Damages for Wrongful Dismissal in Botswana: High Court and Court of Appeal at Loggerheads

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ABSTRACT

The law exists to govern human affairs – to perform this function; it must possess the virtue of clarity and certainty. Courts have a duty to ensure that the law is clear and certain. An employee whose contract of employment is wrongly terminated looks to the courts for redress and an award of damages is one of the available remedies. In this article, we pose the question – what is the rule for determining the quantum of damages in an action for wrongful dismissal? Anyone who attempts to locate the applicable rule in quantifying such damages will soon find himself in a dense bush of disjointed judicial opinion, a territory where the law, aided and enabled by courts, completely forsakes the all-important virtues of clarity and certainty. In the labour relations, the law has an additional function, one of striking a fair equilibrium of power between the employer and the employee. We argue that it is the employee who suffers more owing to this lack of certainty in the law. This article focuses on the action for wrongful dismissal at the High Court. In this article, we examine the jurisprudence of the High Court and Court of Appeal, and reveal the confusion, contradictions and blinding defiance of simple logic. As a solution, we propose that there is need for alignment and consolidation of principles in this area by the Court of Appeal or intervention by the legislature, the latter being the preferred long term solution and the former the interim measure. To put the analysis in proper perspective, we discuss the decisions in their chronological order. The study is divided into three sections. Section I explains the relevant statutory provisions. Section II is a study of the case law relating to fixed term contracts. Section III looks at indefinite period contracts and contracts for specified piece of work. In the conclusion, we make recommendations.

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1. STATUTORY FRAMEWORK: COURTS AND REMEDIES

Botswana maintains two courts of concurrent jurisdiction in labour matters, the High Court and the Industrial Court. The High Court has unlimited original jurisdiction in all civil matters[1] whilst the Industrial Court is a specialized labour court with exclusive jurisdiction on trade disputes.[2] When an employee's contract of employment is unlawfully terminated, they have two options: they can file a statutory wrongful dismissal[3] claim at the Industrial Court seeking reinstatement or compensation,[4] or they can approach the High Court with a common law action for wrongful dismissal that seeks reinstatement or damages.[5] In the former option, Parliament has, through the Trade Disputes Act, laid down governing principles to be followed by the Industrial Court in determining the quantum of compensation to be awarded in every case. In the latter option, that is, the High Court, there is no statute law that deals with the question of damages, as such, only Roman Dutch common law principles are applicable. It is not the object of this study to deal with the differences between the two remedies in detail. However, in *Sekgwa* v *Institute of Development Management*[6] the High Court explained the interaction of the two courts as follows:

> "The High Court thus has concurrent jurisdiction with the Industrial Court to hear labour disputes. I accept that the Employment Act, which is of general application, and touches upon all aspects of the employer/employee relationship, has replaced the common law on all matters with which it deals, and is to be applied and implemented as such by all courts, rather than following common law rules on the same matters. But the Trade Disputes Act is procedural in form. It creates a new forum, the Industrial Court, for the hearing and determination of Trade Disputes, and lays down special rules, procedures, and remedies which are of application in that court. I do not believe that it displaces the common

1 Constitution of Botswana, Section 95 (1).
2 Trade Disputes, Section 17.
3 Section 24 of the Trade Disputes Act uses the words "wrongful dismissal…".
4 Trade Disputes Act, Section 24.
5 Compensation is not a remedy available to such a litigant at the High Court.
6 2001 (2) BLR 434 (HC).

> law, but rather it places limitations on the relief available to litigants who elect to pursue their grievances in this forum. It does not, in my judgment, replace common law rights in employment law insofar as these are compatible with the Employment Act. In particular there is no statutory limit on the contractual damages for wrongful dismissal which can be awarded by the High Court. If this were so, there would be many cases where manifest injustice would result. An example is an employer who wrongfully dismisses a contract employee just before the expiry of his contract, thus depriving him of his gratuity. The damages suffered might well exceed the six months' salary limit under the Trade Disputes Act. Similarly, the damages suffered from the unlawful repudiation of a fixed term contract will frequently amount to in excess of six months' salary. The litigant thus chooses between the short and inexpensive route of the Industrial Court, which has jurisdictional limitations and cannot award costs, and the longer and more expensive High Court route, where there is no jurisdictional limit on damages and where costs may be awarded."

Although not in entirety, termination of employment is regulated by statute law. Contracts of employment in Botswana are generally governed by the Employment Act,[7] with the exception of contracts of employment in the public service, which are largely governed by the Public Service Act.[8] We submit that the law on termination of contracts under the two statues does not differ in substance.

