



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: LCA 22/2015

In the matter between:

**DR. J. D JURGENS**

**APPELLANT**

and

**FANUEL GEIXOB**

**1<sup>ST</sup> RESPONDENT**

**THE LABOUR COMMISSIONER**

**2<sup>ND</sup> RESPONDENT**

**JOSEPH WINDSTAAN**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Jurgens v Geixob and Others* (LCA 22/2015) [2017] NALCMD 2  
(27 January 2017)

**Coram:** NARIB AJ

**Heard:** 16 and 28 September 2016

**Delivered:** 27 January 2017

**Flynote:** Labour Law – Dismissal without a hearing by a domestic tribunal always unfair.

**Headnote:** Appellant dismissed the first respondent due to alleged misconduct, in that first respondent was alleged to have stolen firewood from the appellant's farm on a number of occasions.

An arbitrator held that the dismissal was unfair on the bases that the appellant was unable to prove that he had a valid and fair reason for the dismissal and that a fair procedure was followed.

Appellant conceded in this appeal that first respondent was summarily dismissed, without a hearing and that for this reason the dismissal was unfair, but contended that due to the gravity of the misconduct, the dismissal was not substantively unfair and for this reason no compensation was payable to the first respondent.

*Held*, that, once the employer is unable to discharge the onus which is in terms of s 33(1) read with subsec (4) on him/her/it, be it on the question of fair procedure or valid and fair reason for the dismissal or both, the finding of unfair dismissal must necessarily follow, provided that the employee was able to establish the dismissal.

*Held*, accordingly that the arbitrator's finding of unfair dismissal is unassailable.

*Held*, further that in any event the employer did not prove that he had a valid and fair reason to dismiss the employee.

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**ORDER**

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The appeal is dismissed.

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**JUDGMENT**

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NARIB AJ:

[1] This appeal is against a part of the award of the labour arbitrator (the arbitrator), made on 20 March 2015, in terms of s 86(15) of the Labour Act, 2007.

[2] The appellant, Dr JD Jurgens, is the erstwhile employer of the first respondent, Fanuel Geixob. The first respondent was employed by the appellant in the position of farm manager at farms Bisiport and Narib, until his dismissal on 31 August 2014.

[3] The second respondent in this appeal is the Labour Commissioner and the third respondent is the arbitrator. The second and third respondents did not partake in the appeal proceedings and are not directly affected by the order sought in this appeal.

[4] The appellant was found by the arbitrator to have dismissed his employee (the first respondent in this appeal) unfairly and was ordered to pay a total amount of N\$44 901,86 to the employee. This amount consists of N\$1895,18 one month's salary, N\$7435,50 severance pay, N\$12 829,02 loss of income calculated from 01 September 2014 to 20 March 2015 and N\$22 742,16 compensation for a period of twelve (12) months. This amount had to be paid by 31 March 2015.

PART OF THE RECORD IS IN AFRIKAANS

[5] This matter was initially set down for hearing on 16 September 2016. Having considered the record before that date, I noticed that some portions of the record are in Afrikaans and part of the evidence of one of the witnesses, that is, a certain Mr. Swartbooi, was 'interpreted' by the appellant from Afrikaans to English. Part of Mr. Swartbooi's evidence was also recorded in Afrikaans. For this reason, on 16 September 2016, I postponed the matter to 28 September 2016 and requested the parties to address me on the following issues:

'2. Parties are to prepare Argument on how the Court should deal with the fact that portions of the record remain in Afrikaans and some portions of evidence of at least one witness was translated on record by one of the parties to the matter.

3. Parties are further to address the question on whether the Court may have regard to the portions of the record that have been translated by one of the parties and if not, whether the appeal must be decided on the remaining part of the record of the evidence.'

[6] I also ordered the parties to file argument on or before 26 September 2016 at 15h00. The parties have duly filed written argument and also addressed me on the above questions.

[7] Mr Jacobs, on behalf of the appellant argued in essence that:

(a) the part of the record which is recorded in Afrikaans may simply be ignored, due to the fact that it is not translated into the official language;

(b) that part of the record which was 'interpreted' from Afrikaans to English by the appellant may be considered by the court because:

(i) there was no objection to this interpretation when the matter was heard by the arbitrator;

(ii) the arbitrator, the first respondent and the appellant all understood Afrikaans and did not take issue with the translation;

(iii) there is no law which requires that the arbitrator should keep the record in English and there is no provision for any interpreter in the rules applicable to the arbitration proceedings;

(iv) the arbitrator is free to establish the procedure by which to conduct the proceedings.

[8] Mr. Bangamwambo on behalf of the first respondent argued in essence that:

(a) the fact that part of the proceedings was translated by a party to the proceedings from Afrikaans to English was a material irregularity with the result that there is no proper record before this court;

(b) the fact that part of the record is in Afrikaans also renders the record incomplete; and

(c) for these reasons, the appeal should be struck from the roll.

