



**REPORTABLE**

CASE NO: SA 40 / 2015

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JOHANNES ANDIMA**

**Appellant**

and

**AIR NAMIBIA (PTY) LIMITED**

**First Respondent**

**LABOUR COMMISSIONER**

**Second Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and FRANK AJA

**Heard:** 13 April 2017

**Delivered:** 12 May 2017

**Summary:** The appellant was dismissed from his position as a 'duty controller' of Air Namibia after being found guilty of negligent handling of the employer's petty cash box containing money; disregarding company rules and procedures on passenger checking-in, and irregularly issuing boarding passes to passengers. He succeeded at the arbitration but on appeal the Labour Court set aside the award against which the appellant now appeals.

*On appeal*, the appellant argued that the Labour Court had no jurisdiction to interfere with the factual findings of the arbitrator as it was not a 'question of law' as contemplated in s 89(1)(a) of the Labour Act 11 of 2007. The appellant further argued that the employer had not rebutted the presumption of unfair dismissal contained in s 33(4)(a) and (b) of the Labour Act. The employer argued that the court *a quo* was justified in interfering with the decision of the arbitrator.

Court on appeal *held* that a finding is perverse if: (a) it is based on inadmissible or irrelevant evidence, (b) it fails to take into account all the relevant evidence, and (c) it is against the weight of the evidence in that it cannot be supported by the evidence on the record. Accordingly, the finding would not be perverse and appellate interference would not be justified just because, on the same facts, the superior tribunal could have come to a different conclusion.

Court on appeal further *held* that in respect of the charges relating to the petty cash box, the arbitrator's findings fell within a range of reasonable inferences open to a trier of fact and was thus not perverse; that in respect of it, the Labour Court improperly assumed jurisdiction in terms of s 89(1)(a).

As regards the charges of dishonesty and disregard of company rules and regulations, *held* that the evidence establishes, on a preponderance of probabilities, that the appellant was the source of the boarding passes handed to people who had no right to have them. Accordingly, the arbitrator misdirected himself and ignored the golden rule of fact-finding that all relevant evidence must be properly accounted for to justify a conclusion of fact. Labour Court's conclusion that the arbitrator's finding one which no reasonable arbitrator would have come to and therefore appealable, upheld. Appeal dismissed.

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## APPEAL JUDGMENT

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DAMASEB DCJ (MAINGA JA and FRANK AJA concurring):

[1] This case is about when the Labour Court may, on appeal, reverse an arbitrator's finding that an employer had unfairly dismissed an employee. Section 33(1)(a) of the Labour Act 11 of 2007 (the Act) states that an employer must not, with or without notice, dismiss an employee unless there is a valid and fair reason. Section 33(4)(a) and (b) of the Act on the other hand provides that once an employee establishes that he/she has been dismissed, it is presumed in any proceedings concerning a dismissal that the dismissal is unfair unless the employer proves the contrary. The onus thus rests on an employer to justify a dismissal both procedurally and substantively. In the present appeal, there is no issue about the fairness of the procedure that led to the dismissal. It is rather whether the employer had proved a valid reason for the dismissal.

[2] The arbitrator had, after hearing oral evidence, found that the appellant (Mr Andima) was unfairly dismissed by his employer, the first respondent (Air Namibia). Air Namibia appealed the finding to the Labour Court which held that the arbitrator, against the weight of the evidence, came to a conclusion which no reasonable trier of fact would have reached.

[3] In this appeal Mr Andima's case is that in so doing the Labour Court exceeded its jurisdiction as s 89(1)(a) of the Act limits an appeal against an arbitrator's decision to a 'question of law alone'.

## Context

[4] Mr Andima was employed by Air Namibia as a 'duty controller' at Hosea Kutako International Airport (HKIA), until his suspension on 5 April 2012. He was dismissed on 22 August 2013 following a disciplinary hearing at which he was found guilty of misconduct. After unsuccessfully exhausting all internal appeal remedies, Mr Andima on 29 November 2013 referred a dispute to the Office of the Labour Commissioner for conciliation and arbitration. At the arbitration Mr Andima was successful. The arbitrator found that he was unfairly dismissed. The arbitrator ordered his reinstatement with full benefits. Air Namibia appealed the award to the Labour Court which allowed the appeal and set aside the award. It is against that decision that Mr Andima appeals to this court.