The Employment Act classifies contracts of employment into three categories: a contract of employment for a specific piece of work; a contract of employment for a specified period of time (fixed term contract) and a contract of employment for an unspecified period of time (indefinite contract). According to Section 17(1) of the Employment Act, a contract of employment for a specified piece of work, without reference to time, or for a specified period of time shall, unless otherwise lawfully terminated, terminate when the work specified in the contract is completed or the period of time for which the contract was made

7 Cap 47:01.
8 Act No 30 of 2008.

expires.[9] However, a contract of employment for an unspecified period of time (other than a contract of employment for a specified piece of work, without reference to time) is deemed to run until lawfully terminated.[10]

Thus, fixed term contracts and contracts for a specified piece of work terminate when the work is completed or when the period of time expires, unless otherwise lawfully terminated. The Act recognizes other lawful means of terminating such contracts. An indefinite contract of employment is deemed to run until lawfully terminated. Section 18 prescribes one lawful method of terminating a contract of employment for an unspecified period of time – termination by either party through prior notice.

Whilst a method of terminating an indefinite contract of employment is prescribed under the Act, this is not the case with fixed term contracts or contracts for a specified piece of work. There is a lacuna here. Under Section 26, the employer is entitled to terminate any contract of employment without giving notice of his intention to do so or making payment in lieu of notice where the employee is guilty of serious misconduct in the course of his employment. Even though Section 26 gives the employer grounds upon which a contract may be terminated, the method of doing so is not prescribed. The question we pose is – what is the rule for determining the quantum of damages in an action for wrongful dismissal? As we demonstrate below, the examination of the jurisprudence of the High Court and the Court of Appeal reveals a morass of confusion and uncertainty.

2. FIXED TERM CONTRACTS

In *Rakhudu* v *Botswana Book Center Trust and Others*[11] (Rakhudu's case), the Appellant first entered the employment of Botswana Book Center in July 2000 as a marketing manager. In this position, he was required to serve a probationary period of three months. At the time of his initial appointment and throughout the entire duration of his employment, he was also a Councillor of the City of Gaborone.

9 Section 17(1).
10 Section 17(2).
11 2005 (2) BLR 283 (CA).

The Appellant commenced duty as a Marketing Manager on the 1st July 2000. Two months later, prior to the expiration of his probation period, the Appellant was appointed acting General Manager which appointment was to last until further notice. On the 5th of October 2000, he was appointed General Manager. This appointment was for a period of three years and was subject to the Appellant serving three months' probation. The Appellant remained in this position until 7th December 2000. On that date, his services were abruptly terminated. He was given 14 days' notice of termination from 8th December 2000 so that he finished work on 24 December 2000.

This case did not deal strictly with damages for unlawful termination of employment. However what is important is what the Court held about termination of fixed term contracts. The Court opined as follows:

> "Since the Act makes no specific provision as to the method of termination of a fixed term contract of employment, we must fall back on the common law, which clearly allows the termination of an employment contract (a fortiori during a probationary period) on reasonable notice without the giving of reasons or the right of appeal, unless there are terms, express or implied, to the contrary."[12]

Contrary to the decision of the Court of Appeal, at common law, a contract of employment for a fixed term cannot be terminated without just cause. However, for purposes of this study, we take the decision as it is.

In a later case, *Zimbank Botswana Limited* v *Makura*[13] (Zimbank's case), the Respondent claimed damages. She alleged that she was prematurely dismissed before the term of her employment had expired. The Court of Appeal, opining *obiter*, dealt with the question of the measure of damages for unlawful termination of fixed term contracts. The Court of Appeal held as follows:

> "The normal measure of damages [in the case of wrongful dismissal] is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he would reasonably be expected to earn in other employment. The dismissed employee like any innocent party following a breach of contract by the other party must take reasonable steps to minimise

12 At p. 290.

13 2002 (2) BLR 497 (CA).

> his loss. In the case of wrongful dismissal these reasonable steps mean that the employee must seek and accept any reasonable offer of other employment. If he fails to take other employment when he ought reasonably to have done so, damages will be assessed on the basis of the difference between the salary or wages under the broken contract and what he would have received from the substituted employment."

Despite the fact that the dictum is *obiter*, the *Zimbank* case has been referred to, with approval, by both the High Court and the Court of Appeal when dealing with the issue of computation of damages for unlawful termination of fixed term contracts.

What followed was the *ABM University College* v *Reiford Khumalo*[14]decision. In this case, the Respondent was offered employment on the 19th March 2010 as a Professor on a three year contract starting 1st April 2010. It was a term of the contract that the Respondent would be paid a salary of P22 210.00 (Twenty Two Thousand Two Hundred and Ten Pula) per month. There was no express provision that the Respondent would be on probation for any period. There was no express provision that the contract would be terminable on notice. The Respondent's contract of employment was terminated by the Appellant on the 30th September 2010. The Respondent sued the Appellant for damages equivalent to the balance of the contract at the High Court and was successful. In its Grounds of Appeal' the Appellant sought the following relief:

> "The respondent be awarded damages to the equivalent of one month, the period which the contract could be lawfully terminated in terms of clause 8.1 of the conditions of employment which has already been paid to the respondent. Alternatively, the respondent be awarded damages equivalent to three months of his monthly salary, in addition to the one month already received by the respondent."

