REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2019/00070

In the matter between:

LEWIS STORES (PTY) LTD Appellant

and

VIOLET BASSON 1st Respondent

NICOLEEN MOTINGA 2nd Respondent

Neutral Citation: *Lewis Stores v Basson* (HC-MD-LAB-APP-AAA-2019/00070) [2021] NALCMD 14 (15 April 2021)

CORAM: MASUKU J

Heard: **3 July 2021**

Delivered: **15 April 2021**

Flynote: Labour law - Unfair dismissal - Procedural fairness – Recusal - Duty to give reasons and consequences of failure to do so.

Summary: The First Respondent having been dismissed from employment by the applicant lodged a dispute with the office of the Labour Commissioner.

The first respondent being victorious and the Appellant being dissatisfied with the outcome brought the matter on appeal. The issue before court to determine is whether the dismissal of the respondent was procedurally unfair as found by the arbitrator.

Having raised issues before the disciplinary proceedings which lead to her dismissal the first Respondent requested for the recusal of the chairperson of the disciplinary committee and for legal representation. The determination of the recusal application was made by the superior of the chairperson. This position was contested by the respondent and subsequently upheld by the arbitrator. The appellant took issue with the monetary award granted in favour of the respondent, contending that the arbitrator acted in an arbitrary manner when he issued an award without giving reasons to substantiate the award so given.

Held that: a chairperson cannot abdicate their responsibility to a third party for decision in respect of a decision that ought to be taken by themselves.

Held further that: Applications for recusal must be determined by the person whose continued participation is sought to be brought to an end.

Held that: There was a valid and fair reason for dismissing the respondent, but the procedure followed amounting to the dismissal was not correct.

Held further that: the arbitrator reached a conclusion to award an amount without any justification as to how he came to the amount so ordered or how it is computed.

Held that: Reasons for a conclusion reached is a fundamental and necessary part of adjudication.

In the premises the court found the dismissal to be procedurally unfair but the monetary award issued by the arbitrator was set aside and referred back to the office of the Labour Commissioner for reconsideration by the same arbitrator.

The second respondent did not challenge the appeal, it appeared that her dismissal was both substantively and procedurally fair, as a result the court set aside the award issued by the arbitrator in favour of the second respondent.

ORDER

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1. In relation to Ms. Basson, the award issued by the Arbitrator dated 6 December 2019 in favour of the said Ms. Basson, is hereby confirmed in so far as it held that the dismissal of Ms. Basson was procedurally unfair.
2. The monetary award issued by the arbitrator in favour of Ms. Basson, be and is hereby set aside.
3. The matter is referred back to the Office of the Labour Commissioner to allocate the aspect relating to the monetary award to the same arbitrator without undue delay.
4. In relation to Ms. Motinga, the award issued by the arbitrator in favour of Ms. Motinga, is hereby set aside as of no force or effect.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] It is an undeniable fact of life that employment relationships, like most other human relationships do at some time or another, go moribund. Employees, rightly or wrongly, do get dismissed for one reason or another. In a democratic country like Namibia, the employer, regardless of the proximity they may enjoy to the centre of power, will often be called out, in terms of the labour laws, to account for the dismissal.

[2] This case is no different. The respondent, Ms. Violet Basson, who held a lofty position of branch Manager of Lewis Stores, the appellant, in Keetmanshoop, was dismissed by the appellant consequent to an internal disciplinary hearing. She had been charged and found guilty of gross negligence culminating in the appellant losing an amount in the excess of N$ 300 000.

[3] Dissatisfied with the dismissal, the respondent lodged a dispute of unfair dismissal with the Office of the Labour Commissioner. The dispute was not resolved at conciliation. It eventually served before Mr. Matheo Rudith, an arbitrator allocated to deal with the dispute. After hearing evidence, the arbitrator found that the appellant's dismissal of the respondent was procedurally unfair and in violation of s 33 of the Labour Act, 2007. He accordingly issued an award dated 6 December 2019 in the respondent's favour in the amount of N$ 84 000, which represented six month's salary. The respondent was not, however, reinstated to her previous position.

[4] The appellant, in turn dissatisfied with the award issued, lodged an appeal with this court. The appellant contends in the main that the award constitutes a gross irregularity and that this court should, in the circumstances, set it aside and uphold the dismissal as it was eminently warranted in the premises.

[5] The court is, in this judgment, called upon to determine the propriety or otherwise of award. It is, however, pertinent to mention that the respondent has not taken the appeal supinely. She has engaged counsel and has not unexpectedly supported the award with every sinew in her body.