[5] It is settled law that a perverse finding of fact is appealable as a 'question of law' under s 89(1) of the Act: *Rumingo v Van Wyk* 1997 NR 102 (HC). In *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC), O'Regan AJA held at 567I-J that:

'[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperilled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed, and it echoes the approach adopted by appellate courts in many different jurisdictions.' (Footnotes omitted).

[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.’

[6] Air Namibia had to prove the charges against Mr Andima on the civil standard: In other words that it was more likely than not that he committed the misconduct charged: *Atlantic Chicken Co (Pty) Ltd v Mwandingi & another* 2014 (4) NR 915 (SC), para 27.

#### Incontrovertible facts

[7] It is common cause that Air Namibia’s petty cash box containing N\$7000 was under the care of Mr Andima during October 2011. It then went missing whilst under his care and Air Namibia suffered a loss of N\$7000. The petty cash box was kept in a safe kept in an Air Namibia office at the HKIA. The only two persons with keys to the petty cash box were Mr Andima and his superior, Mr Shihepo. But the only person who had responsibility for safeguarding the petty cash box was Mr Andima. There were two keys to the safe in which the petty cash box was kept: One was kept in a drawer in an office to which several people had access and the other key was kept by Mr Andima.

[8] The applicable Air Namibia policy on the petty cash box states as follows:

‘When not in use all cash shall be stored in a lockable cash box by the person designated to maintain the float. The cash box containing the float shall be locked in a safe overnight and during weekends.’ (Emphasis supplied.)

At the time the petty cash box disappeared, this policy was in place.

[9] It is not in dispute that Air Namibia had a scheduled flight from Windhoek to Frankfurt, Germany, on 22 April 2012. Passengers destined for Canada use the Frankfurt flights and remain in transit there *en route* to Canada. On 22 April 2012, amongst the passengers who had boarding passes for that flight were the following persons: Kaaronda Brumilda Veundjakuani; Mujoro Lorraine; Kamuzeuao Kandjambi Vejamuno and Kavari Nateree. Those persons were not allowed to fly because Air Namibia discovered that their boarding passes were irregularly issued. The police were called in to investigate the circumstances under which the boarding passes were irregularly issued. The individuals in question were arrested by the Namibian police on account of their attempting to board an Air Namibia flight using the suspect boarding passes.

[10] It is common ground that Mr Andima was suspended by Air Namibia on 5 April 2012 pending an investigation and disciplinary proceedings. In his own words, the suspension arose from suspicion that he was involved in irregularly facilitating the travel of Namibians to Canada.

[11] The background is that a number of Namibians flew to Canada around that period seeking asylum. The Canadian authorities were naturally concerned by this development and secured the cooperation of the board and management of Air Namibia to profile and screen persons intending to fly to Canada before they actually board Air

Namibia flights. That process involved Air Namibia forwarding the details of such passengers to the Canadian High Commission (at any time including at night) so that the Canadian authorities satisfy themselves that the prospective passengers appeared *bona fide*. For example, if the passenger had no previous history of travel, he or she would not be allowed to travel to Canada. Mr Andima conceded the existence of the arrangement between Canadian authorities and Air Namibia and that he too had the responsibility to enforce the agreement.

[12] All Air Namibia employees who had responsibility to issue boarding passes were issued with individual codes which allowed them access to the Air Namibia computer system. It is possible for that reason to trace back a particular transaction conducted on the computer to an individualised code.

[13] Mr Andima is very proficient in Air Namibia's boarding procedures and could access the Air Namibia data base and complete travel-related transactions from anywhere in the world as long as he had access to a laptop and a 3G device. That much Mr Andima conceded but retorted that it was not possible in the present case because when he went on suspension he had surrendered the laptop and the 3G device.

[14] It is common cause that when the boarding passes were issued in respect of the individuals who were barred by Air Namibia from boarding the flight of 22 April 2012, Mr

Andima was on suspension and had no business or permission to be on Air Namibia premises.

The charges and the nub of Mr Andima's defence

[15] At the disciplinary hearing Mr Andima was found guilty on the following charges:

'GROSS NEGLIGENCE IN PERFORMING DUTIES

On or about, or during the period of October 2011, at the Hosea Kutako International Airport you were grossly negligent in performing your duties in that you failed to safeguard the petty cash box, by leaving it unsupervised and/or in an unsafe place whilst knowing that the box contained money to a potential value of N\$7000-00 which money is now unaccounted for.

