REPUBLIC OF NAMIBIA REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LC 101/2013

In the matter between:

WILLEM ABSALOM AND OTHERS **APPLICANTS**

1.1.1.1.

And

NOVANAM LIMITED **RESPONDENT**

Neutral citation: Novanam Ltd v Absalom (LC 101/2013) [2014] NAHCMD 38 (29 September 2014)

Coram: SMUTS, J
Heard: 16 September 2014
Delivered: 29 September 2014

Flynote: Application for leave to appeal. Principles restated. An additional consideration in labour matters is the need for finality. Applicant not establishing reasonable prospects of success or that an important issue of principle is raised by the appeal. Application dismissed.

ORDER

The application for leave to appeal is dismissed. No order as to costs.

JUDGMENT

SMUTS, J

(b) This is an application for leave to appeal against a judgment of this court handed down on 30 April 2014. This court upheld the respondent's appeal against an arbitrator's award under s89 of Act 11 of 2007, setting aside the award, confirming the dismissals of the applicants and removing the review application from the roll – which was directed against the award.

(c)

(d) A number of grounds are raised in the application for leave to appeal. In this judgment, I propose only to deal with those raised in argument by Mr Rukoro when this application was heard. Both he and Mr Denk had appeared for the applicants and respondents respectively in this application as well as for their clients in the appeal and review application.

(e)

(f) Before dealing with the grounds and argument raised in support of them, I first refer to the principles applied by courts in deciding whether to grant leave to appeal where leave is required, as in the present instance by s18 of the High Court Act.[1] These principles are well settled and are usefully summarised in Herbstein and Van Winsen: *The Civil Practice of the High Courts of South Africa*.[2] Firstly leave will only be granted where there is a reasonable prospect of success. Secondly the amount in dispute should not be trifling. In the third place, the matter is to be of substantial importance to either or both of the parties and

[1]Act 16 of 1990.

[2](5 ed) vol 2 at p1212.

fourthly that a practical effect or result can be achieved by the appeal.

(g) I enquired from both counsel during argument whether a further consideration should arise in applications for leave to appeal in labour matters, namely, the need for finality and the expeditious determination of those disputes. Mr Denk argued that the Labour Act, 2007[3] contemplated the speedy finalisation of disputes. He referred to the fact that the infraction occurred in June 2012, the dismissals were finalised later in 2012, the disputes referred to the office of the Labour Commissioner at the end of 2012 and the arbitration finalised in May 2013. Mr Rukoro accepted that the need for expedition in the finalisation of labour disputes is a factor to be taken into account but, he said, it should form part of the balancing act when taking into account other factors such as the importance to obtain a definitive judgment on the issue of team misconduct. That latter factor outweighed the need for finality, so he submitted.

(h)

(i) In bringing about far reaching changes to the mechanisms to resolve labour disputes more speedily in the Labour Act, 2007, the legislature premised its approach upon establishing specialist tribunals for that purpose and stressed the imperative of expedition in finalising those disputes before those tribunals. The Act established[4] specialist arbitration tribunals, as contemplated by Art 12 (1)(a) of the Constitution under the auspices of the Labour Commissioner to determine labour disputes. Disputes concerning dismissals are to be referred within 6 months.[5] The Act provides no power to arbitrators to extend that time limit. Conciliation of the dispute is to be first attempted. If unsuccessful, the arbitrator proceeds to arbitrate it.[6] The Act requires an arbitrator to issue an award within 30 days of the conclusion of the arbitration.[7]

(j) Appeals against awards are limited to questions of law alone and reviews of awards are to be brought within 30 days of service of an award,[8] except

[3]Act 11 of 2007.

[4]Section 85(1).

[5]S 86(2).

[6]S 86 (6).

[7]S 86 (18).

[8]S 89(4).

where a defect in the proceedings involves corruption in which case a 6 week period applies.

(k)

(l) It is clear from these provisions that the fundamental principle underpinning the structure of dispute resolution mechanisms provided for in the Act is one of expedition in the finalisation of labour disputes (and the concomitant need for finality and certainty).

(m)

(n) It follows that the need for the expedition in the finalisation of disputes in order to bring about certainty is thus an important factor to be taken into account in the determination of applications for leave to appeal.

(o) The requirement of leave embodied s 18 of the High Court Act also in my view presuposses limiting the workload of the Supreme Court in matters where no right of appeal to that court exists so as not to unduly over burden that court. The importance of the matter would address this consideration so that appeals in labour matters (where leave is required) are essentially confined to raising important issues of principle, and not merely of importance to parties, given the need to expeditiously finalise labour disputes.

