

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: LC 64/2016

QKR NAMIBIA NAVACHAB GOLD MINE (PTY) LTD

APPELLANT

and

ERRICK DAUSAB

1ST RESPONDENT

THE LABOUR COMMISSIONER

2ND RESPONDENT

Neutral citation: *QKR Namibia Navachab Gold Mine Pty Ltd v Erick Dausab*(LC 64/2016) [2017] NALCMD 21 (16 June 2017)

Coram: PRINSLOO AJ

Heard: 12 May 2017

Delivered: 16 June 2017

Reason Given: 26 June 2017

Flynote: Labour Law – Labour Appeal – Appellant appealing against the award issued against it in the arbitration proceedings – The appellant's case is that the arbitrator misdirected herself in finding that the respondent's dismissal was either procedurally or substantively unfair – The appeal is opposed – The first respondent

submits that the evidence adduced at the arbitration hearing was properly evaluated, and the conclusions reached by the second respondent relating to the hearing held by the appellant against the first respondent.

Court held: In the matter *in casu*, the appellant offered the first respondent the chance to defend himself against the allegations of misconduct which led to his dismissal. The employee did not take the opportunity. The crucial question is whether his absence from the hearing was, in the circumstances of this case, justified; or, differently put, whether fairness to both parties applied.

Court further held: Having regard to the arbitration proceedings and the arbitrator's award, it would appear that that the Arbitrator misdirected herself as to the assessment of the facts.

Court further held: To reach a reasonable decision in a matter of this nature it is indispensable for the arbitrator to take into account all relevant factors she is bound to consider resulting in a decision that is reasonable and logical. From this court's observation the arbitrator has unreasonably failed to perform her mandate in this regard and thereby have prevented the appellant from having its case fully and fairly determined.

Court further held: There was no evidence which could reasonably have supported the arbitrator's findings and this court must conclude that no reasonable arbitrator could have made such findings.

ORDER

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1. The appeal is upheld.
 2. The arbitration award under Case number CRSW-135–14, delivered on 13 October 2014, is wholly set aside.
 3. There is no order in respect of costs.

JUDGMENT

Prinsloo AJ:

Introduction

[1] The appellant is QKR Namibia Navachab Gold Mine and the respondents are Erich Dausab, first respondent, and the Labour Commissioner, second respondent. I will refer to the parties as they appear in the appeal.

[2] This is an appeal brought by the appellant, against an award made by an arbitrator, Ms Gertrude Usiku on 14 October 2016. In short the arbitrator found that:

2.1. The respondent is not in compliance with its own disciplinary code in that the alleged offence was committed on two separate occasions, being 17 June 2013 and 28 October 2013. The disciplinary code stipulated under the index, disciplinary hearings and under the notes for supervisors and secondly procedures for hearing a case, that a case needed to be dealt with within 2 working days and this was apparently not done.¹

¹ Record 106 par 1.

2.2. The appellant did not prove that the dismissal was fair because the third, fourth and fifth witnesses could not establish how the applicant was investigated to be part of those employees on the list.²

2.3. It was a commonly known fact that all employees working for mines are provided with transport as the mining area is situated at most 5 to 10 kilometers, if not more, outside of town.³

2.4. Because the appellant's first witness agreed that the letterhead as well as the date stamp on the original sick certificate is of the Ministry of Health and Social Services, thus the sick certificate cannot be forged or falsified as alleged by the respondent.⁴

2.5. The respondent's second witness on Exhibit "C" had booked off a certain Dausab CC for acute hypertension from 17 January 2013 to 19 January 2013, which makes it probable that the denial by the first witness that MBCHB is not a medical term for qualification seemed to be lying under oath as the second witness on page 26 of Exhibit "C" used the same terms on his qualification when he booked off the abovementioned patient.⁵

2.6. The appellant only targeted a certain bargaining unit for investigations in respect to fraudulent medical certificates.⁶

2.7. The respondent had essentially been singled out and disciplined on a balance of probabilities and that the appellant had acted frivolously.⁷

2.8. The appellant's disciplinary code and procedure dated back to the colonial era of South West Africa.⁸

² Record 106 par 2.

³ Record 106 par 3.

⁴ Record 106 par 4.

⁵ Record 106 par 5.

