REPUBLIC OF NAMIBIA

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

Case Number: HC-MD-LAB-APP-AAA-2021/00028

In the matter between:

SEFALANA CASH & CARRY (NAMIBIA)
PTY LTD, T/A METRO HYPER **APPELLANT**

and

MIRJAM EISES **RESPONDENT**

Neutral citation: *Sefalana Cash & Carry (Namibia) Pty Ltd, T/A Metro Hyper v Eises* (HC-MD-LAB-APP-AAA-2021/00028) [2021] NALCMD 46 (26 October 2021)

Coram: RAKOW, J
Heard: **24 September 2021**
Order delivered: **26 October 2021**

Flynote: Labour Appeal – Labour Act 11 of 2007 - Appeal against the award issued by the arbitrator – Arbitrator finding that the respondent was dismissed unfairly – Principles of dealing with Mutually Destructive versions restated – Requirements for duress restated - Appeal upheld.

Summary: The respondent Ms. Eises, was employed by the appellant, Sefalana Cash & Carry (Namibia) Pty Ltd, T/A Metro Hyper, as an administrative manager. Her employment was subsequently terminated, as the parties entered into a separation agreement. The respondent alleged that the contract of employment was unfairly terminated by the appellant. She then complained of unfair dismissal with the Labour Commissioner. The appellant denied that the dismissal was unfair, stating that the termination of the contract of employment had been by mutual agreement. The arbitrator consequently found that the respondent was both procedurally and substantively unfairly dismissed. The appellant was ordered to pay the respondent and to reinstate her in her previous position. The appellant now appeals against that award, the respondent opposed the appeal.

Held that, the onus is on the employee to establish the existence of a dismissal.

Held further that, as soon as the existence of a dismissal is established, the onus shifts to the employer to prove that the alleged dismissal was for a valid and fair reason and that a fair procedure was followed in dismissing the employee.

Held that, when faced with mutually destructive versions, the arbitrator should decide on the evidence presented to him or her. Arbitrators should refrain from making personal conclusions on evidence that was not presented.

ORDER

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1. The arbitrator's orders are replaced with the following order: The dispute referred under CRWK467/20 is hereby dismissed.
2. No order as to costs.

JUDGMENT

RAKOW, J:

Introduction and background

[1] Mirjam Eises, the respondent was employed by the appellant, Sefalana Cash & Carry (Namibia) Pty Ltd, T/A Metro Hyper, as an administrative manager. Her contract of employment was terminated on 26 February 2020. The respondent alleged that the contract of employment was unfairly terminated by the appellant and she accordingly lodged a complaint of unfair dismissal with the Labour Commissioner. The appellant denied that the dismissal was unfair, contending that the termination of the contract of employment had been by mutual agreement.

[2] On 18 March 2021, the arbitrator made an award in terms of which she found that the appellant terminated the respondent's contract of employment without fair and valid reason and not in accordance with fair procedure, consequently that the respondent was both procedurally and substantively unfairly dismissed. As a result of this order, the appellant now appeals to this court against the award, which appeal is opposed by the respondent.

The Grounds of Appeal and opposition to the Appeal

[3] The appellant raises several grounds which essentially address the same complaint. These were formulated as questions of law and formulated quite lengthy, which I intend to reduce somewhat for the purposes of this judgement.

1. The arbitrator erred in law, in finding that the respondent had been dismissed as contemplated in section 33(4)(a) of the Labour Act,2007, in circumstances where every reasonable arbitrator would have found, on a proper consideration of the evidence before the arbitrator, that the termination had been by mutual agreement. For this reason, the arbitrator erred in law in finding that it had been common cause that the respondent had been dismissed and that she had been dismissed based on poor work performance. The court is then referred to several arguments the arbitrator failed to consider.
2. The arbitrator erred in law in finding that the mutual separation agreement was vitiated by duress when there was no factual basis on the material before the arbitrator for such finding.