(p)

(q) Bearing these principles in mind, I turn to the background of this matter and the grounds raised in this application for leave to appeal.

(r) The applicant's grounds of appeal are that the court erred as follows:

'1. In law by finding that the respondent was unable to pinpoint the perpetrators of the misconduct;

2. In law by ignoring or lending insufficient weight to the fact that the respondent failed to produce the best evidence at its disposal;

3. In law by finding that the applicants failed to give evidence of exculpatory nature at both the internal and arbitration proceedings and that their dismissal was therefore fair;

4. In law by ignoring or lending insufficient weight to the fact that many of the applicants may not have known about the theft and could thus not have reported same or given evidence of exculpatory nature, save to deny guilt;

5. In law by finding that the applicants were guilty of team misconduct;

6. In law by finding that the applicant breached their duty not to act against their employers' interest;

7. In law by failing to give no weight alternatively little consideration to the fact that fish was found in the lockers belonging to specific employees and that it is only after the lockers were broken into and fish emptied on the floor of the ablution facilities that some employees were called to bear witness;

8. In law by not referring the matter back to the Office of the Labour Commissioner for arbitration by a different arbitrator;

9. In law by determining the appeal before hearing the review application in the same matter.'

Background

(s) The proceedings before the court comprised an appeal against and a review of the arbitrator's award of 24 May 2013. The employees had been charged in separate hearings for supervisors and non supervisory employees for the removal of 2, 5 tonnes of fish from the factory floor which occurred during a single night shift in June 2012. Nineteen supervisors were found guilty and their dismissal was recommended. 298 non-supervisory employees, were also found guilty in their separate hearing and their dismissal was also recommended. A third hearing held beforehand for four employees who indicated that they intended to plead guilty, is not relevant for current purposes. The supervisors and non supervisory employees appealed internally. These separate appeals were presided over by outside legal practitioners, as were the

respective disciplinary enquiries.

(t)

(u) The Labour Commissioner, sitting as arbitrator, upheld all but one of the dismissals of the supervisors but found that all non supervisory employees (except for three who were found in possession of fish), were unfairly dismissed and ordered their reinstatement. The respondent appealed against the award and also brought an application to review it. By agreement both the appeal and the review application were heard and argued together.

(v)

(w) The factual background as well as the award itself are dealt in some detail in the judgment of this court. For present purposes, only a few aspects are referred to.

(x)

(y) The non supervisory employees faced two separate charges as well as an alternative to the main charge. The main charge was one of unauthorised removal or participation in the removal of the fish products from the respondent's factory. In the alternative to this charge, the employees were charged for being in possession of fish products without authorisation and with the intention to deprive the respondent of those products. The second main charge was the failure to act in the interest of the respondent in failing to prevent other employees from removing fish products from the production floor to the locker rooms and/or for failing to report to the respondent the names of the perpetrators who had removed or attempted to remove or participated in the removal of those fish products from the production floor to the locker and ablution rooms.

(z) In both the internal disciplinary hearing and the internal appeal, the legal practitioners who respectively convicted and upheld the findings concerning the non supervisory employees referred to the concept of team misconduct on the part of those employees, with reference to authority referred to in their rulings. The non supervisory employees were found to have not cooperated in identifying the culprits after being expressly requested to come forward with information. That this was found to have impacted upon their duty to act in the interest of the employer. It was also found that the only reasonable inference to

be drawn from their conduct was that each individual was involved in the removal or failed to prevent or report it or failed to cooperate with employer to identify the culprits. They were thus found guilty of team misconduct and their dismissals were recommended.

(aa)

(bb) This approach was in essence upheld in the internal appeal. The presiding officer found that it would have been impossible for the employees not to have noticed the 2, 5 tonnes of fish being removed and strewn around and on the floor in the female locker rooms and ablution facilities. The internal appeal found that the employees, by acting in the manner in which they had, breached the relationship of trust to their employer and that their dismissal was justified.

(cc)

(dd) As to the supervisors who were found guilty, the arbitrator found in his award that, on the balance of probabilities, all but one would have known or ought to have known that the perpetrators were involved in removing fish from the production floor to outside the production area. Given their duties of supervision and control and reporting discipline, he found that they had acted negligently and had failed to act in circumstances where they should have acted in the interest of their employer – thus in breach of their positions of trust and responsibility.[9] The supervisors, whose dismissals were thus upheld on this basis by the arbitrator – and not with the reference to establishing specific acts of removing fish – did not cross appeal to the court against the arbitrator's finding upholding their dismissals.

