REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 34/2012

In the matter between:

NAMIB MILLS (PTY) LTD **APPELLANT**

and

MR ANGULA SHIGWEDHA **RESPONDENT**

Neutral citation: *Namib Mills (Pty) Ltd vs Shigwedha* (LCA 34/2012) [2013] NALCMD 6 (22 February 2013)

Coram: PARKER AJ
Heard: **1 February 2013**
Delivered: **22 February 2013**

Flynote: Labour law – Arbitral award – Appeal against – Arbitrator's finding that employee respondent's dismissal is unfair rejected by the court – Court finding that employer appellant's disciplinary hearing was procedurally fair and appellant employer had valid and fair reason to dismiss – Accordingly appeal succeeds and arbitrator's award reinstating employee respondent set aside.

Summary: Labour law – Arbitral award – Appeal against – Arbitrator's conclusion is that disciplinary hearing of employee was unfair based solely on arbitrator's finding that there was no proper interpreter who could speak employee's mother tongue – Court rejected arbitrator's conclusion on the basis that employee never complained to chairperson of the disciplinary hearing that he did not understand the proceedings

when he pleaded guilty to three charges and not guilty to the rest of the charges – Court finding that two of the charges to which employee pleaded guilty are so serious that employer was justified to dismiss – Court held that there is no principle of our labour that where employee is charged with more than one charge and only some of them are proved against him or her, employee cannot be dismissed solely for that fact – Court finding that flagrant disregard for safety standards (charge 3) and leaving the workplace without permission or authorization (charge 6) (which employee pleaded guilty to) are very serious offences – Court concluded that under charge 3 employee breached a very important employee's statutory duty under Chapter 4 of the Labour Act 11 of 2007 – Court concluded that employer had a valid and fair reason to dismiss – Consequently court concluded therefore that employer satisfied the requirements of s 33(1) of the Labour Act.

Flynote: Labour law – Appeal – In terms of rule 17(25) of the Labour Court Rules – Interpretation and application of.

Summary: Labour law – Appeal – In terms of rule 17(25) of the Labour Court Rules – Interpretation and application – Court satisfied with proof of service that notice of hearing date, notice of set down and appellant's counsel's heads of argument were properly served on respondent but respondent failed to appear in person or by counsel – Court decided appeal could be heard – Court reasoning that rule 17(25) infuses a sense of urgency and expeditiousness in the prosecution of appeals in the court and court ought not, unless good reasons exist, delay determination of an appeal which delay might thwart appellant's effort to prosecute appeal within the statutory time limit.

ORDER

(a) The appeal succeeds.

(b) The order of the arbitrator that the appellant be reinstated is set aside.

(c) Termination of the respondent's contract of employment is confirmed.

(d) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] This an appeal by the appellant against the arbitration award delivered on or about 26 September 2012; and the appellant relies on five grounds of appeal. I am satisfied that notice to obtain a hearing date and notice of set down were properly served on the respondent in terms of subrule (3) and also with the proof of service thereof in terms of subrules (6) and (7) of rule 5 of the Labour Court Rules ('the rules'). Additionally, I am satisfied that heads of argument of the appellant's counsel were served properly on the respondent. Despite all these, the respondent did not appear in person or by counsel at the hearing of the appeal, and no explanation had been placed before the court as to why the respondent could not appear for the hearing of the appeal. Having been so satisfied, as aforesaid, I decided to hear the appeal notwithstanding the respondent's failure to appear. It must be remembered that according to rule 17(25) of the rules such appeal must be prosecuted within 90 days after the noting of the appeal, and unless so prosecuted, it is deemed to have lapsed. This rule infuses a sense of urgency and expeditiousness in the prosecution of appeals in the Labour Court; and so the court ought not – unless good reasons exist – delay the determination of an appeal because the delay might thwart the appellant's effort to prosecute the appeal within the statutory time limit.

[2] I proceed to consider the grounds of appeal, and in this regard it is important to set out the following facts. At the appellant's disciplinary hearing involving the respondent, the respondent faced seven charges. He pleaded guilty to flagrant disregard of safety standards (charge 3), leaving company premises without

permission or authorization (charge 6) and poor timekeeping (not clocking when leaving company premises) (charge 7). It is significant to note that the chairperson of the disciplinary hearing did well to question the respondent on his guilty pleas in order to be satisfied as to the voluntariness and genuineness of the guilty pleas (as is done by the court in criminal proceedings under s 112(1)(b) of the Criminal Procedure Act 51 of 1977). From the record it is clear that the guilty pleas were voluntary and genuine; and above all, the appellant informed the disciplinary hearing that he was aware of the existence of the rules at the workplace of the appellant concerning rules whose infraction he pleaded guilty to and he answered in the affirmative when the chairperson asked him, 'Do you understand and appreciate that a guilty plea may lead or contribute toward your dismissal and/or an appropriate sanction in terms of the disciplinary code.' That being the case, the arbitrator ought to have accepted the guilt of the respondent in respect of those three charges, unless the arbitrator had a good reason not to do so, for instance, because the respondent established that the hearing was tainted with irregularities or there were some procedural unfairness that resulted in failure of justice.

