REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 52/2009

In the matter between:

HANGANA SEAFOOD (PTY) LTD **APPELLANT**

And

ROBERT VIRINGA **RESPONDENT**

Neutral citation: *Hangana Seafood (Pty) Ltd vs Viringa* (LCA 52-2009) [2015] NALCMD 27 (3 December 2015)

Coram: PARKER AJ
Heard: **30 October 2015**
Delivered: **3 December 2015**

Flynote: Labour law – Arbitral award – Appeal against – Arbitrator's finding that disciplinary hearing by appellant's domestic disciplinary hearing body was unfair procedurally rejected as having no basis in law and fact – Court finding that on the facts and in the circumstances of the case the guilt of the respondent was established – Consequently, appellant had valid reason to dismiss – If the Labour Act enjoins an arbitrator to deal with the substantial merits of a dispute with minimum legal formalities there is no good reason why a domestic disciplinary hearing body should be bound by strict rules of evidence – Consequently, court held that a

domestic disciplinary hearing body is not bound by strict rules of evidence – On fair reason to dismiss court held that the test whether a dismissal is fair is whether no reasonable employer would dismiss the employee taking into account the circumstances and facts of the particular case – Court held that if a reasonable employer might have reasonably dismissed, the dismissal was fair.

Summary: Labour law – Arbitral award – Appeal against – Court found that there is nothing on the record to indicate that the minimum requirements of fair procedure as set out in the judgment were not satisfied by the appellants domestic disciplinary hearing body – Court found that procedure at the disciplinary hearing was fair – Court rejected arbitrator's finding that admission of a statement by a Doctor whose sick note had been falsified constituted inadmissible hearsay evidence – Court reasoned that strict rules of evidence did not bind the appellants' domestic disciplinary body – On the facts the court found that the appellant had a valid and fair reason to dismiss because respondent was found guilty of misconduct involving a dishonest act – A falsified Doctor's sick note meant to excuse the respondent from work was delivered to appellant's official – Court found that a dishonest act of an employee was material as it went to the root of the employment contract and the duty of an employee to his employer – Consequently, court upheld the appeal, set aside the award and confirmed the dismissal.

ORDER

(a) The award and the order made under Case No. CRW 25-09 are set aside.

(b) The dismissal of the respondent by the appellant is confirmed.

(c) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The appellant appeals from the award in Case No. CRW 25-09, wherein the arbitrator concluded that the dismissal of the respondent was procedurally and substantively unfair. The notice of appeal is accompanied by grounds relied on by the appellant. The respondent opposed the appeal, and there are grounds for opposing the appeal filed of record.

[2] Having condoned, on application made, the late noting of the appeal and allowed certain amendments to the appellant's Form LC41 and Form 11, the court had ordered as follows:

'1. The late noting of the appeal, as amended, is condoned.

2. The amendments to the appellant's Form LC41 and Form 11 are allowed.

3. The respondent must -

(a) not later than 31 July 2015 deliver notice to the appellant that he intends to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in the proceedings; and

(b) not later than 17 August 2015 deliver a statement to the appellant stating the grounds on which he opposes the appeal, together with any relevant documents.

4. Set down hearing date: 09h00, 25 September 2015.'

[3] The order was served by registered mail to the last known address of the respondent. The respondent did not comply with para 3 of the order, and on the hearing date the respondent did not appear in person or by counsel; and so, the appeal became unopposed. Nevertheless, in the interest of justice, the court asked the appellant's counsel who had filed heads of argument to argue the appeal to enable the court to adjudicate on it.

[4] As respects the arbitrator's conclusion that the dismissal of the respondent was procedurally unfair; I have this to say. The arbitrator's conclusion is not based on any reasons that are set out in the award. Indeed, it is fair to say that the arbitrator assumed, without giving clear reasons, that the dismissal was procedurally unfair.

[5] It need hardly saying that the arbitrator's conclusions must be based on reasons; that is, reasons that are clearly set out for all to see. I do not see anywhere in the award where the arbitrator considers 'fair procedure' and the reasons why in her opinion there had been unfair procedure. In any case, the admitting of inadmissible evidence by a domestic disciplinary body and the arbitrator's finding that the respondent 'would not prove its case that the applicant have broke (has broken) a workplace rule regulating conduct' are not instances of procedural unfairness. They are at best indications that the appellant, in the opinion of the arbitrator, failed to establish a valid reason for the dismissal within the meaning of s 33(1)*(b)(ii)* of the Labour Act.

[6] The arbitrator does not refer to any irregularities in the proceedings of the domestic disciplinary hearing tending to establish unfair procedure. It must be remembered that a domestic disciplinary hearing body is not expected to proceed in the same manner as a court of law. What is expected of such body in pursuit of acting procedurally fairly is to obey the rules of natural justice and to listen fairly to both sides, discharge its duties honestly and impartially and act in good faith. See *Meyer v Law Society, Transvaal* 1978 (2) SA 209 (T). The employee should be informed of the charge, and given the opportunity to answer it. (*SPCA of Namibia v Terblanche* 1998 NR 398) Additionally, the domestic body must keep a record of the proceedings. (*Kamanya & Others v Kuiseb Fish Products Ltd* 1996 NR 123.)