[9] I agree with first respondent's counsel that an irregularity occurred when the appellant was allowed to interpret evidence of Swartbooi whom he called as a witness, from Afrikaans to English. The record bears out the complications arising from such a procedure. The appellant, at some stage simply puts his own version to the witness, Swartbooi, and translates this version onto the record as confirmation of such facts. This is also in the form of leading questions, and the version put on record is a mixture of the appellant's own version interspersed with Swartbooi's version. Sight must also not be lost of the fact that Swartbooi was at some stage an employee and therefore a subordinate of the appellant. This may also have affected the evidence provided by Swartbooi, but I cannot, from the record, make a finding of the extent of such influence.

[10] However, despite the above irregularity, the first respondent did not take the matter on review and only raised the point when the court, *ex mero motu* asked the above questions. It is clear from the questions that the court merely raised the issue, because it wanted the parties to address the question, what happens to the text that is in Afrikaans on record and the text that has been translated in an irregular fashion by the appellant. This was not an avenue for the first respondent to take a point he ought to have raised in review proceedings. In view of the fact that no review proceedings were instituted, and there is no cross-appeal before this court, I shall not accede to the request of the first respondent to strike the proceedings from the roll. In any event, I am seized with an appeal and not with review proceedings.

[11] I shall not have regard to the part of the record which is recorded in Afrikaans as well as that part of the record which was translated in an irregular fashion, for the following reasons:

(a) that part which is in Afrikaans is not in the official language and the parties did not seek an opportunity nor did the parties translate that part of the record into the official language;

(b) counsel on behalf of the appellant submitted that the part of the record which is in Afrikaans may be ignored. This part of the record deals exclusively with the evidence on behalf of the appellant and the appellant bore the onus to prove that the dismissal of the first respondent was not unfair. The prejudice in this regard is therefore mostly with the appellant who would in the ordinary course be responsible to put a properly translated record before the court;

(c) the evidence of Swartbooi regarding the removal of wood from the farm of the appellant does not provide a time line as to whether the wood was removed after 03 October 2011 or before that date. The first respondent was previously disciplined by the appellant regarding various alleged misconduct which took place prior to 03 October 2011, which also included removal of firewood from the farm. Evidence of Swartbooi does not conduce to resolve any dispute related to the removal of firewood after 03 October 2011.

[12] I shall for the above reasons, consider the appeal based on the remainder of the record, for it is clear that this court may decide an appeal even in circumstances where full record is not before it.<sup>1</sup>

## THE APPEAL

[13] The appeal is founded on the following grounds:

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<sup>1</sup> See: *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others* 2013 (1) NR 245 (HC) paras 19-25

'1. That the learned arbitrator erred in law in finding that the Appellant's dismissal of the Complainant was substantively unfair, more particularly:

1.1 that the learned arbitrator erred in law in only considering the evidence leading up to the disciplinary hearing of the 3<sup>rd</sup> of October 2011;

1.2 that the learned arbitrator erred in law in finding that the evidence after the disciplinary hearing of the 3<sup>rd</sup> of October 2011 up to the dismissal on the 31<sup>st</sup> of August 2014 is new evidence and must not be considered; and

1.3 that the learned arbitrator erred in law failing or refusing to consider the evidence after the disciplinary hearing of the 3<sup>rd</sup> of October 2011 up to the dismissal on the 31<sup>st</sup> of August 2014.

2. That the learned arbitrator erred in law in finding that the Appellant must pay the Complainant:

2.1 one month's notice pay in the amount of N\$ 1,895-18 (one thousand eight hundred and ninety five Namibia Dollars and eighteen cents);

2.2 loss of income in the amount of N\$ 12,829-02 (twelve thousand eight hundred and twenty nine Namibia Dollars and two cents); and

2.3 compensation equal to twelve months' remuneration in the amount of N\$ 22,742-16 (twenty two thousand seven hundred and forty two Namibia Dollars and sixteen cents).'

[14] According to the notice of appeal, the questions of law appealed against are the following:

'1. Whether the learned arbitrator erred in law in finding that the Appellant's dismissal of the Complainant was substantively unfair, more particularly:

1.1 whether the learned arbitrator erred in law in only considering the evidence leading up to the disciplinary hearing of the 3<sup>rd</sup> of October 2011;

1.2 whether the learned arbitrator erred in law in finding that the evidence after the disciplinary hearing of the 3<sup>rd</sup> of October 2011 up to the dismissal on the 31<sup>st</sup> of August 2014 is new evidence and must not be considered; and

1.3 whether the learned arbitrator erred in law failing or refusing to consider the evidence after the disciplinary hearing of the 3<sup>rd</sup> of October 2011 up to the dismissal on the 31<sup>st</sup> of August 2014.

2. Whether the learned arbitrator erred in law in finding that the Appellant must pay the Complainant:

2.1 one month's notice pay in the amount of N\$ 1,895-18 (one thousand eight hundred and ninety five Namibia Dollars and eighteen cents);

2.2 loss of income in the amount of N\$12,829-02 (twelve thousand eight hundred and twenty nine Namibia Dollars and two cents); and

2.3 compensation equal to 12 months' remuneration in the amount of N\$ 22,742-16 (twenty two thousand seven hundred and forty two Namibia Dollars and sixteen cents).'

