



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASES NO.: LCA 62/2013

In the matter between:

BEN GAMATHAM

APPELLANT

And

NORCROSS SA (PTY) LTD T/A TILE AFRICA

RESPONDENT

Neutral citation: *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* (LCA 62/2013)
[2017] NALCMD 27 (14 August 2017)

Coram: **UEITELE J**

Heard: 22 September 2014

Delivered: 14 August 2017

Flynote: *Labour Law* - Employer/employee relationship - dishonest conduct - employer should feel confident it can trust an employee not to be in any way dishonest - employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of such relationship intolerable - Trust is the core of employment relationship - Dishonest conduct is breach of such trust - it is immaterial that the employee has hitherto been a person of good character or that his or her breach of trust is a solitary act - such breach will justify dismissal.

Labour law - Dismissal - Employees' right to fair hearing - Such right does not necessarily mean that an employer's failure to offer an employee an opportunity of an internal appeal hearing itself justify a finding that that the dismissal was procedurally unfair.

Summary: Mr Ben Gamatham was employed by Norcross SA (Pty) Ltd t/a Tile Africa as Sales Floor manager between August 1998 and February 2013 when he was dismissed from his employment on allegations that he committed acts of misconduct. During February 2013 Gamatham was charged with misconduct it being alleged that he was, grossly dishonest, misappropriated company property, breached company policy and procedures. He was found guilty of all the charges and dismissed. On 8 March 2013 he, in terms of s 85 of the Labour Act, 2007, referred a dispute of unfair dismissal, to the Labour Commissioner.

The Labour Commissioner appointed an arbitrator to conciliate and arbitrate the dispute. At the conclusion of the arbitration hearing the arbitrator ordered the respondent to pay Gamatham an amount of N\$ 25 000 'in consideration of applicant's loyal service with the company as applicant worked for respondent for a long period (fourteen years) with a clean record.'

The appellant was aggrieved by that award and on 6 September 2013, in terms of s 86 (15) of the Labour Act, 2007, appealed against "parts" of the arbitration award. The respondent opposes the appeal and has also filed a cross appeal against the entire award.

Held that an arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary sanction. If the arbitrator finds that there was no valid or fair reason for the disciplinary sanction, or that the process followed was unfair, the arbitrator must uphold the unfair labour practice or the unfair dismissal challenge. But if on the other hand the arbitrator finds that there was a valid and fair reason for the disciplinary sanction and that a fair procedure was followed in imposing the disciplinary action the arbitrator must dismiss the complaint.

Held further that the evidence presented by the respondent was on the probabilities true and correct and the appellant's denials are false or mistaken. The court was therefore satisfied that the appellant's conduct was dishonest and that the respondent had a fair and valid reason to dismiss the appellant.

Held furthermore that the failure by the respondent (especially in the light of the fact that the respondent's disciplinary code did not make provision for an internal appeal hearing) to afford the appellant an internal appeal, was not in itself procedurally unfair.

ORDER

1. The appeal is dismissed.
2. The cross appeal succeeds and for the avoidance of doubt, the award of the arbitrator dated 8 August 2013 is varied to read as follows:
 - '(a) The dismissal of Ben Gamatham is substantively and procedurally fair and his compliant is accordingly dismissed.'
3. There is no order as to costs.

JUDGMENT

UEITELE, J

Introduction and background

[1] Mr. Ben Gamatham¹ was, since August 1998 until his dismissal during February 2013, employed as a Sales Floor Manager by Norcross SA (Pty) Ltd t/a Tile Africa, a

¹ Ben Gamatham is the appellant in the main appeal and the respondent in the cross appeal, and is, in this judgment, referred to as 'the appellant'.

private company incorporated and registered in accordance with the laws of Namibia.² The incidents which gave rise to this appeal and the cross appeal started to play themselves out from October 2012 to February 2013 at the respondent's shop which is situated in the Southern Industrial area of Windhoek, Namibia.

