REPORTABLE

CASE NO.: SA 45/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ATLANTIC CHICKEN COMPANY (PTY) LTD **Appellant**

And

PHILIP MWANDINGI **First respondent**

VICKY KAIMU **Second respondent**

Coram: SHIVUTE CJ, MAINGA JA and DAMASEB AJA

Heard: **28 March 2014**

Delivered: **15 July 2014**

APPEAL JUDGMENT

DAMASEB AJA (SHIVUTE CJ and MAINGA JA concurring):

Introduction

[1] This is an appeal, with leave of the Labour Court, against the judgment and order of that court, dismissing a review application under s 89 of the Labour Act[1] (the

[1] Act No 11 of 2007.

Act), aimed at reviewing and setting aside the arbitration proceedings and the award made under Arbitration No CR WK 866-10.

[2] In his written heads of argument on behalf of the appellant, Mr Maasdorp set out the crisp issue that fell for determination in the review, and therefore the present appeal, as follows:

> 'Did the arbitrator conduct the proceedings before him in a partial manner and did his conduct prevent the appellant from having its case fully and fairly determined?'

The internal disciplinary proceedings

[3] The factual matrix to the unsuccessful review, and the present appeal, is largely common cause: the second respondent (whom I shall hereafter refer to as the employee) was in the employ of the appellant (the company) as a cashier from November 2000 until 19 July 2010, the latter being the date on which she was dismissed for fraud by the company following an internal disciplinary hearing. The employee unsuccessfully appealed against her dismissal to an independent labour consultant engaged by the company to hear and determine her appeal against her dismissal. The employee was not satisfied with the outcome of the internal appeal process and lodged a complaint with the Labour Commissioner in terms of ss 82 and 86 of the Act. The third respondent (the arbitrator) was appointed by the Labour Commissioner in terms of s 85(1)(5) of the Labour Act to arbitrate the dispute. The arbitrator conducted the arbitration and found the employee’s dismissal substantively

and procedurally unfair. He ordered the company to pay the employee 13 month's salary, which the company paid 'without prejudice'.

Common cause facts

[4] The employee was implicated in fraud arising from nine allegedly fraudulent speedpoint transactions amounting to N$745,80 during the period of 7 September 2009 to 22 December 2009. The chairperson of the appeal hearing, who dismissed her appeal summarised the unlawful conduct the employee was accused of in the following terms:

> 'The cashier would ring up a false sale on the till as a speedpoint transaction without a customer having bought the goods or being present at all, i.e., no actual speedpoint transaction would have been effected. The cashier would then remove the equivalent amount of money as indicated for the bogus sale from the till for personal use. At the end of the day when the cash up was made there would be no shortage in cash as the sale would be recorded as a speedpoint sale of which money would only be accruing to the company on a later date. The fraud only came to light when shortages for the payment of speedpoint transactions were detected by head office and queried with the bank.'

[5] That somebody had committed this fraudulent conduct was common cause. A PIN assigned to the employee to facilitate speedpoint transactions at sale was used nine times in the fraudulent manner described. It was common cause during the internal disciplinary process and in proceedings before the arbitrator that the employee was assigned a unique PIN to allow her to operate the till. It was the PIN assigned to the employee that was used in perpetrating the fraud. She was therefore,

implicated in the fraud. She had denied any wrongdoing but was found guilty in the internal disciplinary process.

The evidence traversed in support of the review application

[6] The applicant's founding affidavit was deposed to by Mr Arnold Tjikuzu who is the Windhoek area manager of the company. He deposed that the arbitrator committed misconduct in relation to the duties of an arbitrator and or committed gross irregularities in the conduct of the arbitration proceedings. Mr Tjikuzu stated that during the period of September 2009 the employee failed to submit speedpoint vouchers amounting to N$745,80. Following an internal disciplinary process she was found guilty of fraud allegedly committed on nine separate occasions and causing the company damages in the amount of N$745,80.

[7] The arbitration proceedings were conducted by the arbitrator on 19 August 2010. Mr Tjikuzu represented the company during the internal disciplinary hearings, during the arbitration and also acted as the company's witness during the arbitration proceedings. According to Mr Tjikuzu, during the arbitration proceedings, he was only briefly cross-examined by the employee's representative and substantively cross-examined by the arbitrator. Mr Tjikuzu stated that he attempted to cross-examine the employee after she testified but was incessantly interrupted by the arbitrator. He further testified that the arbitrator allowed his personal experiences to cloud his judgment and in that way prejudging the case and denying the company the opportunity to properly ventilate its case through presenting evidence and fully challenging the employee's version through cross-examination.