3. The arbitrator erred in law in finding that the respondent was dismissed substantively and procedurally unfair, in circumstances where every reasonable arbitrator would have found, on a proper consideration of the evidence, that no dismissal had occurred, and no fair disciplinary procedure had been necessary because the parties had concluded a binding mutual separation agreement.
4. The arbitrator erred in law in finding that no evidence had been led before her of a meeting of minds between the applicant and respondent before the agreement being reduced to writing, because the arbitrator impermissibly failed to consider corroborated and largely unchallenged evidence to the contrary.
5. The arbitrator erred in law when she found that the appellant should have led evidence on the standard of performance expected of the respondent since the issue was irrelevant.
6. The arbitrator erred in law when the arbitrator found that the appellant had failed to lead evidence on the “factual circumstances” which disclosed poor work performance. No reasonable arbitrator could have arrived at this conclusion in circumstances where the issue was irrelevant and the evidence which was lead regarding the work performance, was not challenged during cross-examination of the appellant’s witnesses.
7. The arbitrator erred in law when the arbitrator took her own opinion into account in finding that the respondent signed the agreement as an acknowledgment that she received the document because there was no such evidence before the arbitrator, it was never put to the witnesses and the opinion of the arbitrator in this respect, is irrelevant.
8. The arbitrator erred in law when the arbitrator rejected the appellant's evidence, in finding that the respondent's dismissal was procedurally and substantially unfair when there was no legal or factual foundation to reject such evidence.
9. The arbitrator erred in law in upholding the respondent's claim because the arbitrator failed to analyse the evidence following proper legal tests and rules of evidence, in that the arbitrator failed to provide reasons why the appellant's evidence was rejected and the arbitrator failed to apply the well-established test of the law of evidence i.e. that evidence untested

under cross-examination may be accepted as undisputed by the opposing party. The arbitrator also failed to test the probabilities of each version when faced with mutually destructive versions.

10. In finding that the respondent was entitled to payment of N$212 940, the arbitrator did not exercise her discretion judicially, acted on incorrect legal principles, and failed to consider relevant facts, for eg. the arbitrator failed to take into accounts the amount already paid to the respondent on the termination of their employment relationship and the tax and/or ancillary deductions on the respondent's gross salary.
11. In ordering the appellant to reinstate the respondent into her previous position, the arbitrator did not exercise judicial discretion and acted on incorrect legal principles and/or failed to consider relevant facts. In reaching the factual conclusions that underpin her order for reinstatement as set out in paragraph 17 of her award, the arbitrator impermissibly ignored or disregard several facts, including that there had been many concerns about the respondent's incompetence to do her job, her fit within the respondent's culture and that the respondent and her husband had threatened to harm De Villiers Henning (the respondent's line manager) after the relevant meeting. It could therefore never be just and equitable to order the parties to work together.

[4] The respondent raised several grounds opposing the appeal. Essentially counsel for the respondent summarized the opposition is as follows:

1. The arbitrator correctly found that the mutual separation agreement between the parties was vitiated by duress.

2. The arbitrator correctly found that the respondent was dismissed as contemplated in Section 33 (4) (a) of the Labour Act 11 of 2007, especially given the fact/evidence that the so-called mutual separation agreement was signed whilst the respondent was under duress and not freely and voluntarily.

3. The arbitrator was correct in holding that there was no meeting of minds between the applicant and the respondent before signing the mutual settlement agreement.

4. The arbitrator was correct to hold that the appellant failed to lead evidence of the standard of performance expected of the respondent and failed to subject the respondent to a hearing before dismissing her, hence the dismissal was unfair.

5. The arbitrator was correct to hold that in the circumstances, in ordering the reinstate the respondent into her previous position.

