

**REPUBLIC OF NAMIBIA**



**LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

HC-MD-LAB-APP-AAA-2017/00026

In the matter between:

**EMBWINDA FISHING (PTY) LTD**

**APPELLANT**

and

**DAVID GEORGE JANSEN**

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

**LAURENCE GASEB**

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

**SADNEY GEI-KHOEBEB**

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

**Neutral citation:** *Embwinda Fishing (Pty) Ltd v Jansen* (HC-MD-LAB-APP-AAA-2017/00026) [2019] NALCMD 14 (24 May 2019)

**CORAM: MASUKU J**

Heard on: 7 September 2018

Delivered on: 24 May 2019

**Flynote:** Labour Law- Unfair dismissal – appellant dismissing respondents in internal disciplinary proceedings – Failure to file Rule 17(16) statement of defence and implication thereof – failure to file heads of argument by respondents. Arbitrator holding that there was no justifiable

reason to dismiss the respondents. Appellant, on appeal alleged that the arbitrator acted in a manner that is perverse in setting aside the dismissals. Law of evidence – not every inconsistency or contradiction should lead to evidence being rejected by the trier of fact.

**Summary:** The appellant, a fishing company at the coast employed the respondents in its cold storage facility, with the 1<sup>st</sup> respondent superintending the said facility. On 12 August 2016, the appellant allowed her employees to buy carioca fish on sale. An invoice was issued to every employee who purchased the fish and before exiting the premises, the security personnel would check the fish against the invoice and if all was well, allow the purchaser employee passage.

The respondents came to the gate after 18:00 and on inspection of their consignment, it was discovered that their boxes contained hake and kingklip and not carioca fish as the fish on sale. The respondents' boxes were then returned to the cold room for storage to allow the matter to be dealt with the following week. When the inspection was done the following week, it seems that the boxes were found to contain carioca fish. The respondents were subjected to a disciplinary hearing on allegations of dishonesty. They were dismissed and their appeal was dismissed. They then approached the Office of the Labour Commissioner, which appointed an arbitrator to deal with the matter. The arbitrator found that the dismissal was procedurally and substantively unfair and ordered the reinstatement of the respondents, hence the appeal by the appellant.

Held that: it is imperative for respondents to comply with the provisions of Rule 17(16) by filing a statement outlining the defence is imperative as it gives the court and the appellant an indication of the nature and basis of the defence.

Held further that: a party, which does not comply with the said subrule, which is mandatory, becomes ineligible to participate in the appeal proceedings.

Held that: where a party knows that it has not complied with any rule of court, it should, as soon as possible after realising its non-compliance, make good the non-compliance and then file an application for condonation without delay.

Held further that: the evidence in the matter showed that the respondents were guilty of having attempted to remove the wrong type of fish and the fact that on the day of inspecting their boxes containing fish, the correct fish was found does not detract from the fact which was undisputed that on the first day, the wrong type of fish had been packed in the boxes.

Held that: minor inconsistencies in evidence are to be expected when witnesses testify. It is not every inconsistency or contradiction that should be taken into account but that which is material and has a decisive sway on the direction of the case. The inconsistencies noted by the arbitrator were found not to be material.

Held further that: arbitrators should apply less formalistic procedures in dealing with arbitrations and avoid the strict adherence to procedural rules required in courts of law. At the end, they must satisfy themselves that the rules of natural justice are followed and that the accused employee know the case against him or her and is afforded an opportunity to controvert the case mounted against him or her.

Held that: on a mature consideration of the case, the arbitrator, in view of the evidence placed before her, reached a perverse decision when she held that there was no justification for the respondents to be dismissed. The appeal was upheld.

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**ORDER**

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1. The award issued by the Arbitrator in favour of the First, Second and Third Respondents, dated 13 November 2017, is hereby set aside in its entirety.
2. The decision by the Appellant to terminate the Respondents' employment is upheld.
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

[1] Serving before court for determination is an appeal by the appellant, Embwinda Fishing (Pty) Ltd, against the entire award issued by the Arbitrator in this matter, Ms. Gertrude Usiku on 13 November 2017.

The parties

[2] The appellant is a company duly incorporated according to the laws of Namibia and having its offices situate at Ben Amathila Avenue in Walvis Bay, within this court's area of jurisdiction.