[15] It is clear from the above grounds of appeal that there is no direct challenge to the findings of the arbitrator that:

(a) the disciplinary hearing held on 03 October 2011 was unfair due to the fact that the first respondent was denied a companion in representation and is therefore declared null and void;

(b) that no disciplinary hearing was held to prove that the first respondent was guilty as alleged;

(c) that the summary dismissal of the first respondent was procedurally unfair.

[16] The challenge as per the notice of appeal appears to be that a substantial portion of the evidence of the appellant regarding the events that occurred after 03



October 2011 were not taken into account, in reaching the conclusion that the dismissal was substantively unfair. This is the only substantial issue raised by the above grounds of appeal and I shall, in this judgment attempt to summarise the facts relied on by the appellant regarding the events after 03 October 2011. I reiterate that there is no challenge regarding the finding by the arbitrator that the proceedings of 03 October 2011 are a nullity. I shall, for this reason only consider whether, the events following 03 October 2011, and which were adverted to by the respective parties as per the evidence before the arbitrator, should have had a bearing on the award eventually made by the arbitrator, and if so, make an order which I consider to be appropriate in the circumstances.

## BACKGROUND

[17] I must point out at the outset that it is conceded on behalf of the appellant that the first respondent was dismissed on 31 August 2014 without there having been followed a fair procedure and therefore that the dismissal was procedurally unfair. The record of the proceedings before the arbitrator indicates that the appellant was of the view that since the first respondent had previously been found guilty of theft, that is, during the disciplinary proceedings of 03 October 2011, had acknowledged his guilt during those proceedings and signed an agreement stipulating that he shall not make himself guilty of similar conduct and if he does, he may be summarily dismissed, it was not necessary to hold disciplinary proceedings when the first respondent once again made himself guilty of the same type of conduct. On this basis, and since the conduct the first respondent made himself guilty of constituted theft, which is an offence which at common law warrants summary dismissal, the appellant forthwith dismissed the first respondent without a disciplinary hearing. This much is conceded on behalf of the appellant.

[18] The conduct complained of against the first respondent is various acts of dishonesty, but during the hearing of this appeal, the act exclusively relied on by appellant's counsel was that of theft of firewood from the appellant's farm or farms.

[19] The new evidence referred to in the grounds of appeal, and which the arbitrator disregarded, is evidence of copies of photographs attached to the record

as annexure 'B' as well as evidence of what the appellant had to say about these photographs. These photographs depict dates ranging from 29 August 2013 to 08 November 2013. Some of these photographs depict a Ford pick-up truck and others a pick-up truck with a canopy the make of which I cannot make out. If the dates on the photographs are taken on their face value, it would indicate that they were taken subsequent to 03 October 2011. According to the appellant, these photographs depict firewood which was loaded on the above pick-up trucks on the dates depicted on the respective photographs.

[20] The photographs relied on by the appellant warrant greater evaluation. From the record it is apparent that the appellant did not, during the arbitration proceedings take time to explain each individual photograph on which he relies. He merely explained in general that the camera is installed close to the gate of the farm. It is not clear whether this is farm Bisiport or farm Narib. However, some of the photographs on record appear to indicate farm Bisiport. Appellant explained that the camera takes photos every 15 seconds. According to the appellant, the camera is activated by movement, be it an animal, person or even sometimes, by wind. The camera indicates the date, the time and the place where the photograph was taken as well as the temperature at the time.

[21] Copies of the photographs appear on pages 29 and 31 to 33 of the appeal record. Page 29 is marked 'Annex "B"' in the top right corner and has copies of seventeen (17) photographs but all of them reduced in size to 4 x 3 cm in extent that it is not entirely clear what they depict. These photographs are numbered 1 to 14 except that one of them is not numbered and there is a 13 and 13(a). Two different photographs have the number 14. It appears to me that the same pick-up truck is depicted on photographs 1 to 13(a), but I cannot make out the registration number. The copy of the photograph which is not numbered appears to depict a different pick-up truck and one of the photographs numbered 14 depicts a trailer and the other, yet another, a smaller pick-up truck. The record does not indicate that the appellant took the time to explain the contents of these photographs, except that he referred to photograph 14 as depicting his trailer with wood.

[22] The copies of photographs on pages 31 to 33 of the record appear to be enlargements of the photographs numbered 3, 11, 12, and 14 (of the trailer) on page 29 of the record. However, if one has regard to page 31 of the record, the first photograph which appears there has two dates, 31 August 2013 at 12h46 am and 01 September 2013 at 03h14 pm. The photograph, a copy of which appears on page 32 at the bottom also has two dates, being 18 May 2013 and 19 May 2013. Some of the photographs appear to depict a pick-up truck with what appears to be wood that is loaded on it, but the fact that it is firewood is not entirely clear. From the appellant's version on record, two different pick-up trucks seem to be involved. In his evidence the appellant referred to the pick-up truck belonging to the first respondent and another pick-up truck belonging to a certain Prins, who is supposed to be an in law of the first respondent.