[8] Mr Tjikuzu alleged that in the course of his evidence in chief *qua* witness for the company during the arbitration proceedings, he presented a document involving one transaction (in the amount of N$68,80) as evidence of the manner in which the employee perpetrated the fraud and that he intended to produce 'several similar bundles' in order to prove the total amount of N$745,80 and the dates on which the separate acts of fraud were committed. At that point, according to Mr Tjikuzu, the arbitrator directed that the one document was enough. This, he alleged, resulted in him being prevented by the arbitrator from fully presenting the case of the company. Mr Tjikuzu stated that but for the direction of the arbitrator that he need not produce all the evidence relating to the fraudulent transactions, he intended to prove seven fraudulent transactions.

[9] He alleged further that this conduct by the arbitrator constituted a gross irregularity as it was relied on by the arbitrator subsequently for the conclusion that the company failed to prove the alleged fraud of N$745,80 or that the employee was responsible for the fraud. Mr Tjikuzu further alleged that had the evidence been allowed by the arbitrator, it would have established that on each of the occasions that the fraud was committed, using the employee's PIN, she was present at work as a cashier. Mr Tjikuzu further alleged that if the documentary evidence was led without interference by the arbitrator, it would have established on a balance of probabilities that the employee was guilty of the fraud she was charged with in the internal disciplinary proceedings, regard being had to the fact, he alleged, that on the days that the employee was absent, no similar act of fraud occurred in relation to the PIN assigned to her. It is further the appellant's case that, if this evidence was allowed, it

would have undermined the employee's defence that someone who had access to her PIN perpetrated the fraud. The denial of the opportunity to lead this evidence, Tjikuzu alleged, prejudiced the company.

[10] Mr Tjikuzu also alleged that he was prevented by the arbitrator from challenging the employee in cross-examination on her version that she had informed the area manager of the fact that her PIN was known by other employees. As Mr Tjikuzu stated in his founding affidavit:

> 'After the first respondent intervened and stopped my cross examination of the second respondent on the issue of the pin code, he informed the hearing that the pin issue, according to him, was dealt with. He commented that if the pin was known to more than one person, it was no longer a secret. He made a comment to the effect that he is the only one that is aware of the pin of his bank card, and if this is known to others then it is no longer a secret.'

This assertion is buttressed with the following extract from the record:

> 'FOR RESPONDENT[2]: Didn't you feel that it was a threatening situation to your employment, your work?
> APPLICANT[3]: N$5-00?
> FOR RESPONDENT: No, for people to operate on your till without your concern?
> FOR APPLICANT[4]: Objection, the question has already been answered. She accepted once to pay and then she complained to the manager. The procedure is that she complains to the manager and they take it up with you.
> CHAIRPERSON: Ya, it's fine. But you already did not deny that the manager knows the PIN.

[2] Which is a reference to the company.
[3] Which is a reference to the employee, second respondent.
[4] A reference to the employee's representative.

FOR RESPONDENT: Ya.
CHAIRPERSON: The pin was not a secret.
FOR RESPONDENT: Ya.
CHAIRPERSON: So it was actually a system problem, it's not just an incident.
FOR RESPONDENT: Mm.
CHAIRPERSON: Like we already agreed to that.
. . . .
'FOR RESPONDENT: Coming to that, the manager assigned her, the manager has got the code because he needs to assign the cashier for her to operate on a till.
CHAIRPERSON: ya.
FOR RESPONDENT: That's why the code is not that she only knows the code herself, because the manager needs to assign her for her to be able to operate on a till. Without the manager assigning her she won't be able to operate on a till.' (My underlining)

[11] Mr Tjikuzu also alleged that the arbitrator, prior to the conclusion of the matter (i.e. before he entertained the parties' submissions), commented that the company's faulty systems were responsible for what had happened. The allegation is supported by extracts from the record reflecting exchanges between the arbitrator and Mr Tjikuzu. I propose to refer to only a few typical ones:

'FOR RESPONDENT: …One question that I posed in the initial hearing, I asked her: if N$100-00 is lost in your cash register, who is responsible for it? She answered me and said she is responsible.
CHAIRPERSON: But the question you are asking is wrong: you cannot put the responsibility on her. The mistake is in the system. Like I said, my ATM card, the bank manager gives me the code but it comes in a closed envelope, you understand.
FOR RESPONDENT: Mm-hm.
CHAIRPERSON: So if I come tomorrow at my ATM . . . even yesterday I was at the bank and I saw somebody complaining about her card apparently has been used and she never used it. But the PIN was given to you in a closed envelope, so you might

