

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: LC 09/2016

In the matter between:

HAIHAMBO GABRIEL

1ST APPELLANT

PRISKILLA MUKONGELWA

2ND APPELLANT

and

SHOPRITE ONGWEDIVA

RESPONDENT

Neutral citation: *Gabriel v Shoprite Ongwediva* (LC 09/2016) [2017] NAHCNLD
56 (23 June 2017)

Coram: CHEDA J

Heard: 07 April 2017

Delivered: 23 June 2017

Flynote: A company which wishes to warn its employees against certain conduct must display notices, at accessible places and such notices should be in the language understood by the employees – where theft of property is alleged, it must be given a value – punishment must be commensurate with the offence.

Summary: Appellants were employees of respondent. They were employed as Shop Steward and Front-end Controller respectively. It was alleged that during their duties, they tasted food, being sausages which were meant for customers. They were arraigned before a Disciplinary Hearing Committee which found them liable and dismissed them. The matter was taken up with the Labour Commissioner who upheld that decision.

During the hearing respondent could not give value to the said pieces of sausages. There was no proof that they had been advised not to test food while they were in their supervisory positions and were overseeing the customers who were supposed to test pieces of meat on the Taster Stand. There was evidence of bad blood between management and themselves. One of the managers was found to be vindictive. Appeal upheld.

ORDER

1. The finding of the Disciplinary Hearing Committee and the Labour Commissioner are set aside; and
2. Respondent is ordered to reinstate the appellants to their respective positions with effect from 19 October 2016 with full salaries and benefits.

JUDGMENT

CHEDA J:

[1] I am confronted with an appeal against a ruling by the Arbitrator in the Office of the Labour Commissioner. The appellants were employed by respondent up to the time of their dismissal following a ruling by the Arbitrator on the 27 October 2016. First appellant was employed as a Shop Steward while second appellant was employed as a Front-end Controller.

[2] They had been found guilty of breaching their conditions of service in that they both ate pieces of sausages which were on the "Taster Stand" without authority. It was respondent's allegations that on the 16 October 2015 they were spotted eating pieces of sausages which were on the Taster Stand.

[3] The appellants were brought before a Disciplinary Hearing Committee where they were charged with a contravention of a company policy. After a hearing the evidence adduced by both parties, the committee found them guilty of unauthorized consumption of company goods and were accordingly dismissed. They were aggrieved by this finding and appealed to the Labour Commissioner who after hearing their submissions dismissed their appeals. It is that finding which has led to these proceedings before me.

[4] Appellants made the following submissions which I deal with *ad seriatim*:

- a) that they were not aware that they were prohibited from consuming or tasting pieces of food which was on the Taster Stand as this was for customers. In fact, their argument went further that customers had complained that the sausages were not palatable or nice and they then took a piece each in order to ascertain whether this was so. In other words, it was not their intention to eat as commonly understood, but, they were tasting. They went further and argued that infact they often did so and it was known to their superiors;
- b) that at the time of this incident, there was no notice of warning on the wall as alleged by the respondent. Such notice was only put up after they had been suspended;
- c) that the pieces of meat they took were valueless as respondent was unable to put value on them;
- d) that the penalty was unduly harsh in light of the valueless pieces of meat;
- e) that, with regards to first appellant his view is that he had always been targeted by management in particular by Ms. Frieda Johannes [hereinafter referred to as "FJ"] the Branch Manager, because, she had previously accused him of being a member of SWAPO Party. He also stated that he had previously remarked or expressed his disapproval of how FJ was treating

workers equating this treatment with that of the colonial days. This did not go down well with management. A case in point is that respondent's management had introduced a policy and / or requirement that all workers at a low level or shop floor, as they are normally referred to, should enter their names in a Register that was placed near the toilets as to the time they went in and out of the toilet. This practice was also confirmed by 2nd appellant;

- f) that they had been employed from 18 September 2006 and 07 June 2006 respectively and were dismissed on a first offence without warning; and
- g) they were first offenders.

That was the gist of their arguments.