[23] I have considered the photographs which appear on record but without knowledge of the appellant's say so, I would not have been able to say that the vehicles depicted in the photographs in fact carry firewood. However, in view of what was said by the appellant, I can make out what appears to be firewood on the photograph 14 on page 29, the upper photograph on page 31 of the record as well as the upper photograph on page 32 of the record. I am unable to make out firewood in any of the other photographs which are on record. It is also clear from the record and in view of the concession made on behalf of the appellant that prior to the arbitration proceedings, the first respondent was not confronted with the contents of any of these photographs.

[24] This is the new evidence which according to the grounds of appeal, the arbitrator failed to have regard to in coming to the conclusion that the appellant was unfairly dismissed.

#### SUBMISSIONS OF THE PARTIES AND THE LAW

[25] In summary, the arguments on behalf of the parties before me were the following.

[26] Counsel on behalf of the appellant had two main submissions. In the first instance he submitted that once it is found that one of the two legs of the enquiry set out in s 33 of the Labour Act, 2007, is missing, the dismissal must be held to be unfair. To this extent he disagrees with the decision in *Kamanya & Others v Kuiseb Fish Products Ltd* 1996 NR 123 at 127I-128A. I agree with his submission and shall herein below deal with this aspect of the judgment in the *Kamanya* matter.

[27] Secondly, counsel for the appellant submitted in essence, that even if the finding of unfair dismissal must follow in circumstance where the employer is able to establish a valid and fair reason for the dismissal before the arbitrator, but where a fair procedure was not followed at the domestic tribunal, the arbitrator is enjoined not to make an award of reinstatement, re-employment or compensation. According to counsel for the appellant, the arbitrator in the present case erred in law in this regard in that he failed to have regard to the new evidence of events that occurred after 03 October 2011 and if he had regard to same, he would have found that the first respondent committed an offence of theft from the employer, which warrants a summary dismissal at common law. For this reason, the appeal should succeed. For these submissions counsel for the appellant relied on the decision in *Kamanya*, as well as *Society for the Prevention of Cruelty to Animals v Terblanche* 1996 NR 398 (LC) at 402 and *House and Home (a trading division of Shoprite (Pty) Ltd v Majiedt and Another* 2013 (2) NR 333 (LC) para 60.

[28] Counsel on behalf of the first respondent, in the first instance made common cause with the submission on behalf of the appellant (which he termed a concession) that once it is found that one of the two legs of the enquiry set out in s 33 of the Labour Act, 2007 is missing, a finding of unfair dismissal must necessarily follow. In his view such a concession is fatal and the appeal stands to be dismissed on this basis alone.

[29] Counsel on behalf of the first respondent relied on the decision in *Rossam v Kraatz Welding and Engineering (Pty) Ltd* 1998 NR 90 (LC) at 92 where the following was stated:

'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law, this court has to be satisfied that such a dismissal was both procedurally and substantively fair. Since I am satisfied that already on the requirements of procedural fairness the respondent's actions fail to pass the test, I do not need to consider any of the other grounds advanced by either the complainant or the respondent.' (own emphasis)

[30] Counsel on behalf of the first respondent submitted further that the dismissal was in any event also tainted by substantial unfairness, as the first respondent was never confronted with the paragraphs on which the appellant relied to prove the offence of theft. According to him this constituted new evidence that could not be considered to determine the question of substantial fairness. On this score, counsel for the appellant relies on the authority of *Kahoro and Another v Namibia Breweries Ltd 2008 (1) NR 382 (SC)* para 46 to submit that the arbitration proceedings constitute a hearing de novo and that the arbitrator was compelled to consider all the evidence led in determining the issues before him.

[31] Counsel on behalf of the first respondent submitted further that the authorities on which the appellant relies were decided before the Labour Act, 2007 came into force and that the legal position has since changed.

[32] It is common cause that the first respondent was dismissed on 31 August 2014. In terms of s 33(4) of the Labour Act, 2007, it is thus presumed, unless the contrary is proved by the employer, that is, the appellant, that the dismissal is unfair.

[33] Section 33(1) of the Labour Act, 2007, provides as follows:

- '(1) An employer must not, whether notice is given or not, dismiss an employee-
- (a) without a valid and fair reason; and
  - (b) without following –
    - (i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34(1); or

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.'

[34] It is clear that this section has two distinct requirements for a fair dismissal:

- (a) valid and fair reason for the dismissal; and
- (b) dismissal in accordance with fair procedure.

[35] The first requirement has two distinct elements being:

- (a) valid reason for dismissal; and
- (b) fair reason for dismissal.

