

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO. LCA 25/2017

In the matter between:

NAMIB POULTRY INDUSTRIES

APPELLANT

and

TOMAS HAKKO

RESPONDENT

Neutral Citation: *Namibia Poultry Industries v Hakko* (LCA 25/2017)
NALCMD 23 (6 September 2018)

CORAM : MASUKU J

Heard : 03 March 2018

Delivered : 06 September 2018

Flynote: Labour Law – appeal against an arbitral award – appellant claiming that the Arbitrator was wrong in her findings that dismissal of the respondent was substantively unfair – the charge sheet – should contain all the allegations against the employee and if some necessary allegations are not made in the charge sheet, they may not be considered even if the evidence shows they are applicable – because the charge sheet did not

contain allegations of racist remarks, it was procedurally unfair to dismiss the respondent on the basis of racism when the charge sheet never alleged his remarks were racist in nature.

Summary: The appellant, pursuant to internal disciplinary proceedings, dismissed the respondent. The latter reported a dispute with the Labour Commissioner. The arbitrator, after hearing the evidence presented by both parties, held that the dismissal of the respondent by the appellant was substantively unfair. Aggrieved by that finding, the appellant approached this court seeking an order setting aside the arbitrator's finding.

Held – that respondent had been charged for using foul and abusive language against his supervisor and that the appellant, during the internal disciplinary hearing relied on the allegation that the respondent had uttered a racist remark which was the basis for the dismissal.

Held further – that the charge sheet should contain all the necessary allegations against an employee for him or her to know the full case he or she has to meet.

Held - that it is improper and unfair for the employer to make certain allegations for the employee to meet in the disciplinary hearing only to later have regard to and rely on allegations that were not part of the charge sheet in dismissing the employee.

Held further – that in finding that the appellant had acted improperly, the court was not in any way, shape or form encouraging or turning a blind eye on the serious issue of racism. The fact that a person has uttered what is considered a racist remark should in no way serve to attenuate or negate his or her right to a fair hearing.

Held – that in the circumstances, the dismissal of the respondent was procedurally unfair and the appellant's appeal was dismissed.

ORDER

1. The Appellant's appeal is dismissed.
 2. There is no order as to costs.
 3. The award of the Arbitrator, dated 27 March 2017, is ordered to stand.
 4. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:

Introduction

[1] It may be paradoxical that certain words, when used in a certain context, may be colourless. However, when those very words, are used in a different context, they may assume colour that may be perceived as unpalatable and distasteful in the extreme.

[2] In the instant case, the respondent, Mr. Hakko, found himself in a hot soup with his employer, the appellant in this matter. Words commonly used in a family setting in Namibia, namely, 'Oupa' and 'Ouma', which ordinarily mean 'grandfather' and 'grandmother', respectively, are, from the appellant's appeal, at the centre of the current appeal.

[3] It would appear, although denied by the appellant, that the respondent's supervisor, a Mr Strauss, referred to the respondent during the course of their work, as 'Oupa', 'Ouma.' The use of these words in reference to the respondent, constituted a rock of offence and over which he stumbled. He perceived these words to suggest that he was 'gay'. In an *instanter* retaliation, he claims, he called his supervisor a 'Hotnot', which word was

found to have been distasteful and contrary to the appellant's disciplinary code, thus culminating in disciplinary proceedings against the respondent being initiated by his employer.

[4] After an internal disciplinary hearing, the respondent was found guilty and was dismissed. He did not take this dismissal in a supine or prostrate posture. He approached the Office of the Labour Commissioner, where he lodged a dispute of unfair dismissal. The matter was referred to an arbitrator, Ms. Nondumiso Mbidi, by the Labour Commissioner to arbitrate the proceedings between the parties.

[5] After hearing the parties, the arbitrator, in her wisdom, found that the respondent had not been fairly dismissed. She accordingly issued an award dated 24 March 2017, in terms of which she found and held that the respondent's dismissal was substantively unfair and she ordered the appellant to reinstate and to also pay him an amount of N\$ 9 497.36, the equivalent of four months' salary.