⁶ Record 107 par 6.

⁷ Record 108 par 7.

⁸ Record 108 par 7.

2.9. The appellant's second witness indeed agreed that DrFernandes and Mandoza could be employed by the hospital as they were doctors employed, which he did not know.⁹

2.10. The Pricewaterhouse Coopers' ("PWC") could not be relied on and was null and void by virtue of the following writing appearing on the report:

'We confirm that our report and the findings therein, are for the exclusive use of yourselves and your appointed legal representative(s). No other party, whether referred to herein or not is entitled to rely on any of the views expressed in the report.'¹⁰

2.11. Not all reasonable steps were taken in terms of the respondent's disciplinary policy because the immediate supervisor was not the initiator. This in turn lead to a breach of the policy.¹¹

2.12. The respondent was denied his right in terms of the *audi alteram partem* rule.¹²

[3] As a result, the arbitrator in her award ordered that:

3.1. The appellant reinstate the respondent in the position he previously held with full benefits at the current rate and that reinstatement be effective from 1 November 2016.

3.2. The respondent needed to be at work at 08H00 sharp and that the applicant needed to provide the respondent with transportation.

⁹ Record 108 par 5.

¹⁰ Record 109 par 6.

¹¹ Record 109 par7.

¹² Record 109 par 9.

3.3. The appellant needed to remunerate the applicant for the loss of income for 18 months, which amounts to N\$143,139.06 (and needed to be done on or before 29 October 2016).¹³

[4] It is because of this order that the appellant came before this court for an appeal against the arbitrator's award, on the reasons and grounds as stated in the Notice of appeal.¹⁴

Brief Facts

Disciplinary hearing

[5] The first respondent who was employed as a grade control officer by the appellant for 7 years, received a notification of suspension dated 6 May 2014 from the appellant stating, inter alia, that the appellant had suspended him for being implicated in a scheme of employees who submitted false medical certificates to the appellant.¹⁵

[6] Almost a month later, the first respondent received a letter date 2 June 2014 notifying him to attend to a disciplinary hearing on 5 June 2014, at 13h30 to answer the charge of fraud for having forged / falsified documents for monetary or other gain.

[7] On 5 June 2014, the first respondent took transport provided and arranged by the appellant to attend the hearing. Upon his arrival, he was informed that he had arrived late and that the hearing would not continue on that day as a result. He was then returned to his residential address via the same transport. The hearing was postponed indefinitely. The first respondent contends that the reasons as to why the matter was postponed indefinitely were not given to him nor does it appear anywhere in the record.

¹³ Record 110 par 1-3.

¹⁴ Notice of Appeal, page 7 – 16.

¹⁵ Record page 318,933.

[8] 8 days later, the first respondent received a written request to attend a hearing on 17 June 2014 at 12:00. The first respondent prepared himself and waited for the appellant's transport to arrive and take him to the venue, however it did not appear. He called his representative when it turned 12:00 to advise that the transport had not arrived.¹⁶

[9] When the aforementioned disciplinary hearing was held, the record of the disciplinary hearing reflects that the first respondent's representative was in attendance. The minutes of the disciplinary hearing reflect that the chairperson recorded that the first respondent's representative had been in attendance but had declined to sit in on the hearing.¹⁷

[10] The disciplinary hearing was conducted on 17 June 2014. The appellant had 3 hearing officials in attendance which constituted the chairperson, the initiator and the manager in HR department. The initiator made submissions that the first respondent was guilty of the charges for which he was called upon to answer, in view of the findings of a forensic auditor's report received from Price Water House and Coopers dated 19 May 2014 and two falsified sick notes, as well as witness statements.

[11] The chairperson stated that in view thereof that he had received no written statements from the first respondent, he could only rely upon the evidence presented by the appellant's initiator, and proceeded to conclude that he finds the first respondent guilty upon the content of the reports presented to him.¹⁸

[12] The chairperson after establishing the first respondent's guilt, he proceeded to the next enquiry, involving reviewing the first respondent's past record to determine an appropriate sanction. After the manager of the HR department testified, the chairperson expressed that he was satisfied with the information provided about the first respondent and proceeded to pronounce the first respondent guilty of the charge levied against him

¹⁶ Record, pages 935, 970-973, 1012, 1052.