DISREGARD OF COMPANY RULES AND REGULATIONS

On or about the 21 and 22 April 2012, you disregarded company rules and regulations as per check in and boarding procedures for passengers Brumilda Veundjakuani Kaaronda, Lorraine Mujoro, Vejamuno Kandjambi Kamuzeuao, Nateree Sesekie Jessica Kavari, Jakotoka Karupa and Mbaukuaa Viajiukua respectively on flight SW 285 from Windhoek to Frankfurt.

DISHONESTY

On or about the 21 and 22 April 2012, you were dishonest in that you checked in and issued boarding passes to passengers Brumilda Veundjakuani Kaaronda, Lorraine Mujoro, Vejamuno Kandjambi Kamuzeuao, Nateree Sesekie Jessica Kavari, Jakotoka Karupa and Mbaukuaa Viajiukua respectively on flight SW 285 from Windhoek to Frankfurt.'

[16] Mr Andima's defence to the petty cash box charge is that any of the Air Namibia employees who had access to the safe could have removed it. In connection with the

boarding passes charges, his defence is best summed up in his instructions put to Ms Kate du Toit , a witness for Air Namibia (infra), in the following terms:

'He did not have anything to do with issuing of tickets or boarding passes . . . He was never implicated in that, there is no evidence. He is not the person whose code is there. That is why his version is he was not involved.'

### The evidence

[17] Air Namibia led several witnesses at the arbitration hearing in support of the allegations of misconduct against Mr Andima. Mr Andima testified on his own behalf and also called some witnesses to support his version of events. I will next summarise the salient aspects of the evidence.

[18] There is very little by way of disagreement between the protagonists when it comes to the facts surrounding the petty cash box. In my view, the summary I gave above is sufficient for the purpose of coming to a conclusion one way or the other in this appeal.

### *Ester Munjondjo*

[19] Ms Munjondjo, who worked as a cleaner at the Eros airport, testified at the arbitration that she knows Mr Andima very well. She would assist him by ironing his clothes. She testified that she was on friendly terms with him. One Sunday and on her off-day, Mr Andima asked her to deliver an envelope to three people at the HKIA. She did not know the content of the envelope and was simply told by Mr Andima that the

envelope was meant for students that were to be interviewed by Air Namibia and had to travel to Canada. She travelled to HKIA in a car driven by a person she did not know but which was arranged by Mr Andima. At HKIA parking lot she called a number provided to her by Mr Andima and met up with three people, two females and one male. She testified that the female person was called 'Mujoro' and that her number was provided by Mr Andima. When she, together with the three, opened the envelope there were three boarding passes in there.

[20] Ms Munjondjo further testified that upon her return to work, she confirmed with her supervisor, Mr Silas, that the people that she had given the boarding passes to were subsequently arrested. She thereafter phoned Mr Andima about the incident who in turn told her that 'people usually fly with that type of boarding passes and that nothing will happen'. Ms Munjondjo gave a statement to the police on the sequence of events that took place *that* Sunday whereafter she identified the three persons as Mujoro, Kaaronda and Kaziambi. Their names were written on the envelop that she had delivered on the Sunday at Mr Andima's request.

*Ernest Shalioka Lyamene*

[21] Mr Lyamene worked as a security guard at the Eros airport. He testified that at about 15h00 on 21 April 2012, Mr Andima came to the boarding counter at Eros airport. At the arbitration proceedings he identified Mr Andima as the person he saw that day. Upon arrival at Eros airport, Mr Andima sat next to him at the check-in counter and proceeded to print four boarding passes on Air Namibia's computer. When asked by the witness to identify himself, Mr Andima refused, only stating that he will return the next

day. Mr Lyamene reported the suspicious conduct to Air Namibia senior personnel with a description of the person. They informed him that the description fitted the identity of Mr Andima who, at the time, was on suspension at Air Namibia's instance. Mr Lyamene also made a statement to a member of the Namibian police at the Eros airport on 21 April 2012 and subsequently gave a statement under oath to the police on 27 April 2012.

*Catherine Du Toit*

[22] Ms du Toit is a duty controller at the HKIA. According to her, Mr Andima was the only person who was responsible for safeguarding the petty cash kept in a safe in the duty controllers' office. She testified that one day she was requested by Mr Shihepo to collect the petty cash box from the safe only to discover that the petty cash box was nowhere to be found. According to the instructions she had received, only Mr Andima had the responsibility to safeguard the petty cash box even though Mr Shihepo and Ms Sakaria also had keys to the safe. The witness stated that the key to the safe was kept in a drawer for all duty controllers to have access to the safe in case they needed to open the safe for ticket stock or phone cards.