[2] The events which gave rise to this appeal are as follows. During October 2012 the appellant prepared a quotation (Quotation Number 196939). The quotation did not have a description of who the customer or person in respect of who it was made out to was, it also did not indicate the address or other details of that customer or person. Mr Jairus Uupindi, an employee of the respondent alleges that during the course of the month of October 2012 the appellant gave him that quotation (i.e. Quotation Number 196939) and instructed him to load the goods (valued at N\$ 25,730-20) in respect of which the quotation was made out onto a customer's vehicle. After the instructions Mr Uupindi loaded the goods onto the customer's vehicle.

[3] On 3 November 2012 another employee of the respondent, a certain Mr Issaskar Muundjua, processed a sale of goods valued at N\$ 99 672-73 on the account of a client of the respondent, Dikola Construction CC. I will later in the judgment come back to the circumstances under which the sale was processed and the goods booked out on the name of Dikola Construction CC.

[4] Mr Jairus Uupindi furthermore alleges that during 30 January 2013 a person (who I will refer to as a customer) came into the respondent's shop and requested a quotation for certain goods. He alleges that he prepared the quotation (Quotation Number 199441) handed the original quotation to the customer and retained a copy which he alleges he placed on a file in his office. Another employee of the respondent, a certain, Benestus Muundjua, alleges that later during the course of that day (i.e. on 30 January 2013) the appellant approached him and gave him a quotation (Quotation Number 199441) that was prepared by Uupindi and instructed him to load the goods indicated on that quotation on a customer's vehicle.

[5] Benestus furthermore alleges that he initially objected to loading the goods without a proper tax invoice, but the appellant as Floor Manager instructed him to

² Norcross SA (Pty) Ltd t/a Tile Africa is the respondent in the main appeal and the appellant in the cross appeal and is, in this judgment, referred to as 'the respondent'.

nonetheless load the goods. Benestus furthermore alleges that the branch manager of that shop, a certain Mr Jaques Gouws had on various occasions impressed on them that they must obey the orders given to them by the appellant it is for that reason that he obeyed the order and loaded the goods. Because there was no tax invoice which supported the loading of the goods Benestus alleges that he took a piece of paper and recorded all the goods that were to be loaded and thereafter carried out the instructions to load the goods.

[6] During the first week of February 2013 the respondent's branch manager of the shop where the appellant was employed, Mr Gouws noticed an invoice in respect of Dikola Construction CC that was generated on 3 November 2012 and that had, by the end of January 2013, not yet been paid. Mr Gouws accordingly took it upon himself and to call Dikola Construction CC (who was a client of the respondent) and enquire from Dikola Construction CC as to when the invoice would be paid.

[7] A certain Ms Ellanorth Dikola of Dikola Construction CC telephonically indicated that Dikola Construction CC did not order or take any goods during November 2012 from the respondent's shop and that Dikola Construction CC was therefore not indebted to the respondent she confirmed the telephonic discussion in writing on 4 February 2013. Due to the fact that the sale of goods on 3 November 2012, was processed by Issaskar Muundjua, Gouws called Issaskar and enquired from him as to who bought the goods on Dikola Construction CC's account. Issaskar's response was that Gouws must not ask him but, should rather ask the appellant. Gouws thereafter called the appellant and enquired about the goods that were purchased on Dikola Construction CC's account on 3 November 2012, the appellant's response was that the sale was processed by Issaskar as such Gouws must take up the matter with Issaskar.

[8] When he received that response from the appellant Mr Gouws requested Issaskar to, in writing, set out what he knows about the purchase of goods on Dikola Construction CC's account on 3 November 2012. This brings me back to the circumstances under which the 'sale' of goods to Dikola Construction CC allegedly occurred. On 4 February 2013 Issaskar addressed a letter to a certain Mr Conrad Bock, the Regional Operations Manager of the respondent. In that letter Issaskar states that on the 2nd day of November 2012 he was approached by the appellant who asked him

about the tiles that a certain Frans (the owner of Dikola Construction CC) wanted. He alleges that his response to the appellant was that Frans did not need the tiles then.