> have been negligent. Maybe if I give my PIN to my girlfriend and she sneaks to the ATM and draws money, the bank will say it is me, you understand.
> FOR RESPONDENT: Mm-hm.
> CHAIRPERSON: But if the manager in the bank knows my pin I cannot be held accountable. I will say no, maybe the bank manager used my PIN. Why should I share my PIN with somebody else? That's the principle. I'm not blaming anybody. I'm just trying to pinpoint it would seem it is a weakness in the system.
> . . . .
> CHAIRPERSON: To my knowledge . . . you know, our gate here is actually coded and we have several offices inside here. And when I come in I have my code, which is my secret. I cannot give it to somebody else, now suppose I come in overnight maybe to collect something, in my office I have a key but to pass that entrance I will have to put in my code. Now suppose Monday we come and something is missing, the system will be able to say 'look it is Mwandingi who passed this door'. But I keep my code to myself. But the moment I give my code to somebody else that person can come in and use my code and then I will still be responsible. But now there are two ways to give that code. One way is maybe I send somebody in my office
> [interruption] . . . .

[12] Mr Tjikuzu stated on behalf of the company that the stance by the arbitrator that the employee's PIN was known to the manager and that for that reason the fraud was the result of a 'system problem' was evidence that he had prejudged the matter. The view taken by the arbitrator, Mr Tjikuzu contended, although open to him in considering whether or not the company proved its case, demonstrated that he precluded himself from considering that the employee's defence was not plausible if regard be had to the fact that the employee was present on all the dates the individual fraudulent acts were committed and that no such fraud occurred when she was not on duty. According to Mr Tjikuzu, the arbitrator's stance also precluded him from

reaching the possible inference that the employee's guilt was proved in light of her failure to report any shortages in her till.

[13] Mr Tjikuzu alleged that the arbitrator's bias against the company was obvious from his finding, contrary to the weight of the evidence, that the chairperson of the internal disciplinary hearing was biased by reason only of the fact that the chairperson was an employee of the company. Mr Tjikuzu alleged that the record of the internal disciplinary process amply demonstrates that the employee received a fair hearing, implying that the arbitrator's finding otherwise was only explicable on the basis that he harboured an impermissible bias towards the company.

[14] Mr Tjikuzu stated in his founding affidavit that these salient incidents attributable to the arbitrator amounted to a 'substantial miscarriage of justice' and demonstrate that the arbitrator was 'not impartial and neutral' in the conduct of the arbitration. That, it is said, undermined and negated the applicant's rights to a fair trial and violated the applicant's rights under the Labour Act and Articles 12(1)*(a)*[5] and or 18[6] of the Constitution.

[15] In his supplementary affidavit, Mr Tjikuzu amplified the review grounds advanced in the founding papers adding, in the first place, that in the conduct of the arbitration, the arbitrator descended into the arena by 'effectively' cross-examining Mr Tjikuzu, taking on the role of leading the evidence of the second respondent,

[5] Which guarantees all persons a fair hearing by an independent, impartial and competent Court or Tribunal.
[6] Requiring administrative officials to act fairly and reasonably and comply with the requirements imposed on them by common law and legislation.

impermissibly relying on his personal experience in the adjudication of the matter and in that way clouding his mind.

[16] As is by now apparent, the appellant impugns the arbitrator's conduct of the arbitration on the following bases: that he improperly descended into the arena by interfering with the appellant's presentation of its case, cross-examining the appellant's witness and taking the lead in the leading of the employee's case; shielding the employee from legitimate cross-examination which may well have undermined her defence; that he was biased against the company and favoured the employee by his discriminating against the company in the conduct of the arbitration; that he did not have an open mind as a tribunal ought to have, in that he allowed his personal experiences to override his duty of fairness as an arbitrator.

The arbitrator was not impartial

[17] The company's review ground under this heading is premised on the following: although both parties were represented during the arbitration, the arbitrator actively led the case for the employee. The arbitrator is accused of conducting the cross-examination of the company's only witness and representative at the hearing although the employee was represented by someone. In particular, the allegation is made that except for two questions asked to the company's representative by the employee's representative, the raft of the cross-examination of the company witness was conducted by the arbitrator. Even while the company representative was testifying, he was regularly interrupted by the arbitrator and the employee invited by the arbitrator to deal with contentious matters during the course of the company's

evidence. On this version, instead of the employee awaiting her turn after the company's evidence was finalised, she was asked, by the arbitrator, to comment on the evidence Mr Tjikuzu was tendering.