[23] As concerns the charge of disregarding Air Namibia's rules and regulations, Ms du Toit testified that on 21 April 2012 she received a phone call from another duty controller, Ms Sakaria, who reported to her that a female passenger was already checked in for the flight of the 22 April 2012 before the actual date of departure. On 22 April 2012, Ms du Toit and Ms Sakaria further discovered that two more passengers

were booked in without any screening being done in terms of the agreement with the Canadian Embassy. The passengers had no luggage to check and went straight past the check-in counter into the waiting area. The three passengers were then removed from the flight, detained and questioned by the police in the presence of Ms du Toit and Ms Sakaria and she and Sakaria gave statements to the police as part of a criminal investigation. Ms du Toit testified that it transpired during the questioning that the passengers had received the boarding passes from a lady in the parking lot. The witness identified the boarding passes that were tendered in evidence at the arbitration as those belonging to the three people that were arrested on 22 April 2012. The names on these boarding passes are: Kaaronda Brumilda Veundjakuani; Mujoro Lorraine; Kamuzeuao Kandjambi Vejamuno and Kavari Nateree. These names correspond to the names listed in the two charges involving boarding passes.

[24] Mr Andima was implicated because the time and date on the boarding passes found with these passengers match the time and date that he was seen at the Eros airport on 21 April 2012, printing boarding passes. The witness testified that the HKIA printers were low on ink at the time and so all boarding passes were not clearly printed whereas the ones in question were clearly printed. Furthermore, all passes were to be printed on the new boarding cards kept at HKIA while the ones found in possession of the passengers were printed on the old boarding cards. She stated that those factors indicated that the suspect boarding passes were not printed at HKIA.

*Wilhelmine Sakaria*

[25] Ms Sakaria worked as a duty controller and a ticketing agent for Air Namibia. She testified that she was on duty when the petty cash box went missing. According to her, she never handled the petty cash and that Mr Andima was in charge thereof; that the key to the main safe, which was in Mr Shihepo's care, was kept in an office where the duty controllers, station commanders and the passenger services employees would use it to have access to the main safe.

[26] Ms Sakaria testified that on 21 April 2012, she discovered from the Air Namibia computer system that a female passenger was already checked in for the flight of 22 April 2012. She narrated this to Ms du Toit through the phone call that she had made. It further emerged from her evidence during cross-examination that the code for Mr Johannes Nelulu (also an Air Namibia employee) was used to issue these boarding passes on 21 April 2012. On the 22 April 2012, two more passengers were discovered to have been booked in without being screened according to the agreement with the Canadian authorities. During checking-in time, three passengers were apprehended, a female and two male passengers. This witness stated that one of the passengers was Mujoro Lorraine, a name listed in the charges.

*Moses Shihepo*

[27] Mr Shihepo, an Air Namibia employee, was Mr Andima's supervisor. As regards the charges involving boarding passes, Mr Shihepo stated that Mr Andima had been trained to access Air Namibia's network from anywhere, as long as he had a laptop and

a 3G device. He added that Mr Andima was the most proficient of Air Namibia's employee in the Departure Control System (DCS) and in the Data Updater System and was thus able to do anything on the system from anywhere.

*Petrus Albertus Louw*

[28] Mr Louw, Air Namibia's IT assistant manager, testified that he was responsible for the whole network of Air Namibia. He testified that duty controllers are allocated PID numbers which are pre-configured and issued to a specific person or computer which enable them to access Air Namibia's network of emails and reservations. The system would in turn keep an audit trail of the transactions conducted against an agent's code. He testified that Mr Andima definitely had access to the reservation system and DCS.

[29] Mr Louw testified that he was approached by management to follow the trails from the reservation system. He testified that Mr Andima's user ID was blocked while on suspension and confirmed that no traces were found in the HKIA system during the time of his suspension. Mr Louw, however, retrieved boarding passes issued at Eros airport for passengers that would be leaving from HKIA. That meant that a static PID was used which could only be traced to Air Namibia's network and not attached to a specific person. Mr Louw further testified that Air Namibia's network allows for passengers to be checked in at a terminal other than the one from which they would board.