[9] Later on in the day the appellant again called Issaskar and asked him to process a sale of Tiles on Dikola Construction CC's account, because they needed to meet the shop's targets so that they could qualify for commission. When Issaskar refused to do so the appellant informed him that he is awaiting a sale of approximately N\$ 200 000, the following week and that he (the appellant) will reverse the sale which he is requesting Issaskar to process on Dikola's account once his (appellant's) sale (of approximately N\$ 200 000) has materialised. Issaskar alleges that he was reluctant to process the sale.

[10] Issaskar further alleges that on 3 November 2012 the appellant called him again and insisted that Issaskar must process the sale on Dikola Construction CC's account, which he (Issaskar) ultimately did. On the following Monday the appellant approached Gouws and enquired about the commission because of the sales that they did. Gouws informed him that the shop did not meet its monthly sales targets and will as such not qualify for any commission. When Issaskar heard that the shop did not meet its monthly sales targets, he approached the appellant and enquired from him about the sale that he (Issaskar) processed on Dikola Construction CC's account, the appellant's response was allegedly that that was Issaskar's story and he (appellant) did not care anymore.

[11] During the January 2013 monthly stock taking at the shop it was realised that there were stock losses in the shop. The branch manager, Gouws, started investigating how the losses occurred, it was during that investigation that, Uupindi revealed to the branch manager, what transpired during 2 and 3 November 2012 and Benestus also revealed to Gouws what happened on 30 January 2013 and handed over the paper on which he wrote down the goods that he loaded, allegedly, on the instructions of the appellant on a customer's vehicle. As a result of these revelations Issaskar, Benestus, Uupindi, Gouws and the appellant were subjected to polygraphic tests.

[12] When the result of the polygraphic tests were made known the appellant was on 4 February 2013 suspended from work and on 5 February 2013 charged with six counts of misconduct. The charges which the appellant faced were, gross dishonesty,

misappropriation of company property, breach of company policy and procedures. On 7 February 2013 a disciplinary hearing commenced and the hearing concluded on 18 February 2013. The appellant was found guilty on all the six charges of misconduct and dismissed from the respondent's employment.

[13] On 8 March 2013 the appellant referred a dispute of unfair dismissal to the office of the Labour Commissioner. On 18 March 2013 the Labour Commissioner designated a certain Ms Tuulikki Shikongo to conciliate and if necessary arbitrate the dispute. The arbitrator set the matter down for conciliation on 9 April 2013 and when conciliation failed, arbitration proceeded on 25 and 26 April 2013.

[14] On 8 August 2013 the arbitrator handed down her award. In her award the arbitrator refused to order reinstatement and ordered the respondent to pay to the applicant an amount of N\$ 25,000 'in consideration of applicant's loyal service with the company as applicant worked for respondent for a long period (fourteen years) with a clean record.'

The appeal, the cross appeal, grounds of appeal and the grounds opposing the appeal

[15] The appellant was aggrieved by that award and on 6 September 2013, in terms of s 86 (15) of the Labour Act, 2007, appealed against 'parts' of the arbitration award. As I have indicated above the respondent opposes the appeal and has also filed a cross appeal against the entire award. I am of the view that, in order to appreciate the grounds on which the appellant basis his appeal, and the grounds on which the respondent oppose and cross appeals, it is appropriate to briefly set out the reasoning behind the arbitrator's award. She said the following (I quote verbatim from the award):

'6 ANALYSIS AND ARGUMENTS

Having listened to both sides of the story I have the following to state:-

- One can believe that the Company may have really suffered certain losses, but to which extend. Although Respondent is claiming to have lost stock to the tune of hundred and forty9 thousand dollars, there was no evidence to support the claim.

- It was also puzzling how employees of Respondent would just take verbal instructions to load the stock without proper documents and they are not taken to task.

- ...

The other unclear issue is why the Respondent did not grant or hold the appeal hearing. Although the case may have looked straight forward and that the respondent felt that it made the right decision to dismiss, procedures should have been followed to the conclusion. Instead of Respondent telling Applicant to refer matter to CCMA. Respondent should have granted Applicant an opportunity for his appeal to be heard.

