



REPORTABLE

CASE NO: SA 66/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMDEB DIAMOND CORPORATION (PTY) LTD

Appellant

and

RICHARD RONNIE GASEB

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 10 April 2018

Delivered: 9 October 2019

Summary: In a contract of employment an employee has an implied fiduciary duty towards his or her employer which involves an obligation not to work against his or her employer's interests. This fiduciary duty exists even though there is not an express term in the contract of employment to that effect.

An arbitrator has a discretion not to order reinstatement or compensation where an employer has succeeded in proving a valid and fair reason for the dismissal of an employee but has failed to prove a fair procedure.

The onus of proving damages or compensation in terms of the provisions of Act 11 of 2007 rests on an employee – an arbitrator is not bound to award damages where evidence in support thereof is available to the employee which he or she has not produced.

Held on appeal, that the appellant rebutted the presumption of unfair dismissal contained in s 33(4) of Act 11 of 2007. Found that the respondent was dismissed for a valid and fair reason and in compliance with a fair procedure.

Appeal succeeds with costs.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and SMUTS JA concurring):

[1] This appeal lies against a judgment of the labour court handed down on 22 April 2016 in which the appellant's appeal from arbitration proceedings was dismissed. The labour court found (as did the arbitrator) that the respondent was dismissed by the appellant without a valid and fair reason and without a fair procedure. Leave to appeal was granted with leave of this court subsequent to a petition to the Chief Justice.

Background

[2] The respondent was employed by the appellant as a security officer since 1994. Whilst on duty during July/August 2013 a number of incidents occurred in a restricted area (also referred to as a red area) when the respondent was on duty. As a consequence the respondent was charged with breach of trust, and secondly, gross

negligence leading to diamond theft. At the second disciplinary hearing during December 2013,¹ the respondent pleaded not guilty. At the conclusion of the trial he was convicted of the charges and was dismissed, the chairperson of the disciplinary hearing having found that the employee – employer relationship had been breached beyond repair.

[3] The internal appeal was heard on 10 January 2014 but was unsuccessful. The respondent referred the dispute to the Labour Commissioner for conciliation and arbitration in terms of the provisions of the Labour Act 11 of 2007, citing the nature of the dispute as an unfair dismissal. The arbitrator heard testimonies on 24 November 2014.

The arbitration proceedings

[4] The first witness called by the appellant was Mr James Fisch (Fisch). He was employed by the appellant as a senior security officer for longer than 24 years. He testified that as a result of information received, himself, a colleague Mr Simon Epafras, and his superintendent, Mr Karel du Toit conducted an investigation regarding certain activities in the railway bins area (red area).

[5] On 13 July 2013, the respondent and a senior security officer, Mr Willem Winkler were on duty in the decentralised control room (DCR). According to video footage on that particular day on three different occasions suspects entered the area

¹ The first disciplinary hearing was convened on similar though not identical charges. The internal appeal against the findings of the first disciplinary hearing was successful.

of the railway bins (bins 3 and 4) of 'Three Plant' containing diamondiferous gravel. The suspects were Mr Rainold Maisho (Maisho) (a plant operator), Mr Lukas Gylis (Gylis) and Mr Johannes Hishidimwa (Hishidimwa). Winkler assisted Maisho to remove the grid of the bin at 07h40. Maisho and Hishidimwa entered the bin. At 07h55 they climbed out.

[6] At 08h00 Gylis assisted Maisho to remove the grid again and Maisho and Hishidimwa entered the bin again. Later at 09h15 Maisho and Winkler again removed the grid of bins 3 and 4 and at 09h28 Maisho and Hishidimwa exited. During all these times Winkler was on top of the bin whilst Maisho and Hishidimwa were sorting through the material inside the bins. During these times the respondent was inside the DCR. From inside this room distance surveillance can be done in respect of activities inside the plant via CCTV cameras. Inside the DCR are two monitors designated for the cameras in the railway bins area.

