasonable conduct and one which would be utterly unfair for the respondent to countenance in the circumstances. One must keep in mind that the appellant was not an ordinary employee but the CEO of the NSFAF which was of strategic importance and she benefited (she continued to receive her salary of N$185 000 per month) by continuing to frustrate the continuation of the hearing and the conclusion thereof.

[161] The respondent relied on clause 10.1 of the Employee Relations Policy which provides that an employee may be dismissed without a hearing in circumstances where the appellant's conduct rendered the holding of the hearing impossible. Another factor considered by the respondent was the high costs of the disciplinary process. It is not surprising that the Board took the view that to press fresh charges against the appellant, she would have further frustrated the disciplinary process.

[162] The respondent's decision to dismiss the appellant was further based on a fiduciary duty and a duty to act in the interest of the respondent. Mr /Awarab referred to the minutes of the board meeting of 6 February 2020 where it is reflected that 'the Board must act in the public interests in discharging fiduciary duties. The Board was of a civil view that the termination of the CEO's employment service was the only viable option available to bring the protracted disciplinary process to finality and protect NSFAF against further costs if the process was to continue, whereas the CEO

has no real intention to lead her defence, let alone a sense of urgency in having the matter finalised because she is on full pay and benefits'.

[163] In this matter the appellant's conduct did not prevent the continuation of the disciplinary hearing but rendered the conclusion of the hearing virtually impossible.

[164] As the court in *Peace Trust* (*supra*) remarked that:[33]

> 'It is settled law that a breakdown in the relationship between the employer and employee can lead to dismissal of the employee provided that the employee is the substantial cause of such breakdown.'

The court in *Peace Trust* referred to Grogan[34] with approval who observed that:

> '"Incompatibility" arises where employees are unable to work in harmony with their colleagues or supervisors or subordinates, or to adapt to the "*corporate culture*" of their companies. The rationale for the dismissal . . . is the right of an employer to expect its employees to adapt to the employer's norms and standards and to conduct themselves in a manner acceptable to other employees.'

In addition Grogan,[35] confirmed that a valid reason to dismiss may exist in circumstances where the relationship of trust and confidence has been compromised. In *Electrical & Allied Workers Trade Union of SA v another v The Productions Casting Co (Pty) Ltd*[36] the following was stated:

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[33] Para 79.
[34] J Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2 ed at 511.
[35] J Grogan *Dismissal, Discrimination & Unfair Labour Practices* 1 ed p 438.
[36] *Electrical & Allied Workers Trade Union of SA v another v The Productions Casting Co (Pty) Ltd* (1988) 9 ILJ 702 (IC) at 708G-I.

> '. . . As far as misconduct is concerned I believe that if the employer is of the *bona fide* view that as a result of the employee's conduct which has come to his attention and which he has investigated to such an extent that would exclude any grounds that he (the employer) acted arbitrarily, the relationship between him and the employee has become intolerable for commercial or public interest reasons, he will be entitled to dismiss the employee. If an employer for instance mistrusts an employee for reasons which he must obviously justify (not according to any particular standard of proof), and he can show that such mistrust, as a result of certain conduct on the part of the employee, is counter-productive to his commercial activities or to the public interest (where appropriate), he would be entitled to terminate the relationship.'

[165] This Court in *Kahoro* (*supra*) assumed the correctness of the position in *Kamanya* (*supra*) and explained that the rationale for the rule in *Kamanya* 'is that a valid and fair reason for a dismissal is one which justifies dismissal of the employee and is independent of the procedure followed before a dismissal is carried out. A valid and fair reason for a dismissal is founded on facts, conduct or circumstances which, independently, make the continuation of the employment relationship impossible . . .'.

[166] The relationship of trust has in this matter, in my view, irretrievably broken down and has so been established by the evidence on record. The appellant's legal practitioner in his heads of argument, as a ground of appeal, submitted that the court *a quo* 'unduly relied on highly unreliable evidence of the respondent's witnesses that the trust relationship between the parties had been broken down and failed to properly consider and rely on appellant's evidence in this regard'.

[167] I disagree that the evidence presented by the respondent on this score is 'highly unreliable'. The evidence is overwhelming that the trust relationship had indeed broken down.

[168] The relationship was described as 'unbearable',[37] as 'acrimonious',[38] 'disruptive and uncooperative',[39] 'no trust in the leadership of the appellant',[40] and that it would 'not be in the best interest of the respondent to reinstate the appellant'.[41] The appellant herself in her founding affidavit in support of her application to the High Court to halt the disciplinary proceedings, in para 15 of her affidavit, stated that the 'animosity and hatred towards me by the Board were acutely raw'.[42]

[169] Here the appellant described a very sombre picture of her perceived relationship with the Board. This evidence is in contrast with appellant's *viva voce* testimony during the arbitration proceedings where she denied the breakdown of the relationship with the Board and senior employees.