*Johannes Job Nelulu*

[30] Mr Nelulu also known as 'JJ' was the Air Namibia official manning the check-in counter on 22 April 2012. He testified that Mr Andima was present on that day at the check-in counter and when he (Mr Nelulu) briefly stepped away to get something to eat, Mr Andima went on the computer and issued boarding passes which are the subject of the charges. This evidence is uncorroborated and no reliance can be placed on it as Mr Nelulu is clearly a very unreliable and unsatisfactory witness. Mr Phatela, counsel for Air Namibia, conceded as much and submitted that we should completely disregard Mr Nelulu's testimony.

*Johannes Shituna Andima*

[31] Mr Andima testified that he worked for Air Namibia as a duty controller and was also a DCS coordinator at the HKIA. Regarding the charge involving the petty cash box he stated that he was off duty when it went missing. He testified that he was the custodian of one bundle of keys to the duty controllers' office which had on it the key to the safe and the petty cash box; that the other set, without the petty cash box key, was in the care of Mr Shihepo and was kept in a drawer in the duty controllers' office.

[32] As regards the allegation of irregular checking-in of passengers and issuing of boarding passes, he denied that he was dishonest or disregarded company rules and regulations since, during the period in question, he was on suspension. He denied going to the Eros airport on 21 April 2012 and testified that he never entered the buildings of the first respondent without permission while on suspension.

[33] Mr Andima admitted to knowing Mr Nelulu's code since the latter worked under his shift but denied using Mr Nelulu's password at Eros airport. He pointed out that the evidence does not establish that a computer at Eros airport was indeed the computer from which the boarding passes were issued and printed. Mr Andima admitted entering the premises of the Eros airport on 19 April 2012 for the purpose, according to him, of speaking to Ms Munjondjo when he came to certify his identification documents at the Eros airport. He stated that he gave her an envelope to take to the police officials for certification, which she then returned to him. He denied ever giving Ms Munjondjo any envelope containing boarding passes.

*Kenneth Otto Abrahams*

[34] Mr Abrahams, who testified on behalf of Mr Andima, is the former IT manager of Air Namibia responsible for, amongst others, aviation systems and reservation systems. He testified that the VTD, which operates as an IP address indicates which computer a ticket has been issued from. As for the four suspect boarding passes, Mr Abrahams testified that the agent number used, 172, from an IP address, 69117, is not in the range of PID provided to Air Namibia and did not belong to Air Namibia. According to him that PID belongs to Society International Telecommunications Aeronautics (SITA) which is the umbrella body for all airlines of which Air Namibia is a member. His testimony is that the boarding passes in question originate from Frankfurt and were merely re-printed from an office in Namibia.

[35] That being the evidence, can it be said that the findings of the arbitrator in respect of the petty cash box and the boarding passes charges were those that a reasonable trier of fact could have reached?

When is a finding perverse?

[36] A finding will be perverse and therefore one no reasonable trier of fact would have reached if: (a) it is based on inadmissible or irrelevant evidence; (b) it fails to take into account all the relevant evidence; and (c) it is against the weight of the evidence in that it cannot be supported by the evidence on the record. That is, by no means, exhaustive as each case must be considered on the facts. One thing is clear though: If the conclusion reached was open to the trier of fact from a range of reasonably possible inferences on which reasonable people might differ, it is not perverse; hence the principle that appellate interference is not justified just because, on the same facts, the superior tribunal could have come to a different conclusion.

The award

[37] The record in this matter runs to 12 volumes. The evidence is rather extensive, yet as Mr Phatela for Air Namibia submitted not without justification, the arbitrator's treatment of it is rather terse. In fact, the analysis of the evidence runs to no more than one and half page. The critical conclusions are contained in the following paragraphs:

[85] According to the testimony from witness, it was stated that on the 21<sup>st</sup> April 2012, while on suspension, applicant went to Eros Airport and printed a number of boarding passes. Mr Lyamine testified that he was a security guard at this post but he did not

bother much to question the applicant who he did not know and who was not in an official uniform of Air Namibia in the first place. One might wonder what Mr Lyamine's duty was. Mr Basson to whom this report was made by Mr Lyamine did not give this hearing his part of his story in this matter.

[86] It was further testified that on the 22<sup>nd</sup> April 2012 applicant had given a certain Ms Munjondjo an envelope containing boarding passes and these were handed over to some people at parking lots at Hosea Kutako International Airport. She only testified that she got this envelope from a certain unknown person who said he was sent by the applicant. She did not see the applicant on that day herself.

[87] She does not know this person and she went on to explain that the car in which she travelled to the Airport did not have any identification marks whatsoever.