(ee) The arbitrator however adopted a *volte face* in respect of the non supervisory employees. He found that it was 'very difficult if not inappropriate to find the rest collective guilty' and found the fact that they had been charged collectively had offended against the presumption of innocence and s 33(4) of the Labour Act[10] He further found that 'collective guilt concept is not only alien to South Africa but also the Namibian legal system and probably not a good public

[9]See par [73] of the judgment.

[10]Par [74] of the judgment.

policy too.'[11] This statement was made despite applying one of the matters[12] in which team misconduct had been found to apply in South Africa in respect of the position of supervisory employees and failed to deal with the other authorities which were referred to.

(ff) The respondent appealed against the arbitrator's specific finding concerning the non applicability of the concept of team misconduct on the non supervisory employees. It was correctly contended that it was a question of law. Mr Rukoro who also appeared in the appeal and the review application, did not dispute that contention, as is reflected in the court judgment.[13]

(gg)

(hh) As is also correctly reflected in the court's judgment, Mr Rukoro placed no authority before the court with reference to the issue of team misconduct or collective guilt. But he submitted at the time that the respondent had not adduced the evidence to prove the guilt of each employee and departed from the principle of the right to be presumed innocent until proven guilty.[14]

(ii) Central to the approach of the court was finding the existence of a duty on the part of an employee to an employer of honesty and faithfully serving that employer and of protecting the employer's interests and not acting against those interests. This in my view at the core of an employment relationship. The authorities relating to this finding are referred to in the judgment.[15] The court proceeded to find that this principle was applicable to the circumstances of this matter in finding that the employees who declined to prevent or report such large scale theft and declined repeated invitations to come forward and identify the perpetrators had breached that fundamental duty of an employee to an employer not to act against the latter's interest and not to abuse the confidence of that employer and to protect that employer's interest. The court found that it was clearly established from the evidence that the removal of such an

[11]Par [77] of the judgment.

[12]*Federal Council of Retail and Allied Workers v Snip Trading (Pty) Ltd* (2001) 22 ILJ 1945 (Arb). (Snip Trading).

[13]*Federal Council of Retail and Allied Workers v Snip Trading (Pty) Ltd* (2001) 22 ILJ 1945 (Arb).

[14]See par [88] of the judgment.

[15]See par [79-80] and the authorities collected there.

enormous quantity of fish during a single shift from the processing plant to the female ablution facilities and locker rooms would have required large scale participation and that it was not only incumbent upon supervisors to prevent and report on this but also upon the employees who worked on that shift.[16] The court further found that the failure to do anything about the large scale unlawful and dishonest activity was compounded by the subsequent failure of the employees to come forward to provide information on the incident in circumstances where those employees would reasonably be supposed to have had information concerning those who were guilty. There was not only the opportunity to do so but there were express requests prominently displayed that the work place enjoining employees to come forward with information of that nature.

(jj) The court proceeded to refer to and discuss the authorities in South Africa with reference to the concept of team misconduct and found that these authorities apply to Namibia as well. This was in the face of no authority cited by the applicants' Mr Rukoro to the contrary. The court accordingly found that the arbitrator's position upon that issue was not only contradictory (with reference to the manner in which he dealt with the position of the supervisors and his reliance upon *Snip Trading*[17]), but that the arbitrator's conclusion as to the state of the law on this issue was flawed and without substance. It not only showed a misfundamental conception of the doctrine of common purpose which very much forms part of the law of Namibia, but he was also entirely incorrect with reference to his categorical statement as to the position in South Africa. Those aspects are dealt with in the judgment of the court.[18]

(kk) But the court found that at the very least there had been a breach established on the part of the employees not to act in the respondent's interest – on a similar basis to that of the arbitrator's finding that the supervisors had failed to act in the respondent's interest. Once this breach had been established, the court held that it would then have been in the discretion of the respondent to determine an appropriate sanction and that a dismissal would not have been

[16]See par [92] of the judgment.

[17]Supra in footnote 12.

[18]Paras [94] – [105].

unreasonable, applying authority of this court as well as South African and English authority in concluding that.[19] A breach of such a duty was the second main charge which the employees had been charged with and upon which they had essentially been found guilty. There was no need to further consider the question as to whether the employees had on the basis of team misconduct participated in the removal of the fish, given the fact that the breach of the duty of the employees was established by the facts, properly construed and with necessary and reasonable inferences drawn from those facts. This court thus did not find that the non supervisors employees committed theft by virtue of team misconduct. It was not necessary for it to do so. The duty in question and its breach had thus been established and that a dismissal for that was not so unreasonable or unfair as to warrant interference.

