NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-LAB-APP-AAA-2020/00016

In the matter between:

EBEN ISAACS **APPELLANT**

and

BEIFANG MINING SERVICE (PTY) LTD **FIRST RESPONDENT**

EMMA NIKANOR N.O. **SECOND RESPONDENT**

Neutral citation: *Isaacs v Beifang Mining Service (Pty) Ltd* (HC-MD-LAB-APP-AAA-2020/00016) [2021] NALCMD 21 (10 May 2021)

Coram: Schimming-Chase AJ

Heard: **27 November 2020**

Delivered: **10 May 2021**

Flynote: **Labour law** – Appeal – Question of law – An enquiry into a factual finding of an arbitrator will only amount to a question of law where there is no evidence which could reasonably support the finding of fact.

Labour law — Labour Act 11 of 2007, s 33(1) (a) and (b) — Dismissal — Fairness of — Misconduct — Involving an element of dishonesty — Fair reason — Test whether

dismissal for fair reason — If reasonable employer might reasonably have dismissed employee — Employee in breach of duty of acting honestly — Breach material and went to root of employment contract — Dismissal fair.

Evidence — Evidence — Witnesses — Calling, examination and refutation of — Cross-examination — If party fails to cross-examine witness, it is improper for him to argue that witness should be disbelieved — Party whose witness not cross-examined is entitled to assume that witness's evidence accepted unless it is so absurd, fantastic or of so romancing a nature that no reasonable person can believe it.

Summary: The appellant was previously employed by the first respondent as a maintenance foreman responsible for the first respondent's maintenance workshop. The first respondent conducts drilling and blasting activities, using explosives, as a contractor for Swakop Uranium on its mining site near Arandis.

Following a disciplinary hearing in December 2017, the appellant was dismissed having been found guilty on two charges of misconduct, namely insubordination and deliberately supplying falsified information. The matter was referred to arbitration, at the end of which the second respondent found that the appellant's dismissal was both procedurally and substantively fair.

Her findings were, amongst others, that the respondent's witnesses were not meaningfully challenged (in some instances not challenged at all) on the facts and events leading to the charges being laid against the appellant. She also found that the factual basis for the appellant's belated defence to the charges relating to insubordination was not laid, as the respondent's witnesses were not cross-examined on this defence.

The appellant appealed the arbitrator's findings on the basis that no reasonable trier of fact would have made such findings, and that the arbitrator should have set aside the sanction of dismissal, because the appellant was not counselled on the misconduct complained of.

Held that as an overriding principle it is to be borne in mind that unless the decision of an arbitrator is asserted to be perverse, an Appellate Court should be assiduous to avoid

interfering with the decision for the reason that on the facts, it (the Appellate Court) would have reached a different decision on the record. That is not open to the Appellate Court. The test is whether the arbitrator reached a decision on the facts that no reasonable decision maker could have reached.

Held further that an employment agreement creates a fiduciary relationship between employer and employee, requiring conduct of the utmost good faith. Therefore, an employee's dishonest conduct goes to the foundation of the employment relationship. It amounts to a breach of its material terms and has invariably been accepted by our Namibian courts as a valid ground for dismissal.

Held further that a party to legal proceedings has the duty, through cross-examination, to dispute the evidence of witnesses should she disagree with their evidence. She must confront the witnesses with the conflicting version(s) and must place the contrary version(s) before them. Thus, if the evidence of a witness is not challenged in cross-examination, the party who called the witness (and the trier of fact) may assume that the unchallenged evidence has been accepted as correct.

The court could not find any basis upon which to hold that the factual findings, or the application of the relevant law by the arbitrator was in any way incorrect and unreasonable.

The appeal was accordingly dismissed.

ORDER

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1. The appeal is dismissed.