As it appears above, the Appellant sought to argue that the High Court erred by awarding the Respondent damages for the unexpired period of the contract as opposed to the period it would take for the employer to lawfully terminate the contract of employment. The court decided that:

14 CACGB 076-12, unreported.

> "In the present case, however, it is a fixed term contract but there is no clause in the contract providing for lawful termination on notice or in any other way. In that situation, section 17 (1) of the Act provides that the contract shall terminate when "the period of time for which the contract was made expires."

In this case, the Court awarded damages on the basis of the unexpired period of the contract.

2.1 ANALYSIS

The decisions discussed above lay down the following principles: first – the rule in *Rakhudu'* s *case* - where a fixed term contract does not have a termination clause, it may at common law be lawfully terminated on reasonable notice without giving reasons or the right of appeal unless there are terms express or implied to the contrary. Second – the rule in *ZimBank case* - in fixed terms contracts, the measure of damages is equivalent to the amount the employee would have earned for the period until the employer could lawfully terminate it.

Consequently the principle in the *Rakhudu case* is that the quantum of damages in relation to fixed term contracts, with no termination clause, ought to be equivalent to the period constituting the reasonable notice required to lawfully terminate the contract without giving reasons at common law. However, in the *ABM University College case*, [15] the Court of Appeal adopted a different approach in relation to the measure of damages in fixed term contracts with no termination clause by deciding that the measure of damages is the amount equivalent to the unexpired period of the contract.

It is submitted that the Court of Appeal has laid down two conflicting approaches in relation to the award of damages on unlawful termination of a fixed term contract which has no termination clause. This causes confusion in the assessment of the proper quantum of damages. If the approach in the *Rakhudu case* is adopted, the quantum of damages for unlawful termination of a contract of employment with no termination clause would be equal to the period which would be determined as reasonable notice required to lawfully

15 Case No CACGB-076-12.

terminate the contract of employment. On the other hand if the *ABM University College case* is adopted, the quantum of damages for unlawful termination of employment with no termination clause would be equal to the unexpired period of the contract.

These conflicting decisions by the Court of Appeal are bound to create conflict with employers preferring the *Rakhudu case*. Here, employers can argue that a fixed term contract of employment can be "otherwise lawfully terminated" as provided by section 17(1) by giving reasonable notice. Consequently, the quantum of damages for unlawful termination ought to be equivalent to the period which would be deemed as reasonable notice to lawfully terminate the contract. On the other hand, it is not inconceivable that former employees whose contracts of employment had no termination clause would rely on the *ABM University case* and contend that their contracts can only lawfully terminate by effluxion of time. Consequently, the quantum of damages ought to be equivalent to the expired period of the contract. This difference of opinion remains unresolved.

3. INDEFINITE-PERIOD CONTRACTS AND CONTRACTS FOR SPECIFIED PIECE OF WORK

The first case of interest in the area of indefinite period contract is *Sekgwa* v *Institute of Development Management (Sekgwa's case)*.[16] The Plaintiff instituted action against the Defendant, his former employer, for wrongful and unlawful termination of his employment contract. The Plaintiff had been employed as the Country Director of the Defendant, a public institution which provided management training for members of the public, private and parastatal sectors in Botswana, Lesotho and Swaziland. When appointed to the position, the Plaintiff had no prior management experience, a fact known to his employer. His contract could be terminated by one month's notice. Despite some difficulties with his immediate supervisor, the Plaintiff's probationary period of one year was confirmed and he was appointed in his position. A month later, the Plaintiff was given an appraisal form which presented an unsatisfactory assessment of his

16 2001 (2) BLR 434 (HC).

work and behavior. He was assessed as needing training in management.

In June 1996, six months after his probationary period ended, the Plaintiff was informed of a disciplinary investigation against him. The committee dealing with the investigation grilled the Plaintiff for a day and a half on the eight charges after which the committee found all charges of incompetence against him to have been established and it recommended that he be dismissed with immediate effect. The Board of the Defendant advised the Plaintiff that he had been dismissed on one month's notice. Approximately a year later, the Plaintiff obtained employment albeit at a reduced salary. The Court held that there was ample material to justify a conclusion that the Plaintiff was incompetent in his post but it was not satisfied that the decision to terminate was substantively fair. The procedure the defendant adopted also had to be fair. On the issue of damages the Court opined as follows:

> "The cases cited above, to which Gyeke-Dako J. referred as dealing with 'the unexpired period of (the employee's) contract', relate particularly to fixed term contracts and not contracts for an indefinite period, which are terminable on notice. I must, with due deference, disagree that the full period up to retirement age is to be used in the calculation of damages for unlawful dismissal in a contract for an indefinite period, terminable by notice."

