REPORTABLE

CASE NO.: SA 6/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

VICTOR KAHORO **FIRST APPELLANT**

WILLEM KAEKA **SECOND APPELLANT**

and

NAMIBIA BREWERIES LIMITED **RESPONDENT**

Coram: Shivute, C.J, Maritz, J.A, *et* Damaseb, A.J.A

Heard on: 2006/10/16

Delivered on: 2008/04/30

APPEAL JUDGMENT

DAMASEB, AJA: [1] The two appellants were, until their dismissal at the end of August 2002 following a retrenchment exercise, employees of the respondent, Namibia Breweries Ltd. In April 2002, the respondent undertook a retrenchment process in terms of s 50 of the Labour Act, No. 6 of 1992 (the Labour Act). That the retrenchment exercise was justified is not in dispute in this appeal, although much was made of it in the District Labour Court and, to a lesser extent, on appeal to the Labour Court. In this

Court the appeal focuses on the procedure used by the employer which culminated in the appellants' dismissal following upon retrenchment.

[2] The appellants filed two separate complaints of unfair dismissal in terms of s 46 of the Labour Act in the District Labour Court (the trial court) which were later consolidated - alleging that the employer held an "*assessment which failed in totality to be transparent, objective and fair and did not meet the requirements of a proper and adequate assessment at all*".

Brief summary

[3] The first appellant is Victor Kahoro. He never testified in the trial Court but it had been accepted by that Court and the respondent that the second appellant, Willem Kaeka, testified on behalf of both complainants. Victor Kahoro was initially employed by the respondent as a driver but in 1991 after serving 4 years in that position, he was promoted to the position of "*customer representative*". The position involved promotion of sales and acquisition of new customers. Kahoro won 8 awards for exceptional performance as the respondent's customer representative.

[4] Willem Kaeka (second appellant) was employed by the respondent in 1989 as a customer representative. He was the longest serving employee of the respondent in that position. He had been specially recruited by the respondent at a time when it was facing boycotts and struggling to penetrate the market.

[5] On 29 April 2002 the respondent started a restructuring exercise which would involve abolishing, amongst others, the position of "*customer representative*" *a*nd introducing new positions with different job contents. The two appellants were, together with the rest of the employees, informed of the impending restructuring. They were informed that the process would result in the abolition of "*customer representation*" to be replaced by "*customer service and sales promotion*". The appellants underwent a psychometric competency evaluation followed by an interview to determine their suitability as a result of which they were found unsuitable. In order to avert being retrenched, they were offered alternative employment as "*merchandiser*", a position 5 notches below the positions they held. As customer representative they earned N$7000 per month but, if they accepted the new positions as merchandiser, they would earn only N$3 400. The appellants rejected the lower level alternative positions which they had been offered and were accordingly dismissed. They also rejected the retrenchment packages offered by the respondent although they accepted the money when paid to them.

[6] It is common ground that before the commencement of the their assessment by a committee to determine whether they should be recommended for employment in a revamped structure, the appellants had a dispute with a Senior Manager of the respondent to whom they reported, over what the latter perceived as their failure to follow an instruction in relation to the use of company vehicles assigned to them. Through cross-examination of the only witness for the respondent and the testimony of Kaeka (the second appellant), the appellants alleged specifically that the Senior

Manager concerned told them that because of their refusal to comply with the instruction he would see to it that they do not pass the assessment for re-employment. The Senior Manager who made this threat subsequently participated as a member of the selection committee. The appellants failed the assessment. It is maintained by the appellants that the respondent failed to prove that the Senior Manager's participation in the assessment process did not have a prejudicial effect on their chances of being selected for re-employment. The respondent takes the view that the involvement of the Senior Manager in the assessment process did not at all influence the process to the detriment of the appellants; that in any event the appellants failed to ask for the recusal of the Senior Manager and that Kahoro's failure to testify is fatal to his case.

[7] I will dispose of the latter point at this early stage. The failure by a party to litigation to testify has a bearing on the strength of its case and is a consideration in the overall assessment of the probabilities in the case and in deciding whether or not the ultimate *onus,* or the evidential burden (depending on which is applicable), has been discharged or met. I am not aware of any rule of law or of practice, and none has been cited, that a party must be non-suited solely on the ground that it did not testify on its own behalf. (Contrast: *Putter v Provisional Insurance Company Ltd & Another* 1963(3) SA 145 at 150 A-D.) In the present case the material facts on which the first appellant relies are either common cause, are not disputed, or are admitted.

