



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

LCA 36/2016

In the matter between:

**TOMAS IMENE**

**APPELLANT**

**And**

**NAMDEB DIAMONDS (PTY) LTD**

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

**MATHEO RUDATH N.O.**

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

**LABOUR COMMISSIONER**

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

***Neutral Citation:*** *Imene v Namdeb (Pty) Ltd and Others LCA 36/2016 [2018] 26 NALCMD (18 October 2018)*

**CORAM:** MASUKU J

**Heard:** 17 April 2018

**Delivered:** 18 October 2018

**Flynote:** Labour Law – unfair dismissal following an arbitration – employee appealing to have award set aside – irregularities committed by the arbitrator – admission of hearsay evidence, failure to record findings on inspection *in loco*; participation of third party in proceedings held to constitute

sufficient basis to set aside the proceedings and to have same start *de novo* before another arbitrator.

**Summary:** The appellant was employed by the 1<sup>st</sup> respondent in its mine as an information technology technician. A diamond went missing and he was strongly suspected of having had a critical role in its disappearance. He was subjected to a disciplinary hearing around the said disappearance and was dismissed. Dissatisfied with the dismissal, he appealed to this court to set aside the award.

Held: the charges levelled against an employee alleged to have violated company policies or disciplinary code, must have the tenets of fairness by pointing out the alleged transgression and informing the employee in sufficient detail the case against him or her.

Held further that: the arbitrator allowed what was clearly prejudicial evidence to be admitted against the appellant when there was no basis for doing so, and particularly as the evidence adduced was prejudicial to the appellant.

Held that: labour law does not ordinarily allow the intricacies and strictness of civil proceedings, where the procedure followed, or the evidence allowed serves to impinge prejudicially on the fairness of the proceedings as a whole, the court may set aside the offensive portions to ensure fairness is achieved, considering in particular that a dismissal is a very grave sanction that should demand that the resultant proceedings exude fairness.

Held further that: a full record of observations and findings obtained during an inspection *in loco* must be recorded and caused to form part of the record of proceedings for the reason that an appellate court may derive assistance and direction therefrom as to why certain findings or conclusions were made. Where the record does not form part of the record that renders the record of proceedings incomplete.

Held that: certain evidence that was referred to that could either exculpate or inculcate the appellant was not led and the reasons therefor were not convincing.

Held further that: the arbitrator impermissibly allowed a third party, who was neither a witness nor a representative of either party to effectively participate in the proceedings, thus vitiating the proceedings.

In view of the irregularities mentioned above, the court took the view that the arbitral award should be set aside and the matter referred to the Labour Commissioner to appoint a new arbitrator who would have to start the proceedings afresh.

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### ORDER

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1. The award issued by the Arbitrator, Mr. Mathero Rudath *N.O.* be and is hereby set aside.
  2. The matter is referred back to the Labour Commissioner for allocation to a new Arbitrator, who is to commence the arbitration proceedings *de novo*.
  3. There is no order as to costs.
  4. The matter is removed from the roll and is regarded as finalised.
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### JUDGMENT

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MASUKU J:

#### Introduction and background

[1] On or about 17 July 2014, a breath-taking discovery was made by employees of Namdeb (Pty) Limited, the 1<sup>st</sup> respondent in this matter. A diamond, which was weighed at 77.324 carats, was discovered at its mine.

This seems to have buoyed the spirits of the employees concerned and management alike.

[2] This spirit of exhilaration, like a fix of intoxicating substance, did not last long. About three weeks later, when some persons needed to inspect this precious stone, alas! It was nowhere to be found. It had just disappeared without trace.

[3] Investigations ensued in earnest in order to retrace the steps that could have resulted in this precious stone mysteriously going missing. In the retracing of the steps, the appellant, Mr. Tomas Imene, who was in the employ of the 1<sup>st</sup> respondent as an Information Technology (IT) specialist, appears to have been a prime suspect who may have played a pivotal role in the saddening disappearance of the precious stone. This was, according to the 1<sup>st</sup> respondent, because his behaviour during the time when the precious stone was last seen, had all the hallmarks of the suspicious.