[36] The above provisions are slightly different in form from the provisions of s 45 of the repealed Labour Act, 1992 which read as follows:

'45 Meaning of unfair dismissals and unfair disciplinary actions

(1) For purposes of the provisions of section 46, but subject to the provisions of subsection (2) -

- (a) any employee dismissed, whether or not notice has been given in accordance with any provision of this Act or any term and condition of a contract of employment or of a collective agreement;
- (b) any disciplinary action taken against any employee, without a valid and fair reason and not in compliance with a fair procedure, shall be regarded to have been dismissed unfairly or to have been taken unfairly, as the case may be.'

[37] In *Kamanya* it was held that where an employer has succeeded in proving before the District Labour Court (substitute arbitrator) a fair reason for dismissal,

whether or not such employer has proved that a fair procedure was applied before the domestic tribunal it will be open to the District Labour Court to find that the employee has not been dismissed unfairly. The court went on to say that even if it was not correct in the above view, District Labour Court was still entitled in accordance with s 46(1)(c) of the Labour Act, 1992 not to grant any remedies provided for in s 46(1)(a) and (b) of the Labour Act, 1992 but to confirm the dismissal or decline to make any order.<sup>2</sup>

[38] The ratio of the decision appears to lie in what the court found to be an ambiguity in the wording of s 45(1) of the Labour Act, 1992 read with ss 46(1), 46(1)(c), 46(3) and 46(4) of the Labour Act, 1992. The ambiguity which was identified was that the section could mean that for a complaint of unfair dismissal or unfair disciplinary action to succeed, such dismissal or disciplinary action must be 'without a valid or fair reason' as well as 'not in compliance with a fair procedure' or that it could also mean that the disciplinary action or a dismissal will be unfair even if one of the requirements are present<sup>3</sup>. In my view, on the proper construction of the section, and with the greatest of respect to the court, such an ambiguity did not exist, and I shall demonstrate this below.

[39] The court was further of the view it would be an exercise in futility to attempt to disprove the presumption of unfair dismissal contained in s 46(3) of the Labour Act, 1992 if the complainant could succeed merely because the procedure before the domestic tribunal was defective<sup>4</sup>. In my view, and once again, with respect, the question whether an employee was dismissed unfairly should not in law be looked at through the lens of the remedies such an employee would be entitled to, but this is what seemed to have happened in *Kamanya*. The finding of unfair dismissal should follow, as I shall demonstrate below, once the dismissal is established, and the employer is unable to discharge the onus, as regards the valid and fair reason and fair procedure or both, for the dismissal.

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<sup>2</sup> At 127-128

<sup>3</sup> At 127D

<sup>4</sup> At 127F

[40] However, it bears to mention that even in *Kamanya*, the court held that the requirements of natural justice were met in that there was a fair hearing in substance before the domestic tribunal except in regard to the appropriate sanction. This decision and the decisions following thereon are for this reason not authority for the proposition that a dismissal of an employee, where there was no hearing at all, that is, in complete disregard of the audi alteram partem rule may not be set aside on the basis alone that there was a valid and fair reason for the dismissal.

[41] In *House and Home v Majiedt*, the court stated the following:

‘The question whether procedural defects per se render a dismissal unfair must be considered with regard to the presence or absence of substantial fairness. This in turn would entail an enquiry whether the appellant has proved whether a valid or fair reason existed for the dismissal of the first respondent.’

[42] In reaching that conclusion, the court did not refer to s 33(1) of the Labour Act, 2007 nor did it give any analyses of these provisions and how they may differ from the equivalent provisions of the repealed Labour Act, 1992. However, even in *House and Home v Majiedt*, the court was not dealing with a case where an employee had been dismissed without any procedure having been followed, that is, in a summary fashion. It is clear that in that matter, disciplinary proceedings which were chaired by a certain Mr. Blessing Nyandoro, were held.<sup>5</sup>

[43] In my respectful view, in *Kamanya*, the court erred in two material respects.

[44] In the first instance, the test as regards the fairness of the dismissal was not formulated correctly. The court stated that:

‘Section 45(1) itself sets out two requirements for a successful complaint of unfair dismissal or unfair disciplinary action, . . . .’

[45] This in essence was a reversal of the onus which in terms of s 46(3) of the Labour Act, 1992 was on the employer. If the presumption in the latter subsection

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<sup>5</sup>At para 10



was properly applied, it would follow that what was set out in s 45(1) was not the test for a successful complaint. It was for the employer, and not the employee, to establish these two requirements. These were thus requirements or a test for a successful defence.

[46] Therefore, to state that these were requirements for a successful complaint, as if the onus in this regard was on the employee who would be the complainant in such proceedings, was, with respect wrong.

[47] Seen in this light, the ambiguity in s 45(1) which was identified by the court also disappears, because it becomes clear that a successful defence requires that both requirements must be met. In the absence of one, a finding of unfair dismissal had to follow, provided of course that the dismissal was established.