Detailed factual background

[8] Mr H F Feris was the only witness who testified on behalf of the respondent who bore the *onus* of proving that the dismissals were fair. As the respondent's Human Resources Manager, Feris coordinated and managed the restructuring process which led to the dismissal of the appellants and he therefore bore first-hand knowledge of the events about which he testified.

[9] According to Feris, the restructuring process was initiated by the respondent's senior management team and had the approval of the board of directors. The process was initiated to achieve profitability, effectiveness and efficiency in the respondent's business. All aspects of the business were to be looked into against the backdrop of trying to make the business "v*iable and sustainable*". Through the restructuring process, the employer wanted to achieve the right numbers, the right people and the proper structures, in view of the very competitive business environment in which they operate - where their opposition has an edge over them in terms of economics of scale and multinational support which make it possible for it to undercut the respondent on price and thus gain market share.

[10] Employees' skills needed to be properly aligned to the positions in the company in order to make them work better and to be innovative. The process involved re-advertisement of the new positions effective 2 May 2002. Also required was a psychometric competency assessment of the affected employees for the new positions followed by a panel interview to determine their suitability for re-employment.

Altogether 50 employees were affected by the restructuring.

[11] Feris testified that on 25 April 2002, the Managing Director of the respondent wrote a letter to the Labour Commissioner and informed him of the respondent's intention to "*embark on a process of re-engineering and alignment*". The letter was copied to the General Secretary of NAFAU, the recognised trade union. Two phases were identified in this letter: Phase 1 was to negotiate packaging material cost reductions, transportation efficiencies, bulk materials handling, and the outsourcing of non-core functions. Phase 2 was to align structures to meet the respondent's strategic objectives by placing "*the right people in the right numbers in the proper structure*". The Sales, Marketing and Distribution component of the business was the first to be looked into as part of phase 2 in order to "*efficiently meet all customer and consumer demands*". The letter made clear that in some cases retrenchment might be "*unavoidable*" for individuals not suited for the new structure. According to Feris, the respondent made clear from the start that employees found not suitable for the new positions might be retrenched if they did not fit the profile of the new position applied for.

[12] Feris testified that the position of "*customer representative*" then occupied by the appellants retained its name but the content of the job changed. As Feris explained, the new positions in essence changed from an "*order taker into a business partner*".

[13] On 2 May 2002, Feris sent a memorandum to several NBL employees - including

the appellants. The memorandum made reference to a meeting held on 29 April 2002 and, amongst others, stated that existing structures would become obsolete by June 2002; that each and every employee would have a fair chance to apply for the new positions; that candidates not suited for the new positions would have to accept alternative employment (if available) or be retrenched; that NBL would determine the suitability of an individual for a specific position, and that the selection panel would consist of internal management members as well as external specialists in order to ensure fairness and objectivity in the selection.

[14] Feris testified that each and every employee was given a fair chance to compete for the new positions through the establishment of a selection panel comprising internal management members and external specialists.

[15] All told, of the 50 employees affected by the restructuring, the process resulted in 8 employees being retrenched while there was a net growth in the staff complement in excess of 8 people. Of the 8 employees retrenched, only the appellants challenged their dismissals.

[16] Feris testified that the appellants responded to the advertisements by applying for the new position of "*bulk channel*". The external consultant, Sidney Hanstein, conducted a competency preference profile of the appellants as a precursor to the interview panel meeting with the appellants.

[17] I must digress at this point to point out that "p*sychometric* or *personality profiling*" such as was conducted by Hanstein is a practice common in the corporate world today - especially but not limited in recruitment - to obtain a better understanding of an individual's personality traits in an attempt to match personality traits to positions; to identify training needs and to develop person–specific training programmes in order to help employees realise their full potentials; or help them promote their strengths and improve on their weaknesses – all geared to obtaining a strategic advantage for the employer. As far as I am aware, psychometric or personality profiling does not consider a person's education or skills but only personality. In the trial court the evaluations conducted by Hanstein were, wrongly, taken as meaning that the individual passed or failed a test of performance competence.

[18] The gist of Hanstein's findings in respect of each appellant can be summarised as follows:

Kahoro (first appellant)

In respect of "*cognitive assessment*", Hanstein found Kahoro's capability as "service orientation"; his "*reasoning and conceptual ability*" as "above average" and his personality preference assessment as, amongst others, "*practical* and *realistic with a natural head for business*" with a preference for "organising *and running activities*".