[3] This observation leads me to the next level of the enquiry. The only reason – indicated in the arbitrator's award – that led the arbitrator to conclude that 'the procedures of the disciplinary hearing were not fair' was that 'there was no proper interpreter who can speak fluently the mother tongue' of the respondent. I accept submission by Mr Vlieghe, counsel for the appellant, that there is nothing on the record tending to show that the respondent complained that he did not understand the proceedings. For instance, there is nothing on the record which establishes that when the respondent pleaded guilty to the three charges (and not guilty to the rest of the charges) and was questioned by the chairperson, as I have said previously, he did not understand the proceedings. I find that on the record of the disciplinary hearing the arbitrator did not have one iota of reason to conclude that 'the procedures of the disciplinary hearing were not fair'.

[4] Although the arbitrator had before him irrefragable proof that the respondent pleaded guilty voluntarily to three charges – two of which (ie. charge 3 and charge 6) are very serious in labour law – he decided to undertake an unnecessary excursion

around one charge, ie ‘Intoxication while on duty on Company premises’ charge 1) as if charge 1 was the only charge. That the arbitrator lost his bearing during this unnecessary excursion is borne out by this finding of his, ‘The respondent dismissed the applicant based on the allegations that he was under the influence of alcohol’. Even if charge 1 was unproved against the respondent, as the arbitrator appears to have found, it must be remembered that there is no principle in our labour law that where an employee is charged with more than one charge and only some of them are proved against him and he is dismissed, the employer has – solely for that fact alone – no valid and fair reason to dismiss that employee. In the instant case charge 3 for which he was found guilty upon the respondent’s own plea of guilty is a very serious offence meriting a dismissal. Flagrant disregard for safety standards is a very serious offence in our labour law. That this is so can be gathered from the Labour Act 11 of 2007. A whole chapter of the Act (ie Chapter 4) is devoted to health, safety and welfare of employees, and in that regard the Act assigns duties to employers towards employees and other persons who are not employees (s 39 and s 40, respectively) and also assigns duties to employees (s 41). Section 41 provides:

> ‘Every employee has a duty to –
>
> (a) take reasonable care to ensure –
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> (i) the employee’s own safety and health in the workplace; and
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> (ii) the safety and health of any individual who may be affected by the employee’s activities at work; and
>
> (b) cooperate with the employer to enable the employer to perform any duty imposed under this Chapter or the regulation.’

[5] I have no doubt in my mind that on the facts of this case the breach of the respondent’s duty is undoubtedly serious. The respondent himself appreciates that by his failure to obey this statutory duty he endangered both his life and that of the other employee who jumped unto the forklift he was driving and therefore in control of. To hold that the offence the respondent committed should not merit a dismissal is

to disregard a very important statutory provision which is there to protect the health, safety and welfare of employees and persons who may be affected by the activities of employees at work.

[6] The sanction prescribed by an employer's disciplinary code for a specific form of misconduct is generally regarded as the primary determinant of the appropriateness of the sanction. In deciding whether the sanction of dismissal in the instant case is appropriate the 'test appears to be whether the decision to dismiss can be regarded as so excessive that no reasonable person (or employer) would have taken it' (*Model Pick 'N Pay Family Supermarket v Mwaala* 2003 NR 175 at 179H.

[7] For the reasons and conclusion regarding the seriousness of charge 3 which concerns failure to carry out a statutory duty which aims at protecting employees and other persons, as I have set out previously, I find that the decision of the appellant to dismiss is not unfair or unreasonable. It is also my view that the arbitrator is wrong in finding that the employer did not have a valid and fair reason to dismiss the respondent. I have already found that the arbitrator is wrong in finding that the disciplinary hearing was procedurally unfair. That being the case I find that in dismissing the respondent the appellant satisfied the requirements of s 33(1) of the Labour Act.

[8] In the result I make the following order:

(a) The appeal succeeds.

(b) The order of the arbitrator that the appellant be reinstated is set aside.

(c) Termination of the respondent's contract of employment is confirmed.

(d) There is no order as to costs.

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C Parker

Acting Judge

APPEARANCES

APPELLANT:	S Vlieghe Of Koep & Partners, Windhoek
RESPONDENT:	No appearance