[18] It is also alleged that the company representative and witness was required to give evidence under oath but that the employee was not required to take the oath. The arbitrator, not the employee's representative, then assisted the employee in leading her evidence without any oath or admonition. Incongruously, the employee's representative at the arbitration hearing was allowed to answer questions on behalf of the employee as regards the procedural unfairness of the proceedings. When he provided those answers the employee's representative was not sworn in or admonished.

The respondent's case

[19] As I understand the second respondent's case, she does not dispute the actions, conduct and utterances of the arbitrator by reference to the record. Her case, rather, is that such actions, conduct and utterances do not lend themselves to the inference of a gross irregularity which the applicant asks to be withdrawn. It becomes unnecessary, therefore, to traverse in detail the facts detailed in the affidavits. I am satisfied, in the manner the case was argued before us, that the present is not a case that calls for the resolution of disputed facts but rather one which involves deciding whether the common cause facts justify the conclusion of gross irregularity which the appellant wants to be drawn.

[20] For completeness, I am satisfied that the applicant has laid sufficient evidential basis for the inferences he urges to be drawn that:

(a) the arbitrator descended into the arena;

(b) the arbitrator interfered with the company's cross-examination of the employee; and

(c) the arbitrator had prejudged the case and incessantly and improperly interrupted the company's representative in his presentation of the company's case.

[21] The question I must now consider is whether this conduct of the arbitrator amounts to a gross irregularity and whether it prejudiced the appellant to the extent that it did not have a fair hearing.

The proceedings in the Labour Court

[22] The company took the arbitrator's award on review to the Labour Court on the ground that the arbitrator did not act fairly during the arbitration proceedings; that he was not independent and had prejudged the case; and that he was biased in favour of the employee.

The conclusions reached by the Labour Court

[23] The Labour Court was satisfied that the arbitrator's conduct was beyond reproach. It rejected all the grounds upon which the appellant sought to review and set aside the proceedings conducted by the arbitrator. The Labour Court was satisfied in particular that the appellant failed to establish good grounds why the review must succeed.

Grounds of appeal

[24] Although the appellant's grounds of appeal are extensive and to a large extent overlap, the gravamen of its complaint against the Labour Court's judgment is that the court *a quo* misdirected itself in finding that the arbitrator did not commit a gross irregularity in the conduct of the arbitration, in light of the arbitrator's alleged obvious bias towards the employee and the denial of the company's procedural rights which had the result that the company did not receive a fair hearing.

[25] To recap, the main grounds on which the arbitrator's conduct is assailed are that he:

(a) did not act even-handed or independently;

(b) pre-judged the issues that fell for his impartial adjudication;

(c) descended into the arena and in the process evinced bias against the company and in favour of the employee.

Issues in dispute

[26] The employee strenuously denied that she committed the fraud. She suggested that her PIN was known to several people in the company and that any number of them could have used the PIN assigned to her. It was incumbent on the company therefore, to provide sufficient evidence that showed that it was more probable than not that the employee committed the fraud.

The standard of proof

[27] The company had to prove on a balance of probabilities that the employee committed the nine acts of fraud. The applicable standard is the civil standard of proof. That standard would be met if it could be shown that it was more likely than not that the employee committed the fraud. This court approved in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurtz*[7] the *Govan v Skidmore*[8]- test in civil proceedings to the effect that in finding facts and making inferences in a civil case it is permissible for the court to find a case proved upon a mere preponderance of probability. In so doing the court need not find that every other reasonable doubt is excluded. A civil court is entitled in finding facts or making inferences to balance the probabilities and 'select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

[7] 2008 (2) NR 775 (SC) at 790D-E.
[8] 1952 (1) SA 732 (N) at 734A-D.

[28] All items of evidence which would assist in discharging the burden resting on the company were therefore, relevant and were open to the company to introduce in evidence. In this regard, the following was material evidence: whether or not the employee was on duty as a cashier on the days the fraud was committed; how many people had access to the employee's unique PIN; the number of times that the PIN was used and the employee's whereabouts at the time; whether or not any fraud occurred with the use of her PIN on the days she was not on duty; whether or not she reported any cash shortfalls in her till; and whether or not she raised any concern about the alleged over-exposure of the PIN assigned to her.