Evidence and proceedings before the arbitrator

[5] The appellant called two witnesses, Jaime Smith, and Henning de Villiers. Ms. Smith is employed by the appellant as an IR Specialist and testified that on 26 February 2020, the respondent was instructed by Mr. Henning De Villiers, the respondent's supervisor to come to her office. The meeting was intended to discuss problems and issues the appellant had with the respondent.[1] During the meeting the respondent got upset and it was explained to her that disciplinary actions will be taken against her due to poor work performance, incapacitation, incompetency, as well as certain tasks that were allocated to her that she did not complete.[2]

[6] She further testified that when the respondent was informed that disciplinary action would be taken against her, she indicated that she will resign and that the appellant must just pay her money and that she would leave.[3] She then asked the respondent whether she just want to resign and explained that she will only be entitled to one month's salary. They then started to negotiate and Mr. De Villiers informed the respondent that the appellant was willing to pay the respondent out the three months' salary that she requested, including severance payment.[4] She then drafted the settlement agreement which terminated the employment contract of the

[1] Record. Page 62: line 22-24

[2] Record. Page 62: line 24-27 and page 63 line 1-20.

[3] Record. Page 63: line 17-21.

[4] Record. Page 63: line 27, page 64, line 1-4.

respondent. The respondent then read the agreement and indicated that her name was miss-spelled and the mistake fixed and the agreement was re-printed and then signed. Mr. De Villiers further advised the respondent to go home and discuss the matter with her people but she said 'no, let's just finish this.'

[7] Henning De Villiers testified under oath that on 26 February 2020, he called a meeting to discuss the respondent's poor work performance. Present at the meeting was himself Jaime Smith and the respondent. The respondent was not getting along with the staff members and displayed poor work performances, it was on this ground that he initiated the meeting of 26 February 2020. It was explained that there would be an inquiry on her demotion and if she does not improve she will be dismissed.[5] She then indicated that she wants her money and she just wants to go. They then discussed a separation agreement and offered her a separation package, which she accepted and then signed the agreement. He further testified that while at the meeting the respondent was issued with a mutual settlement agreement, moreover the agreement was read to the respondent and she was advised to take it home to her husband in case she needed to make an informed decision.[6]

[8] The respondent testified that on 26 February 2020 that she was informed to see Ms. Smith in her office. She was asked why from 2016 to 2020 she did not possess any managerial skills. While Ms. Smith was talking to her she noticed that there was a paper on the desk with some calculations of her three months' salary. Ms. Smith told her that the appellant has decided to pay her three months' salary because she does not possess the necessary managerial skill. She was further informed that if she does not sign the mutual settlement agreement disciplinary action would be taken against her. She testified that she signed the mutual settlement agreement after she was put under pressure or duress by Ms. Smith when she told her that the appellant is not going to change its mind and because of the duress she did not apply her mind before signing the agreement.

Findings by the arbitrator

[5] Record. Page 91: line 22-27.

[6] Record. Page 77: line 19-27, page 78, line 1-

[9] In her ruling, the arbitrator discussed the separation agreement and found that there was no evidence before her that the applicant had prior knowledge or any discussion regarding the separation agreement before it was reduced in writing. She found that there was no meeting of the minds and further that the respondent was given an ultimatum to either sign the agreement or face disciplinary action. She then proceeded and found that no evidence was led by the appellant to show that the respondent indeed performed poorly. She further concluded that there is no doubt in her mind that the respondent signed the separation agreement under duress due to the unequal power dynamics between the respondent and the appellant and also found that due to the nature of this unequal power dynamics the respondent signed the agreement as to the acknowledgment that she received the agreement with the information contained into it.

[10] She then proceeded and indicated that she is satisfied that the appellant took the initiative which had as a consequence the termination of the respondent's contract of employment. She found that it was common cause in the current matter before her that the respondent was dismissed for poor work performance and the appellant's action to dismiss the respondent was therefore not substantively fair as they had to produce evidence of the said poor work performance.