[5] On the other hand respondent was represented by Joel Kapingana [hereinafter referred to as "JK"] who is the company's Human Resources Manager. His submission in the main was that:

- a) appellants were employed in positions of trust and supervision;
- b) had been employed by respondent for a fairly long period;
- c) they were aware that they were not allowed to taste food laid out for customers;
- d) that company rules were posted on the company premises and were therefore visible to all employees to read;
- e) they were all written in the English language and employees were free to consult him for translation if they so wished. He even went so far as to say that there were some employees who had done so before;
- f) admitted that indeed there exists a Register wherein employees/workers going to the toilet record their names and times for going in and out. He also advised the court that he was the author of such a Register after realising that some of the employees were not genuine about their toilet activities;
- g) it had been proved that they had indeed partaken the pieces of sausages without authority; and
- h) accordingly the finding by the Disciplinary Committee and the Labour Commissioner was proper.

[6] Having listened to the submissions by both parties, I agree with the findings of the tribunals a quo in that:

- a) the appellants indeed tasted the pieces of sausages; and
- b) had been employed in supervisory positions.

[7] The question then is, whether the company adequately placed notices that prohibited the practice of tasting food laid down for customers. Appellants argued that they were allowed to taste the food in response to customers who would come to them with complaints regarding the quality of the food. It was their arguments that prior to this incident there were no notices, the said notices were hung up after their suspension.

[8] Respondent through JK argued that, these notices had always been there for anyone to see together with the written ones which are always attached to individual contracts with respondent and he produced some samples before the court, they were all written in the English language. When asked whether all his employees in the lower echelons of the establishment understood English, he stated that they did not. In my mind this is an admission of a short coming on respondent's part. Appellants admitted that the warnings were in their contracts, but, argued that they did not understand them as they were written in English. I find it difficult to understand why appellants would deny the existence of such notices being on the walls which would have been visible to everyone.

[9] In order to determine this issue, it is essential to examine it in totality with all the circumstances surrounding this case. It was not disputed by JK that FJ was treating her subordinates in an unfair manner. It was also not disputed that first appellant was targeted as he was viewed as the most vocal. This was corroborated by second appellant. This was not disputed by JK, respondent's representative. In all probability respondent through FJ and JK were desirous to get rid of 1st appellant and this incident gave them that golden opportunity to do so. I say so for the scenario which I will outline below.

[10] It is correct that appellants ate some pieces of sausages. Respondent however, was unable to put value on the said pieces of sausages. Appellant described them as valueless, which in my mind could pass for morsels. I tend to agree with their arguments for the reason that, if the pieces were of any commercial value, respondent would have clearly stated this in order to enhance its case thereby showing prejudice it suffered by appellants unlawful conduct. In this case they in their wisdom or lack of it did not do so. It is trite law that he who asserts must prove and the court has no capacity or authority to conclude on speculation or conjecture.

[11] There is doubt that there was a notice in the public place warning workers not to consume food prior to this incident.. What I find to have existed are the attachments of the said warnings in the workers' contracts which were written in English.

[12] I, however, have a problem with the said notices as they were all in English. It is common knowledge that a good number of the majority of Namibians are not well conversant in the English language. This defect is not of their own making, but, is due to the previous disadvantageous socio-economic positions they find themselves in. They cannot be blamed for it and the court in my view will be failing in its duty not to accept this truism, see *Hange & others v Orman* NLLP 2014 (8) 451 LCN at para 19. It is my view that an objective balance should be struck between the less fortunate workers and the giant commercial and industrial conglomerates who enjoy their seats in the higher pedestals of society.

[13] In my opinion, respondent should have notified all its employees clearly and in the language they understood. It is only after this exercise that respondent can claim to have given a sufficient warning to all its employees. Where, a warning lacks clarity or is given in a language which is not understood by the recipients, it will not serve any purpose as it will continue to be ignored. The consequence, thereof, is that its author cannot be heard to complain for non-compliance and equally so it cannot fairly punish the recipients for failing to heed its call. It was an error admitted by respondent that the majority of employees would not have been sufficiently catered for in the event of notices being in English and not in the local language (Oshiwambo).

[14] In addition to this factor, there is issue of the value of the sausages. Appellants argued that they were valueless and respondent also did not contradict this argument. The question then is why were appellants being charged for having eaten sausages which were of no commercial value or any value at all.