The Court found support for rejecting this approach in English cases and South African cases. Referring to English and South African position, the Court stated that:

> "..The rule in England under the common law, where employment is for an indefinite period terminable by notice, is that contractual damages for wrongful dismissal are limited to the *amount of net salary in lieu of notice which would have been payable if proper notice had been give*… In South Africa too this has always been the common law position. See, for example: *Usakos Recreation Club* v. *D Slaney 1950* (3) *S.A. 121 (S.W.A.)* and *Stewart Wrightson (Pty) Ltd* v. *Thorpe (supra)* at p. 952." [17] [Emphasis added].

17 The Court also cited *Addis* v. *Gramophone Co (1909) A.C. 488 (H.L.)* and *Pitt Employment Law (3rd ed.) 1997* at p. 179.

According to the Court, the rationale behind this limitation is that since the employee could have been lawfully dismissed had proper notice been given, all he has lost by the wrongful dismissal is wages for the notice period. The Court made a caveat and stated that:

> "…With the development of the law to require just cause for termination with notice, particularly in the case of public institutions, different considerations apply. Actual loss suffered as a result of wrongful dismissal will vary according to the circumstances of each case depending upon the time which it would have taken for the employer to have lawfully terminated the employment..." [18]

The Court continued to state that:

> "…I also note the judgment of Nganunu J. (as he then was) in *Gabaeme* v *Barclays Bank of Botswana Ltd* [1994] B.L.R. 110 at 123 E-H where, in a similar case of damages for wrongful termination of a contract of indefinite duration, it was held that: 'The damages [the Plaintiff] . . . should recover will be equal to the salary she lost for a period of time. . . . All in all therefore there is a reasonable period for which the plaintiff should be paid damages by the defendant, which period is determined by the prospects of finding alternative work, less any amount which she actually, or should be deemed to have received from any work she did do. The amount of damages would be computed on the basis of her monthly salary multiplied by the months in that period.' In Gabaeme's case the question of damages was only briefly dealt with at the end of the judgment, as a guide to the parties, who were enjoined to settle the quantum themselves. Again, I respectfully disagree that the damages period is to be determined by the employee's prospects of finding work (although damages may be mitigated thereby). *Rather, following the Court of Appeal's decision in Zimbank v. Makura (supra), damages are to be computed related to net earnings for such reasonable period, depending upon the circumstances of the particular case and*

18 The Court referred to *Zimbank Botswana Limited* v. *Diana Catherine Makura* Civil Appeal No. 6 of 1994 (unreported. The rule laid down by the Court of Appeal is that the normal measure of damages (in a wrongful dismissal case) is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he would reasonably be expected to earn in other employment".

> *the features of the contract between the parties, as would have been required for the employer lawfully to have terminated the employee's service in terms of the contract.* There is thus no open sesame principle, entitling a wrongfully dismissed employee who cannot obtain another job to sit back and claim a salary from his erstwhile employer for the rest of his working life, while himself providing no services to that employer." [Emphasis added].

In this case, the Court held that the normal measure of damages in an action for wrongful dismissal in an indefinite contract of employment is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he would reasonably be expected to earn in other employment. Thus, according to *Sekgwa's case*, the ***Zimbank rule***, which, as seen above, applies in relation to fixed term contracts, also applies to quantifying damages in unlawful termination of indefinite contracts. When dealing with the time it would take to complete the disciplinary procedures, the Court held that the reasonable period would be four months and accordingly, the Court awarded the Plaintiff damages equivalent to that period.

To contextualize the approach adopted by the Court in relation to the quantum of damages, it is submitted that, on the reading of *Sekgwa's case*, a court can only use this approach in a "just-cause termination" – that is, where by law; just cause is required to terminate the employment contract. According to Rakhudu's case, no just cause is required to terminate a contract of employment at common law.

Sekgwa's case seems to hold that by reason of the fact that the Defendant was a public body, just cause was a requirement for termination of the contract of employment, thus, one can argue, the case confines the just-cause requirement to such cases only. In an action for wrongful dismissal, the position of the Court of Appeal is that, in the absence of express contractual provision to that effect, rules of fairness have no play in an employment contract.[19] Whether or not the rules of natural justice apply is a question of contractual interpretation. This position differs from the Industrial Court jurisprudence where the employer

19 See *Babeile* v *The Attorney General* 012-09 (CA). Of course, as the Industrial Court is established as a court of law and equity, rules of fairness play a great role in a claim for wrongful dismissal.

must advance a valid reason prior to termination of a contract of employment.[20] In view of Sekgwa's case, one expects that a court applying this rule must first determine whether or not there is a requirement for just cause prior to termination, which either stems from the common law or contract. This exercise is seldom carried out.