#### The charges preferred

[4] The appellant was eventually brought before an internal disciplinary tribunal. Four charges were preferred against him. It may be necessary, for purposes of completeness, to quote the whole charge sheet verbatim:

##### **'1. CHARGE 1. BREACH OF TRUST related to – PO-SE-01-IDT**

In that, the accused caused reasonable suspicion of dishonesty for which there exist extraneous evidence to prove a break down between him and the company. The accused intentionally and deliberately access the Red Area with a criminal mind. The activity in committing the offence was meticulously planned and the accused got away with the precious diamond weighing 77.324 Ct. Organising that a computer to left the Red Area on a short notice to South Africa. The accused manipulate the process with a criminal intend (*sic*). The accused entered the mine on 17 July 2014 at 17h25 and exit at 17h52 without any call logged assigned to him. No call-out was registered at Security Operations Room as well. Coded e-mails between the accused and his accomplice confirm their modes operandi in organized crime, i.e. IDT. The accused left town together with a co-accused employed as a

Temporary Mineralogical Technician in the Geological Laboratory, to South Africa, on the same day (18 July 2014) when the computer exits the Geological Laboratory and overnight in SA before he return to Namibia via Noordoewer on 19 July 2014. The likelihood is very high that the diamond was sold in South Africa. The accused actions caused breakdown of trusted relationship between him and the company which is counterproductive to the Company's commercial activities and to the public's interest.

## **2. CHARGE 2. FALSE EVIDENCE**

In that, the accused contradict him in written statements during the investigation and written a document to gain access into the Red Area under false pretenses. You further give false information during the security investigation enquiries.

## **3. CHARGE 3. NON-COMPLIANCE**

In that, the accused deliberately fail to comply with policies and procedures i.e. the IT policy and Security Policy.

## **4. Charge 4. POOR TIME KEEPING**

In that you left your work area without permission and left town to a foreign Country (SA).'

[5] The first charge, in particular is quite a mouthful. It contains many conclusions, some of which may be considered libellous in nature and content. A charge sheet is normally a document which informs a person of the charge preferred against him or her, together with the allegations that he is expected to meet. Ideally, it should state what misconduct it is that he or she is accused of having committed, where and when.

[6] I will not make a judgment call on the propriety of the contents of the charge sheet quoted above. This may be a matter that has to be dealt with by the Arbitrator. The point to be made is that internal disciplinary proceedings have to be fair on accused employees. In particular, the charge sheet must contain clear allegations as to the misconduct that it is alleged the employee committed and if there is a code related thereto, the code should be cited chapter and verse, in order to place him or her in a position to know fully the case that he or she has to meet.

[7] In *ABB Maintenance Services Namibia (Pty) Ltd v Moongela*,<sup>1</sup> Ueitele J emphasised the importance of the contents of a charge sheet and the sterling role it plays in the fairness of disciplinary proceedings in the employment setting. He remarked that the charge sheet should inform the subject of the nature of the offence and the misconduct alleged, with relevant particulars of the charge. He found in the case before him that one of the charges was 'congested and extremely vague', with no details of the offence.

[8] As intimated above, I will not deal with this issue any further, save to mention that it may be an issue that may require attention in the further conduct of the matter, as shall be apparent as this judgment unfolds further.

#### The arbitration proceedings

[9] In the internal disciplinary enquiry, the appellant was found guilty as charged and he was dismissed. He ultimately sought solace in the office of the Labour Commissioner, where he lodged a dispute. The matter was eventually allocated to the 2<sup>nd</sup> respondent, Mr. Rudath, to conduct the arbitration proceedings.

[10] After listening to oral evidence adduced by the parties, including the appellant at the arbitration proceedings, the Arbitrator, after evaluating the evidence adduced by both parties, found that the appellant had been correctly dismissed and he thus issued an award in those terms.