¹⁷ Record, page 16.

¹⁸ Record page 18.

and ordered a summary dismissal. His rationale for dismissal is that the sanction is in line with the appellant's policy and with precedence in similar cases.¹⁹

[13] The first respondent's representative thereafter lodged an appeal against the findings of the disciplinary hearing on behalf of the first respondent and one of the grounds of appeal was that the first respondent did not receive transport to attend the hearing.²⁰

[14] After lodging his appeal, the first respondent received notification in writing of the date of appeal hearing to be held on 20 June 2014. The first respondent did not attend the hearing and the appeal was finalized in his absence and the finding of the chairperson of the disciplinary hearing was upheld.

[15] After the matter was dismissed on appeal, the first respondent lodged a dispute before the office of the Labour Commissioner, whose award is the subject matter of this appeal by the appellant.

[16] During the arbitration proceedings, various witnesses testified.

Arbitration proceedings:

Dr Fransina Mwafina Shiweda

[17] The first witness called was Dr Fransina M. Shiweda. Dr Shiweda is employed by Ministry of Health and Social Services (MOHSS) as Chief Medical Officer and has been stationed at Katutura Intermediate Hospital since 1990. She stated that in the course and scope of her duties, she schedules the shifts of the medical officers and allocate them to the different departments. When questioned regarding the medical certificates

¹⁹ Record page 19.

²⁰ Record page 936.

in question Dr Shiweda stated that although the medical certificates bore the logo of the hospital and are in pro forma form, these medical certificates were not legitimate medical certificates as they were not issued by legitimate medical officers. Dr Shiweda emphatically stated that she knew all the medical officers employed at the said hospital and that neither Dr Mendoza nor Dr Fernando are or were employed at the hospital.

[18] Dr Shiweda testified that there was a problem with fraudulent medical certificate purported to be issued by Katutura Intermediate Hospital which were under investigation. She confirmed when enquires were made by the appellant regarding legitimacy of a medical certificate issued by Dr Muzu, she followed it up and verified that same was not issued by the said doctor. Dr Shiweda also commented on the terminology used in the medical certificates in question. She stated that acute abdominal pain and severe clinical back pain are not acceptable medical terminology and is more descriptive of the symptoms than the actual illness. In conclusion Dr Shiweda pointed out that the qualification on the medical certificate signed by "Dr Mendoza", MB MD is not a valid or proper qualification as it does not exist. The correct qualification is MBChB.

Dr Muza:

[19] The second witness was Dr Muza, who stated that he is employed as a medical officer and stationed at Katutura Intermediate Hospital since 2011. He is stationed at casualty ward which is responsible for the intake of majority of the patients. On the issue of Dr Mendoza and Dr Fernando, Dr Muza stated that he did not know either of them. He stated that although he did not know all the medical officers employed at the hospital he knew the majority of them. As he is stationed at Casualty it is necessary to liaise with the medical officers of the other departments of the hospital. He submitted that it was a slim chance that these doctors were employed at the hospital. Dr. Muza confirmed Dr Shiweda's submission regarding the terminology with the medical certificates and the academic qualification is reflected on the medical certificate issued by Dr Mendoza.

[20] Dr Muza concluded his evidence in confirming the report of Dr Shiweda stating that the medical certificate allegedly issued by him was indeed not issued under his hand and that there were many of these fake medical certificates in circulation.

Mr. Theron Brand:

[21] The third witness was Mr Theron Brand. He stated that the appellant commissioned PWC to conduct an enquiry into and report on the significant increase in the numbers of employees submitting sick leave applications accompanied with medical certificates. The relevant information was made available to PWC who was engaged with a comprehensive investigation into the problem. There was also the issue of suspected fraudulent medical certificates and on the strength of the report, disciplinary proceedings were instituted against the relevant employees. The first respondent was implicated by virtue of the said report and also because medical certificates issued by Katutura Intermediate Hospital were called into question and had to be investigated.

[22] Mr Brand also testified regarding the disciplinary code and grievance procedure. The witness stated that as the first respondent was absent at the disciplinary hearing the proceedings continued with his absence and he was dismissed. Regarding the appeal proceedings the witness stated that the first respondent was afforded the opportunity to attend the appeal proceedings. He was also duly informed that should he remain absent said hearing will be conducted in his absence. The first respondent did not attend.