Further, as we will demonstrate, the Courts, notwithstanding a finding that there was no just cause for termination of the contract of employment, have in those cases used the approach that the time it would take to complete the disciplinary procedure is the time it would take the employer to lawfully terminate the contract of employment. As it would be argued when addressing the cases, once a court finds that there is no just cause for the termination of the contract of employment, the period it would take to complete the disciplinary process cannot in law be taken to be the period it would take to lawfully terminate the contract of employment. In that case, as the Court would have held that the employee was innocent, there is no basis in logic or law for determining the quantum of damages by reference to the time it would have taken for the disciplinary process to be conducted.

In *Marata* v *Mascom Wireless Pty Ltd (Marata's case)*[21], the Appellant was employed by Mascom Wireless as a Chief Human Resource Officer. The Appellant's contract of employment was an indefinite contract, with no provision for notice upon termination. He was charged with misconduct, he appeared before a disciplinary committee where he was found guilty and subsequently dismissed through a letter dated 20th March 2008. He appealed the decision. The minutes of appeal proceedings indicated that the Chairperson had upheld the appeal. However, on the 22nd May 2008, the Chairperson of the Committee wrote a letter in terms of which he dismissed the appeal. The Appellant applied for a declaratory relief that the decision of the Respondent was as contained in the minutes. The High Court granted the relief. The Respondent refused to reinstate the Appellant. The Appellant claimed that he was entitled to be paid the difference of the amounts he earned in instances where he was employed post termination by the respondent and in addition to that, in so far as the respondent

20 *Phirinyane* v *Spie Batignolles* 1995 BLR 1.

21 Court of Appeal Civil Appeal No. CACLB-082-10, unreported. High Court Case No MAHLB 00029-08, unreported.

was not prepared to reinstate the appellant, damages in lieu of reinstatement.

The High Court held that the Appellant was entitled to his full contractual emoluments in respect of the period 20th March 2008 to 22nd May 2008 and awarded damages for unlawful termination in an amount equivalent to his full contractual emoluments in respect of the period 23rd May 2008 to 22nd November 2008 less amounts earned by the appellant in other employment.

At the Court of Appeal, the appellant insisted that he was entitled to the difference of the amounts he earned in instances where he was employed as his salary post termination, that is, from the 21st March 2008 to the date of lawful termination. According to the Appellant, when the High Court decided that the appeal had been upheld, he had continued to be in the employ of the Respondent until the date of lawful termination. For this contention, the Appellant relied on section 17(2) of the Employment Act.[22] Further, the respondent argued that instead of damages equivalent to six months' salary, he was entitled to twelve months.

The Court of Appeal held that since the employment was terminated unlawfully "....the procedure is to determine what period, from the date of termination, would be required to terminate it lawfully." [23] The Court found that as the Appellant's contract was for an indefinite period without provision for notice, Section 18 of the Employment Act applied, which required that a month's notice be given. In determining how long it would take to lawfully terminate the contract, the Court stated:

> "A contract may be terminated lawfully in different circumstances. If the termination is the result of misconduct, applicable procedures, such as giving notice to the employee of the misconduct and the intention to hold a disciplinary enquiry, allowing the employee time to prepare his defence, and the holding of an inquiry or disciplinary hearing... [may be taken into account]. If the employee is found guilty and the sanction is termination of employment, the employee has to be given

22 17. Termination of contracts of employment generally.
(1) …
(2) A contract of employment for an unspecified period of time (other than a contract of employment for a specified piece of work, without reference to time) shall be deemed to run until lawfully terminated.

23 The Court cited *Zimbank v. Mkura*.

> the opportunity to exhaust internal appeals. Depending on the nature of the misconduct it may be necessary to give the employee notice of termination, and in this case, it would be a full month. How soon these procedures may be completed will depend on the availability of the senior officials of the employer and the appellant's cooperation."

The Court of Appeal agreed and held that in its view, it would take six months to lawfully terminate the contract. Dismissing the appellant's argument that he was entitled to twelve months; the Court said no elaboration was given as to how it would take the twelve months to lawfully terminate the contract.