[3] The respondents are three gentlemen who were previously in the employ of the appellant. I will refer to the respondents as such in the course of this judgment.

[4] The Arbitrator, Ms. Usiku has not been cited in these proceedings and hence she does not feature at all. Happily, the record of the proceedings before her and the award she issued are before court and that should suffice for the proper determination of the issues at hand.

### Background

[5] The respondents were employed by the appellant in its premises Walvis Bay. They were employed in the cold storage, with the 1<sup>st</sup> respondent in a supervisory position. The other respondents were ordinary employees in the cold storage of the appellant. They were all charged with dishonesty, following allegations that they had on 12 August 2016 attempted to purloin certain boxes of Hake fish when they had bought Carioca fish in terms of the appellant's policy of selling certain types of fish to members of its staff at reduced prices. These were referred to as fish sale days.

[6] Following an internal disciplinary process, the respondents were found guilty of attempting to remove company property and were subsequently dismissed from the appellant's employ. It was alleged that their conduct breached the trust that appellant had reposed in them. The dismissal took effect after their internal appeal against the dismissal was unsuccessful.

[7] As they were entitled to at law, the respondents approached the office of the Labour Commissioner, where they lodged a dispute of unfair dismissal. I do not consider it necessary to outline the particulars of the dispute lodged. The matter eventually served before the arbitrator Ms. Usiku, who, at the end of the process, found that the appellant had not dismissed the respondents fairly. She found that there were reasons to hold that the dismissals were not procedurally and substantively fair.

[8] In her award, the Arbitrator ordered that the respondents should be reinstated to the positions that they previously held with the appellant. She further ordered that some different amounts of money be paid to respondents equalling 13 months' monthly salary in respect of each.

[9] The appellant, dissatisfied with the award, did not lie down supinely. It noted an appeal to this court in terms of the relevant provisions of the Labour Act.<sup>1</sup> In the main, the appellant contended that the arbitrator erred in finding that the respondents had been unfairly dismissed from employment. The notice of appeal, in a typical kitchen sink approach, consists of some 14 typed pages and catalogues a long list of irregularities allegedly committed by the arbitrator in coming to the decision that the appellant considers to be perverse. I will not traverse all the grounds alleged and on the basis of which it is contended that no reasonable arbitrator could have reached the decision the arbitrator in the instant case did.

#### The appeal hearing

[10] At the appeal hearing, the appellant raised certain points of law and in respect of which the court was implored to proceed with the appeal on an unopposed basis, as it was not properly opposed by the respondents. I decided that notwithstanding, to hear argument, both in relation to the preliminary points of law and also on the merits of the appeal. This I did in order to obviate the need for a further hearing in case the court, after considering the arguments raised, came to the view that the preliminary points were liable to dismissal.

[11] I shall accordingly deal with the points of law first and if I find that they have merit, that may spell the end of the road for the respondents in so far as their participation in the appeal proper is concerned. Conversely, if the court holds the view that the points of law have no merit, it will be necessary to then indulge in the merits of the matter and consider the case put up by the respondents in their defence, and then determine in a final fashion whether there is any merit in the appeal. I presently deal with the preliminary points of law.

#### *Non-compliance with Rule 16*

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<sup>1</sup> Act No. 11 of 2007.

[12] The first salvo unleashed by the appellant was that the respondents failed to comply with the provisions of rule 17(16). The appellant, accordingly argued that the appeal is, strictly speaking not opposed or properly opposed. There was a deafening silence on the part of the respondents in response. What does the above subrule provide?

[13] The subrule reads as follows:

‘Should any person to whom the notice of appeal or any amendment is delivered wish to oppose the appeal, he or she must –

- a) within 10 days after receipt by him or her of the notice of appeal or any amendment thereof, deliver notice to the appellant that he or she intends to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he or she will accept notice and service of all process in the proceedings; and
- b) within 21 days after receipt by him or her of a copy of the record of proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice to oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.’

[14] The above subrule is couched in peremptory language and this is deduced from the language employed by the rule maker, who chose to use the word ‘must’. The respondents did not comply with rule 17(16)(b), which requires them in mandatory terms, to deliver a statement containing the grounds on which the appeal is being opposed within a prescribed period, namely, within 14 days.