(ll) Having set out the background and the approach of the court, I turn to the grounds of appeal. Unfortunately some of the grounds of appeal incorrectly refer to findings or the findings relied upon are taken out of their proper context. For instance, there was no express finding, as is reflected in the first ground of appeal, that the respondent was unable to pinpoint the perpetrators of the misconduct. The applicants' reliance upon this may have arisen from the reference in paragraph 11 of the judgment to the issues to be determined on appeal (where it was stated that one of the questions raised in the appeal was whether it would be permissible and, if so, in what circumstances for management when unable to pinpoint the perpetrators of misconduct to dismiss a group of employees which would include perpetrators and that this raised the question of team misconduct). That was after all one central findings of law of the arbitrator in relation to the dismissal of the non supervisory employees and upon which the appeal against the award was premised. The issue was a matter which the court dealt with in its judgment within the context as I have outlined above. But it was not an express finding of this court that the employer was not able to pinpoint the perpetrators, even though it would have formed a premise in the discussion of the concept of team misconduct. There was thus no express finding to that effect. It was not necessary for the court to do so.

(mm)

[19] See par [106] of the judgment and the authorities collected there.

(nn) Another criticism levelled against the judgment in this application for leave to appeal, was an assertion on behalf of the applicants relating to the failure on the part of the respondent to produce the best evidence at its disposal. This fails to take into account the thrust of the approach of the court in the judgment. The best evidence point concerned the complaint raised in the appeal and in this application that the respondent did not require employees to identify their lockers and charge those with fish in their lockers. This point was not raised during the internal disciplinary proceedings. Nor was it raised with respondent's witnesses in the arbitration. It also negates certain of the factual matter placed both before the internal disciplinary proceedings and the arbitration concerning the fact that there was not only fish in lockers but large quantities in boots, in plastic bags and bins and strewn all over the floors, not only in the locker rooms but also in the female ablution facilities. The extent of the fish has already been referred to in terms of its mass, being 2, 5 tonnes. But it also serves to point out that it took the respondent's employees some six hours to remove all that fish from those facilities and that it needed to be removed as it created a health hazard. Had this issue been put to the respondent's witnesses, they would have had the opportunity to explain their approach. On the contrary, it was put to Ms Shindume (who had been caught with fish) in the arbitration proceedings by one of the union representatives that it was incorrect that other employees had stolen fish and that she was the only one who had done so. But despite the fact that it had not been raised, this issue would not address the fundamental issue of the breach of the duty raised in the second main charge and referred to in the findings of both internal disciplinary proceedings and in detail in the judgment.

(oo) In support of the ground of appeal that the court erred in finding that the employees were guilty of team misconduct, Mr Rukoro argued that this finding was at odds with an earlier decision of this court in *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*[20]

(pp) I have already referred to the approach of the court on the question of team misconduct. As I have pointed out this court, found that a breach of the applicants' duty to faithfully serve the respondent's interests and not to act

[20]2001 NR 211 (LC).

against them. This arose largely as a result of omissions on their part and inferences which arose from the facts properly approached. Team misconduct would play a limited role in this context. But it was dealt with in view of the arbitrator's flawed approach on the issue. Whilst I found that team misconduct forms part of the law in Namibia, this finding was not central to the finding on the breach of duty of the applicants, although it was of some relevance in drawing the inferences.

(qq) As for the *Pep Stores* matter, it is in my view distinguishable on the facts and the remarks relied upon by Mr Rukoro should be confined to its facts for the reasons I set out below. The fact that Mr Rukoro did not refer to it when the appeal and review were argued does not mean that he (or other counsel if they were engaged to represent the applicants) could not refer to the matter on appeal, if leave were to be granted. But the absence of any reference to it in the judgment is because it was not raised. Mr Rukoro relied upon the statement by Gibson, J in *Pep Stores* to the following effect:

> 'I agree with respondents' counsel that in thus dismissing the respondents on the basis of a suspected collective act of misconduct the appellant infringed the agreement for collective responsibility when it failed to prove the individual guilty of a worker. By adopting this procedure the appellant departed from the legally permissible path of collective responsibility and descended into the unacceptable sphere of collective guilt which has been rightly condemned in South Africa: "see Dichawu and Others v Pep Stores (2000) 9 CCMA 8.1.3." In Namibia, the approach is viewed with disapproval as it goes against the Constitution's guarantee of the right to be presumed innocent until proved guilty, it also goes against the ancient principle of the common law to the same effect.'