[7] Fisch testified that it was the responsibility of the security officer inside the DCR to record all events and irregularities in the relevant registers, namely in the occurrence book (OB), and in the text log book (an electronic system). In the plant shift handover book there was no work that was requested to be carried out in that area – in the railway bins.

[8] On 1 August 2013 the respondent and Winkler were again on duty. Two employees from the engineering team namely Mr Haufiku (Haufiku) and Mr Johannes

Ashama (Ashama) entered the area with a vehicle at 11h02 and climbed into the bins at 'Three Plant' in the recovery area - Winkler joined them at 11h11. The two employees were inside the bin and Winkler on top. The respondent was inside the DCR.

[9] The next incident occurred on 2 August 2013. At 10h36 two employees Haufiku and Ashipala entered the bins area escorted by Winkler. The respondent was inside the DCR. Later on, another employee Mr Jona Gerson (Gerson) entered with a vehicle into the bins area. At 11h04 Gerson and Ashipala climbed into the bin and got out at 11h16 and left the area.

[10] On 7 August 2013 Winkler and the respondent were on duty. The respondent was assigned to work outside and Winkler in the DCR but as with the previous occasions they swapped duties. Winkler again escorted employees Haufiku, Ashipala, Gerson and Kayushwa. They were kept under live camera observation while members of the investigation section were dispatched to the area. Kayushwa who first exited the area managed to escape unhindered. Winkler and Haufiku were found at the exit gate. The witness Fisch observed that Haufiku dropped an object. This object was recovered and found to be in appearance of an unpolished diamond. Gerson was physically searched. In the pocket of his overall trouser an object in the appearance of an unpolished diamond was found. Six objects in the appearance of unpolished diamonds were found hidden halfway in a pipe – right in the direction in

which Kayushwa was observed walking. All the objects were subsequently confirmed to be unpolished diamonds.

[11] Fisch testified that on 13 July 2013 the respondent made some unrelated entries in the occurrence book. Nowhere was there any recording about the events at the railway bins – ie that persons climbed into the railway bins. On 1 August 2013 the respondent again made certain entries in the occurrence book but no recordings were made in respect of the activities in and around the railway bins. No entries of suspicious activities in the railway bin area were made on 2 August 2013 neither on 7 August 2013. On these two days the respondent recorded other occurrences in the occurrence book. On all these days of the incidents Winkler made no entry in addition to those made by the respondent. According to Fisch, it is important to record all events in the occurrence book in order to assist any investigation and to prevent others from colluding with diamond thieves. The respondent was, according to Fisch, 'well experienced' and knew how to complete the occurrence book.

[12] The respondent was not suspended on the same day as the rest of the group because the investigation was not concluded and all video footage were not readily available. The respondent was only suspended on 12 September 2013.

[13] Fisch testified that there was no recording in the plant registers about requests made for any work to be carried out in the railway bins or that any bin had to be

unblocked on any of the aforementioned four days. High level authorisation is required if there is any work to be done inside the railway bins.

[14] According to Fisch, the respondent, in addition did not make any reports in the relevant registers provided for reports to his supervisor or to the supervisor's section, neither did he report the activities on the company's hotline during his shifts. Fisch was of the view that it was impossible that the respondent could not have observed all the activities in the railway bins area because the images of the two cameras focussing on the bins areas are permanently displayed on the monitors inside the DCR, 24 hours per day and 7 days per week unlike other cameras which must be selected.

[15] Fisch testified that when someone enters the area without the knowledge of the security officer in the DCR an enquiry needs to be made with the person in the railway bin, via radio, and if this is not possible the security officer should contact the central control room (CCR) of the plant personnel.

[16] Fisch testified that the respondent inside the DCR would not be able to see on the monitors any activities inside the railway bins themselves since there are no cameras in the railway bins. Fisch testified during cross-examination that there is no footage of activities inside the DCR available because the camera was not selected to record activities inside the DCR. There was therefore no video footage of what the

respondent himself was doing inside the DCR during those days mentioned when the other employees were in the railway bins area.