[11] She then set aside the decision to dismiss the respondent and ordered the appellant to reinstate the respondent in the same position she held before she was dismissed as well as awarded her an amount of money equivalent to the salary she would have earned had she not been dismissed for the period June 2020 till March 2021.

Arguments on behalf of the parties

[12] On behalf of the appellants, it was argued that this case involves directly conflicting versions on material issues and the arbitrator, therefore, erred fundamentally in law when she did not consider that critical evidence by the appellant's witnesses was not challenged by the respondent's representative with the version of the respondent. The subsequent rejection of the appellant's witnesses' evidence by the arbitrator, which is implicit in her findings for the respondent, is not

supported by any logical reasoning or any express credibility findings. She did not apply any of the tools designed by our *jurisprudence* to resolve irreconcilable disputes of fact and her findings are further arbitrary, perverse, and findings that no reasonable arbitrator could have made.

[13] For the respondent, it was argued that the appellant indeed terminated the employment of the respondent and that is clear from the termination agreement that refers to one month's notice which would only be if the termination of the employment relationship is at the behest of the appellant and not if it is by mutual agreement. If the true intention of the parties was to mutually terminate, then a months' notice provision would not have formed part of the agreement. With these contradictions in the 'mutual settlement agreement,' it cannot be said there was a meeting of minds. In this regard, the arbitrator applied her mind correctly in finding that there is no meeting of minds between the parties under the circumstances before the 'mutual settlement agreement' was signed by the parties.

[14] It was further argued that the evidence provided by both parties would suggest that the respondent was under duress when she appended her signature to the 'mutual settlement agreement'. It was submitted that intimidation and improper pressure were put on the respondent by the appellant before signing the agreement. It was argued that the appellant's witnesses both testified that before the mutual settlement agreement was signed the respondent was informed that she would be subjected to disciplinary action. It was argued that the decision by the appellant to terminate the respondent's employment contract was formed well before the meeting of 26 February 2020.

The legal principles applicable

[15] When dealing with determining questions of law on appeal in labour matters, the court can do no better than to refer to the matter of *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd)*[7] wherein the Supreme Court points out what is understood regarding appeals that are limited on a question of law alone. O'Reagan AJA said:

[7] *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (SA 33/2013) [2016] NASC 3 (11 April 2016).

'[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)(a) and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1) (a) as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.

[48] Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.

[49] The advantage of the approach outlined above is that it seeks to accommodate the legislative goal of the expeditious and inexpensive resolution of employment disputes, without abandoning the constitutional principle of the rule of law that requires labour disputes to be determined in a manner that is not arbitrary or perverse. It limits the appellate jurisdiction of the Labour Court by restricting its jurisdiction in relation to appeals on fact and on those questions of fairness that admit of more than one lawful outcome to the question whether the decision of the arbitrator is one that a reasonable arbitrator could have reached.

Other appeals may be determined by the Labour Court on the basis of correctness. In outline, then, this is the approach that should be adopted in determining the scope of appeals against arbitration awards in terms of s 89(1) (a).'

[16] The court was referred to several legal principles applicable in the current matter. Regarding the fairness in the evaluation of evidence, which is one of the key areas complained of in casu, the court wishes to quote the Supreme Court in *Namdeb Diamond Corporation (Pty) Ltd v Gaseb*[8] regarding this element in a judgement by Mainga J wherein he quotes from *Small v Smith*[9]:

'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.'

[17] In the matter of *Benz Building Suppliers v Stephanus and Others*[10] this court per Parker AJ put the position regarding who bears the onus in Labour proceedings as follows:

'[3] Section 33(4)(a) of the Labour Act casts a critical onus on the employee to establish the existence of the dismissal. It is only when the employee has established the existence of his or her dismissal that s 33(4)(b) comes into play, that is, the presumption that after the dismissal has been established it is presumed that the dismissal is unfair unless the employer proves that he or she had a valid and fair reason to dismiss and that he or she followed a fair procedure in dismissing the employee within the meaning of s 33(1) of the

[8] *Namdeb Diamond Corporation (Pty) Ltd v Richard Ronnie Gaseb* (Appeal Judgment) (SA-2016/66) [2019] NASC 596 (09 October 2019).