[15] In the premises, I am of the considered view that the appellant’s contention that the appeal was not properly opposed because of the serious non-compliance by the respondents is in this case justified. In this regard, the

appellant would have come to court expecting to obtain an order by default as no opposition and basis thereof was filed in good time as required by statute.

[16] More importantly, and to the detriment of the appellant, the respondents came to court to argue a case, which was never timeously notified both to the court and the appellant. There is a policy reason behind the requirement that the respondent who wishes to oppose an appeal should comply with rule (17)(16)(b), and it is this – the appellant must be placed in a position to know, not only that its appeal is opposed, but also and more pertinently, the grounds on which the appeal is opposed.

[17] This knowledge is not just for the sake of head knowledge as it were. It is to enable the appellant to properly prepare the case that it has to meet as indicated by the respondent in its statement delivered. This ensures that when the matter is enrolled for hearing, the court will be served with a good and well-prepared meal of submissions, enabling it to prepare accordingly for the buffet of submissions and know what will be on offer and what is worth ingesting and enjoying and what may possibly lead to constipation.

[18] Furthermore, the filing of the statement, of defence, as it gives the reasons why the appeal is opposed, may, in appropriate cases, serve to avoid pointless litigation and unnecessary costs being incurred. I say so for the reason that it may well be that upon reading the statement, the appellant may realise the hopelessness of its case and decide to throw in the towel by withdrawing the appeal and thus freeing valuable court space and time to matters with some merit.

[19] Both the court and the appellant have been denied this very important procedure by the respondents. What is more, the respondents knew that they had not complied with the requirement of the rules but they did nothing about it. There was no application for condonation of the non-compliance with a very material and fairness-enhancing rule. For that reason, there was nothing before court to explain the lapse and the reasons therefor.



[20] I have, to my dismay, in preparation for the judgment, seen that the respondents filed an application for condonation of the non-compliance complained of in this matter on 8 May 2019. For the record, the appeal was argued on 7 September 2018 and the application for condonation is brought barely two weeks before judgment is due.

[21] From the reading of the notice of motion, it appears that the respondents intend to move the application for condonation on judgment day. This procedure is unknown and unheard of. How one can move an application for condonation about seven months after the time when it should have been moved simply escapes me. I shall, for that reason, have no regard whatsoever to the application irregularly filed.

[22] The rule applicable to condonation applications reads as follows:

‘The court may, on application and on good cause shown, at any time-

- (a) condone any non-compliance with these Rules;
- (b) extend or abridge any period prescribed by these Rules, whether before or after the expiry of such period.’

[23] I am of the view that the rule in question does not have a limitless lifespan in terms of its application. In this regard, I am of the considered opinion that there must be a sufficiently close proximity between the moving of the application for condonation and the non-compliance. It will always be a question of degree between the two periods. The words ‘at any time’ must not be taken to mean literally at any time, which might include at or even after judgment has been delivered. In this regard, the sentiments expressed in paras [27] and [28] below bear particular resonance and in my considered view apply.

[24] Another issue that was raised by the appellant, is that the respondents did not file their heads of argument. Rule 17(23) provides as follows regarding the filing of heads of argument:

‘Not less than 10 days before the hearing date the appellant, if he or she is represented by a legal practitioner, must deliver heads of argument which he or she intends to argue at the hearing as well as a list of authorities to be relied on in support of each point to the other parties to the appeal and the other parties, if they are legally represented by a legal practitioner, must deliver similar heads of argument and list not later than five days before the said date.’ (Emphasis added).

[25] In this case, the respondents were represented by Ms. Mbaeva, who is a legal practitioner. Again, there was no compliance with this subrule, which conduces to fairness and proper preparation, both on the part of the adversary and the court. Yet again, there is no explanation for this non-compliance, as no application for condonation in this regard was forthcoming at the hearing of the matter.

[26] I again happened to see perchance that the respondents purported to file heads of argument on 10 May 2019, some fourteen-calendar days before the delivery of the judgment. In this regard, there does not even appear to have been any application for condonation. I therefor will have no regard to the heads of argument, which were filed more than seven months after the judgment was reserved. Heads of argument, by their very nature, are meant to assist the court in following argument at the hearing and subsequently when the judgment is being prepared.