[17] The next witness Simon Riekert (Riekert) was employed by the appellant at the Central Surveillance Platform security department. Prior to this he was employed at Recovery DCR for a few years.

[18] At the DCR his duties included giving employees access to areas under access control, recording everything that was happening in the security areas in the relevant registers and doing surveillance on people. He worked together with the respondent for some time in the past. According to Riekert he informed the respondent how the DCR basically worked and informed him of his duties when on shift.

[19] According to Riekert, every incident during a shift is recorded in the occurrence book and it is the security officers' duty on shift to complete the occurrence book. His view was that a security guard should not assume that the other security officer will record an incident in the occurrence book – he should record it himself.

[20] According to Riekert, he had explained to the respondent the process of how people should enter the railway bins area; also the importance of entering information in the occurrence book; and the importance of keeping the electronic shift report,

which is sent to the supervisor every day and which should contain all the information which is in the occurrence book.

[21] The railway bin area where diamondiferous concentrate is stored, is secured with fences, gates, locks and cameras. It is a prohibited area and access is limited. Access is obtained to the railway bins area by the metallurgy foreman or the engineering foreman making a request by telephone or radio to the security officer inside the DCR – on the relevant dates it would have been to the respondent.

[22] Erastus Nakanyala was employed by the appellant as the production foreman at the recovery plant whose duties included the safety of employees and machinery. He testified that if there was any work to be done at the railway bins area the procedure is that the foreman or the process controller would contact the security personnel inside the DCR and inform them of work to be done and the nature of the work to be done at the railway bins at recovery eg for cleaning the bins or because of a breakdown.

[23] The respondent, Ronnie Gaseb, testified that he was employed as a security guard by the appellant. At one stage he was seconded to help out at the DCR and his duties were *inter alia* to give access to the recovery area and to the annex buildings, answering phone calls and the two way radio. According to him there were no work procedures to be followed inside the DCR. Every security officer worked the way he wanted to work. Inside the DCR was a scrapbook called an occurrence book in which

the daily activities which occurred on shift were recorded. Either one of the security officers could do recordings. The respondent testified that it was not his duty to observe another security officer. Operators were allowed in the absence of security officers to go into the bins area to take bin 'levels', and in the presence of security officers employees repair cracks on railway lines and on top or inside the railway bins and in the presence of security officers the dumpers are tipped.

[24] He testified that, on 13 July 2013 the security officer Winkler escorted operators in the railway bins area. The respondent testified that he became aware of the intended visit by operators because they (ie security officers) had been informed about it via two way radio and telephone. According to him, it was not explained what kind of work was intended to be performed and neither did he himself make any enquiries regarding the nature of the work to be performed. Respondent testified that although it is important as a security officer to know why people were in the red area, the security officer who escorted the people (Winkler) would have informed him why they were there. His testimony further was that, on 7 August 2013 some plant members went to the railway bin area with the security officer Winkler to do work under escort. When he came on duty earlier there was a radio call that security officers were needed in the railway bins area. It was very busy because there were a lot of blockages. Winkler told him that he would assist the operators. He did not see who those people were because he himself was too busy. A call came in and someone told him what was going on in the railway bins area. That is the time according to him that he looked at the monitor and saw a lot of people running around in the railway bins area. Winkler then came to him and informed him inside the DCR

that the crime investigation team is in the area. Winkler's locker was subsequently searched. He, himself, continued with his duties as normal. On 10 September 2013 he was removed from work. Two weeks after Winkler had been arrested, he (ie respondent) was then asked to write a statement. On 12 December 2013 his employment was terminated.

[25] The respondent testified that his general duty as a security officer was to protect the appellant's property, ie to prevent theft. The respondent confirmed that Riekert had informed him about 'the workings with the DCR' and that if someone went into the red area the security officer must keep an observation.

[26] The respondent called Winkler as a witness during the arbitration proceedings. When Winkler was sworn in he asked for an Afrikaans interpreter. The representative of the respondent subsequently decided not to call Winkler as a witness and closed the case of the respondent.

