

REPUBLIC OF NAMIBIA



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO. LCA 16/2016

In the matter between:

B2GOLD NAMIBIA (PTY) LTD

APPELLANT

and

PF HOASEB

RESPONDENT

Neutral citation: *B2Gold Namibia (Pty) Ltd v PF Hoaseb* (LCA 16/2016) [2017]
NALCMD 10 (17 March 2017)

Coram: ANGULA, DJP

Heard: 27 January 2017

Delivered: 17 March 2017

Flynote: Labour Appeal - Dismissal found by the arbitrator to be both substantively and procedurally unfair - On appeal finding that the dismissal was substantive unfair set aside. Court finding that the respondent had deserted his employment by staying away from his work despite being requested in writing to return to work. Arbitrators finding that the dismissal was procedurally unfair, set aside. Finding not supported by evidence. Appeal upheld.

ORDER

1. The appeal succeeds.
2. The arbitrator's order with regard to compensation of the respondent is set aside.
3. No order as to costs.

JUDGMENT

ANGULA, DJP:

Introduction

[1] This is an appeal against the arbitrator's award made in favour of the respondent. At the end of the proceedings the arbitrator ruled that the termination of the employment contract by the applicant was both substantively and procedurally unfair. He therefore ordered that the appellant should compensate the respondent with the full salary for the remainder of the fixed term of the contract.

Background

[2] The respondent was employed by the applicant for a two years fixed term contract of employment as an agriculture research coordinator. The respondent performed his duty in that position for about nine months. During the Christmas holiday in December 2014 the respondent's house was broken into and he was injured in the process. He was booked off from work during the period 13 January 2015 to 22 January 2015 and returned to work on 23 January 2015.

[3] During the period when the respondent was booked off, his computer and other personal items were moved from his office and placed in another office. His office was then occupied by another person working in the small and medium enterprise department. Upon his return the respondent adopted the attitude and maintained that he had been dismissed from his employment because of the removal of his goods from his old office to a new office. As a direct result of the removal of his goods from his office the respondent stayed away from work and failed to report for duty.

[4] A letter was sent to him on the 24 January 2015 asking him to report for work at his duty station on 2 February 2015. In response to the appellant's letter requesting him to report for duty, the respondent responded by submitting a list of grievances relating to his probation period, the lack of performance appraisal and the alleged lack of cooperation by the appellant. Following the submission of that letter the respondent continued not to report for duty maintaining that he was waiting for the appellant to convene a meeting so that his grievances could be heard. The appellant acknowledged receipt of the respondent's letter and advised that the respondent's grievances would be dealt with in terms of the appellant's grievance policy. The letter further informed the respondent that should he continue to withhold his services and absent himself from his duty station, the matter will be dealt with in terms of the disciplinary policy of the appellant.

[5] The respondent did not thereafter report for duty, as a result he was suspended by the appellant on 13 February 2015. Disciplinary proceedings were

instituted by the appellant against the respondent whereby the respondent was charged with two charges: firstly, gross insubordination, alternatively disobedience or refusing to perform legally assigned work and failure to perform duties. The second charge was desertion that he intentionally absented himself from work without leave.

[6] The disciplinary hearing took place on 2 March 2015. At the end of the proceedings the chairperson found that the respondent was guilty of disobedience and recommended that the respondent be dismissed from his employment. The appellant then dismissed the respondent on 12 March 2015. Thereafter, the respondent exercised his right to appeal the chairperson's decision, however, the appeal was dismissed.

Proceedings before the Labour Commissioner

[7] The respondent then filed a complaint of unfair dismissal with the office of the Labour Commissioner in terms of sections 82(7) and 86(1), the Labour Act, No 11 of 2007.

[8] The arbitrator correctly identified the issues for determination before him by stating that he had to determine whether or not the respondent had been unfairly dismissed; that the respondent had first to establish that the dismissal took place; and that thereafter the burden of proof to prove that the dismissal was substantively and procedurally fair rested on the appellant.

[9] The arbitrator found that on the issues of insubordination and desertion he was not convinced that the appellant could not comply with its own grievance procedure because the respondent was not at work. The arbitrator reasoned that there were ways and means available to ensure that the appellant complied with its grievance procedure. The arbitrator therefore found that, the appellant failed to comply with its own grievance procedure starting from the investigation, which relates to the treatment to which the applicant was subjected. Furthermore that the appellant acted inconsistently and subjected the respondent to unfair treatment which finally led to unfair dismissal of the respondent.