Kaeka (second appellant)

In respect of "*cognitive assessment*", Hanstein found Kaeka's capability to be focussed on "quality"; his "*reasoning and conceptual ability*" to be "above average" and his

personality preference assessment to be warm–hearted, talkative, popular and "*conscientious*".

[19] To buttress the point I made about the purpose of psychometric profiling, Hanstein adds the following abstract conclusions about the personality type in respect of "*personality preference assessment*":

Kahoro:
"[U]sually do not care to lead but are often loyal followers. Often relaxed about getting things done because they enjoy the present moment and do not want to spoil it by undue haste or exertion".

Kaeka:

"[B]orn co-operators, active committed members. Need harmony and may be good at creating it. Always doing something nice for someone. Work best with encouragement and praise. Main interest is in things that directly and visibly affect people's lives".

[20] The psychometric evaluation reports of the appellants were received by Feris from Hanstein on 6th June. The next step was the panel interviews. This took place in respect of both. In respect of both appellants the panel consisted of Feris, Raymond Pragt who was the Channel Development Specialist, Dankie Nangombe who had only shortly before joined the respondent, Mark Spyker and the external consultant Sidney Hanstein. The evidence shows that Hanstein's findings were presented to the panel after which the appellants were individually interviewed. Feris was the chairperson of the interview panel. Raymond Pragt was the Senior Manager to whom Spyker reported, while Dankie Nangombe was the Regional Sales Manager.

[21] The evidence also shows (confirmed by both Feris and Kaeka) that during the course of the interview with Kaeka, Spyker asked Kaeka what he would do to regain a certain "Okalindi" client's account which it had lost to a competitor. Kaeka answered, implying Spyker was poorly informed as he (Kaeka) had already regained the account, that Spyker should not ask stupid questions, a doubtless offensive remark which Kaeka attributed to the fact that not only was the loss of the account the doing of Spyker, but that he (Kaeka) had in the meantime regained the account any way.

[22] Having deliberated, the panel came to the following conclusions in respect of the appellants:

Kahoro:
The panel found his customer relations "a bit doubting", his selling skills questionable and his technical knowledge lacking. It also found that he would need a lot of management support. The panel recommended him with "*big reservation*".

Kaeka:

The panel found that Kaeka showed a "*negative approach* to work *and to management*", and had very "*basic functional and technical knowledge*". It also found that he could not work in a team and showed "*serious time management indiscipline*". It found his "*cognitive, reasoning and conceptual ability very concerning low*" (*sic*) and that he would need a lot of development. The panel also found that Kaeka lacked "*people environment skills*" (whatever that means).

The upshot was that the panel did not recommend Kaeka and recommended Kahoro

with reservation. It did so without disclosing its findings to the two appellants and without entertaining any representations from them on its findings.

[23] Once the panel completed its work its findings were placed before the Managing Director, Mr Maske, who authorised the retrenchments. Maske did not ask for or receive any representations from the appellants before taking the dismissal decision. Feris testified that the two appellants accepted without any reservation of rights the retrenchment packages paid out after the negotiations aimed at averting retrenchment failed. (Kaeka's explanation, which I accept in respect of both appellants, is that they really had no choice accepting such payments because they had financial commitments to meet. Nothing can therefore turn on this).

[24] Cross-examination of Feris on behalf of the appellants established that Mark Spyker, in his capacity as Manager Sales (i.e. the supervisor of the two appellants), sat on the interview panel which had to determine the appellants' suitability. It was put to Feris, and he admitted or at best could not dispute, that prior to the sitting of the interview panel, there was a conflict situation between Spyker and the appellants over what was perceived by Spyker as the appellants' refusal to comply with his instruction in respect of the vehicles assigned to the appellants - what is referred to in the record as the "canopy issue". Spyker had wanted the employees, including the appellants, to mount branded canopies on the bakkies issued to them by NBL. The employees affected, including the appellants, objected to that because they felt that being entitled

to the use of the cars for private purposes, it would put them in bad light with the public who would see them using the respondent's property for private purposes; and because of the discomfort the windowless and unventilated canopies would cause to members of their families they would convey in the vehicles. The employees lodged a grievance against the instruction and management decided against it but unhappiness about the instruction continued to simmer; and especially Kaeka felt they still needed to discuss the matter with management. It seems that the other employees accepted the management's explanation but the appellants did not. The tenor of the evidence is that Kaeka was most outspoken about the issue. Whatever the merits of the dispute, it was put to Feris, and he did not deny, that Spyker had told the two appellants that he would see to it that they would not pass the assessment intended for consideration of their suitability for re-appointment - come the restructuring. In his testimony Kaeka explained that he understood Spyker as saying that because of the canopy issue he would make sure that the appellants would not make it in the assessment.