[6] Dissatisfied with this award, the appellant approached this court seeking an order setting aside the award, contending in the main that the arbitrator erred in reaching the decision that she did, particularly that the dismissal was substantively unfair. I need not, for the present moment, deal with the grounds advanced for the appeal in any detail.

Common cause issues

[7] It appears common cause that the respondent and Mr. Strauss were working together in what is known as the Rendering department of the appellant, and of which the latter was the former's supervisor. It is also common cause that the respondent did call Mr. Strauss a 'hotnot'.

[8] The questions that need an answer are whether (i) the arbitrator was justified in finding that the calling of the respondent 'Oupa Ouma' justified the respondent acting in an insubordinate manner; (ii) whether Mr. Strauss had

'dirty hands' such as to entitle the respondent to act towards him in an insubordinate manner and one with racial overtones; (iii) whether the defence of Mr. Strauss is an afterthought; (iv) whether the arbitrator acted in a reasonable manner in concluding that the testimony of a Mr. Biermann should be treated with circumspection and not accepted; and (v) whether the arbitrator was correct in finding that the appellant had acted improperly in that it did not subject Mr. Strauss to disciplinary proceedings as well for his utterances.

The arbitration proceedings

[9] In view of the fact that the issue of dismissal of the respondent was conceded, the arbitrator held, and correctly so, that the onus was on the appellant to show that the dismissal was substantively and procedurally fair. In this regard, the appellant called two witnesses to testify on its behalf. These were Mr. Heinze Strauss and Mr. Balthazer Biermann. The respondent testified in his defence and also called a former colleague of his Mr. Titus Shipalanga, as a further witness.

The evidence

[10] The evidence of Mr. Heinz Strauss was that he worked at the rendering plant of the respondent's premises. It was his evidence that he was the Production Supervisor at the said plant and was in authority over the respondent, who was employed there as a labourer. On the day in question, he further testified, he was driving a fork-lift and one of the items fell from it and he asked the respondent to pick it up.

[11] It was his evidence that he referred to the respondent as Oupa Thomas. Suddenly, and without any reason, the respondent and told him, 'Hotnot I have picked it up'. It was his evidence that the reference to him as a 'hotnot' by the respondent was hurtful and insulting and he accordingly went to report the matter to higher authorities, which culminated in disciplinary proceedings being initiated against the respondent.

[12] In cross-examination, it was put to Mr. Strauss that in requiring the respondent to pick up the item, he had referred to the respondent as 'Oupa Ouma', which the respondent found insulting, as it suggests that he has both the male and female organs of generation and that he was therefore 'gay'. Mr. Strauss vehemently denied using these words and insisted that he only referred to the respondent as Oupa and that this was used in order to distinguish the respondent from another employee, whose name was also Thomas. It was also his evidence that the words 'Oupa Ouma' make no sense in the Afrikaans language and he would not have used them altogether.

[13] Mr. Biermann also testified. His evidence was to the effect that he was Production Manager and the initiator of the disciplinary proceedings after Mr. Strauss had lodged a grievance against the respondent. It was his evidence that he was not present at the scene but upon receiving the grievance he set the disciplinary process in motion and in his evidence, confirmed the evidence that Mr. Strauss adduced, namely that he had been called 'Hotnot' by the respondent without any basis whatsoever and that the said utterances were viewed in a very serious light by the company as they were racist utterances.

[14] He went on to relate the evidence that was adduced by the respondent during the hearing, namely that the respondent called Mr. Strauss a 'hotnot' because the latter had called him 'Oupa Thomas'. It was his evidence that the word 'Oupa' was a word that is respectful to an elderly male and that there was no reason for the respondent to have uttered the 'racist' remark in the circumstances.