[88] According to the evidence placed before this hearing by Mr Nelulu, he stated that applicant came at Hosea Kutako International Airport while he was also on duty and he sat at his computer and performed certain transactions there. He knew that applicant was on suspension during this period and was not allowed to enter the premises.

[89] The evidence of Mr Nelulu and that of Mr Lyamine places doubt in my mind as to where exactly were these boarding passes printed. The boarding passes which were submitted as evidence clearly show that these were printed at Eros Airport and not at Hosea Kutako International Airport.

[90] Secondly, Mr Kenneth Abraham testified that the PAD number used to perform this transaction did not belong to Air Namibia and this must have been done in Frankfurt.

[91] Therefore, I have doubt in my mind that applicant is the one who performed these transactions at all.

[92] As for the issue of the petty cash box it is clear and it is not in dispute that applicant was not on duty when the box was discovered missing. It is further clear that all duty controllers had access to the safe in which the petty cash was being kept. Applicant cannot be blamed unless if he was the only one who kept the keys to the petty cash box, the safe in which the box was being kept and the entire duty room itself.

[93] This safe was lockable and I would not expect that applicant could have done otherwise. Therefore I see no fault on the part of the applicant in this regard as well.'

### The Labour Court's approach

[38] In respect of the petty cash box the court *a quo* concluded that:

'[26] The conduct of the first respondent to put the keys to the safe in a drawer at the office where his colleagues also had access, was careless, negligent, unreasonable and fell short of the requirements of a standard of a reasonable person in the circumstances. A careful duty controller, entrusted with the sole responsibility of keeping a petty cash box with its keys where money of the appellant was kept, would not have allowed other duty controllers to have free access to the safe where the cash box was kept. The first respondent was supposed to have controlled the access to the safe by keeping the keys to the safe with him, which he did not do.

[27] . . . Therefore, it is my view that the arbitrator was wrong in law to conclude that there is no proof that he was solely responsible for the safe-keeping of the petty cash box. He himself allowed free access to the safe by his colleagues. To find that other people had access to the safe in his absence, therefore he is not guilty of the misconduct charges brought against him, is hollow, which no reasonable court would make based on the evidence of Ms du Toit and the first respondent himself.'

[39] In respect of the boarding passes charges the Labour Court was satisfied that the arbitrator's evaluation of the evidence proceeded on a wrong footing and that regard was not had to the totality of the evidence which established that the boarding passes were issued at Eros airport by Mr Andima against Air Namibia regulations and for a dishonest objective. The Labour Court found that the arbitrator's finding to the contrary was one no reasonable trier of fact would have reached.

Parties' submissions in the appeal

*Mr Andima*

[40] In this court, the essence of Mr Rukoro's submission on behalf of Mr Andima is that Air Namibia's evidence did not rebut the presumption of unfair dismissal. According to counsel, the evidence of the witnesses is mutually destructive and did not support the case against Mr Andima – making the dismissal unfair.

[41] In respect of the charge concerning the petty cash box, Mr Rukoro submitted that the evidence did not prove that Mr Andima had exclusive access to the petty cash box when it went missing. He added that the evidence of Ms du Toit, Ms Sakaria and Mr Shihepo confirmed that a key to the safe was kept in an office where all duty controllers as well as cashiers had access.

[42] In respect of the charges concerning the boarding passes, Mr Rukoro submitted that the contradictions concerning the date when Mr Andima was allegedly seen using Mr Nelulu's computer and password is an indication that the presumption was not rebutted. According to counsel, the expert evidence of Mr Louw only indicated that four boarding passes were printed at Eros airport without implicating Mr Andima. That must be seen against the backdrop that Mr Lyamene testified that Mr Andima printed four boarding passes without specifying if the boarding passes related to the charges. Counsel added that there is a very material contradiction between Mr Nelulu and Mr Lyamene as regards the allegation that these two events, ie The Hosea Kutako checking-in and the Eros boarding passes printing, took place at the alleged time and date.

*Air Namibia*

[43] On behalf of Air Namibia, Mr Phatela accepted that the onus rested on the employer to prove on a balance of probabilities that the dismissal was procedurally fair and for a valid reason. Mr Phatela submitted that Air Namibia discharged the onus.

[44] Regarding the charge concerning the petty cash box, Mr Phatela seeks to fault the arbitrator for finding that there is no evidence to prove that Mr Andima was solely responsible for the petty cash box's disappearance because, as found by the arbitrator, other people had access to the safe. According to Mr Phatela, the Labour Court's conclusion is correct on that issue as the evidence of Ms du Toit makes clear that only Mr Andima and Mr Shihepo had the key to the petty cash box and that the fact that other duty controllers had access to the safe does not absolve Mr Andima of his responsibility.