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

[10] *Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 (LC).

Labour Act. Thus, the G employer must satisfy the requirements of substantive and procedural fairness to rebut the s 33(4)(b) presumption in order to succeed.'

[18] From reading the above legal positions, the requirement seems to be for the employee to establish the existence of a dismissal. After that is established, then the onus shifts to the employer to prove that it was for a valid and fair reason and that he followed a fair procedure in dismissing the employee.

[19] In *Tow in Specialist CC v Urinavi,* Ueitele[11] J concludes that to determine what dismissal means in terms of the Labour Act, one can conclude that:

'(t)he Labour Act, 2007 does, however, not define the term 'dismissal'; it follows that I have to turn to the common law or other legal instruments defining dismissal to ascertain the meaning of the term 'dismissal'. At common law dismissal is equated with the termination of the contract of employment by the employer with or without notice. *Grogan*[12] thus argues that at common law a 'dismissal' is deemed to have taken place if the employer gave the required notice; the employee would however have no legal remedy if the termination was by notice, because one of the implied terms of common-law contracts of service is that such a contract may be terminated by either party on agreed notice. In the matter *Meintjies v Joe Gross t/a Joe's Beerhouse*[13] this court held that the word 'dismiss', where it is used in ss 45 and 46 of the Act, 7 means the termination of a contract of employment by or at the behest of an employer. In *Benz Building Suppliers*[14] (supra) Parker AJ stated that 'at somebody's behest' means because somebody has ordered or requested an act or a thing. Thus 'behest' as a noun means 'command' and so, a thing done at the behest of someone would mean that that someone commanded, requested or ordered the act.'

[20] In the above matter of *Tow-in Specialists CC v Urinavi*[15] Ueitele J further discusses the *Newton v Glyn Marais Inc*[16] matter. For purposes of this judgement I would like to quote quite extensively the said discussion herein:

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[11] *Tow in Specialist CC v Urinavi* (LCA 55-2014) [2016] NALCMD 3 (20 January 2016)

[12] John Grogan: Dismissal, Discrimination & Unfair Labour Practices 2nd Ed, 2007 Juta at 180.

[13] *Meintjies v Joe Gross t/a Joe's Beerhouse* 2003 NR 221 (LC) (NLLP 2004 (4) 227 NLC).

[14] *Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 (LC)

[15] supra

[16] *Newton v Glyn Marais Inc* [2009] 1 BALR 48 (CCMA).

‘It appears from the editor of the law reports' summary that the applicant employee left the respondent's services after being accused of not doing her work properly. She claimed that she had been unfairly dismissed. The respondent claimed that she had left her employment voluntarily. The commissioner noted that, to establish that she had been dismissed the applicant employee had to prove that the respondent performed some overt act which signified an intention to terminate the contract. However, to establish that the termination was consensual, the respondent had to prove not only that there was an agreement to terminate, but also the specific terms of the agreement.

He held that while the parties had discussed the possibility of a severance agreement, they had not reached agreement on its terms. The commissioner further noted that, while the fact that the applicant had packed her belongings and left the office might indicate an intention to resign, she had never communicated that intention to the respondent. He accordingly found that the applicant had not resigned and that the respondent had dismissed the applicant.

In considering whether there had been a dismissal or a mutual agreement that the employee should leave the commissioner stated as follows (at 7 – 8):
'Dismissal or mutual agreement?

42. A contract of employment may end in various ways; some consensual, other unilateral. Consensual would be, for instance, by way of an agreed termination agreement or even by way of a pre-determined termination date such as found in so-called "fixed-term E agreements". Section 186(1)(a) of the . . . [LRA] reflects what the common law understands by a dismissal: the repudiation of the contract by the employer, or the employer's acceptance of the employee's repudiation. The only requirement that must be satisfied for this form of dismissal is that the contract must be terminated at the instance of the employer.