[25] Kaeka testified that he, accompanied by the first appellant, conveyed the threat made by Spyker to Pragt whose interest in the matter seemed confined to ascertaining if the first appellant made common cause with Kaeka on the canopy issue as Pragt understood that only Kaeka refused to mount the canopy as directed. The first appellant confirmed his involvement in the matter. Kaeka added that he specifically requested Pragt to discuss the issue of the threat with Spyker in view of the impending assessment. This crucial testimony was not disputed by evidence under oath, although

Mr Corbett for the appellants argued that the allegation was never put to Feris on cross-examination. Although a good point, one should not lose sight of the fact that the appellants were represented in the trial court by a person without legal training.

[26] Mr Beukes, who acted for the appellants in the trial court, put to Feris that there was a duty on the part of Feris to exclude Spyker from the panel based on the prejudice that he had earlier expressed against the two appellants. The full impact of Feris' response to this crucial question forming part of the appellants' case does not come to the fore as significant parts of his answers are shown on the typewritten transcription as "indistinct" - but what I am able to discern is that Feris felt that whatever prejudice Spyker may have harboured against the appellants would have been counterbalanced by the other members of the panel. As fate would have it, Spyker and Pragt were not called to gainsay the allegations made against them, while the other panellists were not called to shed light on what exactly influenced their decisions.

[27] I need to make the following comments immediately. Hanstein had found Kaeka's reasoning and conceptual ability above average, yet the panel found it to be "very concerning low". The panel also found (and that could only come from Pragt and Spyker) that Kaeka had a "*negative approach*" to work and management, yet Hanstein found him to be "*conscientious*". I say that the information must have come from the two for the following reasons: Hanstein was an outsider, Nangombe had only shortly before joined the respondent, and Feris, as Human Resources Manager, was not the line

manager working with the appellants. That leaves only Spyker and Pragt who were the line managers of the appellants. Spyker had made the threat against the appellants and Pragt, as Spyker's supervisor, was aware of the animosity between the appellants and Spyker and, on Kaeka's version, only seemed interested to know who else was not complying with the directive in addition to Kaeka, instead of pursuing Kaeka's request that he discuss the matter of Spyker's threat in advance of the assessments.

[28] Feris conceded in evidence that he was not aware that the canopy issue had been resolved by the time of the interviews. The conclusion is inescapable that Kaeka's alleged "*negative attitude to management*", at least partially, had something to do with the canopy issue. The people who knew about that, as the evidence shows, were Pragt, Spyker and Feris. Feris' interest in the matter would have been only tangential at best, whereas Spyker certainly had a more than passing interest in the matter; and Pragt seems to have been well briefed about the matter. In the circumstances, the issue becomes not so much that the animosity between the appellants and Spyker was not raised with the panel and therefore did not influence it, but that there was a failure to bring it to the panel's attention so that the other panellists could have been on guard and not allow Spyker's subjective view of the appellants to influence them. It is hard to imagine that Hanstein, Nangombe and Feris could not have placed great weight on any assessment of the appellant's suitability by Spyker; and it is even harder to imagine that he did not express opinions about the appellants' suitability. It may be argued that the comment about the "*negative attitude to management*" was made only about Kaeka and

not about Kahoro. A fair point, yes, but sight should not be lost of the fact that the evidence shows that it was Kaeka who seemed to feel most strongly about the matter; and it does provide corroboration for the version that the canopy issue affected the relationship between Spyker and the employees who remained involved in it.

[29] It became clear during the course of Feris' testimony that the appellants' representative did not consider the outcome of the interview evaluations as fair because the results thereof were not discussed with the appellants. Put another way, the complaint was that the appellants should have been afforded the opportunity to make representations to the panel following its adverse evaluation of the appellants. If the charge of "*negative attitude to management*", for example, was disclosed to Kaeka, it is most probable that he would have pointed out that it was motivated by animosity between him and Spyker.