2. There shall be no order as to costs.

JUDGMENT

SCHIMMING-CHASE, AJ

[1] This is an appeal against a ruling of the second respondent, the arbitrator, in which she found that the appellant's dismissal on charges of misconduct was procedurally and substantively fair. Only the first respondent opposed this appeal. I will therefore, for ease of reference, refer to the first respondent as 'the respondent'.

[2] The respondent conducts drilling and blasting activities, using explosives, as contractor for Swakop Uranium (Pty) Ltd (a mining company) on its mining site, near Arandis. The appellant was employed as a maintenance foreman, in charge of its mechanical workshop. He had at least two subordinates reporting to him.

[3] The appellant was charged with four counts of misconduct, namely:

(a) Insubordination, alternatively failure to comply with a lawful instruction;
(b) Deliberately supplying incorrect and falsified information, alternatively dishonesty;
(c) Breach of contract;
(d) Poor work performance.

[4] A disciplinary hearing was held on 4 December 2017 and at its conclusion on 17 January 2018, the appellant was found guilty on two charges of misconduct, namely - insubordination, and deliberately supplying falsified information. The appellant was also dismissed on this date.

[5] The particulars of the insubordination charge were that the appellant continued to collect parts from or place orders with suppliers without a valid purchase order, in violation of the respondent's procurement processes and contrary to direct instructions to refrain from doing so. The last incident relevant to the charges occurred on 20 November 2017.

[6] The particulars of the charge of deliberately supplying incorrect and falsified

information, were that the appellant submitted falsified records with regard to mandatory statutory inspections to be performed on vehicles utilised in the transport of explosive substances. The incorrect and falsified information included:

> [7] a backdated inspection sheet, signed off by one N van der Riet and others on the appellant's instruction, in respect of an inspection performed on vehicle MMU1, whilst Mr Van der Riet did not perform the inspection on this vehicle; and
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> (a) various other inspection sheets that had been completed in the month of November at the appellant's request, but which had been backdated to October 2017. These inspection sheets had a bearing on inspections purportedly performed in October 2017, whilst there were no records of any such inspections actually having taken place.

[8] On 09 May 2018, the appellant referred a dispute of unfair dismissal for arbitration pursuant to the provisions of s 86 of the Labour Act 2007, Act No 11 of 2007 ("the Labour Act").

[9] The appellant advanced that his dismissal was unfair, and without a valid and fair reason because the disciplinary hearing and appeal process did not comply with the rules of natural justice.[1]

[10] At the commencement of the hearing and in his opening statement at the arbitration, the appellant advanced additional grounds relating to the severity of the sanction, and contended that his dismissal was inappropriate because there was no counselling provided to the appellant before he was dismissed.

[11] Two witnesses testified at the arbitration hearing for the respondent, namely Mr P Rooi, the production manager, and Mr N van der Riet, the workshop foreman and mechanic.The appellant also testified.

[12] On 18 February 2020, the arbitrator, dismissed the appellant's claims, holding that his dismissal by the respondent was for a valid and fair reason, and in compliance with s 33 of the Labour Act.

[1] This was in essence, the sum total of the grounds advanced in the Summary of Dispute.

[13] Her findings were, amongst others, that the respondent's witnesses were not meaningfully challenged (in some instances not challenged at all) on the facts and events leading to the charges being laid against the appellant. She also found that the factual basis for the appellant's belated defence to the charges relating to insubordination was also not laid, because the respondent's witnesses were not cross-examined on this defence, it being raised for the first time during the appellant's testimony, after the respondent closed its case. She also found the appellant's evidence to be lacking in credibility.