(rr) But this statement is to be considered within the factual context of that case. There the employees faced a hearing and dismissed for poor work performance relating to stock losses.[21] Furthermore the complaint about their performance relating to stock losses was in respect of an extended period of time with reference to vacillating percentages above the accepted range over a period of several months. The court found that the employer had not discharged the burden of justifying the dismissals. The court, with respect, correctly found

[21] Supra p212 E-F.

that the employer confirmed the issue of poor work performance – a form of incapacity – with that of misconduct. The employer had viewed the failure to curb stock losses over an extended period as a form of misconduct. Yet proceeded against and dismissed the employees for misconduct. The court further found that the failure to follow its internal proceedings by the employer rendered the process defective[22] and concluded that the employer had failed to show that the dismissals were for a valid and fair reason.

(ss) Gibson J referred to a suggestion of collusion or conspiracy in the disappearance of stock and stated:

> 'I was concerned that an employer who suspects acts of dishonesty being done by his workers but is unable to prove it should hide behind the cloak of collective responsibility to make the charge stick.'[23]

(tt) This and the earlier statement are to be viewed within the context of that case – where the employer confused misconduct with incapacity and merely relied percentages of stock losses over a protracted period and did not follow its own procedures. In this matter, the removal of 2,5 tonnes of fish occurred in a single shift and the employers were instead charged with a breach of their duty of faithfulness to their employer and not to act against its interests (and not with an incapacity issue).

(uu) The court's finding in *Pep Stores* on the question of procedure would, with respect, appear to be correct. But the statements on collective guilt, not central to that court's holding, relied upon a South African CCMA decision in *Dichavvu* which was discredited in and not followed by Professor Grogan sitting as an arbitrator in *Snip Trading* which in turn was followed by the Labour Appeal Court (of three judges) in subsequent matters referred to this court's judgment. Those matters were decided after the judgment of Gibson, J and her sentiments are thus be viewed in that context and confined to the facts of that case and no wider. As a general matter, the exposition of the issue in *Snip Trading* and the other authorities referred to in the judgment of the court in this matter are to be

[22]Supra at p222B.

[23]Supra at p219B.

preferred for the reasons given in the judgment to the generalised remarks by Gibson, relied upon by Mr Rukoro.[24]

(vv) Given the approach of this court in upholding the dismissals of the applicants, and the distinguishable facts in Pep Stores and what I have said concerning that matter, I do not consider that the issue of team misconduct raises an important issue of principle which needs to be settled by the Supreme Court in an appeal on the facts of this specific case.

(ww) As to the ground relating to the finding that the applicants breached their duty not to act against their employer's interest, Mr Rukoro did not address much argument on this finding despite its centrality to the court's approach in setting aside the award. He did not dispute the existence of such a duty and correctly so. I understood him to question the inferences drawn in finding its breach. But considered in the totality of the evidence, I do not consider that an attack on this finding enjoys reasonable prospects of success.

(xx) I turn to the ground of appeal contending that the award should have rather been set aside and referred back by reason of what was stated concerning the test on disqualifying bias. As I have said, both the appeal and review served before the court. This was by agreement. Argument was heard on both matters. The appeal was upheld for the reasons stated in the judgment. It followed that it was not necessary to give judgment on the review application. It was then removed from the roll.

(yy) But the review had been fully argued. In view of the fact that the test for disqualifying bias was misconceived by the Labour Commissioner as arbitrator (and by Mr Rukoro in his argument)[25] to be actual bias, it was appropriate for this court to correct that fundamental misconception so as to avoid the application of an incorrect test for disqualifying bias by those tribunals in the future. It was also appropriate for the court to point out that Rule 13 of the arbitration and conciliation rules does not permit arbitrators to express a

[24]In par [95] footnote 14 of the judgment.

[25]In par [86] of the judgment.

predisposition in matters. These statements, although not necessary for the holding in the case, were expressed because of the frequency of arbitrators' awards being set aside because of defective proceedings. Those tribunals are after all tribunals as contemplated by Art 12 of the Constitution. Appeals from them are limited to questions of law only. It is thus imperative and required by the Constitution that parties receive a fair trial as contemplated by Art 12 before them and that recurring flaws which compromise the fairness of proceedings in those tribunals should be rectified. Hence the reason for the court expressing itself on that issue.

(zz) It follows that the applicants have not in my view established reasonable prospects of success on appeal. The further factors listed above do not need to be further considered in view of this conclusion although I also in any event expressed the view that the appeal does not raise an important issue of principle in respect of the issue of team misconduct in this appeal in view of what I have said concerning the argument raised by Mr Rukoro in that regard.

I accordingly make the following order:

The application for leave to appeal is dismissed. No order as to costs.

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D F SMUTS

Judge

APPEARANCES

APPLICANTS:	S. Rukoro
Instructed by:	Harmse Attorneys
RESPONDENT:	A. Denk
Instructed by:	LorentzAngula Inc.