Respondent's submissions on appeal

[29] Taking the cue from the finding of the Labour Court, Mr Elago, for the employee, forcefully argued that an arbitrator, as trier of fact, has the right 'to get it wrong' and that the court must not review and set aside arbitration proceedings merely on the ground that the arbitrator was wrong and that it must only interfere if the arbitrator acted with malice or dishonesty. It is implied in this submission that the arbitrator's conduct of the arbitration was not entirely proper. Mr Elago made clear during argument that it certainly was not of sufficient gravity as to justify a finding of gross irregularity.

When does mishandling of arbitration constitute gross irregularity?

[30] Section 89(4) of the Act bestows a right on a party to a dispute who alleges a 'defect' in an arbitration proceeding under Chapter 8, Part C of the Act, to seek the review and setting aside of an award flowing from such a proceeding. Section 89(5) in turn limits a reviewable defect to 'misconduct' committed in relation to the duties of an arbitrator; 'a gross irregularity' committed in the conduct of the arbitration proceedings, and in the event of excess of jurisdiction. It also allows for review and setting aside if the award was improperly obtained.

[31] It needs to be pointed out that the duty to act independently and impartially is imposed by statute.[9] Mr Elago, for the employee, submitted that an arbitrator has the 'right to get it wrong' and that, to succeed, the appellant had to prove dishonesty and improper motive. This submission must be approached with great care. On the one hand, the courts must be loath to second-guess an arbitrator's handling of arbitration under the Act, lest doing so provides fodder for all manner of unmeritorious applications to courts to set aside arbitration awards and thus defeating the legislative intent that arbitrations be conducted summarily, with minimum formalities and minimum delay. On the other hand, is the equally important consideration that justice must not become a chimera by allowing arbitrators to act arbitrarily and oppressively.

[32] It is trite that an arbitrator is entrusted with the foremost task of determining the facts. In terms of s 89(1)(*a*) of the Act, a party to a dispute may appeal to the Labour Court against an arbitrator's award 'on a question of law alone'.[10] The same principle applied even under s 21(1) of the old Labour Act 6 of 1992. It follows that on

[9] Labour Act, s 85(6).
[10] *House and Home v Madjiedt* 2013 (2) NR 333.

questions of fact, the arbitrator is the final arbiter and it is not open to the Labour Court on appeal to depart from a finding of fact by an arbitrator. [11]

[33] Given that the law reposes so much authority in an arbitrator as the trier of fact, that imposes a special duty on the arbitrator to allow the ventilation by the parties of all the material and relevant facts. Conduct by an arbitrator which frustrates a party in ventilating all material and relevant evidence, especially where the party bears the risk of non-persuasion, will amount to a gross irregularity, unless it is patently obvious that the irregularity did not have a material effect on the outcome of the proceedings.

[34] The proper approach to be taken when the conduct of an arbitrator is impugned on the basis that it constitutes 'a gross irregularity', is that set out by Muller J in *Roads Contractor Company v Nambahu and Others*[12]. In that case, the following conduct by the arbitrator was found to constitute a gross irregularity within the meaning of ss 89(4) and 98(5)(a)(*i*) and (*ii*) of the Act:

> '(a) exhibiting pre-conceived ideas and pre-judging issues;
>
> (b) incessantly intervening while witnesses testified and asking questions which went beyond seeking identifications: As the learned judge observed, the arbitrator became 'the most active questioner'.

[35] The arbitrator's conduct with which the court was concerned in the *Roads Contractor Company* case is on all fours with the conduct of the arbitrator in the case before us. The ratio for the court's conclusion that the arbitrator in the *Roads*

---

[11] Compare, *Visagie v Namibia Development Corporation* 1999 NR 219 (HC) at 224, approving *Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd* 1998 (3) SA 349 (SCA) at 405F-406A; 1997 NR 102 (HC) at 105D-E.

[12] 2011 (2) NR 707 (LC).