...On the issue of misappropriation of company stock, I do not think applicant can be totally cleared from these allegations. He himself stated that he gave some of the sales to a certain new employee to boost his moral or to motivate him, but the claims are that he also had a benefit of receiving some benefits from these translations. As a manager, Mr Gamatham was supposed to be the one to discourage employee not to overlook the policies of the company in the dealings, but got involved in instructing employees to load stock on quotations etc.

I have come to a conclusion that there were shortcomings on both Applicant and Respondent's sides in this matter. Respondent failed to follow the disciplinary procedures by not having allowed the appeal hearing. This amounts to procedural unfairness to a certain extend.

Applicant's claim that he always gives sales to the other employees in an effort to motivate them is only of value if this is in line with Company policies and procedures.

To conclude, I find it very interesting how stock could be misappropriated so easily passing through different hands, without having been stopped immediately.

I suggest that Company should re-visit its own policies to make them stricter and close any identified loopholes.

7. AWARD

I found both parties to have some kind of shortcomings and as such, since Respondent failed to adhere to own policy on appeal, I order as follows:

- That Respondent pays Applicant an amount of N\$ 25,000.00 in consideration of Applicant's loyal service with the company as Applicant worked for Respondent for a long period with a clean record.
- This does, in no way, suggest Applicant's innocence.

I could not order reinstatement or more payment than this as I find Applicant not be totally innocent in this matter.'

[16] After the appellant received the record of the arbitration proceedings he amended his grounds of appeal. The grounds of appeal contained in the amended notice of appeal are four in total and are that:

1. Evident from the award and record of the proceedings, the arbitrator found that the appellant was not totally innocent, but could not, on a balance of probability, find him guilty, and accordingly did not make such a finding, therefore the respondent failed to prove the appellant's guilt and the appellant should have succeeded with his claim of substantive fairness.

2 Evident from the record the respondent failed to provide evidence on a balance of probabilities that the applicant was present at the workplace when an alleged transaction of N\$ 100,000.00 was invoiced without a sale.

3. Evident from the record, the respondent failed to provide evidence, on a balance of probabilities, of the alleged benefit the appellant received from his alleged misconduct of acting contrary to company policy and or misappropriation of stock. All respondent's witness's testimonies concluded that the appellant did not receive a commission for the time in question or any other type of benefit.

4 From the record, with regards the loading of stock on the strength of a quotation, it became apparent that similar misconduct by a manager has occurred in the past and the guilty manager came off with a mere verbal warning. Not derogating from the appellant's insistence of innocence, which was not disproved by the respondent, the respondent's sanction of dismissal, considering the appellant's unblemished fourteen and half years of service, was harsh in the circumstances.'

[17] As I have indicated above the respondent opposes the appeal. The basis on which the respondent opposes the appeal is grounded in the cross appeal. The respondent's cross appeal raises three issues of law. Firstly, whether the arbitrator erred in awarding the appellant an amount of N\$ 25 000; secondly, whether the arbitrator erred in failing to conclude and rule on whether the appellant was fairly dismissed in terms of section 33 of the Act; lastly, in the alternative to the first two questions of law, whether the arbitrator erred in concluding that the appellant was unfairly dismissed by the respondent because the respondent did not follow its appeal procedures when dismissing the appellant.

Issues for determination

[18] Having considered the findings and the award by the arbitrator, the grounds of appeal, the cross appeal and the issues raised in the heads of argument, I understand the following to be the questions that I am called upon to determine:

- (a) Could the arbitrator, on the evidence that was before her, find that the respondent had a fair and valid reason to dismiss the appellant?
- (b) If the answer to the question posed in paragraph (a) above is in the affirmative. Was the dismissal of the appellant procedurally unfair in the light of the respondent's failure to afford the appellant the opportunity to appeal (internally against the findings of the chairperson of the disciplinary hearing)?
- (c) If the respondent's dismissal is procedurally unfair did the arbitrator err in not ordering the respondent to reinstate the appellant?

[19] I find it appropriate to, albeit briefly, before I consider the issues which I am called upon to decide in this appeal briefly set out the legal principles governing those aspects.