[15] In cross-examination of Mr. Biermann, it was put to him that the respondent's version was that he used the words 'hotnot' in reference to Mr. Strauss because the latter had called him 'Oupa-Ouma'. Mr. Biermann testified that such words do not exist in the Afrikaans language and they do not make sense. It was his evidence that he had never heard these being uttered before in that fashion.

[16] In further cross-examination, it was put to Mr. Biermann that the evidence he was adducing was hearsay for the reason that he was not present when the event in issue took place. He admitted this. It was also put to him that the respondent would testify that he had handed his letter of appeal to him but Mr. Biermann vehemently denied that he ever received a letter of appeal from the respondent after the dismissal.

[17] After the appellant closed its case, the respondent was called to testify. His evidence was that while on duty at the Rendering department, they were loading bags onto a truck, with Mr. Strauss operating the forklift. In the process, one of the bags fell off and Mr. Strauss told the respondent to pick it up and said, 'Ouma Oupa, pick up that bag.' It was his evidence that he was angry at being referred to in this fashion and he asked Mr. Strauss, 'Why are you calling me "oupa, ouma"? Then, you are a "hotnot". This exchange happened in the presence of two other workers.

[18] It was the respondent's evidence that this was not the first time that Mr. Strauss had referred to him in this fashion. He testified that Mr. Strauss and another employee called Robert used to call him like this and he warned them that he did not appreciate being referred to as oupa-ouma. Robert desisted from calling him as such but Mr. Strauss persisted.

[19] It was his evidence that he took exception to being called Oupa-Ouma because it connotes that one is gay. He insisted that Mr. Strauss did call him in that manner he considered offensive. He testified that he did not report the incident at the office because the office is manned by white people and that even if he reported the incident, he would not be assisted. In any event, he proceeded, Mr. Strauss had reported first and he, the respondent, would not have received any assistance from those in authority.

[20] It was the respondent's further evidence that he did not call any one as his witness during the hearing because he was afraid that his witness would be victimised for having given evidence against the company. He mentioned that Tate Khume was present during the disciplinary hearing as an interpreter.

According to the respondent, Mr. Titus Shipalanga was present when the incident occurred and that had he called the latter to testify, the latter would have been accused of siding with the respondent. In closing, the respondent insisted though that Mr. Strauss had called him 'Oupa, Ouma'.

[21] In cross-examination the respondent was bombarded with questions, mainly centred on the proposition that 'oupa-ouma' has no meaning in Afrikaans. He testified that he does not know such a word in Afrikaans or even his mother tongue, Oshiwambo and English. He insisted that he did hear the words uttered by Mr. Strauss though and denied that he had fabricated the evidence to that effect in order to justify his calling Mr. Strauss a 'hotnot'. When this was suggested, the respondent retorted angrily, 'Do you think I am mentally disturbed just to call him 'hotnot'? Do you think that?' The respondent insisted that he called Mr. Strauss 'hotnot' in retaliation to Mr. Strauss having called him 'oupa, ouma'.

[22] It was further put to the respondent that the use of the word 'hotnot' was a criminal offence and is racist in this country. The respondent testified that he did not know that. According to the respondent, the word meant someone who is poor and does not have to be of any specific colour to be called as such. He reiterated that he used the word in retaliation to someone who had insulted him without any authority or reason to have done so and that had Mr. Strauss not used the words complained of, he too, would not have uttered the word complained of.

[23] It was further put to the respondent that the recorder of the minutes of the disciplinary hearing had not recorded 'oupa ouma' as now alleged by the respondent. It was stated that the recorder of the minutes had only recorded 'Oupa'. The respondent's reaction was that he does not know what that person recorded because he spoke in his mother tongue and that it must have been the recorder of the minutes who deliberately did not record what he said properly and fully and decided to write what the respondent said selectively.

[24] Lastly, it was put to the respondent that Mr. Biermann denied having received the letter of appeal from the respondent. The respondent insisted that he had submitted the appeal to Mr. Biermann. It was his evidence that his representative had written the appeal and he read it and later personally handed it to Mr. Biermann. He admitted though that he had no proof that he had submitted the letter of appeal but insisted that he had delivered the letter to the said Mr. Biermann.