[30] The appellants were unsuccessful in the trial court which found that the respondent complied with the requirement of a fair procedure and had a valid and fair reason for the appellants' discharge. The appellants then appealed to the Labour Court (the court *a quo)* which found that the employer did not follow a fair procedure. The court *a quo,* however, found that although the employer's procedure was not fair, contrary to s 45(1)(a) of the Labour Act, the dismissal which ensued was for a valid and fair reason and that reinstatement was not possible in the circumstances, holding that*:* "*As regard the second requirement however, if the District Labour Court holds that a fair procedure*

was not followed but a valid and fair reason was proved, the Court may not order reinstatement, reemployment or compensation". The Court *a quo* relied for that conclusion on the case of *Kamanya and Others v Kuiseb Fish Products Ltd.,* 1996 NR 123 (LC) in which O'Linn P (as he then was) came to the following conclusion (at 127J – 128A-C):

> "The result in my view is that no order for reinstatement, re-employment or compensation should be made by the District Labour Court against the employer, where the employer has succeeded in proving before it a fair reason for the dismissal, whether or not such employer has proved that a fair procedure was applied before the domestic tribunal. In such a case it will be open to the District Labour Court to find that the employee has not been 'dismissed unfairly'. However, there may be instances where failure by the domestic tribunal to apply a fair procedure, would be sufficient for setting aside its dismissal of a complaint, e.g. where no opportunity was given to deal with the question of the appropriate sanction to be imposed and where the misconduct was not so grave as to merit immediate and summary dismissal. In the alternative, if I am wrong in the above stated view, then in a case where the employer has proved a fair reason for dismissal but has failed to prove a fair procedure, the District Labour Court would be entitled in accordance with s46 (1) (c), not to grant any of the remedies provided for in s46 (1) (a) and (b) but to confirm the dismissal or to decline to make an order." (My emphasis)

Section 45(1)(a) of the Labour Act states:

> "any employee dismissed, whether or not notice has been given in accordance with any provision of this Act or any term or condition of a contract of employment or of a collective agreement;
>
> …
>
> without a valid and fair reason and not in compliance with a fair procedure, shall be

regarded to have been dismissed unfairly…"

[31] In the present appeal, the correctness of *Kamanya* has not been raised. The parties in fact proceeded on the basis that *Kamanya* represents good law and for the purposes of this appeal I therefore assume that *Kamanya* was correctly decided.

[32] ***The decision of the court a quo***

The court *a quo* found that the respondent failed to prove that it followed a fair procedure in dismissing the appellants. It held that the unfavourable assessment of the appellants by the interviewing panel ought to have been disclosed to the appellants with an invitation for them to make representations thereon as the panel in its evaluation made a subjective value judgment about the appellants. As the court *a quo* said:

> "Mr Kaeka may well have been able to explain what may have been seen as a negative approach to work, or inability to work as a team if he had the opportunity and thus a different perspective to the conclusions would have been thrown in''.

[33] The failure to do so, the court *a quo* found, amounted to the denial of *audi alteram partem.* The C*ourt* also held that the inclusion of Spyker on the panel, against the backdrop of the animosity he had with the appellants over the canopy issue and the threat he made against the appellants, was improper. The court *a quo* reasoned that a "*person who approaches a decision making process with a closed mind, or an adverse interest or bias against the person upon whom a decision is to be made could not render a fair administrative decision*". (My emphasis). Addressing the point that the appellants should have asked for the recusal of the individuals they believed to harbour

bias against them, the court *a quo* said that it could not have been expected of the appellants as lay-men to bring a recusal application and that the employer who bore the onus of proof that the dismissals were fair, had the obligation to exclude biased officials. The Court added that the nature and size of the respondent should not have made it difficult to find substitutes for Pragt and Spyker.

[34] Mr Heathcote, for the appellants, submitted that since the appellants alleged and proved the threat by Spyker that he would see to it that the two appellants did not make it in the assessment process, the respondent should have called Spyker to gainsay it. In criticising the judgment of the court *a quo* on its finding that there was a valid and fair reason and that the Court could not set aside the dismissal, Mr Heathcote submitted that it is not clear from that Court's judgment if the Court appreciated (in interpreting Kamanya) that it had a discretion in the matter. He continued that if indeed the Court appreciated that it had such discretion, it failed to exercise it properly. Appellants' argument further was that rather than demonstrate, as found by the trial court, Kaeka's unsuitability for re-employment, Kaeka's comment that Spyker not ask stupid questions, was evidence of animosity between Spyker and Kaeka, strengthening the case that Spyker should not have been included on the panel in the first place. The appellants' case further is that it is reasonable to conclude that that remark negatively influenced the panel against Kaeka in its conclusion that he was not suitable to be re-employed; accordingly, the respondent failed to prove that there was a valid reason for the dismissal. According to Mr Heathcote, the appellants could not have been expected to

participate at all in the tainted process and that the fact that they did not raise any objection to Spyker's participation on the panel is irrelevant in view of the obligation resting on the respondent to have seen to it that the procedure was fair.