43. Just as the consensus of the parties brings the employment contract into existence, so too consensus may end a contract or may alter its basic terms. For a contract to be terminated by mutual agreement, the agreement of both parties must be genuine. Once there is genuine agreement, neither party can unilaterally change his or her mind; the employment contract ends and along with it the employment relationship. If the employment relationship is terminated by mutual agreement, the termination does not constitute a dismissal for purposes of the common law or the LRA. A dismissal occurs only if the employer performs some clear and unequivocal act that indicates that it no longer intends

fulfilling its contractual commitments (see *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another H* (2002) 23 ILJ 358 (LAC); Jones v Retail Apparel [2002] 6 BLLR 676 (LC)).

44. In most cases, informing the employee that the contract has come to an end effects a dismissal in the sense as contemplated in s 186. Cases frequently arise in which the employee claims to have been dismissed, but the employer claims that the employee resigned. *Ouwehand v Hout Bay Fishing Industries [2004] 8 BLLR 815 (LC)* serves as an example. In that case, the employer claimed that the termination was consensual as the employee had abandoned his employment voluntarily, and that the employer had accepted this. The court held that in such circumstances, the employee is required to prove some overt act by the employer that is the proximate cause of the termination of employment. Where an employer pleads that the termination of the employee's employment was effected in terms of an agreement, the employer bears the onus to prove not only the parties' common intention to enter into the agreement, but also its specific terms. In a case such as this where an employee effectively signs away her rights, it must be absolutely clear what the terms are, especially the amount involved. The employee effectively sells her rights for an amount. . . . (I)t is simply a case of the money (see *Springbok Trading (Pty) Ltd v Zondani and Others (2004) 25 ILJ 1681 (LAC) and Stocks Civil Engineering (Pty) Ltd v Rip NO and Another (2002) 23 ILJ 358 (LAC)*). The employer discharged this onus in the *Stocks Civil Engineering* case. The court found that an employee's acceptance of a proposal that he would leave the employer's service if he was paid a severance package, constituted a consensual termination even though the parties had not agreed on the amount of severance pay. The employer failed to discharge the onus in the *Springbok Trading* case.'

[21] From a reading of the evidence and arguments before the court, it transpires that the respondent alleged in the hearing before the arbitrator that she signed the agreement under duress. In *Namibia Broadcasting Corporation v Kruger and others*[17], Chomba AJA had a look at the meaning of the word duress and in contract law, which elements are necessary to set aside a contract on the grounds of duress:

'The Collins English Dictionary Complete and Unabridged 8 ed have the following definition of the word 'duress':

1. compulsion by use of force or threat; constraint; coercion.
2. law - the illegal exercise of coercion.
3. confinement; imprisonment.

[17] *Namibia Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC).

Secondly, the learned authors *Van der Merwe, Van Huyssteen, Reinecke J & Lubbe in the book Contract - General Principles 3 ed*, citing the case of *Broodryk v Smuts 1942 TPD 47,* state that the following are the elements necessary to set aside a contract on the grounds of duress :

' 1. Actual violence or reasonable fear.
2. The fear must be caused by the threat of some considerable evil to the party or his family.
3. It must be a threat of an imminent or inevitable evil.
4. The threat or intimidation must be *contra bonos mores*.
5. The moral pressures used must have caused damage.'

(See in para 4.3.2 on 119.)

Thirdly, *Black's Law Dictionary* gives many renditions of the definition, but in order to avoid prolixity, I quote only one of them. It states:

'2. Broadly, a threat of harm made to compel a person to do something against his or her will or judgment, especially a wrongful threat made by one person to compel a manifestation of seeming assent by another to a transaction without real volition. Duress is a recognised defence to a crime, contractual breach or tort.'