[10] Regarding the charge of desertion, the arbitrator found that the respondent did not unequivocally communicate his intention not to return to work to the appellant.

[11] In conclusion, the arbitrator held that the appellant was in breach of the terms of the contract between the parties and therefore the termination of the respondent's contract of employment by the appellant was both substantively and procedurally unfair. The arbitrator therefore made an order that the appellant pays the respondent the full salary for the remainder of the unexpired portion of the contract equal to year multiplied by the monthly salary of N\$23,000 which amount to the total sum of N\$276,000 payable on or before 28 February 2016 plus interest at the rate of 20 % per annum.

Notice of appeal

[12] The appellant appeals against the arbitrator awards on the following grounds:

- (a) that the arbitrator erred in finding that the substantive reason for the respondent dismissal was unfair;
- (b) that the arbitrator erred in finding that the procedural process of the respondent dismissal was unfair; and
- (c) that the arbitrator erred in awarding the respondent the full pay of the remainder of the fixed term of the contract of one year amounting in total to the sum of N\$276,000.

Proceedings before this court

[13] The respondent through his legal representative, Murorua & Associates filed a notice to oppose the appeal. The appeal was set down for hearing on 17 June 2016 before Van Wyk AJ. It transpired however that the full and complete record of the arbitration proceeding had not been filed. Accordingly the court issued an order ordering the arbitrator to dispatch and/or release the full and complete record of the

proceedings before the arbitrator to the registrar of this court within a period of five days from the date of service of the order upon the arbitrator. The matter was then postponed to 27 January 2017 for hearing.

[14] According to the record the order was served upon the arbitrator on 27 June 2016 by fax. It would appear however that the arbitrator did not comply with the court's order of 17 June 2016. This prompted the appellant to bring an application set down for hearing on the day the appeal was due to be heard being 27 January 2017. The appellant prayed for an order *"that in so far it may be necessary, the documents appearing collectively at pages 360 to 384 of the record of proceedings and labelled as 'B2Gold Namibia code of conduct', 'final written warning dated 1 September 2015' and 'Synopses of the disciplinary hearing of Petrus Haoseb held on Monday, 2 March 2015 at B2Gold mining administration boardroom at 10h30' be and are hereby admitted as part of the record of the proceedings in the Labour Court proceeding's LCA 16/2016.*

[15] In motivation for the granting of the order sought, the legal practitioner for the appellant, a certain Ms Williams who represented the appellant at the disciplinary hearing as well as at the arbitration proceedings, deposed to an affidavit in which she stated that the documents in question formed part of the documentary exhibits which were handed up to the arbitrator during the arbitration proceedings and on which the respondent was cross-examined. Ms Williams pointed out that upon perusal of the record by Mr Vlieghe who appeared at the hearing of the appeal he informed her that these documents did not form part of the record. Mr Vlieghe deposed to a confirmatory affidavit in this regard. It was submitted on behalf of the appellant that since the arbitrator had already been ordered by the court to release or dispatch the full and complete record of the proceedings and he had not done so, it would not serve any purpose to request the court to once again order him to do so. Accordingly, the appellant sought an order to file copies of those documents which were in its possession to complete the record before court.

[16] In response to the application by the appellant's legal practitioner to submit copies of the said documents in order to complete the record, the legal practitioners for the respondent filed a notice purportedly in terms of rule 9 (b) (ii) of the Labour Court rules. The notice specifically stated that the respondent intended to raise a

point of law. Rule 9, however, relates to joint applications. Rule 6 is the rule that deals with applications and specifically more so rule 6 (9) (b) (ii), which deals with raising points of law. It would appear that the respondent's notice erroneously referred to rule 9 instead of rule 6. Rule 6 (9) (b) (ii) states"

"6 Applications

(9) Any respondent opposing the grant of the relief sought in the notice of motion must-

(a).....

(b) within 14 days of notifying the applicant of his or her intention to oppose the application-

(i).....

(ii) if he or she intends to raise a point of law only, deliver notice of such intention stating concisely the point of law."