Mr Johan Coetzee

[23] The fourth witness was Mr Johan Coetzee, who is the Managing Director of the appellant. He stated that he was the Chairperson of the appeal hearing. The first respondent was duly informed of the scheduled appeal hearing but failed to attend. The first respondent was also duly informed that should he fail to attend the appeal hearing

that same will be finalized in his absence. Mr Coetzee stated that the appellant's disciplinary code allows an appeal chairperson to make a decision without necessarily having a re-hearing.

Mr. Gert Jordaan

[24] The fifth witness was Mr. Gert Jordaan, an associate director within the Forensic Department of Price Waterhouse Coopers (PWC). He stated that he conducted an investigation of the alleged submission of fraudulent medical certificates by employees of the appellant for the period 2013 – 2014. The witness further confirmed the report drafted on behalf of the appellant on the investigation conducted into the possible irregularities relating to suspected fraudulent medical certificates/sick notes. He testified regarding the list of names and the short lists made in respect of specific hospitals or clinics. Mr. Jordaan testified after due investigation of sick leave records and interviews with hospital staff he concluded that the medical certificates with question were fraudulent. Mr. Jordaan compiled a report but same was signed off by the Managing Director of PWC. He confirmed during his evidence that the disclaimer that forms part of the report is aim at other parties, other than the appellant and its legal representatives, who wishes to rely on the said report. He stated that the report could not be used by third parties other for the intended purpose, namely supporting evidence pertaining to the specific sick leave certificates.

Mr. Dausab

[25] Only Mr. Dausab testified in support of his case. He confirmed that they requested for transport for the initial hearing dated of 05 June 2014. Once the hearing was postponed, the first respondent was duly informed on the new date of hearing. He however did not request transport to the subsequent hearing. The first responded also confirmed that he received notice of the appeal hearing but also failed to request

transport in this instance. The first respondent conceded that he received no guarantee that transport to the relevant hearings would be provided to him but he assumed that it will be provided as other employees were provided with transport to attend their disciplinary hearings.

Parties' submissions

The Appellant:

[26] In short, the appellant's case is that the arbitrator misdirected herself in finding that the respondent's dismissal was either procedurally or substantively unfair. The arbitrator misdirected herself in finding that that it was a common known fact that all employees working on mines were provided with transport and that mining areas are situated 5 to 10 kilometers outside of a town.

[27] It was further submitted that the arbitrator could never reasonably, on the facts, have dismissed Dr Fransina Shiweda's testimony as being false, and that the arbitrator could never on the facts have found that it had been conclusively proved (or proved at all) that the appellant had targeted an entire bargaining unit to be investigated for fraudulent activities.²¹

[28] The appellant submit that there was no evidence presented by the first respondent that it was the appellant's duty to provide transport to the respondent to enable him to attend the disciplinary hearing or the appeal hearing and it is also clear from the first respondent's testimony that he took absolutely no positive steps to attend the second disciplinary hearing.

[29] The appellant submits further that the PWC investigation at para 320 of the report found that the respondent's two sick leave certificates dated 17 June 2013 and 28 October 2013 were invalid was not attacked and/or dislodged by any other evidence.

²¹ Record 4 par 8.

In the result and in the absence of any other evidence to gainsay, this arbitrator had no choice but to accept the findings of the report.

[30] The appellant submits that on the strength of the evidence before the arbitrator, she could not reasonably have come to the conclusion that she did – *vis a vis* that the respondent was unfairly dismissed or put differently, that the appellant's internal disciplinary procedures were not procedurally and substantively fair and that the respondents guilt was not proven (by the applicant) on a balance of probabilities.

The First Respondent

[31] On the other hand, the first respondent's case is that due and proper procedural process as per the provisions stipulated in the appellant's disciplinary policy as well as according to the provisions of the Act as well as the principles of the *audi alteram partem* rule were not followed. Specifically, the appellant crucially failed on the following procedural grounds which prove to be fatal procedural irregularities rendering the hearing proceedings flawed:

31.1. The disciplinary enquiry was held in the absence of the first respondent.

31.2. The appeal hearing was held in the absence of the first respondent and failed to take into account that the reasons stated by the first respondent as not attending the hearing is that he had not been provided with transport to attend the disciplinary hearing; and

31.3. The disciplinary hearing, held in the first respondent's absence was not concluded within 2 working days, per the applicable provisions of the appellant's disciplinary policy and constitutes an invalidity.