3.1 ANALYSIS OF FORMULA FOR CALCULATION OF DAMAGES IN INDEFINITE CONTRACTS

In so far as the identification of the formula for calculation of damages is concerned, the *Marata* decision cannot be faulted. It is the application of the formula that raises difficult questions. In the judgment, the Court finds, quite correctly, that Section 18 of the Employment Act applies - the contract is an indefinite contract of employment, with no provision for termination upon notice. If the question for determining the quantum of damages is the time it would have taken to lawfully terminate the contract, then the court ought to have found the answer in the application of Section 18, that it would have taken a month to terminate the Appellant's contract of employment.[24] This is simply logical. But even after finding that the Respondent would have terminated the contract of employment by serving one month's notice, the Court went on to determine the length of time it would have taken for the respondent to complete a disciplinary process against the appellant. Was this inquiry relevant?

The High Court had found that the Appellant's appeal had been upheld. The resultant effect of this is that the Appellant had not, in law, committed any misconduct. So why was it necessary to conduct this inquiry? Conducting this inquiry means the Court had to assume that the Appellant had committed

24 In law, the time it would have taken the employer to terminate the contract ought to be the length of time that the law stipulates as the notice period. The fact that this is delayed by disciplinary proceedings should not be of any import – it does not constitute the period that the law stipulates as the length of time necessary to terminate the contract.

misconduct. What is the basis of this assumption? We submit that both the High Court and the Court of Appeal have failed to explain the source and basis for this assumption. For a court of law to assume that an innocent litigant commits misconduct and should be taken through a disciplinary process to determine the quantum of damages for unlawful termination of contract seems not only impracticable a formula but also profoundly absurd.

The second deficiency with the decision relates to arriving at the length of time it would have taken to complete a disciplinary process.[25] Here the main question is, how did the Court arrive at six months as the length it would have taken for the disciplinary process to be completed? The High Court arrived at six months after having regard to particular circumstances giving rise to the breakdown of the relationship and to the disciplinary procedures required to be adopted. The High Court never stated what those particular circumstances were and never engaged in any critical examination of the disciplinary procedures of the respondent.[26] Notwithstanding this, the Court of Appeal considered that this was sufficient. But it is clear that the Court of Appeal found this to be insufficient.[27] On appeal, the judgment of the Court a quo is evidence of what the Court *a quo* thought. The Court of Appeal ought not to have to surmise.

But even with a clear argument from the Appellant requiring more elaboration of how one arrives at the tenure of the disciplinary process, the Court of Appeal fell into the same error by not going on to demonstrate how it arrived at the period of 6 months. One would have expected the Court to critically look at the disciplinary process, select the relevant procedures and show how much time each one of them was likely to take. It does not help for the Court to simply arrive at a period without showing the path to its decision. This, on its own,

25 By discussing this element of the formula, we are nowhere conceding that it was relevant in the decision to determine the tenure of the disciplinary process.

26 This is probably why the Appellant argued that it was difficult and painful to justify how the six months has been derived.

27 The Court said "A contract may be terminated lawfully in different circumstances. If the termination is the result of misconduct, applicable procedures, such as giving notice to the employee of the misconduct and the intention to hold a disciplinary enquiry, allowing the employee time to prepare his defence, and the holding of an inquiry or disciplinary hearing...[may be taken into account]. If the employee is found guilty and the sanction is termination of employment, the employee has to be given the opportunity to exhaust internal appeals. Depending on the nature of the misconduct it may be necessary to give the employee notice of termination, and in this case, it would be a full month. How soon these procedures may be completed will depend on the availability of the senior officials of the employer and the appellant's cooperation.' And went on to say 'The learned judge a quo had these factors in mind ..."

reveals the difficulties that the courts run into with this formula. The formula carries the Court into a minefield of speculation and conjecture.

In *Unchartered Africa* v *Niehaus,* [28] the appellant employed the respondent as a Project Manager. The Court of Appeal determined that it was a contract for a specified piece of work in terms of Section 17[29] of the Employment Act, terminable by either party giving one month's notice. The contract of employment stated as follows:

> "The Employee acknowledges that he/she is aware that he/she is expected to keep to the standards of behavior and industrial discipline for the duration of this agreement. This includes timekeeping, attendance, honesty, application in the work situation, sobriety, abstaining from the use of illicit and illegal substances, obeying lawful instructions as well as observing all normal operating and safety rules and regulations. Any breach of these standards may result in a Disciplinary Hearing potentially resulting in dismissal of Employee."

The appellant conceded that the dismissal was wrongful. Therefore, at the Court of Appeal, the inquiry centred on the quantum of damages. After setting out the formula for calculating the quantum of damages as the time it would have taken for the employer to lawfully terminate the contract, the Court stated that the quantum of damages may be influenced by mitigating or aggravating circumstances of the termination.[30] The Court went on to point out the mitigating and aggravating circumstances on each party's side. The Court said that:

> "The quantum of damages may, of course, be influenced by any mitigating or aggravating circumstances of the termination. In this case, there are both mitigating and aggravating circumstances on both sides."[31]

The *Unchartered African Safaris* case has more serious difficulties.