[27] I interpose and mention that it is very important for parties in litigation, to quickly remedy any non-compliance with the rules on their part. They should not rest on the forlorn hope that the seriousness of their case will evoke feelings of compunction on the part of the court, to induce the latter to take a look away from the provisions of the rules. In this regard, Kotze JP made the following remarks in *Unitrans Swaziland Limited v Inyatsi Construction Limited*:<sup>2</sup>

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<sup>2</sup> [1997] SZSC 41 at p.11

‘The courts have often held that whenever a prospective appellant realises he has not complied with a Rule of Court, he should, apart from remedying his fault, immediately, also apply for condonation without delay’.

[28] From the remarks I have made above, it is very plain that the respondents, even upon being made aware of their deficiencies in their papers at the hearing, continued in their slumber and decided to bring whatever application for condonation they deemed proper, some seven months later. This is totally unacceptable and reflects a deliberate and wilful disregard for the rules of court by the respondents.

[29] One thing is very plain from what appears in the foregoing paragraphs and it is this – the prosecution of the matter on behalf of the respondents was conducted in a very slovenly manner. There appears to have been very little, if any regard for the applicable rules of court, which by their very nature and purpose, seek to bring fairness and equality in the conduct of the proceedings. A party, like the respondents, who approaches the rules in a cavalier manner, clearly courts disaster and this is what the respondents have attracted to themselves by having this matter conducted in this lackadaisical fashion.

[30] It might well be that the respondents have a target to which they can point an accusing finger in regard to the non-compliance and if I may mention, on very important aspects of the rules. The law reports are replete with admonitions in this particular connection. One oft-quoted case is *Saloojee and Another v Minister of Community Development*,<sup>3</sup> where the Appellate Division of South Africa, expressed itself in the following manner:

‘There is a limit beyond which a litigant can escape the results of his attorney’s lack of diligence or the sufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the rules of this Court. Considerations *ad misericordium* should not be allowed to become an invitation to laxity.’

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<sup>3</sup> 1965 (2) SA 135 (AD) 141 C-E.

### Conclusion on preliminary points of law

[31] In the premises, I am of the considered opinion that the points of law raised by the appellant are formidable and should, in view of all the issues I have mentioned above, carry the day. The respondents, as earlier stated, treated the rules of this court with levity for which they unfortunately have to pay an awesome price. I accordingly hold that there is no proper opposition to the appeal.

[32] In the premises, I will proceed with the appeal on the basis that it is not opposed by the respondents. This is in line with the approach adopted by Parker A. J. in *Benz Building Supplies v Stephanus and Others*.<sup>4</sup> The learned Judge reasoned as follows in part on this issue:

‘A failure to comply with the peremptory provisions of rule 17(16)(a)-(b) is fatal and has the effect of excluding the non-compliant party from participating in the proceedings.’

[33] In my considered view, the respondents have carved their fate with their own hands in that direction. I will accordingly follow Parker A.J.’s approach, which is in my view consistent with the law and principle. I will have no regard to the documents filed by them without having timeously sought and obtained the leave of court.

### The appeal on the merits

[34] The appeal by the appellant is premised on the grounds that the arbitrator misdirected herself and could not properly reach the factual conclusions that she did in the light of the evidence before her. It was thus contended on behalf of the appellant, placing reliance on *Old Mutual Life Assurance Company Limited v Linda Schutz*,<sup>5</sup> that the arbitrator had reached

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<sup>4</sup> 2014 (10 NR 283 (LC) at para [13].

<sup>5</sup> LCA 84/2010, delivered on 27 May 2011, at para [7].

conclusions that are perverse, regard had to the evidence that was before her. Is this contention sound?

[35] In order to reach a conclusion on this issue, it is important to consider the evidence that was placed before the arbitrator. I will do so in broad strokes. The evidence shows that the respondents were employed by the appellant at its cold storage facility, with the 1<sup>st</sup> respondent, being the cold store superintendent and the other respondents were ordinary cold store workers.

