SUMMARY

CASE NO. LCA 47/2007

**PUPKEWITZ HOLDINGS (PTY) LTD** **Appellant**

and

**PETRUS MUTANUKA & OTHERS** **Respondents**

Heard on: 2008 June 27

Delivered on: 2008 July 3

PARKER, P

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**Labour law -** Appeal from decision of district labour court – Appeal to Labour Court is appeal on the record**,** and not rehearing in true sense – If discretion by court of original jurisdiction has been exercised judicially and for sound reason, court of appeal ought to be slow to interfere and substitute its decision – Court finding no misdirection or irregularity to justify interfering with lower court's decision that dismissals were not for valid and fair reasons.

**Labour law -** Rule 6 (6) of District Labour Court Rules – Interpretation of – The mere filing of a document with clerk of the court does not prima facie constitute proof of truthfulness of contents of the document where the document is not agreed document between parties – Court finding that documents filed by labour inspector with clerk of court ought to have been properly admitted and evidence led on them.

**Labour law -** Unfair dismissal – Onus on employer to prove it had a valid and fair reason to dismiss (substantive fairness) – Court holding that where a court finds dismissal was not for a valid and fair reason after conducting of internal disciplinary hearing, it serves no purpose for court to enquire further whether disciplinary hearing was conducted in a manner that was procedurally fair.

**Labour law -** Compensation – Award of – Factors to be considered when making award – Amount awarded must be easily ascertainable and possible to calculate.

**Labour law -** Reinstatement – Award of – Factors to be taken into account when considering order of reinstatement – Reinstatement already a tremendous inroad into common law principle that contracts of employment cannot normally be specifically enforced – Accordingly, discretion to order reinstatement must be exercised judicially and on sound grounds – Court finding that in circumstances of present case the district labour court was wrong in ordering reinstatement.

CASE NO. LCA 47/2007

**IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**PUPKEWITZ HOLDINGS (PTY) LTD** **Appellant**

and

**PETRUS MUTANUKA & OTHERS** **Respondents**

**CORAM:** PARKER, P

Heard on: 2008 June 27
Delivered on: 2008 July 3

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**JUDGMENT**

**PARKER, P:**

[1] This is an appeal from the Rundu District Labour Court against the judgment of that court delivered on 17 February 2006 in which the court ordered:

> that the complainants (Mutanuka, Mpasi, Muyeu, and Katebo) be compensated from the date of dismissal and to be reinstated as in their previous positions.

[2] At the commencement of this appeal hearing, Ms Bassingthwaighte, counsel for the respondents, informed the Court that she was abandoning the point *in limine* concerning the appellant's alleged late filing of the notice of appeal because it was apparently filed within the time limit. Counsel took the point about the admissibility of the minutes of the disciplinary hearing and attachments thereto in her arguments on the merits.

[3] I respectfully accept Ms Bassingthwaighte's submission that an employee must be afforded reasonable opportunity to prepare for, and to attend, his or her disciplinary hearing, to give evidence, to call witnesses to testify on his behalf, and to put questions to witnesses called to testify against him or her, and to be informed about appeal procedures

in pursuit of procedural fairness. The appellant says such opportunity and information was given to the respondents; the respondents deny that.

[4] In this regard, Ms Bassingthwaighte submitted that the "procedural issues could only have been dealt with by the Chairperson of the disciplinary hearing who did not testify". The better evidence, in my opinion, in these matters is for a proper and useful record of the proceedings to be properly placed before the court and admitted as evidence of the compiler of the record; in the instant case, the chairperson of the disciplinary hearing. It is important to note that the record before this Court contains crucial documents – documents whose contents were critical for the determination of the issues that the lower court was called upon to decide, viz. whether the complainants' dismissals were fair. The documents are "Notice of suspension and a disciplinary hearing", together with its attachments, in respect of the complainants. With regard to Katebo, Mutanuka and Mpasi, there is even a document indicating their "acknowledgement of debt".

[5] From the evidence, I see that copies of the documents concerning the disciplinary later filed with the clerk of the district labour court in terms of rule 6 (6) of the District Labour Court Rules. Rule 6 (6) provides:

> In the event that a settlement cannot be reached, the parties shall co-operate with the labour inspector to identify such facts and documents relevant to the complaint or to the defence thereto which are not in dispute and a list of facts and documents so agreed upon, if any, shall be prepared by the labour inspector, signed by the parties and filed by the labour inspector with the clerk of the court not later than three days prior to the date of the hearing, or if no such facts or documents can be agreed upon, a notice to the court to that effect by the labour inspector shall be so filed with the clerk of the court.