[35] For his part Mr Corbett, on behalf of the respondent, submitted that the conduct of the respondent should be viewed in the context of the restructuring process as a whole. He took the view that the court *a quo's* finding that there was procedural unfairness was wrong but that its conclusion that there was a valid and fair reason for the dismissal is sound and should be upheld. Mr Corbett submitted that even if we should find that Spyker should not have participated in the assessment of the two appellants, it does not follow that the appeal should succeed as there is no proof that he negatively influenced the rest of the panel. According to Mr Corbett, the issue must be decided on the probabilities which favour the conclusion that Spyker could not have imposed his point of view on the other panellists who, in any event, far out-numbered him. Mr Corbett added that Spyker had not even raised the canopy issue during the deliberations of the interviewing panel. Mr Corbett argued against the finding of the court *a quo* that it was necessary to observe *audi* in this case after the panel had taken its evaluation decision. He submitted that it was not necessary for the appellants to be shown and to make representations on the evaluation results because what was involved was not a performance appraisal but an assessment of suitability of the candidates for new positions. Mr Corbett conceded though that, "although with less force" as he termed it, the principle that (in the case of dismissals and disciplinary hearings) the presiding

officer should not be biased and should keep an open mind, also applies to a restructuring process where a determination is to be made whether retrenched employees should be re-employed in the restructured business. He also conceded that a reasonable suspicion of bias would be relevant in the employment context such as the present if the person taking the decision is shown to be personally antagonistic towards the employee.

[36] In my view, not only should Spyker not have participated on the panel, but seeing that he did, the dispute which had arisen between him and the appellants over the canopy issue should have been fully disclosed to the rest of the panel so that they could properly weigh any adverse assessment by Spyker and Pragt about the appellants. I agree with the reasoning of the court *a quo* that the unfavourable evaluations of the appellants by the panel should have been disclosed to them for them to make representations if they wanted to, before the final decision was made. I say so for three reasons. Firstly, the history of animosity between Spyker and the appellants raised the possibility that Spyker would not be favourably disposed towards the appellants and they were entitled to rely on that for the inference that the panel would be negatively influenced by Spyker and should guard against it. Secondly, the panel's findings of the appellants' unsuitability were based, in no small measure, on the appellants' perceived poor performance and lack of competence - and that required for them being placed in a position to challenge it (as to which see *De Vries & Others v Lanzeric Hotel & Others,* (1993) 14 ILJ 1460 (LAC) at 1464 F-H); and thirdly, the personality profiling of

the appellants by Hanstein was in significant respect different from what the panel concluded after the interviewing process. What changed in the meantime? The appellants were entitled to make representation thereon. I do not think the distinction between a performance appraisal and assessment for suitability suggested by Mr Corbett is a good one. The facts of each case will determine whether or not such disclosure, coupled with the opportunity to make representations, is necessary.

[37] I come to the conclusion therefore that the court *a quo* correctly concluded that the procedure followed by the respondents in dismissing the appellants was unfair.

[38] The court *a quo* however *found* a valid and fair reason in that:

(i) the employer negotiated in good faith once the retrenchment of the appellants became inevitable;

(ii) The appellants were offered alternative employment, but refused.

Because there was a valid and fair reason for the dismissal, even though a fair procedure was not followed, the c*ourt a quo* refused to hold that the dismissals were unfair and it accordingly refused the appeal. (See record pp 627-628). The appellants obtained leave from the *court a quo* to appeal to this Court.

[39] Leave to appeal was granted for the determination of the following:

"1.1 despite having found that the procedure through which the applicants were dismissed, was unfair (the court *a quo*) did not uphold the appeal;

1.2 she erred in finding that the word 'and' as used in section 24(2) of the Labour Act, 1992:

(a) does not mean that the employer must satisfy both requirements (i.e. of procedural and substantial fairness); alternatively

(b) even if, in certain circumstances, it is not necessary for the employer to satisfy both requirements , the learned judge erred *in casu*, in not holding that in the circumstances of the applicants' case, both requirements had to be satisfied, and more particularly in that:

(i) the termination procedure is interwoven with the obligation to negotiate in a *bona fide* manner; and

(ii) the negotiation process *in casu*, could not have been separated from the process in terms of which the decision to retrench the applicants were made;