[36] It is common cause that on 12 August 2016, the appellant conducted a fish sale in terms of which fish was sold to the appellant's employees at discounted prices. On that day, the Carioca fish was the fish of choice on sale. The employees who wished to purchase the fish on sale would approach the cold store manageress Ms. Jacky Swart, who would issue the purchasing employee with an appropriate invoice with the details of the transaction recorded therein.

[37] The respondents, as they were entitled to as employees of the appellant, also took advantage of the sale and purchased fish from the appellant in boxes. They, like other members of staff, were issued with invoices in proof of their purchase. They were within the premises until around 18:30 when they attempted to take their purchase out of the security gate.

[38] The 1<sup>st</sup> respondent had bought 60 kg of carioca fish, which was interned in 5 boxes, which were wrapped in plastic covering. The 2<sup>nd</sup> respondent purchased 73kg of carioca fish, which was interned in 6 boxes. He wrapped the boxes himself with plastic covering. The 3<sup>rd</sup> respondent, for his part, purchased 120kg of the same species of fish. It was interned in 10 boxes, which were also wrapped in plastic covering.

[39] The procedure was that all the employees who purchased the fish on sale that day had to present their invoices to the security personnel at the security boom gate. The security personnel would check the invoices against

the fish in the boxes and they could take their respective purchases home if the coast was clear, so to speak.

[40] As indicated earlier, the respondents carried out their respective purchases in a forklift, which was operated by Mr. Severius Mayale, who had reported for duty at 18h00. This was around 18h00. When the security personnel checked the respondents' respective purchases, their suspicions were aroused because the respondents' respective purchases were wrapped differently from the employees' who had left the company premises earlier.

[41] The evidence of Ms. Hallelujah Mathias in this regard, was that she asked to open the 1<sup>st</sup> respondent's consignment of goods in order to check them against the invoice issued. She was with her colleague Mr. Kaveto Mushenge. Lo and behold! She found that the boxes contained Hake fish. She refused to let him take the fish out of the premises. The fish boxes were then returned to the cold storage on the 1<sup>st</sup> respondent's instructions.

[42] Besides the respondents, another employee, a Mr. Jacky Jagger, also had his fish brought by the forklift. His consignment was checked against the invoice and it was found to be in order. This left the consignment of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the forklift. On inspection, the security personnel found that there were portions of some Hake and Kingklip, respectively. The boxes were then returned to the cold storage, as they contained the wrong species of fish.

[43] It was Ms. Mathias' evidence that she marked the boxes containing the wrong fish with a green marker and the boxes were taken to the cold storage, for safe-keeping. The respondents then left empty handed. A formal report of the events of that evening was then prepared. This, in a nutshell, was the evidence of the appellant.

[44] The evidence of the respondents was, no pun intended, a different kettle of fish altogether. Their version was that they were turned away at the gate by the security personnel because they were informed they were too

late. The respondents also testified that the following Monday or Tuesday, when the boxes that had been taken from them and returned to the cold storage were inspected, they found only carioca fish. This explanation was rejected by the chairperson of the disciplinary committee, holding that the respondents, who worked in the cold store, had an opportunity to change the fish in the boxes for the carioca, which they were entitled to buy on sale. He accordingly found them guilty.

[45] It is against this evidence that the findings of the arbitrator must be gauged for a finding to be made as to whether or not her award was, in the light of the evidence, perverse or not. In her award, the arbitrator perforated large holes in the finding, the reasoning and ultimate decision of the internal disciplinary hearings.

[46] In her award, the arbitrator found that there was no valid and fair reason to terminate the services of the respondents for the reason that when the inspection of the respondents' consignment was carried out, the following week, the correct species of fish was found, namely carioca fish.<sup>6</sup> She also found that there was a discrepancy in the number of fish boxes. One witness said they were 22 in number, whilst another said they were 18.<sup>7</sup> She further found that the 1<sup>st</sup> respondent had, on a balance of probability, shown that they had actually purchased carioca fish, which they took the security guards on the Friday. For those reasons, the respondents' labour dispute was found to be justified, hence the positive finding in their favour.

[47] The arbitrator, finally found that there was no valid and fair reason for the appellant to have terminated the respondents' employment. She accordingly issued the award mentioned earlier. Was the arbitrator correct in her approach, and particularly her findings in the light of the evidence that was placed before her?

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<sup>6</sup> Page 444 of the record, finding No.1.