Contractor matter failed to be neutral and independent, was succinctly set out by Muller J in the following terms:

> 'The arbitrator clearly revealed his attitude and anybody reading the record would have the perception that the arbitrator had pre-conceived ideas and pre-judged the issue. . . . Furthermore, the whole procedure and the way that the hearing was conducted, made it impossible for any witness to testify, because the arbitrator constantly and nearly after each and every sentence in the evidence of a witness, intervened and asked questions which were not only based on assistance or clarification. The arbitrator not only interfered in the evidence and cross-examination of witnesses, but he seemed the most active questioner.'[13]

[36] The learned judge then goes on to give very useful guidelines to arbitrators in para 31 of the judgment. In particular, he states:

> 'The arbitrator should always remain independent and impartial and he/she cannot allow that any party gain the perception that he/she is not a neutral and impartial adjudicator. In this regard the arbitrator:
>
> (a) does not descend into the arena;
>
> (b) does not cross-examine any witness;
>
> (c) only ask questions for clarification or to provide guidance;
>
> (d) does not interrupt or stop cross-examination, unless it is clear that the questions being asked in cross-examination are repetitive, have already been answered, or do not have any relevance;

[13] Ibid at 711G-I.

(e) never give any indication how he or she feels about the evidence or give any indication how he or she may decide . . . . .'[14]

[37] It sets too high a standard to hold, as suggested by counsel for the employee, that an irregularity must be accompanied by malice or dishonesty in order to be reviewable. There is a line of authority which holds that arbitrator 'misconduct' connotes malice and dishonesty.[15] We do not need to decide what constitutes misconduct in the present appeal because the matter falls for determination on the alternative ground of gross irregularity. What is clear though is that a 'gross irregularity' need not involve malice, bribery or dishonesty. The language deployed in s 89 does not justify such interpretation or finding.

[38] It is, I accept, not every irregularity committed by an arbitrator that meets the standard of a gross irregularity, but it is essential that the irregularity causes prejudice.[16] It must be an irregularity that constitutes a negation of a fair trial. That approach accords with *dicta* from South Africa and Namibia[17] as regards what constitutes a gross irregularity in the conduct of arbitration.[18] An arbitrator commits a gross irregularity within the meaning of s 89(5) if his or her conduct denies a party a fair hearing. Such conduct may consist in the breach of the well-trodden tenets of

---

[14] Ibid at 724H-J and 725A.
[15] *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176; *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA). See also, Parker, *Labour Law in Namibia*, UNAM Press at 211 -212
[16] *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 359.
[17] *Strauss v NIMT and Others* (LC 94/2012) [2013] 38 (06 November 2013) at 18, para 35 www.saflii.org.
[18] *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 RJ 2405 (CC) at 2490C-E

natural justice (*audi alterem partem* or being judge in one's own cause)[19] or, as stated in Halsbury's:[20]

> ' . . . such a mishandling of the arbitration as is likely to amount to some substantial injustice . . . or appear to be unfair.'

[39] The fact that the arbitrator has discretion to determine the procedure of an arbitration in terms of s 86(7) of the Act does not justify an arbitrator completely disregarding the legitimate expectation of parties to be allowed procedural rights which are commonly associated with a hearing before a 'tribunal' as envisaged in Art 12 of the Constitution. It is trite that arbitration is a tribunal contemplated in Art 12.[21] To call witnesses, to present evidence and to challenge the evidence of the opposing party – all within reason (i.e. without the hearing being converted into a full-blown prolonged adversarial contest) – are procedural rights which should be accorded to the parties, unless there is a cogent reason, which must be apparent from the record, to depart therefrom or the parties either waive their rights or agree otherwise. The discretion to determine procedure is certainly not a warrant for an arbitrator to act arbitrarily or oppressively towards the parties.

[40] It is common cause that in the present matter the arbitrator interposed Mr Tjikuzu's evidence *qua* witness for the company and in the process sought to elicit from the employee her version of events on what constituted a material dispute

---

[19] Parker, *op cit* at 212-213.
[20] *Halsbury*, Vol. 2 4 ed, para 649.
[21] *Purity Manganese v Katzao* 2012 (1) NR 233 (LC) at 240, para 21C-E, and *Roads Contractor Company, supra* at 724, para 31F-G; Labour Act, section 85 (1).

between the parties. That much is apparent from the following extract from the record when the interruption occurred while Mr Tjikuzu was testifying:

> 'Now he is saying this specific . . . you know what happened, you were there, this specific transaction is not reflected here. I want you or your representative to look at it. What do you say? Because those are some of the bases. We cannot look at everything, but he made a spot check'[22].

[41] It is equally common cause that the arbitrator extensively cross-examined the company's witness under oath although, when it was the turn of the employee to testify, she was neither admonished or asked to testify under oath. It is indisputable that the arbitrator assisted the employee in leading her evidence in chief and rendering the presence of the employee's representative unnecessary. Similarly, it remains undisputed that the arbitrator adopted a procedure which allowed the employee's representative to answer questions on the employee's behalf, and without, for good measure, being sworn in or admonished.

