REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 9/2017

In the matter between:

NAMIBIA BREWERIES LIMITED **APPELLANT**

and

KAJONAA MUJORO **RESPONDENT**

Neutral citation: *Namibia Breweries Limited v Mujoro* (LCA 9/2017) [2018] NALCMD 1 (31 January 2018)

Coram: ANGULA DJP
Heard: **28 July 2017**
Delivered: **31 January 2018**

Flynote: Labour Law – Labour Appeal – Appellant appealing against the arbitrator's award – The appellant contended that the arbitrator erred in law in a number of instances and in finding that the respondent's dismissal was procedurally fair but substantively unfair; appellant contending that the respondent had been dishonest, untruthful by proffering two contradictory explanations; that such untruthfulness negatively affected the trust relationship between the parties; and therefor the arbitrator erred by ordering the appellant to reinstate the respondent to his previous position.

Summary: The appellant initially instituted disciplinary proceedings against the respondent in which the respondent was charged with two counts: dishonesty and unauthorized consumption of meat – At the internal disciplinary hearing the respondent was convicted of both charges – He lodged an internal appeal at the end of which the conviction for unauthorized consumption of meat was set aside but the conviction for dishonesty was confirmed – He was dismissed.

The respondent then filed a complaint with the Office of Labour Commissioner claiming unfair dismissal. At the end of the arbitration proceedings, the arbitrator found that the charge of dishonesty had not been proved and therefore the dismissal had been substantively unfair and ordered that the respondent be re-instated and be compensated for his loss of income.

This appeal is against the arbitrator's whole award.

ORDER

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1. The appellant is ordered to pay the amounts of N$19 500 and N$49 500 respectively to the respondent as compensation for loss of income.

2. The appeal is dismissed.

3. There is no order as to costs.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an appeal against the arbitrator's award who found that the respondent had been substantively unfairly dismissed and ordered that the appellant reinstates the respondent and compensate him in respect of his loss of income.

Brief background

[2] The respondent had been employed by the appellant for over 10 years as a merchandiser until 16 July 2015. He was charged with two counts. In respect of the first charge it was alleged that he acted dishonestly; and in respect of the second charge it was alleged that he had consumed the appellant's client's meat which was kept in the client's cooler, without the said client's permission. He was then subjected to an internal disciplinary hearing at the end of which he was found guilty of both charges. He lodged an internal appeal. On appeal the conviction of consumption of the meat without permission was set aside, however the conviction for dishonesty was upheld. Consequently, the respondent's services were terminated and he was accordingly dismissed.

[3] The respondent then filed a complaint of unfair dismissal with the Office of the Labour Commissioner. In his complaint the respondent prayed that that the appellant reinstate him with full benefits and furthermore that he be compensated for the financial loss he had suffered.

The arbitration proceedings

[4] The only issue for determination by the arbitrator, was whether the respondent was dismissed for a fair and valid reason regarding the charge of dishonesty and whether a fair procedure had been followed.

[5] At the arbitration hearing the respondent testified on his own behalf. Two witnesses testified on behalf of the appellant.

[6] The evidence of the respondent can be briefly summarised as follows: On 2 July 2015, he was working at Woermann & Brock shop at Wanaheda. His duties as a

merchandiser entailed packing the appellant's products into fridges of clients such as Woermann & Brock. On the day in question, he packed those products which were available on the floor. After he finished, he wanted to pack Aqua Splash bottled water but could not find it. The bottled water is produced by Namdairy, a sister company of the appellant. The water was previously merchandised by a Namdairy merchandiser but had shortly before the incident been taken over by the appellant and had to be merchandised by the respondent. He then asked a merchandiser from Namdairy where he could find the water. The merchandiser informed him that he used to store the water in the cooler at the back of shop. On the 7th of July 2015, he went back to Woermann & Brock shop again. Based on what he was told by the Namdairy merchandiser, he decided to go to ascertain whether the water was packed in the cooler. He then entered the cooler but could not see the water. He went out because it was very cold in the cooler. He went inside the cooler for the second time and moved some creates inside the cooler but could not find any water. He went in again for the third time and also moved other creates but did not find any water. The respondent then proceeded to pack other merchandise outside the cooler around the shop.