[32] The first respondent further contends that it was common cause that the first respondent does not own a motor vehicle and relies solely on the transport provided by

the appellant to travel to and from the first respondent's workplace. This applies to any other employees of the appellant who do not privately own their own motor vehicles, specifically when it came to attending disciplinary cases. First respondent testified that he expected for the appellant to provide him with transport to attend the hearing. The line of discussion relating to transportation and the expectations of the first respondent from the appellant to provide same is lengthy and is self-explanatory.

[33] It is submitted by the first respondent that the evidence adduced at the arbitration hearing was properly evaluated, and the conclusions reached by the second respondent relating to the hearing held by the appellant against the first respondent having been procedurally unfair are legally correct findings on the law, on the questions presented to her by the parties respectfully and constitute grounds for her findings as she did in favour of the first respondent.

The Issue

[34] The issue that needs to be decided in this matter is whether or not the arbitrator erred in his finding that the dismissal of the respondent was both procedurally and substantially unfair.

The Relevant Law

The question of law

[35] The starting point is in terms of Section 89(1)(a) of the Labour Act, Act 11 of 2007, which states:

'(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 –

(a) on any question of law alone; or . . . '

[36] The full bench of the High Court (per Mtambanengwe J) in ***Rumingo and Others v Van Wyk* 1997 NR 102 at 105D – E** stated the following on the issue of a question of law:

‘The test in appeals based on a question of law, in which there has been an error of fact was expressed by the South African Appellate Division in *Secretary for Inland Revenue v Guestyn Forsyth & Joubert* 1971 (3) SA 567 (A) at 573 as being that the appellant must show that the Court’s conclusion ‘could not reasonably have been reached’.’

[37] The *Rumingo* principle was further developed in the matter of ***Janse van Rensburg v Wilderness Air Namibia(PTY) Ltd***²² by the Supreme Court in the following way in paragraphs 43-47:

‘[43] I now turn to the language of s 89(1)(a). First and foremost, it is clear that by limiting the Labour Court’s appellate jurisdiction to ‘a question of law alone’, the provision reserves the determination of questions of fact for the arbitration process. A question such as ‘did Mr Janse van Rensburg enter Runway 11 without visually checking it was clear’ is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record 21 and may not be the subject of an appeal to the Labour Court.

[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperiled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed, and it echoes the approach adopted by appellate courts in many different jurisdictions.

²²2016 (2) NR 554 (SC)

[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.'

[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)(a) and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1)(a) as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognized to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.'

Substantial and Procedural Fairness

[38] Labour relations in Namibia are governed by the Labour Act.²³ In dealing with dismissal, specifically unfair dismissals, the Labour Act pronounces itself in Section 33 of the said Act, which reads as follows:

'33.

- (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.
- (2) It is unfair to dismiss an employee because the employee - . . .
- (4) In any proceedings concerning a dismissal -
 - (a) if the employee establishes the existence of the dismissal;
 - (b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.

[39] Section 33(4)(a) and (b) of the Act provides that once an employee establishes that he/she has been dismissed, it is presumed in any proceedings relating to a dismissal that the dismissal is unfair unless the employer proves the contrary. The onus thus rests on an employer to justify a dismissal both procedurally and substantively. It is thus clear that it is a requirement that before an employer dismisses an employee the employer must follow a fair procedure.

[40] In ***Cenored v Ikanga***²⁴ Ueitele J at para 16 stated the following in respect to procedural fairness -

'[16] Basically, the rules of natural justice require employers to act in a semi judicial manner before imposing a disciplinary penalty on their employees. A fair procedure is meant to

²³ Act No. 11 of 2007

²⁴ (LCA 13/2013) [2014] NALCMD 18 (30 April 2014).

discourage arbitrary and spur of the moment action against employees. The rules of natural justice require no more than that domestic tribunal must be conducted in accordance with common sense precepts of fairness. I accept that courts must not expect or require an employer to handle a disciplinary hearing according to the standards of a court of law, but the employer must meet certain minimum requirements if the hearing is to qualify as being procedurally fair. See in this regard the case of *Management Science for Health v Bridget Pemperai Kandungure*²⁵ where Parker, AJ said at para [5];

[41] The learned judge proceeded and said at paragraph 5 of that judgment that the minimum requirements are these:

“(a) The employer must give to the employee in advance of the hearing a concise charge or charges to enable 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.” ’

Audi alteram partem Rule

[42] The main issue in this matter regarding procedural fairness is the fact that the disciplinary proceedings took place in the absence of the first respondent.