[6] The task of the court in the circumstances, is to identify the party, between the protagonists, who rests securely in the arms of the law in this regard. If truth be told, it cannot be that both parties fall on the correct side of the law. In that connection, the concept of a 'draw', meaning that the parties are even, and will thus share the spoils, is unknown to labour law. There must be a victor and a vanquished. Who will it be?

The 2nd respondent

[7] It will be apparent that from the citation of the parties in this matter, there are two respondents. This includes Ms. Motinga, cited as the 2nd respondent, who was also in the appellant's employ. She was also dismissed for different reasons.

[8] She, like the 1st respondent, challenged her dismissal and the same arbitrator found in her favour. He held that her dismissal was in contravention of s 33 of the Labour Act, 2007 in that there was no valid and fair reason for her dismissal. He also held that her dismissal did not comply with a fair procedure. She was, in consequence, awarded an amount of N$ 47 520, equivalent to 12 months of her salary.

[9] It is clear, however, that after the appeal was noted by the appellant, she, unlike Ms. Basson, did not oppose the appeal. Consequently, there is nothing placed before me on her behalf that may persuade me that there was anything wrong with her dismissal. I should mention in this regard that her case was handled differently from that of Ms. Basson.

[10] In the premises, and particularly in the light of the fact that she did not oppose the appeal, and on the grounds advanced by the appellant, it does appear that her dismissal was both substantively and procedurally fair. If she had any ought regarding the appeal, she would have opposed the proceedings. Despite proper service of the appeal documents, she did not oppose the appeal and consequently did not place her case before this court. I accordingly will set aside the arbitrator's decision regarding the award that he issued pertaining to Ms. Motinga and about whom I will say no more in this judgment.

[11] I will, for ease of reference, refer to the Lewis Stores (Pty) Ltd as 'the appellant'. Ms. Basson, will henceforth be referred to as 'the respondent'. To the extent that it may be necessary to refer to Ms. Motinga, she will be referred to as such, or simply as the 2nd respondent.

Background

[12] The respondent had been employed by the appellant as the Branch Manager in Keetmashoop. On 27 February 2017, the respondent was given notice of a disciplinary hearing scheduled for 2 March 2017. She had been charged with a breach of the cash handling procedures stipulated by the appellant. The hearing was postponed because the respondent requested that she be represented and further applied for the recusal of the chairperson of the disciplinary enquiry, a Mr. Janser. The hearing was then postponed to 9 March 2017.

[13] The respondent was then given notice on 6 March 2017 of the hearing scheduled for 9 March 2017. The charge sheet had been amended. Its particulars recorded that the respondent had breached the appellant's banking policy and the core activity of her job profile. She was, after the hearing dismissed and it does not appear that the appellant's disciplinary code provides for appeals.

[14] Disgruntled with the dismissal, the respondent approached the Office of the Labour Commissioner, who appointed an arbitrator to preside over the proceedings because the dispute was not settled at conciliation. As indicated above, the arbitration proceedings were held and finalised. They terminated in the respondent's favour.

[15] The appellant is also dissatisfied with the arbitral award. It lodged an appeal to this court. The appellant contended that the arbitrator erred in finding that the dismissal was procedurally unfair. The appellant contended that the departure from its internal procedure and guidelines does not necessarily render the procedure followed unfair, as the arbitrator found.

[16] It was the appellant's further contention that the arbitrator erred in finding and holding that the respondent was entitled to external legal representation as exceptional circumstances were not proved to exist. The appellant further adopted the position that the arbitrator erred in holding that there was a conflict of interest because the appellant's Divisional Human Resources Manager, Mr. Janser, was appointed as the chairperson for the disciplinary proceedings. It was the appellant's contention that Mr. Janser was not involved in the preparation or

preferment of the charges against the respondent. His impartiality, so contended the appellant, was not in any way compromised.

[17] The main question to determine, is whether the appellant is correct that the dismissal of the respondent was procedurally unfair. This is so against the backdrop of the arbitrator's finding that there was no merit in the allegation that the proceedings were attended by substantive unfairness. He found, and correctly so, in my considered view that there was ample evidence that the respondent was the manageress at the shop and that she failed to comply with the company policies. In this regard, she failed to ensure that the cash was verified daily and was properly placed in a moneybag and sealed and placed into the drop safe as procedure dictated. I cannot fault this conclusion by the arbitrator.