[17] The notice stated that the respondent intended to raise a point of law at the date of the hearing of the appeal namely, that the record as it then stood, the portions or copies of the documents the appellant wanted to add to the record did not form part of the record until such time the court has ruled that they be added and form part of the record. The notice further pointed out that the legal practitioners for the respondent were of the view that the appeal could only be heard after the court had granted the appellant's application. The notice stated further that the respondent did not intend to oppose the appellant's application. I should mention that I got the impression at the time that the respondent's notice was a tactical delay on the part of the legal practitioner for the respondent. I say this for the reason that on the day the appeal was set down for hearing the respondent's legal representative had not filed their heads of argument. It would appear that that the expectation was that the appeal would then be postponed to allow the record of the arbitration proceedings to be completed with the copies. The postponement would have afforded an opportunity to the legal representative, in the meantime to file respondent's heads of argument.

[18] The arbitrator in his award recorded that the bundles of documents agreed between the parties and submitted as exhibits for the record purpose consisted of

exhibits A to T and would form part of the record of the arbitration proceedings. This fact was not disputed by the respondent. The court was in the dark as to what happened to the exhibits as no response had been received from the arbitrator.

[19] Having considered the application and submissions advanced by counsel for the appellant, the court was satisfied that a case had been made out and ruled that the copies of the missing documents should be allowed to form part of the exhibits in order to make the record complete. Upon the record being made complete the appeal was ready for hearing.

[20] Mr Vlieghe for the appellant had submitted heads of arguments in terms of the rules. Mr Kasper who appeared on behalf of the respondent did not file heads of argument. He attempted to submit oral arguments but the court ruled against such attempt. There was no explanation why heads of argument had not been filed in terms of the rules. Furthermore, there was no application for a postponement to allow the legal practitioner for the respondent an opportunity to file heads of argument. Accordingly, the appeal proceeded with only Mr Vlieghe presenting arguments based on his heads of argument.

Submissions on behalf of the appellant

Arbitrator's finding that the dismissal was substantive unfair

[21] The appellant attacks the arbitrator's finding that the dismissal of the respondent was substantively unfair. The arbitrator found that the appellant failed to comply with its own grievance procedure; that it acted inconsistently and subjected the respondent to unfair treatment which finally led to the unfair dismissal of the respondent. On reading the record it is not clear on what evidence the finding by the arbitrator was based. The arbitrator did not spell out in what respect the appellant failed to comply with its grievance procedure. Furthermore, the arbitrator did not spell out in what respect the appellant acted inconsistently and what conducts by the appellant towards the respondent constituted an unfair treatment. Mr Mbeeli the appellant's industrial relations practitioner testified that his duty and role is to ensure that both management and employees adhered to the company industrial policy and

procedures. He testified further that he gave advice to the respondent's supervisor about the respondent's insubordination; that he was involved when the respondent was given a final warning. Mr Mbeeli further testified that the respondent was given instruction to report to his duty station but failed to do so and stayed away from office and nobody knew where he was. He further testified that he was present at the disciplinary hearing of the respondent and that at the end of the hearing, he explained to the respondent his right of appeal and that the respondent lodged an appeal which was submitted to the managing director, but that the appeal was dismissed. In the light of the foregoing, I am constrained to agree with the submission by the legal practitioner for the appellant that, it was a finding of fact which no reasonable arbitrator would have made based on the facts before him or her. Accordingly, the finding by the arbitrator on this point was wrong as it was not found on any evidence on record. The finding cannot stand and is liable to be rejected.

[22] Regarding to the issue of desertion, the arbitrator found that it was clear during the arbitration proceedings, that the respondent did not unequivocally communicate his intention to the appellant not to return to work, therefore misconduct of desertion was not established.

[23] It was common cause that the respondent did not report for work for at least eight consecutive working days and he was called to the office to collect the suspension notice which formally placed him on suspension. On the respondent's own admission, after he submitted his letter of grievances he did not report for duty because he was waiting for a meeting to be called within 48 hours to discuss and resolve the grievances. The respondent further conceded that the appellant acknowledged receipt of his grievances letter and informed him that his grievance was under consideration.

[24] The learned author Grogan, J¹ in his work has outlined the legal position with regard to desertion as follows:

¹ Dismissal, 2nd Edition p214 to 217.