[7] He testified that he did not see the meat forming the subject of the charge nor did he eat any meat in the cooler. He denied that he would have said that he had entered the cooler to drink water as stated in his summary of dispute document.

[8] The first witness on behalf of the appellant was Mr Raphael Henry Tjombe. He is an area sales manager for the appellant. Mr Tjombe testified that on the 7th of July 2017, he was informed by the second witness for the appellant, Ms Valentyn that meat which was kept in the cooler for resale purposes went missing. They then viewed the video footage showing what transpired when the respondent entered the cooler. He testified that he found it a bit suspicious why the respondent did not switch on the lights in the cooler and why he moved to the right hand corner of the cooler, which was the same side the meat that went missing was stored.

[9] Mr Tjombe however conceded that the video footage did not have image of the respondent eating the meat or of the respondent taking the meat with him out of the cooler. He further conceded that it was possible that the other two employees of

Woermann & Brock, who also entered the cooler could have taken the meat. However due to the fact that the respondent was not authorised to enter the cooler, Mr Tjombe was of the opinion that respondent's actions were suspicious and that he was dishonest as he had two contradictory explanations why he had entered the cooler.

[10] The second witness for the appellant was Ms Chantal Valentyn. She is the shop manager of Woermann & Brock shop at Wanaheda. She testified that only perishable goods are stored in the cooler and only the perishable shop assistant and the two sales ladies have access and are authorised to enter the cooler. The respondent therefor had no reason to go into the cooler as his products that he worked with were stored in what is referred to as, 'the bulk area' in the shop. Ms Valentyn further testified that the respondent's behaviour was suspicious; and that had no right to enter the cooler and the fact that he kept going to the right hand side of the cooler where the meat was stored. She testified further that the other two employees who also entered the cooler on that day were not authorised to enter the cooler and have likewise, in the meantime, been dismissed from their employment with Woermann & Brock. Finally she mentioned that she would not trust the respondent anymore especially anywhere in the shop under her management.

The arbitrator's findings

[11] The arbitrator's main findings were that the respondent was busy executing his duties; that he was falsely accused 'for eating the meat'. The arbitrator further found that there was no proof that the applicant had stolen or had eaten the meat. Furthermore, that the main charge of unauthorised consumption of meat was changed to dishonesty. It was for those reason that the arbitrator concluded that the dismissal was procedurally fair but substantively unfair.

Grounds of appeal

[12] The first ground of appeal was that the arbitrator erred in law in failing, on the available evidence, to make an adverse finding as to the respondent's credibility, alternatively erred in accepting his version. The charge of dishonesty, in terms of

which the respondent was dismissed, was based on an allegation that the respondent gave an explanation that he went in the cooler to look for Aqua Splash water. The charge sheet reads as follows:

'Dishonesty, alternative Derivative Misconduct

"In that you, on 7 July 2015, acted dishonestly/deceptively made misrepresentation, thereby breaching the trust relationship between yourself and the Company as well as the client, when meat belonging to the client (Woermann & Brock, Wanaheda) was discovered to have been eaten after you were in the Namibia Dairies' cooler but you said you were looking for Aqua Splash products in it." '

[13] Before dealing with the ground of appeal above, it may be helpful to indicate to the reader what the misconduct of dishonesty entails or means in the employment law environment. The misconduct of dishonesty was explained by Ueitele J in the matter of *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa*[1], quoting with approval what was stated by the South African Labour Court of Appeal as follows:

'[33] In the case of *Toyota SA Motors (Pty) Ltd v Radebe & Other*[2] the South African Labour Court of Appeal said that dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. It is now well accepted that in employment law, a premium is placed on honesty. It thus follows that, where an employee ruptures the trust reposed in, or expected of, him or her, such rupture may result in the termination of his/her contract of employment. This Court, in the case of *Foodcon (Pty) Ltd v Schwartz*[3] said:

> "In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely on the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee." '

[1] (LCA 62/2013) [2017] NALCMD *27* (14 August 2017).
[2] (2000) 21 ILJ 340 (LAC) at 345F-H.
[3] An unreported judgment of Labour Court, Case No. LCA 23/98 [1999] NAHC 14 (delivered on 29 September 1999).