[48] I am fortified in the above view by the manner in which the test was formulated and applied in *SPCA of Namibia v Terblance* 1996 NR 398 at 399H-I, thus:

‘The first thing to note about this subsection is that the test for a valid dismissal is twofold.<sup>6</sup> The criterion set out is cumulative and not separate. I have come to this conclusion because of the use of conjunctive “and” in ss (b) where it says: “. . . without a valid and fair reason and not in compliance. . . .”

The first limb of this test requires the existence of a good and genuine grievance for dismissing the employee. In my reading of the subsection once that hurdle is passed a consideration of whether the disciplinary proceedings were fairly conducted has to be made.’ (my emphasis)

[49] The second material error in *Kamanya* was that the question of what remedy the employee would be entitled to in the event of a finding of unfair dismissal, clouded the determination of the question whether the employee was dismissed unfairly. The court stated the following<sup>7</sup>:

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<sup>6</sup> As opposed to invalid

<sup>7</sup> At 127I–J

'The result in my view is that no order for reinstatement, re-employment or compensation should be made by the District Labour Court against the employer, where the employer has succeeded in proving before it a fair reason for the dismissal, whether or not such employer has proved that a fair procedure was applied before the domestic tribunal. In such a case it will be open to the District Labour Court to find that the employee has not been 'dismissed unfairly.' (my emphasis)

[50] It is clear that what the court had in mind was to deny a remedy to an employee who has committed misconduct warranting a dismissal, even in circumstances where such an employee had been dismissed not in accordance with fair procedure but a valid and fair reason for the dismissal is established before the District Labour Court.

[51] Such an approach does not accord with the test set out above, which puts a burden on the employer to establish both requirements for a valid dismissal. Furthermore, it was clear from s 46(1) that the District Labour Court was empowered to consider the remedies there set out only upon being satisfied that the employee has been dismissed unfairly or that the disciplinary action was taken unfairly. The question of the remedies available upon a finding of unfair dismissal or unfair disciplinary action should not have clouded the determination of the question whether there in fact was an unfair dismissal or unfair disciplinary action. These, in terms of ss 45 and 46 of the Labour Act, 1992 were two distinct enquiries, except that s 46(4) specifically prescribed what the District Labour Court had to take into account in considering whether there had been an unfair dismissal or an unfair disciplinary action.

[52] It is perhaps with the above in mind, that the Legislature, when it repealed the Labour Act, 1992 and enacted the Labour Act, 2007:

(a) by s 33(1) set out the specific requirements, each with its own subsection;

(b) changed the structure of the presumption contained in s 33(4) and moved it away from the section dealing with remedies<sup>8</sup>; and

(c) discarded the provision of s 46(4) of the Labour Act, 1992.

[53] The Labour Act, 2007 in peremptory terms, now makes clear, by requirements set out in separate subsections of s 33, what the employer has to establish for a valid dismissal.<sup>9</sup> The use of the conjunctive 'and' between subparagraphs (a) and (b) makes it clear that the employer must establish both the requirements of valid and fair reason and that a fair procedure was followed<sup>10</sup>. As regards fair procedure a distinction is drawn between procedure required for a dismissal arising from collective termination or redundancy as set out in s 34 and procedure for dismissal in any other case. This, to my mind, means that in the case of dismissal arising from collective termination or redundancy, the procedure set out in s 34 must be followed and in any other case a fair procedure must be followed.

[54] The Labour Act, 2007 like the Labour Act, 1992, does not lay down what is to be considered a fair procedure. However, it is now well established that the following are the important ingredients of a fair disciplinary hearing<sup>11</sup>:

(a) the right to be told the nature of the offence or misconduct with relevant particulars of the charge;

(b) the right of the hearing to take place timeously;

(c) the right to be given adequate notice prior to the enquiry;

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<sup>8</sup> In the Labour Act, 1992 the presumption was provided for in s 46(3), which section dealt with remedies for unfair dismissal or unfair disciplinary action, whereas in the Labour Act, 2007 it is part of the section dealing with unfair dismissal.

<sup>9</sup> See: *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee* (LCA 30/2015) [2016] NALCMD 45 (06 December 2016) at 12, para 19

<sup>10</sup> See: *Management Science for Health v Kandungure and Another* 2013 (3) NR 632 para 6

<sup>11</sup> See: *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee*, at 9–10

- (d) the right to some form of representation (the representative could be anyone from the work-place; either a shop steward, works council representative, a colleague or even a supervisor, so as to assist the employee and ensure that the discipline procedure is fair and equitable);
- (e) the right to call witnesses and to cross examine those who testified against him or her;
- (f) the right to an interpreter;
- (g) the right to a finding (if found guilty, he or she should have the right to be told the full reasons why);
- (h) the right to have previous service considered;
- (i) the right to be advised of the penalty imposed (verbal warnings, written warnings, termination of employment); and
- (j) the right of appeal, i.e. usually to a higher level of management.'

[55] It is also clear from the record before me and as so properly conceded on behalf of the appellant that none of these procedures were followed when the first respondent was dismissed on 31 August 2014. The finding of unfair dismissal is for this reason unassailable.

