

CASE NO.: LCA 11/2004

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ROBERT LESLIE WILLIAMS

APPELLANT

and

ROADS CONTRACTOR COMPANY

RESPONDENT

CORAM: SILUNGWE, AP.

Heard on: 2006.03.31

Delivered on: 2006.03.31 (*ex tempore*)

JUDGMENT

[1] SILUNGWE, AJ.: This is an appeal against the whole of the judgment of the Windhoek District Labour Court in which the appellant's complaint for unfair dismissal was dismissed.

[2] The appellant was employed by the respondent with effect from March 1, 1992, and rose to the position of a manager. It is not in dispute that during October and November 2000, the appellant removed his employer's nine injector pumps (pumps) from the respondent's workshop and took them to Diesel Systems CC, allegedly for testing and calibration; and that, as a result of the respondent's intervention, those pumps were returned to the respondent's premises, according to the appellant's version which was supported by his superior, Mr B. Morgan, when the latter gave evidence during a disciplinary hearing against the appellant. At the disciplinary hearing, the appellant was found guilty of all three charges levelled against him, which were substantially as follows: (1) failure to register the nine "pumps into the store or (*sic*) to instruct the

store clerk to book them in” and seven of them were later found missing – conduct that was tantamount to misappropriation and/or deliberate loss of property to the company; (2) failure to register those “pumps into the store or (*sic*) to instruct the store clerk to book them in” and seven of them were later found missing – conduct that was tantamount to wilful loss or causing company property to get lost and thus rendering himself guilty of misconduct; and (3) failure to register those “pumps into the store or (*sic*) to instruct the store clerk to book them in” and seven of them were later founded missing – conduct that was tantamount to negligent loss of company property through carelessness or negligence; or that the complainant (now the appellant) failed to give a satisfactory account therefor and thus made himself guilty of misconduct.

[3] The District Labour Court Chairperson found, for good reasons, and it is now common cause, that the conduct of the disciplinary hearing was procedurally unfair. Notwithstanding that finding, however, the court *a quo* came to the conclusion that the respondent “had a valid and fair reason or reasons to dismiss the complaint” and thus gave judgment in favour of the respondent which is now the subject of this appeal.

[4] Mr Visser, learned counsel for the respondent, concedes that the charges should have been framed in the alternative and that the only charge that the appellant should have been found guilty of was the third

one. There is merit in Mr Visser's submission that the charges should have been set out in the alternative.

[5] It is apparent that the appellant brought back the pumps to the respondent's premises; and that, subsequently, seven of them were found missing but there is no evidence as to when their disappearance occurred..

[6] As there is no dispute that the first and second charges were not proved, the question is whether the third charge was proved against the appellant? It will be recalled that the charge alleged that failure to register the pumps or to instruct the store clerk to book them in amounted to negligent loss of the property "through carelessness or negligence; or that the appellant failed to give a satisfactory account for the disappearance of the seven pumps and thus made himself guilty of misconduct. The substance of this charge was not failure to register the pumps, etc, but the loss thereof which was allegedly caused by the appellant's carelessness or negligence.

[7] Mr Heathcote, learned counsel for the appellant, argues that the *onus* of proof was on the respondent to show that the appellant's carelessness or negligence led to the loss of the seven pumps; and that the respondent failed to discharge such *onus*.

[8] There is indeed no evidence on record, either directly or impliedly, to show that the disappearance of the seven pumps was attributable to the appellant's carelessness or negligence, neither is there evidence to show that the appellant had custody of, and/or control over, the said pumps after they had been returned to the respondent's premises and prior to their disappearance so as to require him to give a satisfactory explanation for the disappearance thereof.

[9] It is quite clear that the respondent failed to prove on a balance of probabilities that it was the appellant who lost the pumps or caused them to be lost; or that the pumps were lost whilst they were under his custody and/or control. Hence, the District Labour Court's finding that:

"The evidence as a whole in this case also (*sic*) gives rise to a reasonable suspicion that the complainant permanently removed the pumps belonging to the respondent or directly allowed (*sic*) them to be removed permanently due to his gross negligence."

was, with due respect, unwarranted. Further, the court *a quo's* finding that the appellant's dismissal was for a fair and valid reason was not supported by the evidence before it.

[10] I would like to add that the conclusion reached by the court *a quo* that the relationship between the appellant and the employer had broken down irretrievably could only have been influenced by a finding of the disciplinary committee to that effect, but it is common cause that the conduct of the disciplinary hearing at which the finding had been made was procedurally unfair. On the facts, this case is distinguishable from *Kamanya and Others v Kuiseb Fish Products Ltd* NLLP 1998(1) 125 (NLC) at 128 and so the principle enunciated therein about ordering “re-employment or reinstatement” is inapplicable here.

[11] In the result, the appeal succeeds; and I make the following order:

[11.1] the order of the District Labour Court’s is set aside.

[11.2] the finding of the Chairperson (i.e. that the appellant is guilty of the charges levelled against him in the disciplinary hearing) is set aside.

[11.3] the District Labour Court’s order is substituted with the following:

- [11.3.1] the complainant was unfairly dismissed by the respondent on 7 August, 2000;
- [11.3.2] the respondent is to reinstate the appellant with immediate effect;
- [11.3.3] the respondent is to pay to the appellant, an amount equal to that he would have received had it not been for the unfair dismissal, being the sum of N\$173,800.00 (for the period since his dismissal until date of the complaint) plus the sum of N\$126,400.00 for the months that lapsed after the complaint had been lodged until the date of the District Court's judgment, namely: February 18, 2004.
- [11.3.4] the matter is referred back to the District Labour Court for the presiding District Chairperson to determine further losses, if any, suffered by the appellant from the date of the District Labour Court's judgment, that is: February 18, 2004, to the date of the appellant's actual reinstatement.

SILUNGWE, AJ.

ON BEHALF OF THE APPELLANT
Heathcote

Mr R.

Instructed by:
Inc.

van der Merwe-Greeff

ON BEHALF OF THE RESPONDENT
Visser

Mr CHJ

Instructed by:
Inc.

Lorentz Angula