[14] Against the background of those legal principles and definition as to what dishonesty entails, I now proceed to consider the grounds of appeal against the evidence on record.

[15] It is significant to note that in the charge quoted above, there is no allegation that the respondent ate the meat. It is common cause that the video image on which the appellant heavily relied on did not show the image of the respondent eating, or carrying the meat out of the cooler. This much was conceded by the appellant's witnesses. It is further common cause that two of the Woermann & Brock employees who were not authorized to enter the cooler had entered the cooler on the same day and that they had been dismissed. No video image of the said two employees while they were in the cooler was placed before the arbitrator to show what transpired while they were inside the cooler. It is fair to assume that their entrance and presence in the cooler was also video recorded like the respondent. Most importantly no reason was given by the shop manager, Ms Valentyn, when she testified, why they had been dismissed. As a matter of fairness to the respondent, the appellant should have placed such evidence before the arbitrator.

[16] Furthermore, the appellant did not contend another version except for its two witnesses to allege that the respondent acted suspiciously. Thus there was no other version before the arbitrator which he could have considered. In my view, the mere allegation of suspicion falls far short of proving on the balance of probabilities that the respondent was actually guilty of the misconduct of dishonesty. There was no evidence at all that linked the respondent to the misconduct of dishonesty[4]. In my view, it did not amount to dishonesty for the respondent to have stated that he entered the cooler looking for Aqua Splash water. It would have been a different thing altogether if he gave such explanation and the evidence proved that he went into the cooler and did something else, like eating meat. Such a scenario would perhaps have created a basis for the arbitrator to make an adverse credibility finding against the respondent. The ground is dismissed for lack of merit.

[17] A further ground of appeal raised on behalf of the appellant is that the conflicting versions given by the respondent why he entered the cooler e.g. that he

[4] *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee* (LCA 30/2015) [2016] NALCMD 45 (6 December 2016)

was looking for the Aqua Splash water which he merchandised and that he went in the cooler to drink water, did not warrant the conclusion reached by the arbitrator that the respondent was busy executing his duties. It was submitted on behalf the respondent that the respondent was not charged with the misconduct of unauthorized entry into the cooler. In my view, even if it were to be accepted that the respondent entered the cooler without permission, I cannot conceive how such an act *per se* without accompanying deceptive or misrepresentation conduct can be said to constitute dishonest conduct. I have earlier pointed out that the appellant did not offer evidence as to what the respondent went to do in the cooler if he did not enter to execute his duties. The appellant bore the onus. It is common cause that the respondent did not enter the cooler to eat the meat as it was earlier alleged by the appellant in the other charge. He had been exonerated from that charge.

[18] As to the alleged conflicting versions given by the respondent why he entered the cooler, it has long been held that the fact that a witness has given conflicting versions does not *per se* mean that such witness is lying. It only means that one of those versions is correct and the other is incorrect. Furthermore that not every contradiction made by the witness affect his credibility. In each case the trier of facts has to make an evaluation of the evidence; taking into account such matters as the nature of the contradiction, their number and importance and their bearing on other part of the witness evidence[5].

[19] In the instant matter, it is clear that that the correct version is that the respondent did not enter the cooler with the intention to eat the meat. His explanation was that he was looking for Aqua Splash water. It is common cause that, Aqua Splash waster is the product of the appellant. As to the alleged suspicion why he went into the cooler in and out cannot be said not to be possible, probable true. It is fair to say it is common knowledge that such coolers are usually unbearably cold. As will become clear later, the so-called conflicting versions appear to be an honest mistake which slipped in the statement in respect of summary of dispute. For those reasons this ground of appeal is likewise dismissed.