[45] Mr Phatela submitted that the evidence of Mr Louw that the suspect boarding passes were not printed at HKIA corroborates the evidence of Mr Lyamene that Mr Andima printed boarding passes at the Eros airport and at a time when he was on suspension. A further corroboration lies in the evidence of Ms Munjondjo that she was asked by Mr Andima to deliver an envelope containing boarding passes to people who were later arrested and questioned by the authorities.

[46] Mr Phatela submitted that the arbitrator had all the evidence before him but failed to make credible findings and did not lay the basis for denying Air Namibia's version. The court *a quo's* interference is justified and should be upheld on appeal.

### Analysis

#### *The petty cashbox*

[47] The evidence on the record shows that the petty cash box was kept in a safe with two keys: one key was kept in a drawer in the room used by all duty controllers and the other by Mr Andima. The charge is premised on the theory that Mr Andima had an obligation to ensure that no one improperly gained access to or removed the petty cash. The difficulty with that reasoning, as Mr Phatela for Air Namibia conceded in argument, is that Air Namibia's regulations dictated that it was at all times to be kept in the safe. Besides, one did not need to have access to the petty cash box key to remove it from the safe. Anyone with access to the safe could have removed the petty cash box.

[48] We can debate and debate what Mr Andima could have done or should not have done to safeguard the petty cash box, but that is no part of the inquiry on appeal. The question is whether the arbitrator's conclusion that anyone with access to the safe could have removed the petty cash box is one of reasonable inferences open to him on the facts. Ms Sakaria, a witness for Air Namibia at the arbitration, described the circumstances in which the petty cash box was kept in the following ominous terms:

'What I can remember when I was called in regarding the money that was missing, is that the money was, it was between Mr Shihepo and Andima and we were never notified about the money. I think no proper handover was done. Starting from Mr Shihepo, he

knew that there were three duty controllers and yet he only handed the money over to Andima, which Andima never mentioned the money to us as well, he never shared the information.

...

And then we were called, and it was a big surprise, for me, especially for me it was a big surprise that we are working in an office, there is money in the safe, and the office is like anybody can walk into that office.' (My underlining for emphasis.)

[49] Here it must be borne in mind that the policy applicable at the time stipulated that the petty cash box had to be kept in a safe overnight. In these circumstances, for the arbitrator to rely on this policy instead of focusing on access to the safe which was not alleged to have been under Mr Andima's control and supervision, cannot be said to be perverse.

[50] In my view, regardless of whether this court could have come to a different conclusion, the conclusion reached by the arbitrator fell within the range of reasonable inferences open to him on the proven facts. The Labour Court therefore fell in error in concluding that the arbitrator's finding on the petty cash box charge was an appealable 'question of law' under s 89(1) of the Act.

#### *The boarding passes*

[51] According to Mr Rukoro, Ms Munjondjo's evidence does not support the allegation that Mr Andima was at Eros airport on 21 April 2012 as the lack of certainty as to the date she was allegedly given the envelope with boarding passes does not corroborate the version that the suspect boarding passes were printed on 21 April 2012.

That Ms Munjondjo made an honest mistake about the date is clear from the following: she was clear that the incident occurred on a weekend, a Sunday. The boarding passes she said she was given were intended for use on a weekend (22 April 2012) by persons she positively identified by names as the ones she met in the parking lot at HKIA and handed them to. Those individuals attempted to board the Air Namibia flight on 22 April 2012. It was in relation to that very day that she made a statement to the police describing the events implicating Mr Andima. Ms du Toit corroborates Ms Munjondjo in that her evidence confirms that on 22 April 2012 three of the individuals bearing the names Ms Munjondjo said were the ones whose names appeared on the boarding passes handed to her by Mr Andima, were the ones who attempted to improperly board flight SW 285 and ended up being arrested.

[52] Then there is Mr Lyamene's unassailable evidence that it was Mr Andima who on 21 April 2012 came to Eros airport to print boarding passes and left in circumstances which compelled Mr Lyamene to consider his conduct as suspect and to report it to the authorities. I agree with Mr Phatela that the arbitrator misdirected himself in finding, against the weight of the evidence, that Mr Lyamene did not confront Mr Andima about his actions on 21 April 2012. The arbitrator observed that:

'Mr Lyamine testified that he was a security guard at this post but he did not bother much to question the applicant who he did not know and who was not in an official uniform of Air Namibia in the first place.'