Findings of the arbitrator

Substantive fairness

[27] The arbitrator found that 'the security in the DCR room has no contact with the person who enters the railway area or bin and that the security official in the DCR room is also not allowed to leave the DCR room and go to the restricted area to make sure his colleague is doing his job properly. The security officer in the DCR room will therefore not be in a position to confirm the validity of the authority of the person who

enters the restricted area. The security officer in the DCR room is also not present when engineering and metallurgic employees receive authority to work in the railway area or in the bins. The security officer in the DCR, in this case the applicant, (respondent) is forced to trust the security officer who follow the person(s) into the restricted area to make sure the operator/s confines himself or herself or themselves to their duties and their purpose is legitimate. The arbitrator found that the respondent (appellant) should therefore not hold the applicant (respondent) accountable because the appellant failed to put mechanisms in place where the security officer is provided with a written authority certificate, unless the respondent (appellant) expects their security to be “verbal lie detectors”. Based on the evidence presented, the arbitrator found no evidence that the applicant (respondent) failed to follow procedure, when engineering and metallurgic personnel entered the railway bins area. The arbitrator found that the charges against the applicant ‘was for breach of trust and gross negligence and not failure to follow procedure or giving unauthorised entry to the railway bin or restricted area’.

[28] The arbitrator recounted that Fisch had testified that the applicant failed to complete the OB and that Fisch stated the reasons why the suspects entered the railway bins should have been recorded in the OB but it was not so entered. The arbitrator reasoned that if the OB was not completed correctly then the supervisor of the security officers must have trained the security officers and should have advised them how to complete the documents accordingly. It was found that the OB and relevant registers were completed incorrectly by the security officers at the DCR and

not only by the applicant. The arbitrator mentioned that Fisch testified that he did not have a specific rule or number of rules that the applicant breached in a book, even though there is a rule, but Fisch did not know where to find the rule.

[29] The arbitrator found that the testimony that any security officer may make an entry is not sufficient reason to hold the applicant who was only in an acting capacity at the DCR, accountable because his superior had failed to record the activity in the OB what he had observed. It is, according to the arbitrator, clearly important for the outside security officer who follows the operators to the railway bin, to make the entry himself or radio in to ask the security officer in the DCR to make the entry should he return too late.

[30] The arbitrator found, that based on the evidence placed before him, no evidence that the applicant (respondent) was guilty of any negligence as it was the duty of his colleague (Winkler) to complete the OB book to accurately reflect what he saw.

[31] The arbitrator also reasoned that it should not be a surprise if the security officer inside the DCR focused more on the other areas that needed watching since his colleague was already closely observing operators in the railway bins area. The arbitrator found that based on the evidence presented he could find no evidence against the applicant (respondent) that 'may place a reasonable suspicion of mistrust

that may prove a break down in the relationship against the respondent since the respondent failed to prove the allegations against the applicant'.

Procedural fairness

[32] The arbitrator based his finding of procedural unfairness on the lack of video footage, non-compliance with the terms of an agreement on Industrial Policies and Procedure between the appellant and the Mine Workers Union of Namibia, and on the lack of 'equality'.

[33] The arbitrator stated that in terms of the industrial relations policy (clauses 2.1 and 2.3.1) the supervisor will investigate an alleged offence and the relevant sections of the complaint form must be completed within 24 hours of the offence having been committed. Therefore, since the respondent was an acting security officer in the security department the allegations against him should have been investigated by his supervisor and not by Fisch who is from the risk department.

[34] Furthermore, it was stated that in terms of clause 2.3.4a of the appellant's policy, the official concerned will hear the case within two full working days of receiving the complaint and where it cannot be done reasons for this should be recorded by the industrial relations officer. The arbitrator found that the respondent, according to the evidence, was suspended more than a month after the offence was alleged to have been committed, the complaint form was completed about six weeks late, and the respondent was given notice of a disciplinary hearing two months after

the appellant became aware of the alleged incident which sparked the charges against the respondent. The arbitrator found that the appellant failed to submit reasons why the respondent was only charged two months late which was not in compliance with the appellant's own policy.