[5] *S v Oosthuizen* 1982 (3) SA 571 at 576 G-H.

[20] The next ground of appeal is that the arbitrator erred in finding that the respondent was only falsely accused of eating the meat and the main charge was later amended to that of dishonesty. In this connection, it was argued on behalf of the appellant that the charge sheet clearly shows that the respondent was charged with dishonesty as a main charge from the outset. Counsel for the respondent on the other hand argued that, the arbitrator's conclusion in this regard was not unreasonable because the alleged eating of meat was not proven and therefore the charge of dishonesty should have fallen away. I agree that the respondent was from the inception, charged with dishonesty and that the arbitrator was incorrect in stating that the charge was amended to dishonesty. That being said it appears to me that there is merit in the argument on behalf of the respondent. As I tried to demonstrate earlier in this judgment, the charge of dishonesty was inextricably linked and was dependent on the charge of eating the meat being proven. The charge of dishonesty was not a stand-alone or independent from the charge of eating the meat. For instance the charge did not allege other acts of misconduct, such as entering the cooler without permission or entering the cooler to commit a misconduct unknown to the appellant. It would appear to me that even though the criticism is valid, namely that the charge was not amended, it is neutral, and it does not tilt the scale in favour of the appellant.

[21] A further ground of appeal is that the arbitrator erred in law and did not exercise his discretion judicially when he ordered that the appellant reinstate the respondent in his previous position. In this connection, it was submitted on behalf of the appellant that since the respondent gave two conflicting versions or explanations, namely that he went into the cooler to look for the water which he merchandised and that he went in the cooler to drink water, it must follow that one version is untruthful. It follows therefore, so the argument went, that his conduct proved deceptive and dishonest; therefore the trust relationship which existed between the appellant and the respondent had been damaged. Accordingly the arbitrator erred in ordering re-instatement of the respondent.

[22] In support of the above argument the court was referred to a number of cases where it had been found that the employee had been unfairly dismissed based on the allegation of dishonesty but the courts declined to order re-instatement[6].

[23] Firstly, the argument is opportunistic because it loses sight of the fact that the respondent was not charged nor was he convicted of dishonesty because he gave two contradictory explanations as to why he went in the cooler. The charge of dishonesty was alleged, that he was dishonest because when it was discovered that the meat belonging to Woermann & Brock have been eaten after the respondent had been in the cooler he gave an explanation that he went into the cooler looking for Aqua Splash products. At the time the charge was formulated the statement of the summary of dispute where it appears that the respondent would have said that he went into the cooler to drink water, was not in existence.

[24] Secondly, I consider it to be rather simple to argue that because the witness made two contradictory statements he is dishonest. In such a situation it has been held that the trier of fact has to consider whether it is a matter of deliberate falsehood or a case of an honest mistake. Where a witness has been shown to have been deliberately lying on one point, the trier of fact may conclude that his evidence on another point cannot safely be relied upon. On the other hand where a witness has been mistaken in other parts of his evidence it is irrelevant because the fact that his evidence in regard to one point is honestly mistaken cannot support an inference that his evidence on another part is a deliberate fabrication[7].

[25] Keeping the above principles in mind, I now proceed to consider the evidence around the two versions. The respondent version is that he went into the cooler looking for the Aqua Splash water so that he could pack it in the fridges. The respondent version had throughout been that he went in the cooler to look for Aqua Splash water because he was told by the Namdairy merchandiser that the latter used to store in the cooler when he was merchandising that product.

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[6] *SPCA v Terblanche* NLLP 1998 (1) 148 NCL at 156; *Shiimi* NLLP 2002 (2) NLC and *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka* an unreported judgment of Parker J delivered on 3 July 2008 [par17].
[7] *S v Oosthuizen* (supra) p577 at B-C.