28 CACGB 044-13.

29 17. Termination of contracts of employment generally.
(1) A contract of employment for a specified piece of work, without reference to time, or for a specified period of time shall, unless otherwise lawfully terminated, terminate when the work specified in the contract is completed or the period of time for which the contract was made expires.
(2) …

30 Paragraph 30.

31 Paragraph 30.

First, it is vital to note that the decision makes no reference to the *Marata* case. This may explain its radical departure from the principles in the *Marata* case. Like the *Marata* case, after determining that the contract is terminable by one month's calendar notice from either party, the court does not make one month the period which it would have taken to lawfully terminate the contract. Instead, the court does not only engage in the question of the tenure of the disciplinary process, but two more inquiries, the mitigating and aggravating factors inquiry and the rules of natural justice inquiry, an absolutely irrelevant and incorrect exercise, in our respectful view.

As stated above, the approach that has been adopted by Courts in determining the quantum of damages is the time it would take for the employer to lawfully terminate the contract. Regarding the period of time it would have taken the employer to terminate the contract in this case, the Court held as follows *ipsissima verba:*

> "Accordingly, in my view, the contract which the parties entered into was a contract for a specified piece of work but one which could lawfully be terminated by either party in writing giving a calendar months' notice."[32]

In this case once the Court held that the contract of employment could lawfully be terminated by giving one month notice that ought to have been the end of the enquiry. However having held that the contract of employment could have been lawfully terminated by giving one month notice, the Court held as follows:

> "The time that would have been required for the employment to be lawfully terminated in this case involves what it would take to go through the disciplinary process."[33]

These are two contradictory positions. As in other cases, there is no explanation of why when the law allows the employer to terminate the contract by one month's notice the Court reaches a different finding that the time it would take the employer to terminate the contract is the tenure of the disciplinary hearing.

32 Paragraph 16.
33 Paragraph 44.

Another difficulty arises on the approach taken by the Court. We submit that the mitigating-aggravating factors inquiry has no basis in precedent and the Court provided none for this proposition. It is a novel factor in the calculation of the period that it would take the employer to terminate the contract, the approach is not supported by any previous authority, either from the High Court or the Court of Appeal. It is also a puzzling factor. As a qualitative standard, it is difficult to assimilate into the calculation of the period of time -which is a quantitative standard. We submit that this is an incorrect position of the law. It is a factor that is taken into account in the award of compensation at the Industrial Court under Section 24 of the Trade Disputes Act.

The manner in which the Court deals with the issue of the disciplinary hearing reveals the complexity surrounding the question of the application of the rules of natural justice in the area of employment law. According to the court, the employer was obliged to hold a disciplinary hearing or comply with the rules of natural justice. On this aspect, after holding that the concept of summary dismissal does not exclude a hearing, the Court accused the appellant of misunderstanding the rules of natural justice.

We submit that the Court misdirected itself on the application of the rules of natural justice in this case. As stated above, rules of natural justice will only apply in a contract of employment when parties have expressly stipulated that they should apply. At least from the text of the judgment, the Court did not make any reference to the parties contract in reaching the conclusion that the rules of natural justice are applicable. As submitted above,the rules of natural justice do not apply automatically, in each case the question must be whether or not the contract of employment incorporates them. Although the Court says nothing about this aspect, in this case, the contract of employment provided for a disciplinary hearing.

The *Ackson Mbewe* v *Funeral Services Group*[34] case follows. In this case, the Plaintiff was employed on an indefinite term contract by the Defendant as a General Manager, Assurance Division. On the 10th November 2010 the Plaintiff was charged by the Defendant with 6 offenses among others use of abusive language, racism, insubordination and intimidation. He was called to a disciplinary hearing which he could not attend due to illness. He was found

34 CVHLB 000425-11.

guilty and dismissed.

The Court after a thorough analysis of the facts of the case held at paragraph 125 of its judgment that the dismissal of the Plaintiff was clearly both procedurally and substantively unfair and unlawful. The Court made a definite finding that the termination was substantively unfair. It is worth noting that this is similar to the finding made in *Sekgwa case,* where the Court found that there was ample evidence to justify termination of the contract of employment.