[18] Regarding the issue of procedural fairness, the arbitrator held that the dismissal was unfair because the charges preferred against the respondent had not been drafted in consultation with the Divisional Human Resources managers. The arbitrator also held that the respondent's application for the recusal of Mr. Janser was wrongly dealt with as the determination of the recusal application was not made by the said Mr. Janser, but by a Mr. Jonathan Hoctor, who was not the officer appointed to preside at the hearing. He found established that the chairperson of the inquiry, Mr. Janser discussed the case with the person who drafted the charges.

[19] Lastly, the arbitrator found that the appellant's management recognised the employees' right to unionise and for the union to represent the workers. He held that the relevant clauses of the recognition agreement did not limit the Union to only represent its members at Lewis via its workplace representative. For the above reasons, he held that the process followed was procedurally unfair and found for the respondent, as recorded earlier.

Determination

[20] The law that applies to this matter can be regarded as trite. The parties, in their useful heads of argument articulated the relevant principles with great

aplomb and the court is indebted to them for their industry. The enquiry, as indicated above, will be limited to the question whether the findings of the arbitrator on procedural fairness were correct.

[21] Because the gravamen of the appeal hinges of procedural fairness, it is apt that a little be said about what procedural fairness entails. The court was, among other matters, referred to *ABB Maintenance Services Namibia (Pty) Ltd v Moongela*,[1] where the court propounded the applicable law as follows:

'[21] . . . the Labour Court has placed so high a value on procedural fairness that in many cases employees were granted compensation or even reinstated because of a lack of proper pre-dismissal procedures, even though the court was satisfied that would otherwise have been a valid reason for the dismissal. . . In view of the clear and unambiguous words of s 33(1)(a) and (b) of the Act, even where an employer succeeds in proving that he had a valid and fair reason to dismiss an employee, the dismissal is unfair if the employer fails to prove that it followed a fair procedure.

[22] The court was also referred to *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee*[2] where the following insightful remarks are to be found:

'. . . a valid and fair reason for dismissal cannot, in my view, exist in facts which, if a proper procedure were followed, might well have been different. In the present matter the reason for the finding of guilt, is inextricably linked to the procedure followed by the appellant. In the light of all the above, the inescapable conclusion is that the appellant, has, on a balance of probabilities, failed to prove that the respondent was actually guilty of misconduct. The dismissal of the respondent is unfair, more specifically in respect of the procedures followed in connection with his dismissal.'

[23] It would appear, from the foregoing that there is a give and take, so to speak, between the validity of the dismissal and the fairness of the procedure followed in reaching the dismissal. The two may be considered to be two sides of

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[1] *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (LCA 11/2016) [2017] NAHCMD 18 (07 June 2017), para 21.

[2] *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee* (LCA 30/2015) [2016] NACCMD 45 (06 December 2016), para 44.

the same coin, although on different sides and with different inscriptions, at the end of the day give value to the totality of the coin.

[24] Mr. Muhongo, for the appellant, commenced his address on a confessional note. He submitted that the procedure followed by the appellant, which led to the dismissal, was less than perfect. That said, he continued, whatever shortcomings there may well have been, did not prejudice the respondent. He harped monotonously, but understandably on the fact, which was accepted by the arbitrator that there was a valid and fair reason to dismiss the respondent. What of the other side of the coin? It is to a discussion and determination of the latter that I now turn.

[25] Before I deal with the issue identified immediately above for determination, I should point out that a reading of the appellant's heads of argument suggest that it laid a lot of store on substantive fairness. This is evident from the cases and other authorities referred to in the appellant's heads of argument. As will become apparent, the arbitrator found and held in the award that the dismissal was, from all accounts, substantively fair as there was a valid and fair reason for the dismissal. This finding renders the treatment of that subject hardly necessary in the circumstances.

[26] I commence with the arbitrator's finding that the appellant violated its own policy in that the charges against the respondent were not drafted in consultation with the Divisional Human Resources managers. Clause 3.1 of the appellant's policy reads as follows:

> 'Initiating disciplinary charges for all employees that may result in final warning or dismissals. All these types of charges must be formulated in consultation with the Divisional HR Managers. . . The formulating of accurate disciplinary charges is crucial and hence the Divisional HR Managers must be consulted from the beginning of the disciplinary process.'

[27] I am of the considered view that the above-cited clause, when one has proper regard to it, was formulated not for the benefit of the accused employee but for the benefit of the employer. This was done to ensure that charges are

properly formulated so as to avoid situations where the charges are imprecise or incorrect and ultimately lead to the setting aside of a dismissal. This it is plain, was an internal mechanism to produce 'full-proof' charges that will be technically sound and not fail to sustain the evidence to be adduced.