'Desertion is deemed to take place when the employee has actually intimated expressly or by implication that he or she does not intend to return to work. Other things being equal, the longer the period of absence, more justified the employer will be in terminating the contract. Brief absence from work rarely warrants dismissal at first instance, unless the employee has by absenting him or herself committed some other act of misconduct, such as insubordination or participation in an unlawful strike, or where there is no pattern indicating that the employee is suffering from a chronic illness. Employees who fail to contact their employers during their absence, if they can do so, may find it difficult to persuade their employers – or arbitrators – that they had good reason to be away. Employees who stay away from work in spite of an express instruction to report to duty, may find it even more difficult to justify their absence. [The] onus rests on an employee to provide an explanation for his or her absence and that generally an explanation will be adequate if an employee can prove that the reason was beyond his or her control.' (the underling provided for emphasis)

[25] I am of the view that the above statement of law is applicable to the facts of this matter. It is not always a requirement that the intention not to return to work must be communicated unequivocally, but it can also be communicated by implication that the employee does not intend to return to work. In the present matter, the respondent clearly and by implication did not want to return to work. He had formed a firm opinion, that the fact that his goods were removed from his office in his absence, was a clear indication that he was no longer wanted at the work place and was thereby dismissed. This attitude is further demonstrated by the fact that, he had already called upon the office of the Ombudsman because he was of the view that by being called upon to report for duty was forced labour which is prohibited by the Namibian Constitution. In my view from those facts the respondent even in his own mind had already formed the view that he was not going back to work. The letter from the appellant warned him that he would be dismissed if he did not report for duty. He did not report for duty after receipt of the letter. In my view the only reasonable inference to be drawn from the respondent's conducts is that he had decided not to report for duty and was thus guilty of desertion.

[26] Even if I am wrong in the fore going conclusion, on the facts of this matter I am of the view that, at best, the respondent was guilty of absenteeism, after all he

was charged with absenteeism which is a competent verdict to the charge of desertion. My conclusion on this point is therefore that the finding of the arbitrator on this point was wrong, cannot stand and is rejected.

Arbitrator's finding that the respondent's dismissal was procedurally unfair

[27] Except for concluding that the dismissal of the respondent was procedurally unfair there is no finding based on identified facts on record which supports the conclusion. The arbitrator failed to set out the facts or instances upon which his conclusion was based. The arbitrator stated that "*it was common cause between the parties that the applicant was dismissed following a disciplinary hearing held on 02 March 2012.*" In my view this was an opportune stage for the arbitrator to say in which respect the disciplinary proceedings were unfair.

[28] Counsel for the appellant referred the court to the judgment of this court in the matter of *Management Science for Health v Bridget Pemperai Kandungure*² where the court set the essential elements of procedural fairness. The court said:

'(a) The employer must give to the employee in advance of the hearing a concise charge or charges to able him or her to prepare adequately to challenge and answer it or them. (b) The employee must be advised of his or her right of representation by a member of his or her trade union or a co-employee. (c) The chairperson of the hearing must be impartial. (d) At the hearing, the employee must be given an opportunity to present his or her case in answer to the charge brought against him or her and to challenge the assertions of his or her accusers and their witnesses. (e) There should be a right of appeal and the employee must be informed about it.'

[29] Mr Mbeeli, the industrial manager of the appellant, testified that the procedure was fair; and thus all requirements set out in *Management Science* case were met by the appellant. He testified that he hand delivered the charge-sheet to the respondent and explained the charge to the respondent. He further testified that the respondent's right to be represented was explained to him and he chose to conduct his own defence. On the record it is clear that the respondent testified in his own

² LCA 8/2012[2012] NALCMD 6 delivered on 15 November 2012

defence and also cross examined the witnesses for the appellants. Furthermore after the disciplinary hearing the respondent's right to appeal was explained to him by Mr Mbeeli and that he indeed lodged an appeal. The appeal was, however, dismissed.

[30] In light of the foregoing, my conclusion is that the arbitrator's finding that the dismissal of the respondent was procedurally unfair was totally unsubstantiated by any fact. For that reason alone the finding by the arbitrator on this point was wrong and cannot stand and is liable to be rejected.

[31] In view of my findings that the arbitrator's findings both on the question of substantive ground for dismissal as well as the procedural fairness during the disciplinary proceedings which culminated in the respondent's dismissal, were wrong and liable to be rejected. It follows therefore as a matter of course that the appeal succeeds.

[32] In the result I make the following order.

1. The appeal succeeds.
2. The arbitrator's order with regard to compensation of the respondent is set aside.
3. No order as to costs.

H Angula
Deputy Judge
President

APPEARANCES

APPLICANT:

Mr Mr Vlieghe

Instructed by Koep & Partners

RESPONDENT:

Mr Mr Kasper

Instructed by Murorua Kurtz Kasper Inc.