[56] However, counsel on behalf of the appellant, argued that in view of the 'new evidence' which I referred to above, there was a valid and fair reason for the dismissal and that in the circumstances it was not competent for the arbitrator to have awarded compensation to the first respondent. As we have seen from the second ground of appeal, the compensation referred to is the award of payment of one month salary, loss of income for the period from the date of dismissal to the date just before the award and compensation equal to 12 months' remuneration.

[57] If I understand the appellant's argument well, it is that if the arbitrator had taken the new evidence into account, he would have come to the conclusion that the

dismissal was substantively fair and would not have awarded compensation. As I have stated before, as regards the denial of compensation to an employee who is in fact guilty of misconduct, counsel for the appellant relied, *inter alia*, on the following authorities: *Society for the Prevention of Cruelty to Animals of Namibia v Terblanche at 402*, and *House and Home v Majiedt at 345 para 60*.

[58] In the former case, the court quoting with approval to *Kamanya* stated the following<sup>12</sup>:

‘Again it would be a travesty of justice if the district labour court is compelled to order re-employment or reinstatement or compensation to be paid by the employer, because the employer did not follow a fair procedure, but the district labour court is of convinced that the employer has proved before it that there was a fair reason for dismissal.’

[59] In the matter of *House and Home v Majiedt*, the court expressed a view that the distinction between procedural fairness and substantial fairness affects the relief which may be granted, eg. an employee whose dismissal is procedurally unfair but substantively fair is not entitled to reinstatement and may depending on the gravity of the offence, be denied compensation. (my emphasis)

[60] In my respectful view, the answer to the above issues must lie in the wording of ss 33 and 86(15) of the Labour Act, 2007.

[61] Section 33(1) does not draw a distinction between a procedurally unfair and a substantively unfair dismissal. Rather, the absence of procedural and substantial unfairness is required for a finding that there was a valid dismissal, in other words, that the dismissal was not unfair. In other words, the verdict or finding of the arbitrator must be that the dismissal was either fair or unfair and not that it was substantively or procedurally fair or unfair. The latter requirements simply inform the decision of the arbitrator.

[62] Once the employer is unable to discharge the onus which is in terms of s 33(1) read with subsec (4) on him/her/it, be it on the question of fair procedure or

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<sup>12</sup> See: *Society for the Prevention of Cruelty to Animals of Namibia v Terblanche*, at 402C–D

valid and fair reason for the dismissal or both, the finding of unfair dismissal must necessarily follow, provided of course that the employee was able to establish the dismissal. In that event, the provisions of s 86(15) kick in.

[63] Section 86(15) confers upon the arbitrator the discretion to make the appropriate award, which in my view is not limited to those listed in subparagraphs (a) to (f).

[64] The question of the arbitrator being compelled to make or not to make a particular award, as may have been the case when *Kamanya* and *Society for the Prevention of Cruelty to Animals of Namibia v Terblanche* were decided, therefore, does not arise under the provisions of the Labour Act, 2007. What we see is a discretion which must be exercised judicially.

[65] There is no provision in the Labour Act, 2007, which lays down that the arbitrator is enjoined not to order reinstatement, re-employment or compensation in every case where the employer is able to establish before him or her a valid and fair reason for the dismissal.

[66] In my respectful view, the fact that there is a valid and fair reason for the dismissal must together with all the other factors which the arbitrator, in the exercise of his or her discretion, may take into account, be considered for the determination of the appropriate award. To hold that the arbitrator is bound to hold, in the case of there being established a valid and fair reason for the dismissal, that the employee is not entitled to reinstatement or re-employment, and in some cases, not even compensation, or any other remedy prescribed by s 86(15), is to unduly fetter the discretion which vests in the arbitrator.

[67] In stating the above, I take due cognisance of the fact that there may be cases where the arbitrator may be held to have erred in ordering re-employment or reinstatement or even compensation, in circumstances where there is a valid and fair reason for the dismissal but the dismissal was otherwise unfair. However, this must, in my view, be determined on a case by case basis, as there may be cases where it will be equally unjust to deny any of the above remedies to an employee, merely

because the employer is able to prove a valid and fair reason for the dismissal for the first time in the arbitration proceedings.

[68] It also follows that the Labour Court should not substitute its own decision for that of the arbitrator, merely because it would have exercised the discretion differently. After all, the discretion vests in the arbitrator and not in the Labour Court.<sup>13</sup>

[69] In view of the provisions of s 86(15) of the Labour Act, 2007, I do not see any reason why the test which should be applied regarding the appropriateness of the remedy should not be the same test applicable in all cases where a discretion is vested in the trier of fact. The test that should be applied is “absent a vitiating misdirection or irregularity, the court of appeal will only interfere with the exercise of a judicial discretion if it is satisfied that no court, acting reasonably, would have come to the same conclusion”.<sup>14</sup> If the conclusion is that which a reasonable arbitrator could have reached, the Labour Court should not interfere, even if it could or would itself have exercised the discretion differently.