(iii) the applicants could not have been expected, as laymen, to appreciate the subtle differences as pointed out by the learned judge (even if in existence), and more particularly in that they could not have been expected to participate in a process which they regarded as unfair and which was indeed found to be unfair by the learned judge;

1.3 the learned judge erred in not giving effect to the fact that (when the procedure is found to be unfair) the applicants would be entitled to be reinstated. "

[40] It is difficult to reconcile appeal grounds 1.1, 1.2(a) and 1.3 with the acceptance that *Kamanya* was correctly decided, for those grounds seek, in my view, to contradict the very *ratio* of that decision. As I understand the position, *Kamanya* is authority for the proposition that even if an employer fails to prove a fair procedure was followed leading to the dismissal, the Court may (not must) refuse to hold a dismissal as unfair if the employer proves a valid and fair reason for such dismissal. As the Court said in *Kamanya* (at 126 J):

> "… no order for reinstatement, re-employment or compensation should be made by the District Labour Court against the employer, where the employer has succeeded in proving … a fair reason for the dismissal, whether or not such employer has proved that a fair procedure was applied…" (My emphasis)

[41] The difficulty confronting Mr Corbett is that the *onus* to prove that the dismissals were fair rested on the respondent. Not only was Spyker not called to gainsay the allegation that he threatened to use the retrenchment exercise to relieve the appellants of their employment with the respondent, but the rest of the panellists who sat on the assessment panel were not called to confirm that they were not negatively influenced by Spyker in their assessment of the appellants. The allegation of animosity between Spyker and the appellants is corroborated by the fact that Kaeka in the interview told Spyker not to ask a stupid question. It is difficult to see how such an offensive remark could not have influenced the panellists against its maker, in the absence of a proper explanation of the context which may have excused it or placed it in proper perspective.

That the probabilities favour the inference that this is what happened was recognised by the trial court when it said:

> "To be quite honest and frank an applicant should be very optimistic to expect that his or her application would be successful if he or she tells a member of an interviewing panel that that particular member is stupid. It is indeed a clear indication of Mr Kaeka's attitude at that stage and I believe that the working relationship as reflected between, the differences between Mr Kaeka and Mr Spyker the Sales Manager is damaged beyond repair."

This quotation illustrates the point I have made earlier exactly! What the trial court should have recognised is that the manifested differences between them and the impact they had on the working relationship is the reason why Spyker should never have sat on the panel in the first place.

[42] In my view, this appeal turns on whether on the facts of this case the respondent proved on a preponderance of probabilities that there was a valid and fair reason for the dismissal of the appellants. Although the decision to restructure the respondent was actuated by legitimate and sound business considerations, the respondent also bore the *onus* to prove that the dismissal of the appellants as part of that process was based on a valid and fair reason. If the outcome of the evaluation of the appellants' suitability for re-employment was pre-determined as they alleged it was, what was the effect thereof on whether there was a valid and fair reason for the dismissals? The court *a quo* recognised this problem when it made the remark I quoted in paragraph 33 of this

judgment. I can for my part not conceive, in the absence of very cogent evidence to the contrary and in the most exceptional case, that a valid and fair reason can exist for a dismissal when it has been predetermined on account of factors which do not bear relevance to the restructuring. To the extent that the respondent failed to disprove that the reason for the dismissal was the bias introduced in the procedure by Spyker, the respondent failed to satisfy the requirement that there should exist a valid and fair reason for a dismissal.

[43] In order to bring itself within the protective embrace of *Kamanya*, the respondent had to prove that regardless of the participation of Spyker in the assessment process, the dismissal was for a valid and fair reason. In other words, that the participation of Spyker on the interview panel did not affect the outcome of the assessment. This means that independent of the procedure followed and the bias of Spyker, the result would have been the same.

[44] The rationale for the rule in *Kamanya (as* to which see *Kamanya at 126 G-H)* and similar cases e.g. *Unitrans Zululand (Pty) Ltd v Cebekhulu (paragraphs 45 and 46 infra)* is that a valid and fair reason for a dismissal is one which justifies dismissal of the employee and is independent of the procedure followed before a dismissal is carried out. A valid and fair reason for a dismissal is founded on facts, conduct or circumstances which, independently, make the continuation of the employment relationship impossible. 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 casu,* not only is the reason for the dismissal inextricably linked to the procedure, but it is the very result of that procedure. Therein the court *a quo* erred. It should, on the facts, have come to the conclusion that there was no valid and fair reason for the dismissal.