[11] Dissatisfied with the Arbitrator's award, the appellant approached this court on appeal, contending that the Arbitrator erred in finding that he had been correctly dismissed. He thus importuned this court to set aside the Arbitrator's award. This plea was met with great resistance by the 1<sup>st</sup> respondent, which contended that the Arbitrator was eminently correct in reaching the decision that he did.

#### The appeal hearing

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<sup>1</sup> (LCA 11/2016) [2017] NLCMD 18 (7 June 2017).

[12] The parties filed very useful and compelling heads argument for their respective positions on whether the Arbitrator's award should be upheld by this court or not. I am eternally grateful to both counsel for their industry and the assistance they rendered to the court. The submissions made will be of use, hopefully in future proceedings.

[13] Having considered all the written and oral submissions made, it appears, having regard to the record of proceedings and nothing more, that there were errors some of which were of cataclysmic proportions that were committed by the Arbitrator, which unfortunately impel this court to set the award aside and remit the matter to the Labour Commissioner. I am acutely aware that this, strictly speaking, is an appeal but the nature and gravity of some of the irregularities committed by the Arbitrator in this matter is such that this court may not, in good conscience, turn a blind eye on them and continue as if it is business as usual.

[14] I will deal with some of these in turn below. They range from the serious and to some errors that one may live with, had they been the only ones. The cumulative effect of all of them, considered *in tandem*, however has resulted in the court having to issue the order that appears above, which in the circumstances, resonates with the demands of justice and fairness in my considered opinion.

#### *Hearsay evidence*

[15] I am acutely aware that the sphere of labour law is one where the strict application of the rules of evidence and civil proceedings, is generally relaxed. This is so for sound reasons of policy with which I cannot and do not quibble. In this case, however, by way of an example, the first witness called by the employer in its bid to convince the Arbitrator that there were sound reasons for dismissing the appellant was Mr. Gideon Shikongo, who is head of the security at the 1<sup>st</sup> respondent's establishment.

[16] From his evidence, it became clear that he was intimately involved in the investigations that ensued in the wake of the disappearance of the precious stone. During his sojourn in the witness box, he was led in evidence on matters clearly falling out of his sphere of knowledge and competence. He testified for instance about technical issues relating to the IT department which he was very ill-equipped to do. There are other areas he testified about, including some of the areas within the sensitive departments that one would have expected experts involved in them to tender evidence.

[17] Furthermore, the witness also fell into the trap of tendering evidence based on what he was told by those he interviewed or interrogated during the investigations he conducted. For example, he went on a foray and testified that the appellant went to South Africa, slept at a certain place and entered via a named port of entry. This is not a matter he should have testified about, worse when the persons possessed of the information or relevant documents were not called. It is clear that the persons who gave evidence in relation to those matters should have been called as witnesses. This is so because what he testified about could not be verified and a court or tribunal relying on such evidence, particularly where a serious sanction, amounting to a person losing employment, is disconcerting.

[18] I particularly say so for the reason that there is no evidence that the persons who could testify to those very important issues were not available to be called. They were all employees of the 1<sup>st</sup> respondent and who were in a position to testify about the technical issues and other matters within their knowledge. In this regard, reliance on the evidence of Mr. Shikongo, in the peculiar circumstances of this case, is dangerous.

[19] A person who loses his employment, sometimes referred to as a 'death' sentence in employment terms, should not be allowed to leave the employment arena, not only with a possibility of no longer becoming employable, but also with a bitter aftertaste, knowing that the best and available evidence was not called and he was crucified on the cross of a dismissal using the nails of suspect evidence, when direct and permissible



evidence appeared on all accounts, to have been available. Fairness should be a constant companion throughout the gauntlet of proceedings, particularly those resulting in a dismissal.

*Inspectio in loco*

[20] In the course of the arbitration proceedings and very early in the testimony of Mr. Shokongo, it was decided by the Arbitrator, with the concurrence of the parties' representatives, that an *inspectio in loco* was necessary. I cannot fault the Arbitrator for making that order. It does appear to have been very necessary, particularly for him being an outsider to the 1<sup>st</sup> respondent.