## LAW TO FACTS

[70] The appellant does not as per his grounds of appeal challenge the manner in which the arbitrator exercised the discretion which vests in him by virtue of s 86(15) of the Labour Act, 2007. The second ground of appeal merely states that the arbitrator erred in law in finding that the appellant must pay the amounts which I have referred to above to the first respondent. This is no ground of appeal at all and if I understood counsel for the appellant well, it is inextricably linked to the first ground of appeal. The parties did not argue this ground on the basis that the arbitrator exercised his discretion incorrectly, but rather whether the arbitrator was

<sup>13</sup> See: *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at para 14.

<sup>14</sup> See: *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) at 688I-689A

See also: *S v Kearney* 1964 (2) SA 495 (A) Holmes JA stated (at 504B–C):

“When a Court of first instance gives a decision on a matter entrusted to its discretion, a Court of Appeal can interfere only if the decision is vitiated by a misdirection or irregularity or is one to which no Court could reasonably have come – in other words if a judicial discretion was not exercised.”

enjoined on the basis of the above authorities not to make an award of compensation, in other words, that he did not have a discretion to exercise in the matter.

[71] The first ground of appeal is that the arbitrator erred in law in finding that the dismissal was substantively unfair on the three bases set out in subparagraphs 1.1 to 1.3 of the notice of appeal. These in turn entail that if the arbitrator had taken into account, as he ought to have, the new evidence he would inevitably have come to the conclusion that there was a valid and fair reason for the dismissal, to wit, theft of firewood.<sup>15</sup> In the circumstances, according to the appellant, compensation should not have been awarded to the first respondent.

[72] As we have seen above, a finding of unfair dismissal must necessarily follow if one or the other or both of the requirements set out in s 33 are not established by the employer. If a valid and fair reason for the dismissal is present, that may only have a bearing on the exercise of the discretion of the arbitrator in making the award in terms of s 86(15).

[73] The arbitrator's finding that the first respondent was unfairly dismissed must accordingly stand.<sup>16</sup> Since there is no challenge to the manner in which the arbitrator exercised his discretion, in making the award, the award should also stand.

[74] In the circumstances it would not be necessary for me to consider whether there in fact was a valid and fair reason for the dismissal which would warrant the setting aside of the arbitration award on the basis that the discretion was wrongly exercised. I, however do so, if only to show that such a basis is not established by the evidence before the arbitrator.

[75] From the record it is apparent that no evidence was placed before the arbitrator as to whether the camera which was used to take the photographs was in

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<sup>15</sup> This is not stated clearly in the grounds of appeal, but becomes clear in view of the written and oral argument on behalf of the appellant.

<sup>16</sup> See also: Management Science for Health v Kundungure and Another 2013 (3) NR 632 (LC) at para 6



a good working order, that the dates recorded on the respective photographs were in fact the correct dates and that the places indicated on the respective photographs were in fact the right places.

[76] As we have seen above, some of the copies of the photographs have two different dates, which is impossible.

[77] I have also indicated above that without the say so of the appellant, I would not have been able to make out firewood on any of the photographs, but that in view of what he says on record, I may accept that firewood is detectable on at least two of the copies of photographs.

[78] It is also clear from the record that the first respondent was not confronted with any of these photographs, before he was dismissed and prior to the arbitration proceedings.

[79] When the issue of the photographs was raised, during the arbitration proceedings, there was an objection on behalf of the first respondent, which was upheld, that the photographs constituted new evidence which was not considered at the domestic tribunal. The result was that the first respondent did not deal with any of the copies of the photographs in a meaningful way.

[80] I have also pointed out above that the appellant himself did not, in his evidence, deal with any of the copies of the photographs, but merely referred to them collectively, except that he referred to photographs 14 as depicting firewood.

[81] As I have said above, I will not have regard to Swartbooi's evidence, but even if I had to have regard to those parts which were 'interpreted' by the appellant, there is no reference to any dates when the first respondent is supposed to have stolen firewood from the appellant's farm.

[82] There is some indication on the record that in certain circumstances the workers on the appellant's farm were allowed to collect firewood, both for use on the farm, as well as for own use at their residences in the town of Kalkrand. However,

the appellant appeared to say that they had to be authorised on each occasion of such use. I do not find that plausible in view of the fact that these were farm workers who lived on the farm. One can accept that for them to take the firewood off the farm, they had to get permission.

[83] Finally, the record indicates that during the disciplinary proceedings which were held on 03 October 2011, the first respondent was informed that there were cameras installed on the farm. The arbitrator held that those proceedings were a nullity, and that was not challenged in this appeal.

[84] In view of all the above I am of the view that the appellant in any event did not discharge the burden of proof, regarding a valid and fair reason for the dismissal, which rests on him by virtue of s 33 of the Labour Act, 2007.

[85] In the circumstances, the appeal must fail.

[86] In view of the provisions of s 118 of the Labour Act, 2007, there shall be no order as to costs.

[87] In the result, I make the following order:

1. The appeal is dismissed.

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Narib, AJ  
Acting

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