[43] In para 12 and 13 of the ***Namibia Bureau De Change*** judgment, Ueitele J continues to say:

‘[12] The flexibility of the principles of natural justice was articulated as follows by our Supreme Court in the matter of *Chairperson of the Immigration Selection Board v Frank and Another*²⁶ where Strydom, CJ said:

²⁵ An unreported judgment of the Labour Court of Namibia (LCA 8/2012) [2012] NALCMD 6 delivered on 15 November 2012.

²⁶ 2001 NR 107 (SC) at 174.

“This rule (i.e. *audi alteram partem* rule) embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion... In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act. Consequently the Board need not in each instance give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.”

[13] Baxter²⁷ further argued that a fair hearing need not necessarily meet all the formal standard proceedings adopted by courts of law but any individual who will be affected by a decision or action must be afforded a fair opportunity to present his or her case. In the South African case of *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*²⁸ Colman, J said:

“It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretense of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly *he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.*” ’ (Italicized and underlined for emphasis).

Application of the Law

²⁷ *Supra* (footnote no. 3).

²⁸ 1980 (3) SA 476 (T).

Procedural fairness:

[44] In considering procedural fairness, it is evident that the right to a 'pre-dismissal' hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness²⁹.

[45] In the matter *in casu*, the appellant offered the first respondent the chance to defend himself against the allegations of misconduct which led to his dismissal. The employee did not take the opportunity. The crucial question is whether his absence from the hearing was, in the circumstances of this case, justified; or, differently put, whether fairness to both parties applied.

[46] The first respondent took issue with the fact that no transport was provided to him to attend the disciplinary hearing. From the record of the proceedings it would appear that prior to the initial date set for the disciplinary hearing, i.e. 5 June 2014, the first respondent requested transport, which was provided to him but as he arrived late the proceedings were postponed.

[47] On the next date, 17th of June 2014, the first respondent did not request transport and none was provided. The first respondent was duly informed of this fact³⁰ and due to his absence at the hearing the hearing was conducted in his absence. The representative of the first respondent was present at the hearing but elected not to sit in at the hearing.

[48] The first respondent appealed the decision reached during the disciplinary hearing and he was duly notified of the date of the appeal hearing, which was

²⁹(*Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & Others* (1991) 12 ILJ 806 (LAC) at 813C-D).

³⁰Page 16 of the record.

scheduled for 24th of June 2014. Yet again the first respondent did not attend the hearing and the appeal proceedings were finalized in his absence.

[49] It is important to note that in respect of both the notice of the disciplinary hearing and that of the appeal hearing, it specifically noted the following:

'Should you not be present for the inquiry at the above time, date and venue, it will be assumed that you do not wish to exercise your right to be heard and the inquiry will take place in your absence and you will be notified of the outcome in writing.'

[50] From the record of the arbitration proceedings, it appears to be common cause that the first respondent received all the relevant notices,³¹ although he states that he did not understand the contents and for some odd reason did not ask anybody to it explain it to him. This included his duly appointed representative. In spite of the knowledge that he received documentation regarding his disciplinary hearing and the pending enquiry, the first respondent made no enquiries in this regard and took no positive steps to ensure his attendance at the respective hearings.

[51] The first respondent conceded that he never requested transport to attend the hearings nor was he ever promised that transport will be made available to him³² and that he just assumed that it will be done. However, when the transport did not materialize the first respondent did not bring this to the attention of anybody at the company or to his representative. Even after the date of the appeal hearing the first respondent just stayed at home taking no steps to find out what the outcome thereof was, until he was notified of his dismissal³³.

[52] The first respondent also conceded that he had no absolute right to transport to be supplied by the company. This was not an instance where he requested transport

³¹Page 1071 of the record.