[15] This attracts a lot of questions as to the motive. I totally agree with appellants that they were victims of the whims and caprices of FJ and/or JK himself. I find that this process was actuated by malice on the part of management in order to weed out those employees they viewed as troublesome. First appellant was a workers representative. In other words they were bad apples in the company's cart.

[16] This then brings me to the question of punishment. It is trite that punishment must always be commensurate with the crime/offence committed by the offenders.

[18] An employer is entitled to discipline or mete out punishment on any of its employees who has breached a term or condition of its contract. However, the breach must be material and should go to the root of the contract. In other words it must be a fundamental breach as a mere breach will not suffice. There are several options an employer can use in order to punish employees, suffice to say that they range from a warning to of course dismissal.

[19] The fact that an employee has breached any of his duties in terms of the contract of employment or fundamental term of the contract, which might be a valid reason to dismiss, should not *ipso facto* lead to a dismissal, see *Collins Parker, Labour Law in Namibia, Unam Press. 2012 at 143*. In addition, thereto, the punishment must be fair in the circumstances which means that it should be equitable, conscionable and just, but, not capricious or whimsful. This point was clearly laid down in *Pep Stores Namibia (Pty) Ltd v Iyambo 2001 NR 211 at 219 C*.

[20] The reason for dismissal must be valid. The question then is what is considered as valid. In the determination, thereof, I cannot help, but, take a leaf from the decided authorities which form part of our law. In *Govenda v SASKO (Pty) Ltd t/a Richards Bay Bakery (1990) ILJ 1282 (IC) at 1285C-G* it was stated:

“The validity of the reason relates to the facts on which the reason is based, whilst fairness of the reason relates to the quality of the infraction and whether the sanction imposed was warranted (my emphasis).”

[21] In this jurisdiction the same approach was adopted in *Namibia Breweries v Hoas NLLP* 2002 (2) 380 NLC where Manyarara AJ stated:

“The concept of substantive fairness involves the issue of validity, i.e where there was sufficient evidence placed before the court and the issue of fairness, i.e whether the sanction was appropriate in circumstances.

[22] In my view both the Disciplinary Committee and the Labour Commissioner, through the Arbitrator seriously misdirected themselves in finding against the appellants in that:

- a) there is no evidence that there was a notice displayed at appellants' place of work, prior to this incident;
- b) that appellant did not taste food as a result of complaints by customers;
- c) that there were no mitigating circumstances, thus totally ignoring the facts that the food complained of was valueless and that appellants had invested a good part of their working lives in this company; and
- d) that employees were being ill-treated by both FJ and JK as representatives of the company (I will come to this issue later).

[23] As stated by the authorities, discipline or punishment must be governed by fairness at all times. If it is not, then punishment falls within the category of arbitrariness and is therefore unlawful. As fairness is the key determining factor in this case, this court must, therefore, determine whether dismissal of the appellants in the circumstances was fair. It should be borne in mind that dismissal of an employee is the ultimate punishment which should be resorted to only in very serious transgressions and should not be applied where a lesser punishment would do justice to the case. In that regard employers should be slow in applying it.

[24] I cannot help, but, conclude that respondent's decision and/or judgement was clouded by appellants' responses to what they viewed as unfairness and ill-treatment by FJ and JK.

[25] JK admitted that employees have to register their names and times for visiting the toilet. This policy is unacceptable as employees are entitled to dignified and humane treatment. What is worrying is that the Branch Manager, who herself is a woman finds nothing wrong in enforcing such a policy to her women kind disregarding their sanitary needs and absolute privacy bestowed to them by the rules of nature.

[26] In conclusion the following is the order of the court:

1. The finding of the Disciplinary Hearing Committee and the Labour Commissioner are set aside; and
2. Respondent is ordered to reinstate the appellants to their respective positions with effect from 19 October 2016 with full salaries and benefits.

M Cheda
Judge

APPEARANCES

1ST APPELLANT: Gabriel Haihambo,
Of Omafana, Ohangwena Region

1ST APPELLANT: Priskilla N. Mukongelwa,
Of Epundi, Endola

RESPONDENT: Joel Kapingana
Regional Human Resource Manager
Shoprite