[25] When put to him that he did not follow up on his letter of appeal, the respondent testified that he did but when he went to the company premises Mr. Biermann chased him away. In re-examination the respondent stated that a Mr. Shitongeni employed by the appellant took the letter of appeal and said he would make a copy of same but never gave the respondent a copy hence he could not recall when it is that he handed the letter to Mr. Biermann.

[26] The last person to be called was Mr. Titus Shipalanga who testified that he was present when the altercation between the two men took place. I must say that the evidence of this witness was poorly recorded with a large portion of his evidence not being translated, which makes it difficult to follow exactly what he said or did not say. He did state though that Mr. Strauss did utter the words 'Oupa Ouma' in reference to the respondent.

[27] His version was that Mr. Strauss said, 'Kom Oupa Kom Ouma' to the respondent and that the latter used the word 'hotnot' and that they were arguing. He said he did not attend the disciplinary hearing because he received threats and was told that he would be regarded as someone who was guiding the respondent as to what he must say. In cross-examination, he testified that he could not point at any person who threatened him but that was informed by his colleagues that he should not testify on the respondent's behalf. It was his evidence that he did not testify because he was afraid that he would lose his employment.

The award

[28] After carefully considering the evidence adduced by the parties, the Arbitrator held that on the balance of probabilities, the respondent's version that Mr. Strauss called him 'Oupa' 'Ouma' was true as his reaction could not otherwise be justified. In this regard, she found that there must have been something that Mr. Strauss said that 'triggered (*sic*) the applicant to react in the manner he did, as no normal person will just be provoke (*sic*) by the oupa, which is commonly been used in our community.' She further found that the respondent's concession that he did call Mr. Strauss 'hotnot' indicated that he was a witness of truth and should, for that reason, be believed.

[29] Correspondingly, the Arbitrator did not believe the evidence adduced by Mr. Strauss, namely that he merely called the respondent 'Oupa' and the latter then reacted with the vitriol, I would suggest, he did against Mr. Strauss. In the premises, the Arbitrator concluded that Mr. Strauss' evidence was an afterthought and that he, as a supervisor, should have known that the use of the words he used to call the respondent could be regarded as offensive and could draw a bad reaction from the respondent.

[30] The Arbitrator also found that Mr. Biermann, the initiator of the proceedings against the respondent, was called in order to ensure that the respondent was found guilty, particularly considering his role during the disciplinary proceedings, namely to ensure the respondent was found guilty of the charges. What aggravated this finding, the Arbitrator further found, was that Mr. Biermann failed to provide the minutes of the disciplinary proceedings to confirm the evidence given during the disciplinary proceedings.

[31] The Arbitrator also drew an adverse inference from the appellant's failure to provide the minutes of the disciplinary hearing, reasoning that the appellant had something to hide by not disclosing same. In this regard, she held that the respondent's defence, which he pleaded, would have been proved or disproved by the minutes. That the minutes were not provided, she held, operated against the appellant.

[32] The Arbitrator also criticised the appellant for the manner in which it approached the matter. In this regard, the Arbitrator found that the appellant did not investigate this matter, to find out the respective versions of the parties before deciding on the disciplinary proceedings against the respondent. In this regard, Mr. Strauss' evidence was taken as Gospel truth, as it were and the disciplinary proceedings were placed afoot without further ado.

[33] Having considered the entire evidence placed before her, the Arbitrator concluded as follows,

'I believe that indeed Strauss has (*sic*) called the applicant oupa-ouma which is offensive. One cannot call a man like the applicant an ouma. That in essence is to refer that the applicant except the applicant to be male he is also referred to as a female. The applicant has a name and to avoid such Strauss as the supervisor would have been in a better position to know, how to address subordinates.'