[26] During cross examination the respondent was questioned about the statement contained in his summary of dispute (attached to Form LC 5) namely that he went in the cooler to drink water. The cross-examination is at pages 32 to 34 of the record and it is worth reproducing because, in my view, it gives the reader an insight into the respondent's position *vis-à-vis* the said statement:

> 'REPRESENTATIVE FOR THE RESPONDENT: Okay. Can I also just clarify something initially in your statement you said that you were looking for Fruittree to merchandise. Ag for Aqua Splash to merchandise.
> THE APPLICANT: Yes
> REPRESENTATIVE FOR THE RESPONDENT: And then on your notice of referral you said you went to drink water which was kept in the cooler.
> THE APPLICANT: No I did not drink water.
> REPRESENTATIVE FOR THE RESPONDENT: You did not go to drink water?
> THE APPLICANT: No that was not water.
> REPRESENTATIVE FOR THE RESPONDENT: So your notice of referral, would I have been able to prepare myself according to your notice of referral if I just read that one before coming here?
> THE APPLICANT: Maybe I did not understand you. You said you drink the water? Where is it?
> REPRESENTATIVE FOR THE RESPONDENT: Yes if you just take this, take a look at the second page.
> THE APPLICANT: Look where on the second page.
> REPRESENTATIVE FOR THE RESPONDENT: That is on the second page. That was attached to the notice of referral that we received from the office of the labour commissioner.
> CHAIRPERSON: Excuse?
> REPRESENTATIVE FOR THE RESPONDENT: So would I have been able to prepare myself to know what to expect if I don't know if it is drinking water or if it is finding water to merchandise?
> CHAIRPERSON: Tell you what?
> REPRESENTATIVE FOR THE RESPONDENT: Would I have been able to prepare myself if I did not know if it is for drinking water or for water to merchandise?
> THE APPLICANT: This is water to merchandise what I am saying in my statement.
> REPRESENTATIVE FOR THE RESPONDENT: No what is on the back page then? Did you see the back page?
> THE APPLICANT: I never say that I drink the water.

REPRESENTATIVE FOR THE RESPONDENT: Are you sure you never said that Sir?
THE APPLICANT: Hmm.
REPRESENTATIVE FOR THE RESPONDENT: Are you sure?
THE APPLICANT: I never said not (indistinct).'

[27] The record further shows after cross-examination of the respondent, the representative for the appellant handed into records a number of documents as exhibits. One those documents was the respondent's initial statement he made when he was charged internally. It is hereby quoted without changes. It reads:

'Statement

On 7 July 2015 report on duty is usually and scheduled start my routing from WB Goreagab to WB Wanaheda from 10 am, I start merchandising with fruittree and then with Aqua Splash which I couldn't find stock at the floor and then went to look at back stock which I was told by Namdairy merchandiser that he used to stock in the cooler, that have come to my mind to look in the cooler of which I could not find any stock, I return in the store to look for the ND merchandiser I couldn't find and went back to the cooler moved create to see maybe the water is stored behind but to no avail, due to coldness, I went out for about 3 minutes and return to remove other crate unfortunately, I could not find any water than I left to WB friendly next to services station.

On Wednesday 08, 2015 before we left NBL premises our manger Rafael call both of us my supervisor Ernst and me at his office. He informed us that I or two WB employees did eat meat that was in the cooler due to camera footage that shows my access in the cooler, than I informed him that never saw meat, I only went to look for the water in the cooler. That all I can state for confirmation with ND merchandiser his contact number n 081 733 3036.'

[28] The respondent's summary of dispute which was attached to his Complaint Form LC 5 reads:

'Summary of Dispute

I, Kajonaa Mujoro, was employed by Namibia Breweries Limited from February 2004 as merchandiser, a dismissal came as surprise to me. On 7 July 2015 I worked at

Wanaheda Woermann Brock and went to drink water which was kept in the cooler. Unfortunately in that cooler there were a piece of meat hidden, which I did not seen. Later it turned that I'm the one who hind the meat and on 16 July 2015, hearing was held and I was found guilty and I was dismissed.