[20] Where I fault the Arbitrator though is that the observations and findings, if any, made during the inspection became the exclusive preserve of those who participated in that exercise. As a result, this court is left totally in the dark regarding what was seen, what questions were posed and what answers were given during that important exercise.

[21] It must be mentioned that an *inspectio in loco* is a part and parcel of the arbitration proceedings and the proceedings thereat must be properly recorded and caused to formally form part of the record of proceedings. Any items observed, distances measured and questions asked and answers returned (where necessary or applicable), must, once the arbitration resumes, be formally included as part of the record of proceedings.

[22] Where that is not done, as in this case, the appellate court is placed in an invidious and disadvantaged position in that some of the disputes it may have to determine may hinge exclusively or materially on some part of the proceedings at the inspection *in loco*. In the instant case, those who participated in the said inspection, are the only ones privileged to know and understand what happened and to apply that knowledge to the matter. The court and counsel in this matter, in particular, are rendered mere spectators

on a very important aspect of the proceedings. This should be avoided at all costs.

[23] Just to buttress the point, the learned author Schmidt<sup>2</sup> refers to *Kruger v Ludick v Roberson*,<sup>3</sup> where the following is recorded about such inspections:

‘It is important when an inspection *in loco* is made, that the record should disclose the nature of the observations of the Court. That may be done by way of a statement framed by the Court and intimated to the parties who should be given an opportunity of agreeing with it or challenging it and, if they wish, of leading evidence to correct it. Another method is to, which is sometimes convenient, is for the Court to obtain the necessary statement from a witness, who is called, or recalled, after the inspection has been made. In such a case, the parties should be allowed to examine the witness in the usual way.’

[24] The learned authors Hoffman and Zeffert,<sup>4</sup> after citing the above case with approval, say the following:

‘It is ordinarily best for the judicial officer to record his observations and communicate them to the parties on the spot, so that if there is a dispute he can have another look and form his opinion. Any impressions which have not been recorded in this way must be disregarded.’

[25] I agree with the approach of the learned authors. All I may add, is that it must be recalled that the record of what was seen and or even elicited at the scene, should not end between the parties who were present thereat. In a jurisdiction like Namibia, where the record of all that takes place should be carefully and accurately maintained, it makes sense to then have the observations and findings made recorded in order for them to form part of the record of proceedings as soon as practicable after the court resumes. This will make it easy for those who may not have been parties to the

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<sup>2</sup> CWH Schmidt, *The law of Evidence*, Lexis Nexis, 2003, at p.10.6.

<sup>3</sup> 1947 (3) AS 23 (A) at 31.

<sup>4</sup> Hoffman & Zeffert, *The South African Law of Evidence*, 4<sup>th</sup> ed, Butterworths, 1988 at p.405.

proceedings, particularly a reviewing or appellate court, to become privy to the record of what happened during the inspection.

[26] In view of the conclusion that I have reached on this matter, it is accordingly clear as noonday that the record of proceedings presented to the court is accordingly not complete. In this regard, the proceedings of the *inspectio in loco* were not properly recorded and later transcribed and caused to form part of the main record. It would, in the circumstances be dangerous to deal with this matter as the security arrangements viewed and the Red Area and other places viewed during the inspection are not part of the record.

#### *CCTV Footage*

[27] Another disconcerting aspect in this matter relates to some CCTV footage, particularly of the area, as I understand, where the diamond was dealt with. The evidence adduced was that there are close circuit television cameras monitoring movement in that very sensitive area such that all things being equal, the person who removed the diamond would have been captured thereon.

[28] The evidence adduced by Mr. Shikongo was to the effect that the said footage was in the possession of the Namibian police, who were themselves not called as witnesses. In this regard, it appears very unfair for the Arbitrator to have proceeded with the matter in the absence of such crucial evidence, which may have a decisive bearing on the matter, particularly the role, if any, that the appellant may have had in the disappearance of the precious stone.