[6] Mr Visser, counsel for the appellant, submitted that the minutes of the disciplinary hearings in respect of the respondents and all the attachments, particularly pages 15 to 64 of the bundle, were filed by the labour inspector, Mr Kabwata, with the lower court in terms of rule 6 (6) of the Rules. Therefore, counsel argued, the documents were available to the court and Mr Kasera, the respondents' representative during the district labour court hearing, referred to some contents of some of the documents. Counsel argued further that Mr Kasera did not take issue with the contents of the documents.

[7] Ms Bassingthwaighte's response was simply that the documents did not form a part of the record of the proceedings in the district labour court, and therefore they cannot be placed before this Court in its capacity as an appeal court in the present appeal.

[8] As I understand it, in terms of rule 6 (6), if the documents are agreed documents the parties must signify that they are agreed documents by signing them. Paragraph 3 of the labour inspector's report appears to suggest that the documents were agreed documents, and yet they have not been signed to signify such agreement. Accordingly, I find that the documents were not agreed documents; and therefore it was not sufficient for the purposes of the hearing at the lower court for the appellant to have contented itself with the mere fact that the documents had been filed with the clerk of the court. Since they were not agreed documents, as I have found, they ought to have been properly admitted as part of the evidence of the appellant. What is more, rule 6 (6) does not say

that the mere filing of a document that the parties have not agreed on constitutes a prima facie proof of the truthfulness of its contents. Indeed, in the instant case, all the respondents denied they made any admissions that they stole anything, including money, from the appellant.

[9] I am therefore not surprised that the learned chairperson of the district labour court did not make any marked reference to the documents in her judgment: the reason, as I see it, is that the documents were not properly admitted. For this reason, Mr Visser's submission that Mr Du Plessis's evidence was corroborated by the minutes of the disciplinary hearings falls to be rejected. As the learned chairperson ruled interlocutorily, the appellant was aware that the issue of substantive unfairness was in dispute, and before the appellant closed its case "you could have informed the Court that you wanted to call an additional witness".

[10] In my judgment, therefore, the appellant's failure to call the chairperson of the disciplinary hearing to testify and have the documents relevant to the hearings properly admitted as part of his evidence is fatal to the appellant's case: this Court cannot now take cognizance of them. It is also fatal to the appellant's case that the labour inspector was not called to testify and have his report properly admitted, particularly where there was a dispute concerning paragraph 4 of his report that the main issue in dispute was "procedural fairness", which the complainants deny. The purpose of having a document properly admitted during proceedings is to enable the other party to cross-examine on it so as to test the evidence of the maker of the document in keeping with the *audi alteram partem* rule of natural justice and in line with the constitutional requirements of fair trial. This is not a matter of a rule of evidence, which may be overlooked in terms of rule 10 (1) of the District Labour Court Rules.

[11] It would appear from the judgment of the district labour court that the learned chairperson of the court did not, as Mr Visser submitted, find that the dismissals were procedurally unfair. That may be so; but as Ms Bassingthwaighte also submitted, we cannot speculate in this Court that just because the learned chairperson did not pronounce herself in her judgment on the issue of procedural unfairness or fairness, it meant she accepted the appellant's version that the disciplinary hearings were conducted in a manner that was procedurally fair. In my view, once the learned chairperson had found that each of the dismissals was not for a valid and fair reason, a further enquiry as to whether the disciplinary hearings were conducted in a manner that was procedurally fair would have served no purpose at all. "The fact that the procedure adopted at the hearing of the disciplinary proceedings gives the employee *audi alteram partem* is of little use if there are no grounds for dismissal". (*SPCA of Namibia v Terblanche* 1996 NR 398 at 402A) Thus, based on the record, it would seem the learned chairperson of the district labour court did not find it necessary to consider the question of procedural fairness or unfairness; and I think she was right in taking that course.

[12] I now proceed to deal with the question of substantive fairness or unfairness. If the minutes of the disciplinary hearings, together with their attachments, are expunged from the present proceedings, as Ms Bassingthwaighte invited me to do, and I think I should accept the invitation, then based on the evidence that was before the learned chairperson, in my view, an appeal court acting judicially and fairly cannot fault the

learned chairperson's decision that there was not sufficient evidence on which to hang the guilt of the respondents.

[13] In this connection, it is inexplicable that the chairperson of the disciplinary hearings was not called to testify. Furthermore, it is also inexplicable that Mr Coetzee, who, according to Mr Du Plessis (the appellant's sole witness during the proceedings in the district labour court), admitted that he and the complaints "steal or dispose fuel and take the money and not declaring their sales of that specific days over a certain period of time (quoted verbatim)", was not called to testify and to have his allegations tested in cross-examination.