[14] The appellant raised some 14 grounds of appeal, some of which were not appealable as they are not questions of law. Distilled to its essence, the appeal is based on the arbitrators' factual findings being such that no reasonable trier of fact would have made such findings, and that the arbitrator should have set aside the sanction of dismissal, because the appellant was not counselled about the misconduct complained of. Thus, the appeal is aimed at the arbitrator's findings on the fairness of the disciplinary procedure (procedural fairness) and the validity and fairness of the reasons for the dismissal (substantive fairness). For ease of reference, the appellant's grounds of appeal are summarised as follows:

[15] there was insufficient evidence to find that the appellant failed to obey instructions and falsified documents;

(a) regarding the findings of insubordination, the arbitrator incorrectly applied the respondent's procurement rules, because the appellant acted on direct instructions from his supervisor;

(b) the arbitrator accordingly incorrectly found that the appellant admitted having flouted the procurement procedures;

(c) the arbitrator incorrectly found that the appellant failed to prove that the parts collected were not used in the respondent's vehicle;

(d) the respondent was inconsistent in disciplining the appellant, having tolerated past orders of parts without following the procurement rules under urgent circumstances;

(e) generally, the respondent's evidence of the alleged misconduct was lacking as the witnesses contradicted each other and were evasive;

(f) the disciplinary sanction (dismissal) was unreasonable and unfair.

[16] Before dealing with the findings of the arbitrator, a short exposition of the applicable law, which also informed the arbitrator's findings.

[17] As an overriding principle it is to be borne in mind that unless the decision of an arbitrator is asserted to be perverse, an Appellate Court should be assiduous to avoid interfering with the decision for the reason that on the facts, it (the Appellate Court) would have reached a different decision on the record. That is not open to the Appellate Court. The test is whether the arbitrator reached a decision on the facts that no reasonable decision maker could have reached.[2]

[18] An employment agreement creates a fiduciary relationship between employer and employee, requiring conduct of the utmost good faith. In *Namdeb Diamond Corporation (Pty) Ltd v Gaseb*[3] the Supreme Court expressed itself as follows on this principle:

'An employee has a fiduciary duty or a duty of trust which involves an obligation not to work against his or her employer's interest. This was made clear by Smuts J, in *Novanam v Willem Absalom & others* . In the *Novanam* matter the labour court referred with approval to *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks & others* at 462G-463A where the following is stated: "There is in most, if not all contracts of service, whether it be an employment contract or a contract of agency, an implied fiduciary duty on the part of the employee or agent towards the employer or principal as the case may be. In *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler & another* 1971 (3) SA 866 (W) at 867, Hiemstra J, quoting with approval Hawkins J in *Robb v Green* [1895] 2 QB1 at 10-11, said as follows at 86H-868A:

'There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in the contract of employment to that effect. It is stated thus in the leading case of *Robb v Green* (1895) 2 QB 1, per Hawkins J at 10-11:

"I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the

[2] *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* (LCA 62/2013) [2017] NALCMD 27 (14 August 2017) at para 45.

[3] *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 at para 65.

servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters not appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service."'

[19] The employment relationship gives rise to a relationship of trust, and the employer is entitled to trust in the honesty and integrity of the employee who must act in the best interest of her employer. Therefore, an employee's dishonest conduct – be that theft, fraud, forgery, other forms of dishonesty – goes to the foundation of the employment relationship. It amounts to a breach of its material terms and has invariably been accepted by our Namibian courts as a valid ground for dismissal. This principle has also been expressed as follows:

'. . . it was one of the fundamental principles of the employment relationship that an employer should be able to place trust in the employee and that a breach of this trust or form of conduct involving dishonesty is one that goes to the heart of a relationship and is destructive of it'.[4]

[20] The respondent's blasting activities at Swakop Uranium are regulated by the Explosives Act 26 of 1956 ("the Explosives Act") and the regulations promulgated thereunder[5]. Chapter 6 of the regulations places obligations on the respondent, including:

[21] prescribing that vehicles transporting explosives must be specifically converted for that purpose and must be licensed as such by an explosives inspector;

[22] prohibiting transport of explosives, unless in such purposively converted and licensed vehicles;

[23] prescribing the monthly examination of the condition of the licensed vehicles and its equipment by a qualified motor mechanic or mechanical engineer, during the first week of every month;

[24] the completion by the qualified motor mechanic or mechanical engineer of a prescribed monthly examination certificate and examination sheet, certifying the

[4] *Standard Bank of SA Ltd v Commission for Conciliation Mediation Arbitration and Others* (1998) ILJ 903 (LC) at 905J-906A, approved in *Metropolitan Namibia Ltd v Haimbili* 2004 (4) 110 NLC at 112.