In its contractual concept, duress is raised where the alleger is seeking to rescind a contract on the ground that there was no *consensus ad idem* as a prelude to the consummation of the contract, and that what is presented by his opponent as consent to contract was actually induced by some illicit threat.'

[22] In *Ismail v B & B t/a Harvey World Travel Northclif*, the court applied the reasoning regarding forcing an employee as follows, as well as setting out the requirements that need to be met in such an instance. It said the following:

'It was argued on the applicant's behalf that she was forced into signing the agreement as she had no choice. I fail to appreciate in what material respects the applicant was forced into signing this notice of termination, more specifically since the issues that were captured in that notice were a proper reflection of what was discussed and agreed with her. Thus the common intention of the parties and the terms of the termination were properly captured in the agreement. It was plain from the facts that the applicant had voluntarily signed the written agreement terminating her employment relationship with the respondent. She had been aware of her rights when she acted in that way.

A further argument advanced in support of the proposition that the termination was consensual was that the consequences of an individual signature on a document were well-known. Reference in this regard was made to *Blue Chip Consultants (Pty) Ltd v Shamrock [2002 (3) SA 231 (W) at 239* for the principle that a person cannot escape the consequences of his signature. Ms Stroom during her closing arguments had submitted that the fact that the applicant had signed the notice was immaterial. I cannot, however, agree with this dismissive approach in view of established legal principles surrounding the *caveat subscriptor* rule, which is that a person who signs a document is taken to have assented to what appears above his signature. [*See George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) which was also referred with approval in Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA); [2005] 2 All SA 343 (SCA).]*

In dealing with this legal principle in *Dyokhwe v De Kock and Others* [2012 33 ILJ 2401 (LC); [2012] 10 BLLR 1012 (LC) in para 59], Steenkamp J stated as follows:

> "Our law recognises that it would be unconscionable for one party to seek to enforce the terms of an agreement where he misled the other party, even where it was not intentional. Where the misrepresentation results in a fundamental mistake (*iustus error*), there is no agreement and the 'contract' is *void ab initio*. The purpose of this principle is to protect a person if he is under a justifiable misapprehension, caused by the other party who requires his signature, as to the effect of the document he is signing (*Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA); [2005] 2 All SA 343 (SCA)).* It has also been held that the caveat subscriptor principle will not be enforced if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory." (*Katzen v Mguno [1954] 1 All SA 280 (T)).*

I did not understand the applicant's case to be that she had signed the notice under some form of misrepresentation or that she was misled as to the contents of the notice. Her version that she had signed the agreement without reading or had no choice in the matter has been found to be improbable more so in view of her contradictory responses to questions in that regard. As the applicant had not committed herself to the alternative offer of employment, there is no basis for a conclusion to be reached that she may have been misled. Furthermore, in view of the conclusion that she was not illiterate, and the fact that she was fully aware of her rights and the discussions of 13 April 2010, it cannot be said that she could not have known what she was attaching her signature to.'

[23] When confronted with two mutually destructive versions, like in the current matter, the approach to evaluating such evidence was set out in *National Employers' General Insurance Co Ltd v Jager*[18] *as* follows:

'In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[24] It has been found in this court in numerous cases that arbitrators should utilize a similar process when they evaluate evidence produced before them that is mutually destructive. The court can do no better than refer to *Motor Vehicle Accidents Fund v Kulubone*[19] where the approach adopted by Mtambanengwe, AJA in evaluating evidence and finding facts is described as follows:

'This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.'

Conclusions

[25] When evaluating the evidence that was placed before the arbitrator, it is clear that the evidence presented by the appellant's witnesses and the respondent

[18] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G

[19] *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (at para16 - 17) delivered on 09 February.

are mutually destructive and the arbitrator should have decided on the evidence presented as suggested above. The evidence of the appellant's witnesses was not challenged regarding the discussions that took place about the content of the agreement, wherefrom the evidence it seems that the initial position was that the respondent was to receive only one month's salary but after they negotiated the separation, she received three months' salary together with a severance payment.