The applicable legal principles

[20] The termination of contracts of employment in Namibia is governed by the Labour Act, 2007. The Supreme Court and this court have stated that s 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.³ Unfair disciplinary action against an employee is regulated by s 48 of the Labour Act. That section provides that the provisions of s 33 of the Act, which apply to unfair dismissal, shall, 'read with the necessary changes, apply to all other forms of disciplinary action against an employee by an employer' and s 48(2) states that disciplinary action taken against an employee in contravention of s 33 constitutes an unfair labour practice.

[21] Accordingly, in assessing whether disciplinary action constitutes an unfair labour practice for the purposes of s 48(2), the key questions are whether the disciplinary action was imposed without a valid and fair reason or without following a fair procedure. An employee who considers that disciplinary action has been imposed upon him in contravention of s 33 may refer the unfair labour practice to the Labour Commissioner in terms of s 51 of the Act. A copy of the notice must be served on the employer.

[22] An arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must accordingly make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary action. If the arbitrator finds that there was no valid or fair reason for the disciplinary action, or that the process followed was unfair, the arbitrator must uphold the unfair labour practice or the unfair dismissal challenge. If on the other hand the arbitrator finds that there was a valid and fair reason for the disciplinary action and that a fair procedure was followed in imposing the disciplinary action the arbitrator must dismiss the complaint.

[23] A party dissatisfied with an arbitration award made in terms of s 86 of the Act (save in the case of disputes of interest relating to essential services) may appeal to the Labour Court on any '**question of law alone**'.⁴ In the *Van Rensburg* matter the

³ See: *Leon Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd*, an unreported judgment of the Supreme Court of Namibia delivered on 11 April 2016 under case number SA 33/2013 at para [28]. And also the unreported judgment of the Labour Court of Namibia of *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (LCA 11/2016) [2017] NAHCMD 18 (07 June 2017) at para [20].

⁴ Section 89(1) of the Act.

Supreme Court said the following as to what constitute an appeal on a '*question of law alone*':

[43] ...First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr. Jansen van Rensburg enter Runway 11 without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record⁵ and may not be the subject of an appeal to the Labour Court.

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

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

Did the respondent have a fair and valid reason to dismiss the appellant?

⁵ The supreme Court said: 'The word 'perversely' was used by Lord Brightman in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 (HL) 518 where he said: 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body, and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely'. See also *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 29, per Viscount Simmonds, a court will intervene where a decision maker 'has acted without any evidence or upon a view of the facts which could not reasonably have been entertained'. This approach is similar to the approach adopted in *Yeboah v Crofton* [2002] EWCA Civ 794.

[24] I have indicated above that where a dispute of unfair labour practice or unfair dismissal is referred to an arbitrator, that arbitrator must make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary sanction. From the portion of the arbitration award that I have quoted above (in paragraph [15]) the finding of the arbitrator is not clear. The arbitrator was in my view ambivalent in her findings, she does not tell us whether or not the respondent had a valid and fair reason to dismiss the appellant. I therefore proceed to consider whether on the facts that were placed before the arbitrator the respondent had a valid and fair reason to dismiss the appellant.

[25] I have earlier on in this judgment indicated that the appellant was charged with six counts of misconduct. The first count of misconduct reads as follows:

‘1. Gross dishonesty and misappropriation of Company stock during Aug 2012 and Feb 2013 in that you removed company stock without following the policy and procedures and in effect costing the group a loss +/- R 140 000.00 .’

[26] In the introductory part of this judgment I set out the events which gave rise to this appeal. When I narrated those events I used the phrase ‘it was alleged’. I used that phrase advisedly because the narration was based on the version of the witnesses called by the respondent, a version which was disputed by the respondent.

[27] The respondent placed evidence before the arbitrator which showed that the employees of the respondent including the appellant underwent training on the procedures that must be followed when selling products or goods to a customer. The procedure to which the respondent testified is as follows: A customer will come into the shop and identify the goods they want to purchase. A salesperson will assist the customer and if the customer is a cash paying customer the customer will pay for the goods.

[28] Once the customer has paid for the goods an invoice (in triplicate) is generated. The top copy, a copy of the actual invoice, and a delivery note. The delivery note is then handed over to the salesperson who will collect the goods and check it for correctness and accuracy and then the customer signs the documentation. After the customer has

signed the delivery note, only then is the salesperson allowed to remove the goods from the shop for loading.