[5] Regulations were published by GN1604 of 1972 (RSA GG 3648) and amended by GN2371 of 1973 (RSA GG 4103), GN155 of 1977 (RSA GG 5395), GN2153 of 1977 (RSA GG 5779), GN2153 of 1979 (RSA GG 6665), GN2292 of 1979 (RSA GG 6706), GN AG49 of 1989 (OG 5761), GN51 of 2002 (Nam GG2717).

examination was conducted and recording the condition of the vehicles and equipment and the results of the inspections and any repairs effected;

[25] keeping of the certificates of condition and the monthly inspection sheets, which must be sent to the Chief Inspector of Explosives annually, during September each year.[6]

[26] Non-compliance with the regulations is a criminal offence[7].

[27] A party to legal proceedings has the duty, through cross-examination, to dispute the evidence of witnesses should she disagree with their evidence. She must confront the witnesses with the conflicting version(s) and must place the contrary version(s) before them. Thus, if the evidence of a witness is not challenged in cross-examination, the party who called the witness (and the trier of fact) may assume that the unchallenged evidence has been accepted as correct. In *Small v Smith,*[8] the principle was expressed thus:

> 'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct.... unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.'[9]

Where a party denies allegations made against her, and raises grounds to justify her conduct, in essence a special defence, or defence of justification is raised. Such a defence must be properly pleaded, and supported by evidence on a balance of

[6] Regulations 6.38.1 and 6.38.2.

[7] Regulation 6.50.

[8] *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438 E-G.

[9] Approved in inter alia *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 at par 61 and the authority collected at footnote 4.

probabilities, in order to succeed.[10]

[28] The facts, which are not in meaningful dispute[11], were fully summarised in the arbitrator's ruling. Only the salient facts are summarised below.

[29] As maintenance foreman, part of the appellant's job description was to ensure that the respondent's vehicles and equipment used to transport explosives, were mechanically examined and reported on by a qualified mechanic and electrician every month. This was to ensure that the vehicles were in a condition to safely transport explosives and to comply with the first respondent's obligations in terms of the Explosives Act. Thus, the monthly examination and report, and the results thereof were statutory requirements and had to be attended by (signed) a qualified mechanic and electrician for onward submission to the relevant authorities

[30] The appellant had to present, annually, the twelve monthly examination reports to the respondent's production manager (Mr Rooi) for onward conveyance to Swakop Uranium and the Chief Inspector of Explosives. It had to reach the Chief Inspector by the end of September each year.

[31] The respondent had difficulty during September 2017 to gather and present the previous years' monthly examination sheets. Mr Rooi suspected the appellant did not keep them properly on a monthly basis, as was required.

[32] During early November 2017, Mr Rooi enquired with the appellant into the monthly vehicle examination sheets for October 2017. The enquiry was made prior to the lunch hour. The appellant replied that the inspections were not done and they did not have the examination sheets. He could not hand the October 2017 examination sheets to Mr Rooi, upon his enquiry.

[33] The appellant knew that he had to keep the examination records on a monthly basis, and he also knew what the consequences of not timeously producing examination sheets were, namely that the respondent risked losing their vehicles' explosives licenses

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[10] See *Pillay v Krishna* 1946 AD 946 at 852;

[11] And also not materially placed in dispute in cross examination.

and being held criminally liable and fined.

[34] After the lunch hour, the appellant promptly handed a signed examination sheet to Mr Rooi. The sheet was signed by the mechanic, Mr van der Riet, and the electrician, Mr D Titus, who had certified that the vehicle examinations for October 2017 had been attended to.