[42] Mr Elago, for the employee, argued before us that although such conduct may draw criticism, it was excusable because the arbitrator enjoys discretion under s 86(7) to 'conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and must deal with the substantial merits of the dispute with the minimum of legal formalities'. I gained the distinct impression from Mr Elago's submissions (both oral and written) that he is of the view that even if the conduct of the arbitrator was not beyond reproach in all respects, it

[22] That is the arbitrator to the employee.

was not proved by the appellant that the arbitrator 'failed to deal with the substantial merits of the dispute'. He submitted that the arbitrator's conduct could not be faulted as it was not shown to be *mala fide* or dishonest.

[43] Mr Elago's submission loses sight of the fact that justice has both a substantive and procedural dimension, and hence the adage (in the words of Lord Hewat CJ) in *R v Sussex Justices, Ex Parte McCarthy:*

> '. . . it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

The law to the facts

[44] Based on what I have set out as the proper test for the application of ss 89(4) and 89(5) of the Labour Act, it is difficult to sustain the Labour Court's conclusion that the arbitrator did not commit a gross irregularity in the conduct of the arbitration proceeding now before us. It is not one isolated act of gross irregularity we are here concerned with, but the sum total of his actions which not only evince a pre-judging of issues and clear bias in favour of one party, but his preventing the company's representative from ventilating issues and eliciting potentially relevant facts as the representative saw best and necessary, and not in the way that pleased the arbitrator.[23] Although the arbitrator enjoys discretion and latitude in determining the procedure of the arbitration, he holds no license to dictate to parties which witness is called and which evidence is to be led. That remains the prerogative of the parties, subject to the arbitrator's power to conduct an orderly arbitration, to disallow

[23] *De Vos v Marguard & Co* 1916 CPD 551–554.

inadmissible evidence, and to prevent prolix cross-examination and unnecessary badgering of witnesses.

[45] How does one explain or justify the arbitrator's placing one party under oath and not the other? The reason is not apparent from the record. Similarly, how does one justify his interposing the evidence of the company and eliciting that of the employee when she still had her turn to testify? On what basis did the arbitrator allow the employee's representative to answer questions on her behalf on contentious issues without the representative being asked to take the oath or being admonished? The record is also silent on why the arbitrator became the active cross-examiner of the appellant's witness and the leader of the employee's evidence. The record supports the appellant's allegation that there is no justification for the arbitrator's conclusion that the chairperson of the internal disciplinary procedure was biased against the employee. In fact, it is common practice for internal disciplinary proceedings to be conducted by an employee. The view taken by the arbitrator is, therefore, one of several instances of conduct attributable to the arbitrators which strengthen the appellant's case that the arbitrator had pre-judged the matter.

[46] Particularly telling is the arbitrator denying the company's representative the opportunity to lead evidence about the number of times the employee was on duty when the alleged fraudulent transactions took place. The company's version is that had Mr Tjikuzu been allowed to lead into evidence the documents he was prevented from introducing, the employee's version that someone other than herself used her PIN number would have been the less probable version. The company's case is that

the evidence of the multiplicity of incidents would have had the result that the trier of fact would find that it had established the employee's guilt on a balance of probabilities. This reasoning is hard to fault, especially if one considers, contrary to what appears to have been the Labour Court's tacit assumption, that the employee's defence that the PIN was capable of being used by any number of people was not common cause or admitted by the company. The conclusion that the introduction of the excluded evidence could well have had a different result on the outcome of the arbitration makes the arbitrator's exclusion of the evidence material and, therefore, an irregularity. That amounts to a trial prejudice. That is what the Labour Court ought to have found.

[47] The reasoning of the arbitrator during the conduct of the arbitration that the disclosure of the employee's PIN was comparable to the disclosure of an ATM PIN code is a logical fallacy: just because it is not proper for the bank to bear knowledge of an account holder's personal ATM PIN code, or an employee's access PIN to the employer's premises[24] is restricted, does not justify an inference, as drawn by the arbitrator, that the PIN assigned to a cashier by an employer (running a fast-food outlet) to facilitate speedpoint transactions should be known only to the employee and not by the management. There is a perfectly good reason why the bank may not bear knowledge of a bank account holder's ATM PIN number: the funds in a bank account is the property of the account holder and only he or she has the absolute right to transact on the account. Equally, there is good reason why the company, on whose

[24] Which is even less convincing reasoning, for how else would the employer know whose access code was used, unless someone at the work place knows which access PIN has been issued to which employee?

behalf the employee facilitated the speedpoint transactions, was entitled to know (through its managers and supervisors of the employee) which employee was assigned which PIN number. How else could they possibly detect fraud or carry out investigations to determine the identity of a fraudster?