[29] I have in the introductory part of this judgment set out evidence which was given by Issaskar, Benestus and Uupindi and I will not repeat that evidence. The appellant's response to the evidence of Issaskar, Benestus and Uupindi was a general denial and speculative about the motives those employees allegedly had to give false evidence against him. In addition the appellant's evidence was riddled with inconsistencies. In some respect, the respondent appeared to suggest that the respondent's policy allowed loading of stock without an invoice, while on the other it seems he confuses issues where pre-payment is made by a customer and the stock was loaded, not by quotation, but on the basis that there was full payment of the balance and the invoice will be prepared some other time. What however makes the appellant's denials improbable is his testimony that the sales that were processed by Benestus and Issaskar on his instructions were paid, although he did not have the documents to prove that the goods were paid for.

[30] During cross examination, appellant testified that the procedure that he will follow when he sell goods to a customers is as follows (I quote verbatim from the record):

'I will make a quotation and the client will keep one and the remaining one is with me. If the client returns, may be going to collect the money, then I will make out my invoice. After that I will give the invoice to the people who are responsible for loading, and then they will do the loading.'

[31] Responding to the questions put to him by the arbitrator firstly on whether the appellant has ever asked somebody to load goods without an invoice and on a quotation only, the appellant testified as follows:

'This is always happening and this will be done in consultation with the manager. Because I worked for Tile Africa for years, and there was a client base which was there and people whom one could trust. And if they may be paid cheque in advance, then you will go to the manager and tell him these people want to load things, and the invoicing will only be done on Friday. This was in consultation with my manger.'

[32] I had regard to the evidence as a whole on the record. In my view Uupindi's evidence that during October 2012 the appellant instructed him to load goods without an invoice, Issaskar's evidence that during November 2012 the appellant instructed him to process a sale of goods on Dikola Construction CC's account and Benestus' evidence that during January 2013 he was instructed by the appellant to load goods without an invoice, is on the probabilities true and correct and the appellant's denials are false or mistaken.⁶ I am therefore satisfied that the appellant's conduct was dishonest.

[33] In the case of *Toyota SA Motors (Pty) Ltd v Radebe & Other*⁷ the South African Labour Court of Appeal said that dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. It is now well accepted that in employment law, a premium is placed on honesty. It thus follows that, where an employee ruptures the trust reposed in, or expected of, him or her, such rupture may result in the termination of his/her contract of employment. This Court, in the case of *Foodcon (Pty) Ltd v Schwartz*⁸ said:

'In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely on the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee.'

[34] Any form of dishonesty tends to undermine trust in an employee/employer relationship. As it was fittingly put by the South African Labour Court in *Metcash Trading LTD t/a Metro Cash and Carry v Fobb and Another*.⁹

'....Trust is the core of employment relationship. Dishonest conduct is a breach of that trust. Accordingly dismissal is the appropriate action.'

⁶ See *National Employers General Insurance v Jagers*, 1984 (4) SA 437 (C) at p440 E-G. Also see the unreported judgment of *The Motor Vehicle Accident Fund of Namibia v Lukatezi Lennox Kulobone* Case No. SA 13/2008 delivered on 05 February 2009.

⁷ (2000) 21 ILJ 340 (LAC) at 345F-H.

⁸ An unreported judgment of Labour Court, Case No. LCA 23/98 [1999] NAHC 14 (delivered on 29 September 1999).

⁹ (1998) ILJ 1516 (LC).

I therefore conclude that the respondent had a fair and valid reason to dismiss the appellant.

Was the dismissal of the appellant procedurally unfair?

[35] It is not in dispute in this matter that after concluding the internal disciplinary hearing the respondent dismissed the appellant and did not grant him an opportunity to lodge an internal appeal. From the record it was evident that the respondent's disciplinary code does not make provision for an internal appeal. The only provision in the disciplinary code is that if an employee is not happy with the decision of a disciplinary panel, he or she may approach the CCMA.¹⁰

[36] Despite the evidence that the respondent's disciplinary code did not make provision for an internal appeal the arbitrator nonetheless made a finding that the respondent failed to comply with its disciplinary code by not granting the appellant an opportunity for an internal appeal and that the respondent should have granted the appellant an opportunity for his appeal to be heard. The cross appeal is against this finding.