[170] The appellant's conduct and leadership style towards senior employees and the previous Board (as gauged from the evidence presented), was a direct cause of the group grievance as well as the special investigation at the NSFAF.

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[37] By the group grievance document and Tjahere.
[38] By Fillemon Wise Immanuel.
[39] By Klemens /Awarab.
[40] By Percy Mukondja Tjahere.
[41] By Kennedy Kandume.
[42] Para 105 (*supra*).

[171] As stated in *Peace Trust* and by Grogan (*supra*) the breakdown in the relationship between the employer and employee (as in this instance) can lead to the dismissal of the employee. In my view, the appellant was the substantial cause of this breakdown and that a valid and a fair reason for the dismissal of the appellant was proved by the respondent on a preponderance of probabilities.

The respondent's cross-appeal not properly before court

[172] Counsel on behalf of the appellant submitted that since the respondent had been dissatisfied (as appellant in the Labour Court) with the dismissal of its appeal against the arbitrator's finding in respect of the appellant's dismissal, it ought to have filed its appeal within 21 days as provided for under rule 7(1) of the Rules of this Court, which it did not do.

[173] It was pointed out that the appellant sought and obtained leave and filed her appeal only against part of the Labour Court's orders (setting aside reinstatement) to this Court. It was only thereafter that the respondent filed a cross-appeal on the basis that it was dissatisfied with the dismissal of its appeal in respect of the appellant's unfair dismissal, yet did not file an appeal within the time prescribed, it was submitted.

[174] It was submitted that the respondent ought to have filed its appeal (not cross-appeal) within 21 days, as a result the respondent is not entitled to rely on the cross-appeal provisions of the Rules of this Court. On this basis it was submitted that the cross-appeal be struck from the roll.

[175] On behalf of the respondent it was submitted that after appellant noted her appeal, the respondent was entitled to note a cross-appeal within 21 days of the appellant's notice of appeal (in terms of rule 7(4)). The period of 21 days expired on 28 February 2023, and the cross-appeal was filed on 27 February 2023, well within the prescribed period. Thus there was no basis for contending that the respondent's cross-appeal was not properly before court.

[176] It was further submitted that in the event that this Court is of a different view regarding the interpretation of rule 7, the respondent had filed a condonation application insofar as there might have been a late filing of the cross-appeal, and prayed for the reinstatement of the cross-appeal.

[177] In my view, rule 7(1) provides that a notice of appeal must be filed within 21 days after the judgment or order appealed against. Thus a litigant is not required to file a notice of appeal immediately after the judgment had been delivered or the order pronounced and may decide to wait until the last day to file the notice of appeal as it appears to be the practice by some litigants. In this matter both the appellant and the respondent had a right to appeal against part of the judgment. There is nothing in rule 7 which suggests that a party may not decide to wait what the other party's reaction would be regarding his or her dissatisfaction with the judgment. What would happen in the hypothetical case where both parties file notices of appeal on the same day? Who would be responsible for the preparation of the record? And who would now be expected to cross-appeal?

[178] In my view, there is nothing in rule 7 to suggest, as it happened here, that the respondent could not have waited to see if the appellant was going to file her notice of appeal first, and thereafter file a notice of cross-appeal.

[179] In my view, this ground of appeal is a technical one and there is no merit therein. The cross-appeal is properly before court.

Condonation application

[180] The appellant filed a condonation application for the failure to have the proceedings of the arbitration award included as a portion of the record relevant for the determination of an issue on appeal as required by rule 11(10) of the Rules of this Court. The explanation provided is reasonable and satisfactory and this Court condones non-compliance with that rule by the appellant.

[181] In the result, the following orders are made:

(a) The appeal is dismissed.

(b) The cross-appeal is upheld with costs to include the costs of one instructing and one instructed legal practitioner.

(c) The order of the court *a quo* is substituted with the following orders:

(i) The order that the dismissal of the appellant was without a valid and fair reason and without following a fair procedure is set aside.

(ii) The order that the respondent pay the appellant the monthly remuneration she would have received from 8 February 2020 until 15 July 2021 (subject to statutory deductions) is set aside.

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HOFF JA

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DAMASEB DCJ

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PRINSLOO AJA

APPEARANCES

APPELLANT/RESPONDENT:	S Namandje (with him N Shilongo-Alexander) Of Sisa Namandje & Co. Inc.
RESPONDENT/APPELLANT:	A Corbett (with him K N Klazen) Instructed by Ellis Shilengudwa Inc. (ESI)