However when determining the quantum of damages the Court used the same legal test as applied in Sekgwa case. The Court relying on the *Marata case* opined as follows:

> "The learned judge went on to express his agreement with the Court of Appeal decision *Zimbank* v. *Makura* (supra). *The question is how long it would have taken to lawfully terminate the Applicant's contract*? A contract may be terminated lawfully in different circumstances. If the termination is the result of misconduct, applicable procedures, such as giving notice to the employee of the misconduct and the intention to hold a disciplinary enquiry, allowing the employee time to prepare his defence, and the holding of an enquiry or disciplinary hearing. If the employee is found guilty and the sanction is termination of employment, the employee has to be given the opportunity to exhaust internal appeals. Depending on the nature of the misconduct it may be necessary to give the employee notice of termination, and in this case it would be a full month. How soon these procedures may be completed will depend on the availability of the senior officials of the employer and the Applicant's cooperation." [35] [Emphasis added]

Having restated the law as captured above the Court held[36] in its judgment that it would take no less than twelve (12) months to complete the disciplinary procedures and accordingly awarded the Plaintiff damages equivalent to thirteen months' salary inclusive of one month notice of termination.

As with the other cases discussed above, it is respectfully submitted that the Court erred in its application of the legal principles in the light of its finding that the termination of the Plaintiff's contract of employment was substantively

35 Paragraph 134-135.
36 At paragraph 137.

unfair. It is submitted that the twelve months constituted the time it would take to complete the disciplinary process and not the time it would take to lawfully terminate the Plaintiff's contract of employment. Put differently, the Plaintiff's contract of employment could not be lawfully terminated by subjecting him to a disciplinary hearing whilst he committed no offence, such termination would be substantively unfair. The position of the law as restated by the Court is the time it would take to lawfully terminate the contract of employment which in fact and in law envisages both the substantive fairness and procedural fairness of the dismissal. In the premises it is submitted that the Court erred in holding that it would take twelve months to lawfully terminate the Plaintiff's contract of employment when it had held that there was no just cause for such.

The *Kabelo Alfred Teisi* v *Furnmart (Pty) Ltd* case[37] similarly dealt with the issue of unlawful and unfair dismissal. This judgment further demonstrates the divergent views by the High Court on the issue of determining the quantum of damages for unlawful or unfair dismissal. In this case the High Court expressly differed with the principle that has been consistently applied in the cases discussed above by both the High Court and went further to overrule the Court of Appeal. Whilst the approach taken by the High Court in this regard may not be legally permissible in the light of the doctrine of *stare decisis et non quieta movere,* this however confirms the need for reform on this aspect which is the subject of this article.

Having found that the Plaintiff's dismissal was unlawful, the Court found that, according to the Court of Appeal, the rule in *Zimbank* applied. However, the High Court opined that the Zimbank case is not good law. The High Court stated:

> "But does the *Zimbank* case represent good law? I do not think so. If we accept that the Roman Dutch Common Law represents the law as it applies in Botswana, then the correct test in measuring damages is in my view, as set out in *Myers v Abramson* (1952) 3 SA 121 at 127 by Van Winsen J, the relevant parts of which are reproduced below: 'The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum earned

37 CVHGB-002864-13.

during such latter period in similar employment'."

The Court criticized the Court of Appeal's reliance on a passage from *Chitty on Contract* (26th Ed) Vol. 2 in espousing the principle on damages. According to the High Court, the leading author in that book wrote essentially from an English contract position and not from a Roman Dutch Common Law perspective. The High Court continued to state that:

> "To adopt the position in the *Zimbank* case wholesale therefore, would do injustice as it would equate a Defendant who has breached a contract to a Defendant who has abided by the terms of the contract and given notice. To place both Defendants on the same footing would be to make mockery of the law as it would essentially give employers a carte blanche not to comply with the law."

By questioning whether or not the Court of Appeal applied Roman Dutch law in *Zimbank*, this case brings a new dimension to the issue at hand and is further evidence of the problems besieging quantification of damages in cases of wrongful dismissal. The decision is also different from the other decisions in that it went a step further and delved into the power imbalance that will be caused by the application of the *Zimbank* rule. The case reflects some of the policy questions that arise from this subject, which call for legislative intervention.

4. CONCLUSION

We set out in this article to demonstrate the dissonance in judicial opinion on the quantification of damages in an action for wrongful dismissal. From a study of the cases, the cause of such dissonance arises from various factors such as the belief that the rule for awarding damages must apply differently in the three categories of contracts, although there seems to be no foundation in law for such differential treatment, the requirement of just cause on termination, the application of principles of fairness. The disjointed judicial opinion, including conflicting decisions of the Court of Appeal, require clarification. In our

respectful submission, part of the reason why there are conflicting decisions of the Court of Appeal is due to the fact that the Court does not pay close attention to its precedents.

It is submited that as this is a matter that may involve policy implications, there is a need for legislative intervention on this aspect. This can be implemented through amending the Employment Act and laying down a clear formula and/or criteria for computation of the quantum of damages in cases of unlawful termination of contracts of employment. Although far from perfect, the compensation method provided in the Trade Disputes Act provides a good model and starting point.