[28] In the premises, I am of the considered view that the failure to follow the relevant clause is of no moment in so far as the procedural fairness of the charges is concerned. The respondent can point to no iota of evidence suggesting that she was in any manner, shape or form, prejudiced by the non-referral of the charges to the Human Resources Managers. If this was not done and there were repercussions flowing therefrom, it would be the appellant that would feel the heat and not the respondent. If anything, it may work in the respondent's favour if the charges are not properly formulated in consultation with the human resources managers as stipulated. The respondent can hardly cry foul in that event.

[29] I now turn to the second complaint, namely that the respondent applied for the recusal of Mr. Janser but he did not make a call on that application. There is a letter addressed to the respondent dated 9 March 2017 and it is under the hand of Mr. Jonathan Hoctor, whose designation is recorded as the Senior HR Manger of the appellant.[3]

[30] It is apparent from the letter that the Mr. Hoctor states that an application for recusal had been raised before the chairperson of the disciplinary enquiry but the said application was handed to him for reply. The author dealt with the application relating to the alleged bias of the chairperson Mr Janser and also the issue of representation before the disciplinary enquiry.

[31] In relation to the issue of the bias alleged, the scribe of the letter concludes as follows:

> 'I therefore find no evidence in your application to support the recusal of Mr. Janser as the chairperson of your disciplinary hearing and he will remain the appointed chairperson for your disciplinary hearing.'

[3] Page 673 of the record of proceedings.

[32] It is a tenet of justice that proceedings, including disciplinary hearings should always exude fairness. In this regard, there are roles apportioned to the various players who get involved in the hearing. This includes the chairperson, the leader of the evidence or prosecutor, the witnesses and of course the employee charged.

[33] What is most disconcerting in this matter, is that the chairperson ceded his powers to Mr. Hoctor for a decision of a matter that was placed before him. I have not, in my many years in the legal field, heard or read of a situation where the chairperson of an enquiry avoids making a decision on a matter of fairness and assigns a non-actor to make the decision for the chairperson. This amounts to unwarranted and impermissible abdication of responsibility.

[34] I consider this particular matter of serious concern because it related to foreboding the respondent held, rightly or wrongly, that the chairperson was not impartial. Applications for recusal, because they relate to the person whose recusal is moved, must be determined by the person whose continued participation is sought to be set aside. It is the direct call of that person to listen to the accusations, ask questions if any, and retire to make a decision on the application for recusal.

[35] It is certainly improper and unprecedented that an application for recusal of the chairperson would be moved before the said chairperson and he or she then refers the matter to his or her supervisor for decision. That, in my view constitutes a clear reflection that the person chairing the proceedings is not independent and has to seek the assistance and in this case, the intervention of his superior, to decide for and on his behalf on the allegation of his own partiality. Surely, he has no one to refer those matters to and must take the bull by the horns, regardless of the discomfort, and make a decision.

[36] In my mind's eye, I conceive a situation where a litigant appears before a judge of the High Court and he or she perceives, rightly or wrongly, that the said judge would not be impartial for whatever reason. It would be very odious for the judge concerned to then refer the application to the Judge President for a

decision on an application that is serving and was moved before the judge allocated to hear the case. The Judge President, with all the judicial and administrative power at his disposal would be wrong to entertain the invitation, let alone to make the decision on behalf of the judge.

[37] As indicated above, it does appear to me that the chairperson in the instant case was not independent because functional independence of an arbiter, includes making decisions on matters placed before one, without fear or favour. None of those matters should be considered too serious or complicated such that they have to be referred to a superior. To do so amounts to abdication, which in my view shows that the disciplinary process in the respondent's matter was not procedurally fair. One may never know what other issues may have been referred to and decided by others in the stead of the chairperson.

[38] In the premises, I am of the considered view that it is not necessary, in view of the pervasive nature of the abdication discussed above, to consider the other bases upon which the arbitrator found for the respondent and which the appellant has criticised. The issue of the recusal dogged the proceedings right up to the end as the respondent was still complaining about the refusal of the recusal even under re-examination. It was not a small matter at all.

[39] Going back to the authorities quoted earlier, it appears to me that notwithstanding that there was a valid and fair reason for dismissing the respondent, the procedure followed, was however, seriously flawed such that it cannot, at the end of the entire process be said that the dismissal should stand. To this extent, although for different reasoning applied, the arbitrator was correct in finding that there was no fair procedure followed in this case.