[34] The Arbitrator accordingly found for the respondent for the reasons mentioned in part above. This finding has been criticised as being perverse by the appellant. The question is whether there is any force to the criticisms levelled against the findings by the Arbitrator?

The appellant's case

[35] It is fair to mention that Mr. Barnard, in his forceful address, centred the appellant's argument on the issue of racism. He argued, in this connection, that this was a case of racism in terms of which the respondent referred to Mr. Strauss, his supervisor using words with strong racial undertones.

[36] It was accordingly his contention that in a country like Namibia, racism should not be allowed or tolerated and that the appellant was eminently correct in terminating the respondent's employment in order to send a message home that racism will not be allowed to rear its ugly head in an employment situation. In support of his submissions, Mr. Barnard referred to a number of cases both in this jurisdiction and South Africa, which state in no

uncertain terms how despicable racism is and that employees found guilty of racism should ordinarily face a dismissal. I cannot argue with or add more to these cases.

The real issue for determination and discussion thereof

[37] On a mature consideration of this matter, however, I am of the view that it is not necessary to deal with the totality of the evidence led in order to decide this appeal. There was a fundamental error committed by the appellant in the internal disciplinary hearing and which I debated at length with Mr. Barnard, it having been canvassed by the respondent's legal practitioner in argument. I will turn to this issue in a jiffy.

[38] Before I do so however, I need to deal with the issue of the non-production of the record or minutes of the internal disciplinary proceedings, which the Arbitrator severely criticised and drew an adverse inference against the appellant in her award. This, Mr. Barnard, has also criticised in his argument as having been wrong and insupportable. Is he correct?

[39] I can say that there is no reason proffered by the respondent for the failure to produce the said minutes. It is not doubted that these minutes were necessary in a sense, to corroborate the appellant's version. I say so because there appeared to be a disparity in the evidence of Mr. Shipalanga, in particular, about what he had said. It was put to him in cross-examination that he had not stated what he was testifying to in the arbitration proceedings, namely that he only said Mr. Strauss called the respondent Oupa but did not say Oupa-Ouma, which Mr. Shipalanga hotly disputed. Clearly, the minutes may have assisted in this regard but no plausible reason was proffered for this omission. This must, in the circumstances, be held against the appellant.

[40] In the premises, no proper or sound reason was proffered by the appellant, as to why the said document was not provided. In this regard, I should mention that it was also very important to see the actual charge sheet in which the allegations against the respondent were recorded. This, I have

tried to find in vain and this act of not providing all the necessary and relevant information does not sit well with me as it did not with the Arbitrator. I cannot, in the circumstances, fault her in her drawing the adverse inference against the appellant that she did.

[41] Reverting to the core and probably the decisive issue adverted to in para [37] above, it would appear from the heads of argument (the only record of the charges preferred against him at the court's disposal) that the respondent was charged as follows:¹

'i) Rudeness, the use of foul language and making improper or indecent gestures at a supervisor, in that on the 26th of May 2016, you were rude and used foul language towards your supervisor (Heinz Strauss) when you uttered "hotnot" towards him after you offloaded a bag from a truck which instructed you to offload.'

ii) Refusal and/or failure to perform any lawfully assigned regular work practice not involving unusual physical risk, or disobey instructions given to the employee by the designated supervisor without justifiable or reasonable cause, the onus being on the employee to justify his refusal and or disobedience, in that on 31 May 2016, you refused to clean machinery at Rendering from top to bottom when your supervisor (Heinz Strauss) gave you the instruction in front of another Supervisor. (Abraham Koordom).'

[42] It is clear that the respondent pleaded not guilty to the charges. I am not aware of what evidence he tendered in relation to the second charge nor what evidence was adduced by the appellant, in support thereof. In this regard, it does not appear from the record that this charge was pursued at all as no mention is made of it in the arbitration proceedings. The first charge appears to have stolen all the thunder and limelight.