³² Transcribed record page 1074-1075

³³Transcribed record page 1068

and the company refused to assist. The first respondent did nothing pro-actively to ensure that he attend the hearings and have the opportunity to present his case.

[53] From the record it appears that the first respondent did not make efforts to enquire as he apparently decided in his own mind that the die was cast. This is clear from the following exchange during the arbitration hearing³⁴:

'REPRESENTATIVE FOR THE RESPONDENT: Okay. So Mr Dausab you never asked to find out what and when your disciplinary hearing will be. You never asked to find out what and when your continuation of the disciplinary hearing will be. You never asked what and when your disciplinary Appeal will be held yet you claim you were never given a chance to state you side of the story. Is that correct?

INTERPRETER: (Not translated)

THE APPLICANT: (Not translated)

INTERPRETER: (Not translated)

THE APPLICANT: (Not translated)

INTERPRETER³⁵: I did not ask because from the very beginning everything was not procedural from the side of the mine. And that's what broke my mood even to try and ask all this, about all the documents.

At line 17:

INTERPRETER: I will say from the very beginning it was a (sic) unfair dismissal.

REPRESENTATIVE OF THE RESPONDENT: No, you said procedures were not followed. What are the procedures that were not followed?

INTERPRETER: (Not translated)

THE APPLICANT: (Not translated)

INTERPRETER: Generally speaking it's logic. Even if someone commits any crime he has to be trialed (sic) in order for him to be

³⁴ Transcribed record page 1047-1048

³⁵ Appears to be the applicant as interpreted.

convicted. No, in this case I was not even brought before any hearing, be it disciplinary hearing whatever but then I was suspended.'

[54] The first respondent also understood the consequences of his failure to attend³⁶.

REPRESENTATIVE FOR THE RESPONDENT: And I would presume that you did not know if you decided not to go to a hearing that you give up your rights to defend yourself?

INTERPRETER: (Not translated)

THE APPLICANT: (Not translated)

REPRESENTATIVE FOR THE RESPONDENT: Mr Dausab only the questions. You only answer questions.

INTERPRETER: Yes I knew that it will be negative on my part or against me if I did not attend any hearings but it is only that there was transport provided and because of this transport not provided from the side of the mine that is why I did not attend the hearings.

[55] The first respondent cannot shirk all the responsibility to attend his hearings and wholly lay the responsibility at the door of the company, if he does not even take the trouble of requesting transport from the company. The first respondent did so at his own peril. This is clearly one of those instances where the employer was able to proceed in the absence of the employee. In light of the record of proceedings and the foregoing discussion I am satisfied that the basic requirements of procedural fairness were complied with.

Substantive fairness:

[56] Substantive fairness means that a fair and valid reason for the dismissal must exist. The issue of substantive fairness involves issues of validity, i.e. whether there was

³⁶Transcribed record page 1073.

sufficient evidence placed before court and the issue of fairness, i.e. whether the sanctions was appropriate in the circumstances³⁷.

[57] Appellant argued that the dismissal of the first respondent was substantively fair. It is thus required of this court to determine as question of law whether on the material placed before the arbitrator during the arbitration proceedings, if there was no evidence which could reasonably have supported such findings and/or whether on a proper evaluation the evidence placed before the arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings.

[58] Appellant in its grounds of appeal referred to a number of misdirections or errors in law³⁸. Having regard to the arbitration ruling and the arbitrator's analyses of the evidence, I am in agreement that the Arbitrator misdirected herself as to the assessment of the facts. It is common cause that a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented. I will briefly discuss a few of these misdirections.

[59] The Arbitrator made a broad finding that "it is a commonly known fact that all employees working for mines are provided with transport as the mining areas is situated at most five to ten kilometers out of town."The Arbitrator further found the evidence that the first respondent had to request transport is highly unlikely as all the employees that are subjected to disciplinary hearings are provided with transport. This conclusion that the arbitrator reached is not substantiated in evidence or fact.

[60] The Arbitrator found that by virtue of the fact that the impugned medical certificates was on an original pro forma displaying the logo of the hospital and a hospital date stamp, the said certificate could not have been fraudulently obtained. This is in contradiction to the evidence of both Dr Shiweda and Dr Muza that there were a number of fraudulent medical certificates in circulation.The fact that Dr Shiweda stated that there are no Dr Mendoza or Dr Fernando employed by the Katutura Intermediate

³⁷Namibia Breweries v HoaësNLLP 2002 (2) NLC.