Settlement relief

I want the company to reinstate me with fully benefits that I enjoin before me dismissal and all financial losses.'

[29] If one has regard to the respondent's initial statement, his evidence in chief, read together with his response during cross examination, particularly the reason why he entered the cooler, it is clear that he has been consistent in his version that he went in the cooler to look for the Aqua Splash water. It is not apparent from the record who prepared the statements for the respondent but what is clear is that the respondent is not proficient in the English language. Given his poor command of English (as it appears from the record) consisting of short and incoherent sentences, it is unlikely that the statements were prepared by the respondent himself. It is more likely that he was assisted by someone to write down the statements. In this connection it has been held that it is not proper to draw an adverse conclusion to the credibility of a party merely because there is a discrepancy between his evidence and the pleadings which has been formulated not by the party himself, but by his legal advisor[8].

[30] As it appears from the record of cross examination of the respondent, he was not aware that the summary of dispute stated that he went in the cooler to drink water. He denied that he said that he went in the cooler to drink water which is consistent with the rest of his evidence. It would appear to me that an honest mistake slipped into the summary of dispute document when it was prepared. It is highly improbable that the respondent would have changed his version while knowing well he had already made a written statement stating that he went into the cooler to look for water. Furthermore, that such statement was in possession of the appellant and that must have been part of his evidence when he testified at the internal disciplinary hearing. In the context of the totality of evidence the statement

[8] *Seedat v Turcker's Shoe Co.* 1952 (3) SA 513.

that he went in the cooler to drink water does not make sense. It is common cause that there was no water in the cooler. In my considered view, the statement does not prove a deliberate falsehood on the part of the respondent. The statement appear to be as a result of an honest and innocent mistake.

[31] In the light of the conclusion, to which I have arrived, it follows in my view that it would stretch matters too far for the appellant to contend that the trust relationship has been broken. During the cross-examination the respondent was asked by the representative for the appellant whether he would be happy if he were to be reinstated given the charges preferred against him by the appellant. He answered in the affirmative. Given the fact that the appellant put the respondent through all this whole process from which he has been redeemed, and trust being a two way stream, I can see no reason why the appellant cannot embrace the respondent and resume their relationship. After all the result proves that it was the appellant who was all along wrongly accusing the respondent.

[32] For the foregoing reasons, I do not do agree that the arbitrator erred in ordering that the respondent be reinstated in his previous position. In the result this ground is similarly dismissed.

[33] The appellant's last ground of appeal is that the arbitrator erred in law in awarding the respondent N$26,000 for the period of July 2015 to October 2015 for being without work, in the amount of N$6 500. In this connection, it was pointed out that the respondent had already been paid for the month of July 2015. Counsel for the respondent conceded the point and agreed that the amount of N$26 000 be reduced to N$19 500. That being the case the amount of N$26 000 is hereby reduced to N$19 500 as compensation for loss of income payable to the respondent.

[34] Lastly, it was argued that the arbitrator erred in calculating the difference between the salary the respondent was earning prior to his dismissal and the salary at his new employment that is from October 2015 to October 2016. In this regard, it was pointed out that the appellant had already compensated the respondent for his October 2015 loss in the amount of N$6 500.

[35] The above calculation is hereby rectified. An amount of N$56 000 is hereby reduced by N$6 500 to N$49 500 payable as compensation for loss of income by the respondent.

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

1. The appellant is ordered to pay the amounts of N$19 500 and N$49 500 respectively to the respondent as compensation for loss of income.

2. The appeal is dismissed.

3. There is no order as to costs.

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H Angula

Deputy-Judge President

APPEARANCES

APPELLANT:	G DICKS Instructed by Engling, Stritter & Partners, Windhoek
RESPONDENT:	N N SHILONGO Of Sisa Namandje & Co. Inc., Windhoek