<sup>7</sup> Page 444 of the record, finding No. 3.

[48] I am of the view that the appellant has made a good case on the basis of which one can find that the decision of the arbitrator can be properly held to have been perverse in the circumstances. In *Jense van Rensberg v Wilderness Air Namibia*<sup>8</sup> the Supreme Court reasoned as follows:

‘If, however, the arbitrator reaches an interpretation of fact that is perverse on the record, then confidence in the lawful and fair determination of employment disputes would be imperilled 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 and 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.’

[49] In the first place, it must be stated categorically that the evidence adduced by the appellants’ witnesses was uncontested in so far as it established that on 12 August 2016, the respondents all carried out fish that was not for sale, under the invoice that would have allowed them to only purchase and remove carioca fish. They had, in their boxes, fish other than carioca, namely hake and kingklip, which were not part of the fish on sale to the employees.

[50] There were two witnesses, in particular, who were the security officials who manned the gate at the time the respondents sought to egress the premises with the fish. Their evidence remains unchallenged in so far as they stated that they confronted the three respondents with the fact that their boxes contained fish that was not authorised and they allowed the fish boxes to be returned to the cold store without demur. A report of this incident was apparently made by the security officials.

[51] It cannot be correct to then close one’s eyes to this critical piece of evidence and attempt to sweep it under the carpet and give credence to the version that on the return date, so to speak, the Monday or the Tuesday, when the boxes were inspected, only carioca fish was found in the

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<sup>8</sup> 2016 (2) NR 554 (SC) at 568 para [44], per O’ Regan AJA.



respondents' boxes. That fact does not in anyway do away with the evidence of what was contained in the respondents' boxes on the previous Friday.

[52] It is clear, on the evidence that the security personnel did not have control over the cold room where the offending boxes of fish were stored. Furthermore, it is an undeniable fact that the respondents actually worked in that place. The only reasonable inference that can be drawn in the circumstances, and it is the only reasonable one in the circumstances, is that there was an interference with the contents of the boxes in the interregnum, between the Friday when the illicit fish was spotted and the Monday or Tuesday, when the second inspection of the contents of the boxes was conducted. The latter event, in my considered view, does nothing to discard or dispel the evidence of the security officials regarding the offending contents of the respondents' consignments on the Friday. This renders the finding of the arbitrator perverse in the circumstances.

[53] It is also worth considering that only the 1<sup>st</sup> respondent testified during the disciplinary hearing and also at the arbitration. The versions of the other respondents were not placed before the respective tribunals. With the evidence outlined above staring the said respondents in the face, they had to put a version before the tribunal in respect of each one of them. This is not a case where one respondent could properly speak for the other. If one does not place a version at all, then the only uncontested version should, in my view carry the day, as there is no other version against which one could test the probabilities of the case as a whole in those circumstances.

[54] The arbitrator further held that there were inconsistencies in the evidence of the appellant regarding the time when the respondents came to the gate and the number of boxes they had with them. It would appear that one witness said there were 18 and another testified that there 22 in number. In respect of the first, namely, when the respondents came to the gate with their consignments, one witness said it was at 18:26 and another said it was at 17:30.

[55] This is not abnormal. Witnesses who observe one event may give slightly varying accounts. That, on its own is not a sufficient basis to then discard the evidence in its totality. The trier of fact should consider the inconsistencies and evaluate what effect they have on the case at hand, if at all. If they are not material and do not serve to turn the direction of the case one way or the other, then the court should not discard the evidence.

[56] It has been stated that where witnesses, who adduce evidence do so in a manner that is consistent in every respect, the court may, in appropriate circumstances infer that they may have been schooled in giving evidence that dovetails in every respect, minor and major.

[57] It is now settled law that not every inconsistency should lead to the trier of fact discarding the evidence because of an inconsistency or a contradiction. The inconsistency or contradiction must be of a material nature and capable of swaying the direction of the case in a certain way for the court to have regard to same. In this case, the main fact was that the respondents brought boxes that contained the wrong type of fish.

[58] The exact number of the boxes was not material in this regard as the offence was not necessarily based on the number of boxes as much as the fact of them bringing the boxes with a view to taking them out of the gate, a fact which is clearly not denied by them. Similarly, the time when they moved out was also not material because it was not denied by them that they attempted between 17:30 and 18:30 to move the boxes out of the appellant's premises.