[35] Mr Rooi found it strange that the examination sheet that had not been available earlier that morning, was suddenly presented that afternoon. He enquired with the mechanic and the electrician, who reported to him that they did not actually perform the inspection, but signed the document on the appellant's request.

[36] Mr van der Riet testified that he was the maintenance foreman and a qualified mechanic, who reported to the appellant at the time. He signed the examination sheet for October 2017 during November 2017, upon request by the appellant. The appellant informed him that it was needed for filing purposes, and he signed the sheet without performing the monthly examinations of the explosives vehicles, and without completing the examination sheet.

[37] The appellant admitted that Mr Rooi enquired into the examination sheet for October 2017, and that he eventually submitted the said sheet, albeit belatedly, as they had been busy.

[38] The facts on record revealed that the explosive vehicles' examinations for October 2017 were not done by Mr van der Riet, and that the vehicle examination sheet for October 2017 was backdated when the appellant presented it to Mr van der Riet, who signed it only during November 2017. Further, the examination sheet for October 2017 which the appellant presented to Mr Rooi contained a false certification that the vehicle examinations for October 2017 were done by Mr van der Riet and that they were done during October 2017.

[39] As regards the charge of insubordination, this related to the respondent's procurement policy and procedures on spare parts. When in need of a spare part, the appellant was required to follow the respondent's procurement policy, which required him

to make out a requisition for the spare part and to submit it to the procurement department, which dealt directly with the suppliers to source, order, collect and pay for the spare parts.

[40] The procurement department would make payment and then collect the parts from the supplier, unless they instructed the maintenance personnel to do so. Final approval for the order of a part would lie with the general manager, Mr Wang. Following the procurement policy ensured that the respondent had a constant relationship with suppliers, had internal controls over procurement, that budget constraints were adhered to and it prevented possible abuse.

[41] Previously, the appellant had direct dealings with the suppliers, ordering and collecting spare parts. The suppliers complained to the procurement department that the appellant did not follow the procurement policy. The appellant was repeatedly reprimanded and reminded to follow the policy and procedures during numerous meetings with him, including meetings with the most senior managers at the respondent. The appellant was aware of the policies, and was pertinently informed that serious consequences may follow if he did not follow the procurement procedures.

[42] Contrary to the procurement policy and procedures, and without an order or prior approval from the procurement department, the appellant ordered and collected a spare part from a supplier, Namibia Lubrication Services, on 20 November 2017. The supplier complained to the respondent about the appellant not following the procedures. The spare part collected by the appellant was eventually used in repairs to the respondent's explosives truck.

[43] The appellant testified that he approached Namibian Lubrication Services directly to order and collect the part, on the instructions of Mr Ren, his supervisor. The part was urgently needed to repair the respondent's explosives truck that had been out of order for some time. The appellant stated that he followed the instructions of a superior to act contrary to the existing rules of the procurement procedures, and as a result, his misconduct was justified under the circumstances.

[44] This evidence was presented by the appellant after the respondent closed his

case without same being put to any of the respondent's witnesses. In addition, Mr Ren, who apparently instructed the appellant was not called to testify at the arbitration hearing.

[45] The arbitrator made the following findings on the evidence:

'Evidence was led that the applicant falsified documents, which he was asked by Mr Rooi in the morning, somewhere in November 2017, but he could not provide such documents, and in the afternoon of the same day, he submitted the requested documents. It is weird that the applicant when asked in the morning he could not produce the document, but in the afternoon he produced it. That is clearly indicating that the appellant did not do his job as required, because the document requested was for October 2017, which was supposed to be completed already and he only completed it after it was requested. The applicant knew very well that the inspections were not done on the vehicles, because if it was done, he could have the document ready in the file and if it is requested he would just have gone to collect it and submit it. In fact he would not have waited for Mr Rooi to request for the document if it is his duty to submit it on time, he should have submitted it already without being asked. For the applicant to wait for Mr Rooi to ask for the document, it is already an indication that the Applicant did not do his job as requested.