[43] The principal issue I raise in connection with the first charge is that the respondent was charged with the use of foul or rude language and making improper or indecent gestures. Nowhere during the arbitration proceedings

¹ Para 161 of the record, as contained in the appellant's heads of argument before the Arbitrator.

was any evidence led regarding the improper or indecent gestures alleged and traversed. It would seem that it was a charge steeped in what the respondent said rather than what may have been his alleged indecent gesticulations.

[44] I am gravely concerned that the charge sheet did not, anywhere in its body, allege that the respondent made racist remarks, which is the trajectory, tenor and narrative the evidence, particularly in the arbitration, followed. It appears to me that the respondent was charged with one offence but was found guilty of another charge, which was more serious in nature and effect than that appearing in the charge sheet.

[45] The use of foul and abusive language, on the one hand, and the utterance of racial statements, on the other, are two markedly different charges. Not only are they different in nature, but they are particularly different in terms of seriousness and the impact they may have on whether or not the employment relationship should continue to endure.

[46] In this regard, I am of the considered opinion that the use of foul language in the workplace, abhorrent as it may be, may not necessarily lead to the termination of an employment contract, particularly as here, where it appears it was the respondent's first infraction in that regard.

[47] The issue of racism, on the other hand, is a very serious subject in this country in particular. It is an ugly and depraved practice that should be nipped in the bud and completely eviscerated, if necessary, with the harshest of sanctions applied. This is the message conveyed quite powerfully in the cases usefully cited by Mr. Barnard in his heads of argument.²

[48] In order to drive the message home about how seriously courts view the issue of racism, the appellant referred the court to the case of *Crown*

² *S v Van Wyk* 1993 NR 426 (SC); *Namibia Tourism Board v Kauapirura- Angula* 2009 (1) NR 185 (LC);

Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others,³ where the court reasoned as follows:

‘Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the work place is anathema to sound industrial relations . . .’

[49] I agree entirely with the sentiments expressed by the court in the foregoing case. The point of departure though, is that the person accused should, in the charge sheet, be made aware that he is being charged with the serious charge of racism. It should not be shrouded or covered in any capsule. This will place the person accused in a position to know how seriously his utterances, are viewed by the employer. I say so for the reason that it is clear from the authorities cited that dismissal is normally regarded as a sufficient punishment for racism, considering that racism is a malignant cancer in society so to speak that must face ruthless evisceration. It should not be treated as benign.

[50] In the instant case, it is clear that the issue of racism and its seriousness was only mentioned in the evidence-in-chief of Messrs. Strauss and Biermann and again in the cross-examination of the respondent. In particular, it was put to the respondent that racism was even a criminal offence. Notwithstanding that the appellant was acutely aware of the seriousness of the utterance; it did not deem it fit to charge the respondent with racism. It chose rather, to prefer the charge of the use of foul and abusive language, as I have stated.

[51] In the circumstances, I am of the considered view that the dismissal of the respondent was procedurally unfair. He was called upon to answer one case but a more serious case was mounted against him in evidence, without disclosing the full nature, extent and seriousness of the case the appellant wished to pursue against him. If, as it turned out, it was alleged that he used racially pregnant language, then the charge sheet should have termed it as

³ (2002) 23 ILJ 863 (LAC) at para [24].

such and should not have sugar-coated it, as it were, as foul and abusive language, when clearly the appellant considered his utterance in a very serious light that may, if proved, have merited an outright dismissal.

[52] A party, against whom a case has been alleged, must be under no illusion as to the exact nature, seriousness and scope of the case he or she faces. All the relevant allegations that are levelled must appear in the charge sheet in order to drive home to him or her; the gravity of the allegations made so that he or she appreciates their seriousness and does all in his or her power to meet the charges pound for pound with the seriousness and vigour they demand. To put one case to an employee and then seek to make out another, particularly a more serious one in evidence and then seek to punish the subject on the basis of the serious matter made out in evidence but not alleged in the charge, is in my view, the high-water mark of unfairness.