[45] In the matter of *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC), the employer gave notice to an employee that he was going to be retrenched on a specific date. The employee expressed concern about the process and this resulted in the employer withdrawing the first notice and advising the employee afresh that retrenchment was being considered and inviting him to negotiations. The employer further advised the employee that it was looking at alternatives to retrenchment. The employee said he did not understand the rationale behind the retrenchment and for that reason did not come up with alternatives to retrenchment. The employer, not being able to find an alternative to avert retrenchment, told the employee that retrenchment was now inevitable because the employee did not provide alternatives to avert retrenchment.

[46] Zondo JP, with Davis AJA concurring, said (at p696 E-G):

> "Substantive fairness relates to the existence of a fair reason to dismiss. In relation to substantive fairness the question is whether or not, the consultation process, a fair reason to dismiss existed. With regard to procedural fairness, the question is not whether a fair procedure was followed in court. The question is whether, prior to the dismissal, the

employer followed a fair procedure. The result hereof is, therefore, that, if the evidence placed before the court establishes a fair reason to dismiss which was present at the time of the dismissal, the dismissal is substantively fair. It does not matter, for purposes of determining the substantive fairness of the dismissal, that such reason was not the subject of discussion during the consultation process. The fact that the reason for dismissal was never a subject of consultation matters only at the level of procedure because in terms of section 189 of the Act, it should be a subject of consultation."

[47] Du Plessis AJA differed with the majority, although for different reasons coming to the same result, when he said (at 702 F):

"There may be circumstances in which the procedural fairness and the substantive fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. There may also be circumstances in which it will be impossible after the event to determine that the dismissal was fair despite the failure to follow a fair procedure".

[48] This view seems to accord with what O'Linn P was saying in *Kamanya* and, with respect, I agree with it. It cannot be right in my view that the absence of a fair procedure can, under no circumstances, impact on the validity and fairness of the reason for a dismissal. What the appellants are saying, in reality, is that the outcome of the reorganisation process as far as it related to them, had been pre-determined and that it really mattered not what procedure was adopted as they were destined to be dismissed because of the participation of Spyker and Pragt. They pertinently made that allegation and in cross-examination and in Kaeka's evidence laid the factual basis therefore -

pointing to the involvement of Spyker and Pragt. The employer bore the *onus* to prove that was not the case. It failed to do that. Where the court is faced with the situation that because of the absence of a fair procedure it cannot determine one way or the other that there was a valid and fair reason for the dismissal, the employer who bears the *onus* has failed to discharge the *onus*. That seems to be the gist of the second part of the *dictum* of Du Plessis AJA with which I am in respectful agreement. I come to the conclusion therefore that there was a failure to prove a valid and fair reason for the dismissal because of what took place at the procedural level.

The proper order

[49] The positions appellants occupied before retrenchment had become redundant and it would be otiose to order that they be re-employed in the positions they did not wish to occupy. The respondent had considered but was unable to re-employ the appellants in alternative positions with a salary of N$5,500 as they had asked - because that would be unfair to other merchandisers. That attitude is reasonable. The most appropriate remedy for the appellants is damages for unlawful dismissal.

[50] Mr Heathcote submitted that the representation of the appellants in the trial court left much to be desired and that the trial court, having taken the stance it did on the merits of the matter, could not and did not assist the appellants much in eliciting all the necessary evidence pertaining to *quantum.* He submitted that if this Court were to set aside the dismissal, the matter be referred back to the trial court to determine the *quantum* of damages for unlawful dismissal. Mr Corbett agreed that should the appeal succeed the matter should be referred back to the trial court to determine the *quantum* for unlawful dismissal. We agree.

[51] In the result, the following order is made:

1. The appeal is allowed with costs, such costs to include the costs occasioned by the employment of one instructing and one instructed counsel.

2. The order made by the Labour Court dismissing the appellants' appeal from the District Labour Court is set aside and the following order is substituted:

"1. The appeal is allowed.

2. The order made by the District Labour Court for the District of Windhoek in Case No. DLC 352/02 dismissing the appellants' complaint is set aside.

3. The matter is remitted to the District Labour Court to determine and award damages to the appellants for unlawful dismissal as contemplated in s 46 of the Labour Act, 1992 and to further deal with and dispose of the matter in accordance with law."

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DAMASEB, AJA

I agree.

_____
SHIVUTE, CJ

I agree.

_____
MARITZ, JA

ON BEHALF OF THE APPELLANTS:	MR R HEATHCOTE
Instructed By:	VAN DER MERWE-GREEFF INC
ON BEHALF OF THE RESPONDENT:	MR A W CORBETT
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