Furthermore, the applicant went ahead and produced a document without inspection done, while it was a requirement that the document must be completed after the inspection was done. In my opinion, that is a clear falsification of the document, because he just completed the document without inspection. To add to that, the applicant asked or instructed the Mechanic to sign a blank document, which is a serious thing to do. When Mr van der Riet testified that he was instructed by the applicant to sign a blank document, the applicant did not dispute or challenge such evidence, and that led me to believe that Mr van der Riet's evidence on that aspect. Again, Mr van der Riet testified that he asked the applicant on what was that document for, but he apparently told Mr van der Riet that it was just for filing purposes. That aspect was also not disputed by the applicant, meaning that the applicant was not honest when he asked Mr van der Riet to sign a blank document, while he knows very well that he was going to submit that document to Mr Rooi. Hence I tend to conclude that the applicant falsified the document and he was guilty of such an offence.

It is a known fact that the applicant went to collect the part without purchase order and it is also well known that there were numerous meetings by the management with the applicant to caution him not to go and collect the parts without following procedures, as that was not the first incident. The applicant himself also testified to such effect, but I do not know why he is now saying that he is not guilty of count 1 while he committed that offence.

The applicant testified that he went to collect the part without a purchase order on 20 November 2017 from Namibia Lubrication Systems because he was instructed by Mr Ren to do it. The applicant failed to call Mr Ren as a witness to come and testify and there was no other witness that was called by the applicant to come and corroborate his evidence, despite the fact he testified that when he was instructed by Mr Ren, there were Mechanics, like Century, Nicky and Romeo. I do not know how the applicant expected me to believe and consider his evidence without any corroboration, I believe that, that was just an afterthought from the side of the applicant to sweeten his story, that he was instructed, while it is an actual fact that he failed to follow laid down procedures as usual, because that was not the first incident.

In addition the applicant should take note that by the time he mentioned Mr Ren, the respondent had already closed their case. And there is no way they could call Mr Ren to come and testify after him, hence it was his responsibility to call Mr Ren to come and support his evidence. If the applicant mentioned Mr Ren during cross-examination of the respondent's witnesses, that could be something else, but to mention him after the respondent closed their case and to expect the respondent to call Mr Ren after his testimony, I found that statement unreasonable.'

[46] In the result, the arbitrator found that the respondent had discharged its onus and proved that the findings of guilt against the respondent were entirely correct, and that the appellant's dismissal was substantially and procedurally fair.

[47] In this regard, she made the following finding:

'Again, it will not be fair if the respondent lets him continue to breach the company policy and procedures without being disciplined, because he was supposed to be a leader of his subordinates. If they let him continue breaking procedures that will bring problems in the company, because even the subordinates will not adhere to the rules and procedures.'

[48] After consideration of the evidence led, as well as the findings of the arbitrator, this court cannot find any basis upon which to hold that the factual findings, or the application of the relevant law by the arbitrator was in any way incorrect and unreasonable. It is apparent from the record that the arbitrator properly applied her mind to the evidence and made a correct finding on the facts as well as the law. For the reasons given, the court will also not interfere in the arbitrator's finding that dismissal was

appropriate in the circumstances, given the evidence on record of the appellant's serious misconduct, as well as the fact that the appellant was repeatedly warned (although not in a formal disciplinary setting) to no longer engage in the conduct complained of. The findings of the arbitrator are unassailable.

[49] The following order is accordingly made:

1. The appeal is dismissed.
2. There shall be no order as to costs.

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EM SCHIMMING-CHASE, AJ

APPEARANCES

APPELLANT: Mr Edwin Coetzee
of Tjitemisa & Associates, Windhoek

FIRST RESPONDENT: Mr P J Burger
of Kinghorn Associates, Swakopmund