[53] In the instant case, it is clear that although the word 'hotnot' was cited in the charge sheet, there was no specific allegation that it was a racist remark. All that a reasonable reader of the charge sheet would have fathomed, was, that it was alleged in the charge sheet that the said word amounted to foul or abusive language and no more. This, as matters turned out, was never the case. A person accused of such serious conduct must not be sent on a wild goose chase. The true nature, import and effect of the allegations made against him or her must be put before him or her as bare as they can be, without any cover or canopy.

[54] In the premises, whatever else it is that the respondent submitted and what the appellant alleged, it appears to me that this matter falls at this very important hurdle. It was eminently unfair and unjust to charge the respondent with the use of foul and abusive language and later find him guilty, as it now appears, of having uttered racist remarks, when the allegation of racism was never included in the charge sheet. It is a matter of comment that the issue of racism did not surface after the event in question. It was at all times available for the employer to include in the charge sheet for the respondent to meet it head on during the internal disciplinary proceedings.

[55] By so finding, the court must not be understood to be encouraging the utterance of racist remarks in the employment situation, or elsewhere for that matter. Racism is and must be viewed as a serious plague and should therefore be dealt with in a deservingly serious manner. Before that can be done however, the court must ensure that the procedural rights of the subject are not in any way violated, attenuated, compromised or negated. This must be the case so that when the sword of Damocles eventually descends on the person accused of uttering racial remarks, he or she must have had the full knowledge of the seriousness of the harm and the likely consequences of being found guilty. This is not such a case.

[56] The learned author Dr. Collins Parker, in his work on Labour Law,⁴ deals with procedural fairness and how it is interwoven with substantive fairness. In relation to the former, the learned author says the following:

‘If one extrapolates the natural justice requirement laid down in *Meyer v Law Society* supra and *Foster v Commission for Administration* to the requirements necessary to pass the test of a fair procedure within the meaning of s. 33 (1) of the Labour Act 2007, the following principle emerges: a domestic enquiry, which is usually referred to as a disciplinary hearing or enquiry in the employment situation, conducted by an employer so as to find if a valid and fair reason exists for the dismissal, should respect the rules of natural justice and act fairly.’ (Emphasis added).

[57] It is thus clear, in my considered view that although the rules of natural justice appear to have been followed by the appellant in this matter, when it came to the fairness of the procedure followed, the appellant failed the test for the reason advanced in the preceding paragraphs.

[58] In the premises, I am of the considered view that there is no need to investigate the correctness or otherwise of the findings of the Arbitrator as there was a fundamental failure of justice, which the Arbitrator failed to take into account. This failure, in my considered view, goes to the very root of the

⁴ Collins Parker, Labour Law in Namibia, Unam Press, 2012 at p. 148-149.

propriety and fairness of the internal disciplinary proceedings and renders them eminently unfair. The unfairness perpetrated thereby is not of the class that the court can in good conscience close its eyes to or simply gloss over as a non-issue. The irregularity in this matter is quite serious and detracts materially from the justice and fairness of the internal disciplinary proceedings.

Conclusion

[59] I am accordingly of the view that the decision by the Arbitrator should be allowed to stand albeit for different reasons, as traversed above. As intimated earlier, I do not find it necessary to deal in any great detail with the other issues raised on appeal against the findings by the Arbitrator. As a general proposition, it appears to me, if the matter were to proceed beyond the issue of the procedural fairness raised above, I am of the considered view that the Arbitrator by and large, acted properly in all the circumstances of the case and her findings are well supported by the evidence. It cannot be said that the findings were perverse in all the circumstances of the case.

Order

[60] Having had regard to what I have said above, I am of the considered view that the following order should be issued, namely:

1. The appellant's appeal is dismissed.
2. There is no order as to costs.
3. The award of the Arbitrator, dated 24 March 2017, is ordered to stand.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: P. Barnard
Instructed by: Neves Legal Practitioners

RESPONDENT: N. Shilongo
Of Sisa Namandje & Co Inc.