[37] Apart from complying with the guide-lines for substantive fairness, an employee must be dismissed after a fair pre-dismissal enquiry or hearing was conducted. In the South African case of *Mahlangu v CIM Deltak*¹¹ the requirements of a fair pre-dismissal hearing were identified as follows: the right to be told of the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the enquiry; the right to some form of representation; the right to call witnesses; the right to an interpreter; the right to a finding (if found guilty, he or she should be told the full reasons why); the right to have previous service considered; the right to be told of the penalty imposed (for instance,

¹⁰ This is with reference to South Africa because the respondent's disciplinary code was adopted in South Africa. This is the equivalent of the Labour Commissioner in Namibia.

¹¹ (1986) 7 ILJ 346 (IC).

termination of employment); and the right of appeal (usually to a higher level of management).

[38] In the matter of *Management Science for Health v Kandungure*¹² [Parker JA opined that in order for an employer to find that a valid and fair reason exists for the dismissal of his or her employee, the employer must conduct a proper domestic enquiry – popularly known as disciplinary hearing in Labour Law. And in that regard, the procedure followed need not be in accordance with standards applied by a court of law, but certain minimum standards must be satisfied. The minimum standards that must be satisfied: (a) The employer must give to the employee in advance of the hearing a concise charge or charges to able him or her to prepare adequately to challenge and answer it or them. (b) The employee must be advised of his or her right of representation by a member of his or her trade union or a co-employee. (c) The chairperson of the hearing must be impartial. (d) At the hearing, the employee must be given an opportunity to present his or her case in answer to the charge brought against him or her and to challenge the assertions of his or her accusers and their witnesses. (e) There should be a right of appeal and the employee must be informed about it.

[39] In the matter of *Bosch v T H U M B Trading (Pty) Ltd*¹³ the South African Industrial Court held that these principles are not absolute rules, but they must be regarded as guidelines to assess whether an employee was given a fair hearing in the circumstances of each case.

[40] The Labour Court has placed so high a value on procedural fairness that in many cases employees were granted compensation or even reinstated because of a lack of proper pre-dismissal procedures, even though the court was satisfied that there would otherwise have been a valid reason for the dismissal.¹⁴ Parker has argued that in view of the clear and unambiguous words of s 33(1)(a) and (b) of the Labour Act, 2007 even where an employer succeeds in proving that he had a valid and fair reason to dismiss an employee, the dismissal is unfair if the employer fails to prove that it followed a fair

¹² An unreported judgment of the Labour Court Case No. (LCA 8/2012) [2012] NALCMD 6 (delivered on 15 November 2012) at para [5] and [6].

¹³ (1986) 7 ILJ 341 (IC).

¹⁴ *SPCA v Terblanche, NLLP 1998(1) 148 (NLC)*. *Shiimi v Windhoek Schlachtereij (Pty) Ltd NLLP 2002(2) 224 (NLC)*, *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others*; an unreported judgment of the Labour Court of Namibia Case No. LCA 47/2007, delivered on 3 July 2008 and *Kamanya and Others v Kuiseb Fish Products Ltd 1996 NR 123*.

procedure.¹⁵ Also see the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*¹⁶ where Karuaihe J said:

'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair.'

[41] The question that confronts me, in the cross appeal, however is whether the failure to make provision for an internal appeal in a disciplinary code renders a hearing held under that code procedurally unfair. The decisions of the South African Labour Courts were divided on the question of whether or not the right to appeal was a necessary part of a fair procedure. In the case of *Amalgamated Clothing Textile Workers Union of South Africa and Others v JM Jacobson (Pty) Ltd*¹⁷ and *Metal and Allied Workers Union and Others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd*¹⁸ the court held that employees are entitled to an appeal. In the *Transvaal Pressed Nuts, Bolts & Rivets* matter, the chairperson of a domestic disciplinary hearing failed to inform employees of their right to appeal. This defect amongst other defects rendered the enquiry unfair. The court held that the right to appeal to a higher level of managerial authority must, at least in the case of sufficiently large concerns, as a matter of fairness exist.