Yet the testimony of Mr Lyamene was that:

‘ . . . So almost five steps I stood up from the counter, I tried to approach him. I asked his name. He told me there is no use of asking him his name because tomorrow again he is still coming back, we will see each other.’

[53] If one approaches Mr Lyamene’s evidence against the backdrop of that of Ms Munjondjo (both persons not suggested to have any grudge against Mr Andima), it is clear on a preponderance of probabilities that Mr Andima was the source of boarding passes handed to people who had no right to have them. A reasonable trier of fact could come to only one conclusion on those facts: That Mr Andima irregularly issued boarding passes as alleged. The arbitrator therefore erred in law in not reaching that conclusion.

[54] The arbitrator’s finding that Mr Abrahams’ evidence puts in doubt whether the boarding passes were issued at Eros airport ignores the golden rule of fact-finding: All relevant evidence on record must be properly accounted for to justify a particular conclusion of fact. Mr Abraham’s speculative evidence is undermined by the unimpeachable direct evidence of Ms Munjondjo pointing to Mr Andima as the source of the boarding passes which ended up in the hands of passengers who attempted to fraudulently board Air Namibia’s flights and that of Mr Lyamene which placed Mr Andima at Eros airport at a time he was not supposed to be there. Mr Andima testified that at the time and date Mr Lyamene allegedly saw him at Eros airport he was somewhere else in town with friends one of whom at that particular time withdrew some money from an ATM machine in his presence. This transaction was not on his account

and I do not see how it supports his *alibi*. It certainly does not negate that he had the opportunity to commit the conduct attributed to him by Mr Lyamene.

[55] In the face of the overwhelming circumstantial evidence which establishes Mr Andima's presence at Eros airport on 21 April 2012, his *alibi* defence is just not credible. The evidence also establishes that given the skills he possessed he had the capacity to print boarding passes at Eros airport without the transaction being traced back to him. Mr Abrahams' evidence that the boarding passes were issued at Frankfurt is simply not sustainable and seems self-serving.

[56] The Labour Court therefore correctly concluded that in respect of the two most serious counts, the arbitrator came to findings which no reasonable arbitrator would have come to and the arbitrator's decision was therefore appealable as a 'question of law' in terms of s 89(1) of the Act. The Labour Court, and therefore this court on appeal, was entitled to reconsider the evidence afresh (*Van Rensburg* para 44) to see if the charges were proven on a balance of probabilities - which they were.

#### Disposal

[57] In respect of the charge involving negligent handling of the petty cash box the Labour Court improperly assumed jurisdiction under s 89(1) of the Act. That finding is liable to be set aside. In respect of the charges involving violation of Air Namibia's rules and regulations as regards checking in and boarding procedures, and irregularly issuing boarding passes, the arbitrator committed an error of law which it was competent for the Labour Court on appeal to correct upon a reconsideration of the evidence on the record.

[58] Mr Andima is legally-aided in this appeal and it will be otiose to mulct him with a costs order although Air Namibia has achieved substantial success. There will therefore be no order as to costs.

### Order

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

1. The appeal succeeds in part, that is in respect of a finding of guilty recorded by the Labour Court on the charge involving the petty cash box, but is dismissed in respect of the balance of the charges.
2. The order of the Labour Court is set aside and substituted for the following order:
  - '(a) The appeal against the arbitrator's finding that the first respondent (Mr Andima) is not guilty of the charge of negligence in his handling of the first appellant's ( Air Namibia's) petty cash box, is dismissed.
  - (b) The appeal against the arbitrator's finding that the first respondent (Mr Andima) is not guilty of the charge that he on 21 and 22 April 2012 disregarded Air Namibia's rules and regulations regarding check in and boarding procedures in the checking in of certain passengers named in

the charge; and that he on 21 and 22 April 2012 dishonestly issued boarding passes to named passengers on flight SW285 from Windhoek to Germany, is allowed and the corresponding order of the arbitrator set aside.'

3. The appeal is dismissed and there shall be no order as to costs.

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**DAMASEB DCJ**

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**MAINGA JA**

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**FRANK AJA**

APPEARANCES

APPELLANT:

S Rukoro

Instructed by the Directorate of Legal Aid

FIRST RESPONDENT:

T C Phatela

Instructed by Murorua Kurtz Kasper Inc