[7] Some of the complaints of the respondent in the arbitration was that he was not allowed to prove that he was indeed at the Magistrates' court and that the chairperson of disciplinary body called the Doctor about the sick note but he did not

call the Magistrates' court to ask the court if the respondent had attended at the court.

[8] The complaint which the arbitrator accepted have no merit. On the record it seems to me clear that an official of the appellant had given the appellant permission to attend court and the appellant was specifically instructed to submit to the official documentary proof that he had attended the court. The respondent, therefore, had the duty to submit such documentary proof the day following upon his attendance at the court. He did not do so; and he did not then explain to that official the reason why he could not submit such documentary proof. It was too late in the day for respondent to expect the chairperson of the disciplinary hearing body to fish around for such documentary proof.

[9] In any case, there is nothing on the record tending to establish that the minimum requirements of procedural fairness in para 6 were not satisfied by the appellant's disciplinary hearing body. And, as I have found previously, the award does not contain any clear enquiry into the issue of procedural unfairness: it contains a conclusion only. Consequently, I hold that the arbitrator's finding that the dismissal of the respondent was unfair procedurally cannot be supported.

[10] The charge on which the respondent was found guilty by the disciplinary hearing body was falsification of a Doctor's sick note that was meant to excuse the respondent from work. On the record, that the sick note was a falsified document is not in dispute. It is irrelevant as to how the falsified note got into the hands of the appellant. What are relevant are these: The note is falsified. It bore the name of the respondent and, therefore, he was the person to gain from the note. It is more probable than not that the note was falsified by the respondent or was done with his collusion or at his behest.

[11] There was no evidence before the arbitrator that the written statement about the falsity of the note did not come from the Doctor in question. And it must be remembered that rules of evidence, in the instant case, the principle of, hearsay

evidence does not bind a domestic disciplinary hearing body which is neither a court of law or a tribunal. The disciplinary hearing body was entitled to admit the Doctor's statement so long as the circumstances of its production at the hearing justified such admission. I find that the circumstances of the production of note at the disciplinary hearing justified admission of the sick note. In this regard, I should say that if the Labour Act in s 86(7)*(b)* enjoins an arbitrator to deal with the substantial merits of a dispute with minimum legal formalities, I see no good reason why a domestic disciplinary hearing body should be bound by the strict rules of evidence on hearsay evidence. In my view the sick note was properly admitted by the domestic disciplinary body.

[12] The disciplinary hearing body cannot be faulted for finding that on the facts the guilt of the respondent was proved; and so, I conclude that there was a valid reason to dismiss the respondent.

[13] I now proceed to consider whether there was a fair reason to dismiss, that is, whether the sanction of dismissal imposed by the domestic body was appropriate in the circumstances. On this issue it is well settled that the test whether the sanction of dismissal is appropriate in a particular case appears to be whether the decision to dismiss can be regarded as so unreasonable in the circumstances and facts of the case that no reasonable employer would take such a decision. (See *Model Pick 'N Pay Family Supermarket v Mwaala* 2003 NR 175.) Lord Denning MR put it in this way in *British Leyland UK Ltd vs Swift* [1981] IRLR 91:

> 'Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.'

[14] Thus, the test is an objective test. In the instant case, the respondent was aware of the appellant's disciplinary rule that an act of dishonesty attracts the sanction of dismissal. Not that it matters whether he knew or he did not know of the rule. At common law – and this has not been amended by the Labour Act – an

employee (servant) contracts to act honestly in his dealings with his or her employer (master); and so, he or she bears a duty to his employer in that regard. Any breach of such duty is material as it goes to the root of contract of employment.

[15] Be that as it may, this is not a case where the employee has worked for the employer for a considerable length of time and that that was the first time he has been found guilty of misconduct. The respondent had, before his dismissal, worked for the appellant for a mere ‘one year and a few months’. Being found guilty of a dishonest act is a very serious form of misconduct in the employment situation; for, it goes to the root of the duty of an employee to his or her employer.

[16] I, therefore, find that the sanction of dismissal that was imposed by the appellant’s domestic disciplinary hearing body cannot be faulted. I conclude that the respondent was reasonably dismissed: the appellant had a fair reason to dismiss. The arbitrator is, therefore, wrong in finding that the employer did not have a valid and fair reason to dismiss the respondent. I have found previously that the arbitrator is also wrong for finding that the dismissal of the respondent was unfair procedurally.

[17] Consequently, I conclude that in dismissing the respondent the appellant satisfied the requirements of s 33(1) of the Labour Act. The appeal succeeds, whereupon, I order as follows:

(a) The award and the order made under Case No. CRW 25-09 are set aside.

(b) The dismissal of the respondent by the appellant is confirmed.

(c) There is no order as to costs.

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C Parker

Acting Judge

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APPEARANCES

APPELLANT:	B De Jager Instructed by MB de Klerk & Associates, Windhoek
RESPONDENT:	F Bangamwabo Of Clement Daniels Attorney, Windhoek