³⁸ Notice of Appeal, page 7 – 16.

Hospital just goes to confirm what Dr Shiweda stated regarding the fraudulent medical certificates. Dr Shiweda confirmed that the problem regarding the fraudulent medical certificates bearing the logo of the hospital were under investigation.

[61] In her findings the arbitrator for some inexplicable reason completely disregarded the evidence of Dr Shiweda that no Dr Mendoza and Dr Fernando were employed by Katutura Intermediate Hospital. This is in spite of the fact Dr Shiweda has been at the said hospital since 1990 and was in charge of scheduling the shifts of all medical officers at the hospital. Instead the Arbitrator elected to accept the evidence of Dr Muza who stated that he does not necessarily know all the doctors at the hospital and there might be a Dr Mendoza or Dr Fernando. He however also added that he knew the majority of the medical officers and the chances are slim that there are such doctors on staff.

[62] The Arbitrator went so far as to find that Dr Shiweda lied under oath regarding the qualifications on a medical certificate issued by Dr Muza. The evidence of Dr Shiweda was that the MB MD qualification does not exist and stated that the correct qualification is MBChB. Arbitrator referred in her findings to a medical certificate issued by Dr Muza, that had the same qualifications (MBChB) written on it and therefore found that Dr Shiweda must be lying. The court wants to believe that the Arbitrator misunderstood this evidence of Dr Shiweda, in spite of her clarifying same on more than one instance, because the Arbitrator made a finding totally opposite to the actual evidence of Dr Shiweda. Arbitrator also lost sight of the fact that it was the evidence of Dr Shiweda and Dr Muza that he did not issue the said medical certificate and that the said medical certificate was one of many fake/fraudulent medical certificates with Dr Muza's name on it that were in circulation. The unfortunate result is that because of the Arbitrator misconstrued the facts; she drew a very negative inference of the evidence of Dr Shiweda.

[63] The Arbitrator concluded that first respondent was singled out for institution of disciplinary proceeding as his name did not appear on the list of employees identified

for possible disciplinary proceedings. This is in spite of the fact that the evidence before the arbitrator was that the whole mine was under investigation and it was further explained in detail as to why investigation was launched in respect of the first respondent. In the very next sentence of her findings the Arbitrator concluded, although the witness testified that the investigation was done in respect of all the employees the list only shows that the bargaining unit was targeted. This supposition was put during cross-examination to the witness, Mr Brand³⁹, and was accepted as a proven fact by the Arbitrator. The finding of the Arbitrator is not based on evidence placed before the Arbitrator.

[64] The Arbitrator summarily found that the report by PWC was 'null and void' due to a disclaimer limiting the use of the report to the appellant and or its appointed legal representative. This was without any reasoning on the part of the Arbitrator as to why same should be rejected or why the evidence of Mr. Jordaan in this regard should be disregarded. The Arbitrator thus misdirected herself in finding that the appellant who commissioned the report was unable to present it in evidence.

Conclusion:

[65] To reach a reasonable decision in a matter of this nature it is indispensable for the arbitrator to take into account all relevant factors she is bound to consider resulting in a decision that is reasonable and logical. From this court's observation the arbitrator has unreasonably failed to perform her mandate in this regard and thereby have prevented the appellant from having its case fully and fairly determined.

[65] There was no evidence which could reasonably have supported the Arbitrator's findings that the dismissal was substantively unfair in light of the evidence presented to her.

³⁹ Transcribed record at page 470.

[66] This court must therefore conclude that the finding of the arbitrator was indeed as such that no reasonable arbitrator could have made such findings. For these reasons, I make the following order:

1. The appeal is upheld.
2. The arbitration award under Case number CRSW-135–14, delivered on 13 October 2014, is wholly set aside.
3. There is no order in respect of costs.

H PRINSLOO

APPEARANCES:

FOR THE APPLICANT:

INSTRUCTED BY:

Adv. JP Jones

KoplingerBoltman

FOR THE FIRST RESPONDENT:

Of:

Ms Nambinga

AngulaCo Inc.