[14] It must be remembered that the appeal to this Court is an appeal on the record, and not a rehearing in its true sense. The principles justifying interference with the exercise of an original jurisdiction are firmly rooted in our practice. If the discretion has been exercised judicially and for a sound reason, that is, without caprice or bias or the application of a wrong principle, the appeal court ought to be slow to interfere and substitute its own decision: it is not enough that the appeal court considers that, if it was the trial court, it would have taken a different route (See *Pawani and another v Aching Attorney General* 1985 (3) 720 (ZSC).) I do not find any irregularity or misdirection, and so I have no good reason to interfere with the district labour court's decision that the appellant had failed to discharge its onus of proving that it dismissed the respondents for fair and valid reasons.

[15] However, I cannot accept the order made by the learned chairperson in its entirety. She does not give any reason whatsoever why the complainants should be compensated from the date of dismissal and to be reinstated in their previous positions. In any case, the order regarding compensation is unclear, confusing and difficult to implement. The calculation of compensation must be related to a determinate period and the amount thereof must be easily ascertainable. For instance, in *Kamanya* supra, this Court ordered the employer "to pay to each appellant the equivalent of 3 months wages and emoluments on the basis of their monthly average earnings at the time of their dismissal."

[16] Compensation awarded in labour disputes cannot be equated with contractual and delictual damages. There is an element of *solatium* present aimed at redressing injustice in labour relationships. (*Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC)) Thus, compensation awarded in labour disputes should not aim at punishing an employer or enriching an employee. (*Ferodo (Pty) Ltd v De Ruiter* (1993) 14 *ILJ* 974 (LAC); *Camdons Realty (Pty) and Another v Hart* (1993) 14 *ILJ* 1008 (LAC)) Having taken all the above factors and considerations into account, and *a fortiori*, taking into account the fact that the learned chairperson's award of compensation is confusing and the amount thereof unascertainable and impossible to calculate, it behoves this Court to make an award of compensation that is easily ascertainable and the amount thereof capable of calculating.

[17] I now proceed to deal with the lower court's award of reinstatement. It is important to note that to force an employer to reinstate his or her employee is already a tremendous inroad into the common law principle that contracts of employment cannot normally be specifically enforced. Indeed, if one party has no faith in the honesty and

integrity or loyalty of the other, to force that party to serve or employ that other one is a recipe for disaster. Therefore the discretionary power to order reinstatement must be exercised judicially. In the instant case, the likelihood of the appellants having a similar problem like the one that led to their being charged cannot entirely be ruled out. Added to this is the fact that the respondents were dismissed in June 2004 and the district labour court delivered its judgment in February 2006. In *Shiimi v Windhoek Schlachteri (Pty) Ltd* NLLP 2002 (2) 244 NLC, where the intervening period between the dismissal and delivery of judgment was about three years, the labour court declined to order reinstatement. More important, considering the nature of business the appellant (employer) carries out; I do not think other persons have not already been employed in the places of the appellants. To order reinstatement would be greatly unfair to the present employees. Thus, as this Court observed in *Shiimi* supra, to dismiss the new employees in order to accommodate the respondents, no matter how worthy their case may be, would constitute grave injustice.

[18] In the circumstances of this case, it is clearly a fitting case where the district labour court should have exercised its discretion against ordering reinstatement of the respondents. (See *SPCA of Namibia v Terblanche* 1996 NR 398 (LC).) Thus, for all these reasons, I think I should refuse to confirm the order of reinstatement made by the district labour court.

[19] It follows that in my judgment, I should confirm the learned chairperson's finding that the dismissals of the respondents were unfair (even if only substantively unfair); and therefore the appeal fails in that regard. The appeal succeeds in respect of the award of reinstatement. The appeal against compensation succeeds to the extent set out in the order below.

[21] In the result I make the following orders:

(1) The award of reinstatement is set aside.

(2) The appellant must pay on or before 15 August 2008 to –

(a) Mutanuka (1st respondent) an amount equal to seven months' remuneration at the time of his dismissal.

(b) Muyeu (3rd respondent) an amount equal to seven months' remuneration at the time of his dismissal.

(c) Mpasi (2nd respondent) an amount equal to five months' remuneration at the time of his dismissal.

(d) Katebo (3rd respondent) an amount equal to four months' remuneration at the time of his dismissal.

(3) There is no order as to costs.

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**PARKER, P.**

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| **ON BEHALF OF APPELLANT** | **Mr C H J Visser** |
| **Instructed by:** | **LorentzAngula Inc** |
| **ON BEHALF OF THE RESPONDENTS** | **Adv. N Bassingthwaighte** |
| **Instructed by:** | **Tjitemisa & Associates** |