[29] I must mention that a reading of the evidence and the charges, in part, suggests that the disciplinary proceedings to a large extent hinged on what is said to have been very suspicious conduct by the appellant at the material time. The suspicions all related to the mysterious disappearance of the diamond. It might well be that suspicion should not reign supreme in a case where the relevant high security areas were under surveillance. The footage

may have inculpated or exculpated the appellant in so far as the disappearance of the diamond in question is concerned. The failure to deal properly with this aspect is unsatisfactory.

*The mysterious "Observer"*

[30] In arbitration proceedings, such as the ones under scrutiny, the Arbitrator ensures that all the persons who feature in the proceedings identify themselves and their role. Other than the Arbitrator, those persons who participate would ordinarily be the witnesses for either side, and the representatives of the respective parties. There may, in other circumstances, be interpreters as well. They should also be introduced and form part of those participating in the proceedings.

[31] Inexplicably, a mysterious individual emerged with stealth, totally unannounced in the arbitration proceedings. Tellingly, this individual emerged at the time when the appellant was being cross-examined by the 1<sup>st</sup> respondent's representative. In the record, that person is identified as an 'observer'. This mysterious 'observer' interjected during the proceedings and at times, even appeared to cross-examine the appellant. For ease of reference, the following pages reflect some parts of the participation of this 'observer', namely pp. 1147; 1150 line 12 and 15; p1151 line 2, 6 and 8; p 1161 line 18; 1162 line 4; and 1154.

[32] I am of the considered view that the participation of this particular individual in the proceedings was irregular. First, he or she was not introduced; his or her role is not defined nor is the right of that individual in particular, to make any utterances established. What is most disconcerting is that his or her intervention, from a neutral reading, suggests that the 'observer' was aligned to the 1<sup>st</sup> respondent and was on a collision course with the appellant and his interests.

[33] Properly classified, this person was not just an 'observer', in the ordinary sense. I say so because he or she did much more than to merely

observe. He or she participated actively in the proceedings by making comments, which are on the record. I am very disturbed that the Arbitrator allowed such a person, who is not even identified, to participate, leaving this court to resort to the ravages of conjecture as to who that person may have been. This conduct on the part of the Arbitrator is highly irregular and should, in my view, serve to vitiate the proceedings. Not even a spouse to a party may participate in such a manner in such proceedings, unless they come as a witness. If their role is confined to observing and that observer status is endorsed by the Arbitrator, I would have no qualms whatsoever.

[34] I am of the view that the decision by the Arbitrator to allow this person to participate in the proceedings in the manner I have described, renders the proceedings irregular and liable to be set aside. Even invited guests do not take such active part in such proceedings. Observers, properly so-called do far less than the one in issue did.

#### *Conduct of hearing*

[35] During the reading of the record, I also formed the distinct impression that the proceedings were, at times moving on auto-pilot as it were. I say so because it seems as the Arbitrator was not in charge to times. There were numerous instances where objections were made either as to the line of questioning advanced or the admissibility of evidence and the parties' representatives would argue till the cows come home but there would be no ruling by the Arbitrator on the contentious issues.

[36] The proceedings, in such circumstances, it would appear, became susceptible to the elements as it were and one never knows what was ruled to be acceptable or admissible, nor how deleterious to the final findings the failure to make decisive rulings on the objections had on the propriety and correctness of the proceedings.

### Conclusion

[37] Having regard to what I have stated above, I am of the considered view that there was a failure of justice in the manner in which the arbitration proceedings were conducted. As a result, it would be odious, in the circumstances, to allow such tainted proceedings to proceed any further when they are poisoned at the root so to speak.

### Order

[38] Having regard to all the foregoing, I come to the conclusion that this is a proper case in which the following order suffices and is condign:

1. The award issued by the Arbitrator, Mr. Mathero Rudath *N.O.* in this matter be and is hereby set aside.
2. The matter is referred back to the Labour Commissioner for allocation to a new Arbitrator, who is to conduct the arbitration proceedings *de novo*.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku  
Judge

## APPEARANCES

APPELLANT: S. Nambinga  
Of Angula Co. Windhoek

1<sup>ST</sup> RESPONDENT: G. Dicks  
Instructed by Kopplinger Boltman, Windhoek