[42] In the case of *Olivier v AECI Plofstowwe & Chemiklieë Bethal*¹⁹ the court questioned whether a general right of internal appeal exists. In the matter of *SACCAWU obo Le Roux and Others v Midas Paints*²⁰ the court held that an employer's failure to offer an employee an opportunity to internally appeal itself does not justify a finding that the dismissal was procedurally unfair. The nearest this court came to consider that question (i.e. whether employees are entitled to an internal appeal) was in the matter *Kamanya and Others v Kuiseb Fish Products Ltd*²¹ where the Court was confronted with the question of whether an initially 'unfair disciplinary hearing' could be cured by a 'fair appeal hearing'. In that matter the Court said:

¹⁵ Collins Parker: *Labour Law in Namibia*, University of Namibia Press, at p 156.

¹⁶ 1998 NR 90 (LC).

¹⁷ (1990) 11 ILJ 107.

¹⁸ (1988) 9 ILJ 129.

¹⁹ (1988) 9 ILJ 1052.

²⁰ (2001) 6 BALR 652.

²¹ (1996) NR 123 (LC).

'... our Labour Act requires a fair hearing and a fair reason for dismissal, whether or not this was done in the course of a single hearing or in the course of more than one hearing and irrespective of whether one of those hearings is labelled an "appeal" hearing.'

[43] It has been argued that a right to an appeal is an important safeguard, giving the affected employee a chance of persuading a second tier of authority that the adverse decision was wrong or that it should otherwise be reconsidered. 'In the end the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection.'²²

[44] In this matter, first the arbitrator was quite wrong to find that the respondent did not comply with its disciplinary code by failing to afford the appellant an opportunity to internally appeal. I say the arbitrator was wrong because the appellant's disciplinary code does not afford an employee the right to an internal appeal the code states that an aggrieved employee may approach the CCMA in our case the Office of the Labour Commissioner.

[45] Second unlike in the administrative law context, in our employment law context an employee who suffers a wrong doing at the hands of an employer has a right to a trial *de novo* in arbitration proceedings. In those proceedings the substantive and procedural issues are recanvassed and if any deficiency is found in the domestic proceedings those deficiencies are corrected at the arbitration hearing in the sense that the arbitration award replaces the findings of the domestic disciplinary hearing.

[46] I therefore agree (particularly in view of the fact that the minimum requirements enunciated by Parker JA in the case *Management Health Science v Kandungure*²³ are not absolute rules) with Justice O'Linn's argument that what the Labour Act requires is that an employee be afforded a fair hearing before he or she is dismissed whether or not the hearing was a single hearing or more than one hearing and irrespective of whether one of those hearings is labelled an 'appeal' hearing. I am thus of the view that the failure (especially in the light of the fact that the respondent's disciplinary code did

²² E Cameron 'The Right to a Hearing before Dismissal-Problems and Puzzles. Part I' (1986) 7 ILJ 183 at 213-214.

²³ *Supra* footnote 12.

not make provision for an internal appeal hearing) to afford the appellant an internal appeal, was not in itself procedurally unfair.

[47] In view of the fact that I have come to the conclusion that the respondent had a fair and valid reason to dismiss the appellant and did follow a fair procedure in the dismissal of the appellant the third question posed in paragraph 18 of this judgment does arise for determination.

[48] As to the question of costs I am not convinced that the appellant acted vexatious and I will therefore not make any order as to costs. In the result I make the following orders:

1. The appeal is dismissed.
2. The cross appeal succeeds and for the avoidance of doubt, the award of the arbitrator dated 8 August 2013 is varied to read as follows:
 - (a) The dismissal of Ben Gamatham is substantively and procedurally fair and his compliant is accordingly dismissed.
3. There is no order as to costs.

SFI Ueitele

Judge

APPEARANCES:

Appellant:

Ben Gamatham
In Person.

Respondent:

S Vlieghe
Of Koep & Partners
Windhoek.