[59] I would, in bringing clarity on this aspect, refer to the judgment of the Chamber in *The Prosecutor v Jean Paul Akayesu*<sup>9</sup> where the following is recorded:

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<sup>9</sup> Case No. 1CTR-96-4-T, a judgment of the International Tribunal for Rwanda at p.70-71, at paras 70-71.

'The Chamber noted that during the trial, for a number of witnesses, there appeared to be contradictions or inaccuracies between on the one hand, the content of their testimonies under solemn declaration to the Chamber and on the other hand, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing the witnesses gave false testimony. Indeed, an often levied criticism testimony is its fallibility. Since testimony is based on memory and sight, two human characteristics, which often deceive the individual, this criticism is to be expected. Hence, testimony is rarely exact at (sic) to the events experienced. To educe from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalising frailties in human perceptions. Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory naturally degenerates hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony. Moreover, false testimony requires the necessary *mens rea* and not a mere wrongful statement. [Emphasis added].

[60] I am of the considered view that the above sentiments expressed by the Chamber, apply *mutatis mutandis* to the instant matter. In the premises, I incline to the view that the inconsistencies the arbitrator zeroed on are not of such materiality, considering the important facts of the case and its trajectory, to turn the direction of the case one way or the other. To this extent, the arbitrator, in my view erred and grievously so as to render that criticism and approach to the evidence a serious misdirection on her part.

[61] Whilst still on this issue, it is important that arbitrators do not supplant the high standards applied in court proceedings to disciplinary hearing, where every little departure, regardless of consequence or materiality, is held to affect the proceedings. The timeless sentiments expressed by Parker A.J. in *Hangana Seafood (Pty) Ltd v Virginia*,<sup>10</sup> must not be allowed to sink into oblivion. The learned Judge said:

'It must be remembered that a domestic disciplinary body is not expected to proceed in the same manner as a court of law. What is expected of such body in pursuit of acting procedurally and fairly is to obey the rules of natural justice and to

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<sup>10</sup> 2016 (2) NR 582 LC para [6].

listen fairly to both sides, discharge its duties honestly and impartially and act in good faith . . . The employee should be informed of the charge, and given the opportunity to answer it . . . Additionally, the domestic body must keep record of the proceedings.'

[62] From a bird's eye view, it would appear to me, notwithstanding the criticisms levelled by the arbitrator that the disciplinary bodies substantially complied with the basic precepts outlined by the learned Judge in the above quotation.

[63] The version put on the respondents' behalf by the 1<sup>st</sup> respondent, namely that they were turned back at the gate because they were late simply does not carry any degree of credit. This is so when that evidence is juxtaposed with the uncontested evidence that a Mr. Jacky Jagger also came to the gate at around the same time as the respondents and his consignment, which was carried in the same forklift with that of the respondents, was found to be in order and he was allowed to take his purchase out without any qualms.

[64] I am not, in the event, required to traverse every blade of grass covered by the arbitrator in order to come to the conclusion that hers was a perverse award in view of the evidence led. There are other areas which I do not find it necessary to deal with in the light of what I consider to be very important areas, which demonstrate that her award was indeed perverse.

### Conclusion

[65] In view of the foregoing, I have, notwithstanding that the respondents' submissions were not considered for reasons advanced earlier in the judgment, on a consideration of the record as a whole, come to the conclusion that the appellants protestations about the perverse nature of the award are not far-fetched when proper regard is had to the issues raised in the judgment.

Order

[66] In the premises, I come to the conclusion that the award issued by the arbitrator in favour of the respondents was perverse. This provides the court with the wherewithal to set aside the award, which is the correct step to take in the circumstances. The following order is therefor condign:

1. The award issued by the Arbitrator in favour of the First, Second and Third Respondents, dated 13 November 2017, is hereby set aside in its entirety.
2. The decision by the Appellant to terminate the Respondents' employment is upheld.
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: Mr. P. Burger  
Of Kinghorn Associates, Windhoek.

RESPONDENTS: L. Mbaeva  
Of Mbudje & Brockerhoff Legal Practitioners, Windhoek.