[48] To equate one's personal ATM PIN number to a PIN number assigned to an employee to facilitate transactions between the customer and the company (the employee's employer), and on that basis rule as inadmissible a line of cross-examination designed to elicit concessions from the employee that she failed in her duty to report the over exposure of her PIN number, is most irregular. That is so because, contrary to the view taken by the arbitrator in interrupting Mr Tjikuzu's cross-examination of the employee, the company (through its management) has the right to know the PIN code assigned to its employees. How else could the managers detect fraud or any other improper use? As Mr Tjikuzu correctly, but in vain, sought to convey to the arbitrator 'the manager needs to assign her for her to be able to operate on the till. Without the manager assigning her she won't be able to operate on the till'. The leap from 'the managers knew the employee's PIN' to 'therefore the employee cannot be guilty of fraud because anyone else could have done it' was a prejudging of the case by the arbitrator and thus denying the company the right to a fair hearing.

[49] That the employee's PIN was so widely known that anyone could have used it to commit the fraud, was the employee's case. That case was not accepted or conceded by the company and it was entitled to challenge it through evidence of its own undermining the inference and, through appropriate cross examination, showing

that the employee's version was improbable. The arbitrator could then have determined which of the two versions was more probable. It was impermissible for him though to foreclose his mind to a potentially probable version by reference to what he had predetermined as the probabilities based on his personal, albeit doubtful, view of how things work.

[50] A party is entitled to lead all available evidence that it considers will support the inferences it will ask the trier of fact to have drawn. The actions and conduct of the arbitrator denied the company that opportunity.

[51] Accepting, as I must, that the use of the PIN by others in the way alleged by the employee is disputed by the company, I agree with Mr Maasdorp's submission, that if evidence was led about the number of times that the fraud was perpetrated while the employee was on duty, coupled with an implausible explanation why she had not reported a cash shortfall or the over-exposure of her PIN, it would have significantly undermined the employee's version that any number of people would have perpetrated the fraud. The uncontested evidence that it was the PIN assigned to the employee which was used in the fraud, together with the fact that it only happened while she was on duty, would decidedly have added to the probabilities that the employee perpetrated the fraud. If the company's representative was allowed to lead the evidence of the occasions on which she was on duty when the fraud occurred, it may well have led to the inference, applying the standard of balance of probabilities, that the employee defrauded the company. Therein lies the unfairness in the way the arbitrator conducted the arbitration hearing. Had the Labour Court

approached the matter in that way, it would, and properly so, have found that the arbitrator committed a gross irregularity in the conduct of the arbitration.

[52] Even if there was justice in substance in the conclusion reached by the arbitrator, which in the case before us is by no means a certainty, the uncontested, if cumulative acts of 'mishandling' of the hearing by the arbitrator leaves one with a sense that justice was not 'manifestly and undoubtedly seen to be done'.

[53] I come to the conclusion, therefore, that the appellant had established that the arbitrator committed a gross irregularity in the manner he conducted the arbitration and that the Labour Court should have reached that result. I am satisfied that the appeal must succeed. The parties were in agreement that, in the event of the appeal being successful, the matter be remitted to the Labour Commissioner to appoint another arbitrator to deal with the matter according to law. The power of the court to make such an order derives from s 98(10)(*b*) of the Labour Act. I propose therefore to make such an order. The appellant has not sought a costs order and no such order will be made.

Order

[54] In the result:

1. The appeal succeeds and the order of the Labour Court is set aside and substituted for the following order:

1.1 The application for review succeeds;

1.2 The award in arbitration No CR WK 866-10 is set aside;

1.3 The matter is referred back to the Labour Commissioner to appoint a new arbitrator to conduct the arbitration *de novo* and to deal with the matter according to law.

1.4 No order as to costs is made.

_____
DAMASEB AJA

_____
SHIVUTE CJ

_____
MAINGA JA

APPEARANCES

APPELLANT:	Mr R L Maasdorp
	Instructed by Köpplinger Boltman Legal Practitioners
RESPONDENT:	Mr P S T Elago
	Instructed by Tjombe-Elago Law Firm Inc.