[26] There is further no evidence to support the conclusion of the arbitrator that the respondent merely signed the agreement to acknowledge receipt of it. Therefore the finding by the arbitrator that there were no negotiations and no meeting of the minds cannot be supported when one considers the evidence, applying the guidelines set out in *National Employers' General Insurance Co Ltd v Jager*[20] and the approach set out in *Motor Vehicle Accidents Fund v Kulubone.*[21]

[27] Regarding the question as to who requested the termination, the court finds the following: The appellant’s witnesses requested a meeting to discuss the work performance of the respondent. From the evidence it seems that during this meeting the respondent indicated that she wants to leave, they must just give her money.
The parties then negotiated the agreement, drafted it, printed it, and handed it to the respondent. The respondent pointed out a spelling mistake, which was then corrected and the contract re-printed. It was further never disputed that Mr de Villiers then told her to take the said contract home and discuss it with her husband. The respondent however chose to sign the contract at that stage.

[28] The court, therefore, finds that the termination was indeed instigated by the respondent when she elected to inform the representatives of the appellant that she wants to go and just wants her money. She further participated actively in the process of negotiating the contract as well as proofreading it, ensuring that it is correct. The respondent, therefore, did not show that she was dismissed and the onus to prove that such termination was substantially and procedurally fair could not have moved to the appellant.

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[20] Supra.

[21] Supra.

[29] The respondent relies on the fact that she signed the contract under duress. She explained that she felt intimidated by her employer and that is why she signed the said document. As set out above, duress in essence can be used to set aside a contract where there is actual violence or reasonable fear and the fear must be caused by the threat of some considerable evil to the party or his family. It must be a threat of an imminent or inevitable evil and the threat or intimidation must be *contra bonos mores*. It is also an element that the moral pressures used must have caused damage. In this instance, the fear complained of, was that the respondent would be subjected to a disciplinary proceeding.

[30] From the evidence of the appellant's witnesses, it is clear that the reason for the meeting was to discuss possible disciplinary proceedings and that it was the intent to discuss these proceedings as well as the poor work performance of the respondent when she initiated the separation process. The court can do no better than what was quoted above from the matter of *Ismail v B & B t/a Harvey World Travel Northclif*[22] and find that the respondent knew what she was signing, what the terms were, and was further given the opportunity to take the agreement home for further discussion with her husband, which opportunity she refused. The supposed threat being the institution of disciplinary proceedings was further not a "new" threat but the whole purpose initially of the meeting. In that regard, the court must find that there was no duress present when the agreement was signed.

[31] The court finds that the arbitrator erred in law in upholding the respondent's claim because the arbitrator failed to analyse the evidence following proper legal tests and rules of evidence. The arbitrator further failed to provide reasons why the appellant’s evidence was rejected and the arbitrator also failed to apply the well-established test of the law of evidence i.e. that evidence untested under cross-examination may be accepted as undisputed by the opposing party.

[32] The probabilities of each version were also not tested in any manner when the arbitrator was faced with mutually destructive versions presented by the parties. The court did not deal with all the grounds of appeal as the above discussion dispose of a number of them. The court, therefore, finds that the arbitrator misdirected herself in

[22] Supra.

several findings and as such came to a conclusion that no reasonable arbitrator would have come to if the law was correctly applied. For that reason, the court finds that the appeal must succeed.

[33] The court, therefore, makes the following order:

1. The arbitrator's orders are replaced with the following order: The dispute referred under CRWK467/20 is hereby dismissed.

2. No order as to costs.

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E RAKOW

Judge

APPEARANCES

APPELLANT:	Adv. R. Maasdorp Instructed by Köpplinger Boltman Windhoek
RESPONDENT:	R Silungwe Of Silungwe Legal Practitioners Windhoek