[40] Another ground of complaint raised by the appellant, relates to the amount awarded by the arbitrator to the respondent. The gravamen of the complaint is that there was no evidence led before the arbitrator regarding the quantum at all. As such, the appellant contends that the arbitrator acted in an arbitrary manner in determining the six months' compensation that he issued in favour of the respondent.

[41] I am of the considered view that the criticisms levelled against the arbitrator are perfectly justified in this matter. No evidence was led by the respondent regarding the amount of compensation they sought. This does not appear to have been an issue addressed in the heads of argument before the arbitrator either. There is accordingly no evidence before court on which the arbitrator could have based the amounts he awarded. His award is, likewise as silent as a church mouse regarding how the computation was done.

[42] Mr. Justice Smuts emphasised the need for a party seeking any amount he claims is due to him or her in terms of the Labour Act, to plead how the amount in question arose and how it is computed. Furthermore, the claimant, in that case needs to lead evidence proving the amount claimed.[4] It is clear that the injunctions issued by the learned Judge continue to be overlooked or observed in breach by some parties and arbitrators as well.

[43] The duty to give reasons, which the arbitrator failed to comply regarding the amount awarded has been the subject of comment in the case of *Namibia Foods and Allied Workers' Union v Novanam Limited*.[5] It bears repeating that reasons are a fundamental part of adjudication. They are a necessary process that the decision-maker cannot avoid without consequences on the propriety of the decision, order or judgment in question. Dealing with disputes and merely issuing orders without reasons is the antithesis of justice and accountability that is required from arbiters.

[44] I am acutely aware that labour cases ought to be determined speedily and as far as possible without the treacherous and ensnaring legal technicalities and niceties that tend to accompany ordinary civil matters. Caution has often been given that in matters such as the present, this court, where there has been an oversight in dealing appropriately with the quantum may be placed in as good a position as the arbitrator to determine the amount on the available evidence properly placed before the arbitrator.

[4] *Springbok Patrols (Pty) Ltd v Jacobs and Another (*LCA 70/2012 [2013] NALCMD 17 (31 May 2013), para 12.

[5] *Namibia Foods and Allied Workers' Union v Novanam Limited* (HC-MD-LAB-APP-AAA-2017) [2018] NAHCMD 24 (5 October 2018).

[45] In this case, however, as stated above, there is no material placed before this court that would go to any length in assisting in the determination of the appropriate amount that could be awarded the respondent. It is with great reluctance and regret that I have to remit the matter of the respondent in issue back to the Labour Commissioner to conduct an enquiry confined only to the monetary award that may be issued in the respondent's favour. This is so because as I have found, the dismissal of the respondent was procedurally unfair.

[46] In this connection, and to conduce to a speedy resolution of the matter, I am of the considered view that it would appropriate to have the matter serve before the same arbitrator. I do not, in view of the fact that his decision on the merits has been upheld, there would be any prohibition to his dealing with the outstanding matter to finality. He knows the matter very well, having been involved.

[47] His remit, in this regard, would entail him taking evidence from the parties regarding the quantum that will be deemed appropriate at the end of the enquiry. In this connection, it must be pointed out that both parties should be involved in the process, resulting on what will be an award based on evidence properly taken and tested in terms of the law.

<u>Conclusion</u>

[48] In the premises, I am of the considered view that the appellant has a partial success in this matter. Its appeal against the award issued in favour of Ms. Motinga is successful. Its appeal against the award in favour of Ms. Basson, however, cannot succeed for the reasons adverted to above. In the premises, an appropriate order will be issued below.

<u>Order</u>

[49] Having regard to all the foregoing, the following order is issued:

1. In relation to Ms. Basson, the award issued by the Arbitrator dated 6 December 2019 in favour of the said Ms. Basson, is hereby confirmed in so far as it held that the dismissal of Ms. Basson was procedurally unfair.
2. The monetary award issued by the arbitrator in favour of Ms. Basson, be and is hereby set aside.
3. The matter is referred back to the Office of the Labour Commissioner to allocate the aspect relating to the monetary award to the same arbitrator without undue delay.
4. In relation to Ms. Motinga, the award issued by the arbitrator in favour of Ms. Motinga, is hereby set aside as of no force or effect.
5. The matter is removed from the roll and is regarded as finalised.

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T.S Masuku

Judge

APPEARANCES

APPLICANT:	T. Muhongo Instructed by ENSAFRICA NAMIBIA
1st RESPONDENT:	T. Nanhapo Of Brockerhoff & Associates