[35] The arbitrator also found that the video footage showing the conduct of the respondent inside the DCR room at the time of the alleged offences was 'relevant and crucial' to prove the appellant's allegations or the respondent's innocence. It was found that appellant failed to comply with clause 2.3.4.g of the appellant's policy by not providing the video footage of what had occurred inside the DCR room on 13 July 2013, 01 – 02 August 2013 and 7 August 2013.

[36] The issue of 'equality' was based on the lack of any disciplinary action taken against certain individuals, eg the individuals inside the CCR who have the same remote access to the same cameras as the respondent for example; Mr Ian Ross to whom the OB is sent daily, yet he was not blamed for noticing the absence of entries every time Winkler was on duty 'knowing there is regular traffic of people in the railway bins', and the foreman of the recovery plant and 'superior' of the engineering and metallurgic team were also not investigated for giving the only key to the engineering team on at least six occasions to enter the railway bins area.

[37] The arbitrator found that based on the aforementioned factors the dismissal of the respondent was 'clearly' procedurally unfair.

Findings of the labour court

[38] The court *a quo* stated that the appellant being the 'main litigant' in the appeal bore the onus to prove on a balance of probabilities that the conclusion arrived at by the arbitrator, based on credible and admissible evidence placed before the arbitrator, was wrong and that no reasonable arbitrator could have come to the same conclusion.

[39] In respect of the evidence of Fisch, the court *a quo* mentioned that the testimony of Fisch was that he acted on information that diamond theft was taking place inside the railway bins. It was pointed out by the court *a quo* that the source of the information was not called as a witness during the disciplinary and arbitration proceedings. This evidence, the court *a quo* stated, was hearsay evidence and could not be relied upon by the arbitrator to uphold the finding of the disciplinary hearing.

[40] The court *a quo* remarked that Fisch testified that it was impossible for the respondent not to have observed the activities in the railway bin area, which the respondent knew were illegal, but Fisch could not tell why he came to this conclusion, and why Fisch as the supervisor of the respondent, did not charge him with theft of diamonds as an accomplice (for being part of the syndicate).

[41] The court *a quo* pointed out that video footage viewed during the arbitration proceedings showing Winkler and the respondent swapping positions did not form

part of the appeal record and thus the court *a quo* had been denied the opportunity to see what the arbitrator saw to make a proper finding in respect of the conclusions of the arbitrator.

[42] The court *a quo* remarked that the testimonies of the appellant's witnesses in the arbitration proceedings directly implicated those who had been apprehended and arrested by the police, but did not implicate the respondent. The court *a quo* found that the failure to record events in the OB and the swapping of shifts with a senior 'co-security officer' cannot lead to an inference that the respondent reconciled himself with what the other employees had been doing in the railway bins – at best this amounted to 'suspicion, conjecture and speculation'.

[43] The court *a quo* pointed out that the witness (Fisch) failed to refer the arbitrator to any rule of 'Namdeb Security' which obliges an employee to report an irregularity of an incident 'suspected of diamond theft', and remarked that Fisch could not tell the arbitrator whether or not such a rule existed.

[44] The court *a quo* agreed with the finding of the arbitrator, after analysing the testimony of Fisch, that the testimony of Fisch was not credible, not plausible and that Fisch contradicted himself.

[45] In respect of the evidence of Riekert the court *a quo* remarked that his evidence on who should record events in the OB is of general nature, and that it was

'reasonable possibility true' (*sic*) that Winkler was expected by the respondent to 'note' the events which occurred in the recovery area in the OB, and not necessarily the respondent if regard is had to 'their position of hierarchy'.

[46] The court *a quo* found that no evidence was presented by the appellant to the effect that indeed requests for permission to access the recovery area were made by anybody and that those requests were ignored and were never recorded by the respondent in the OB 'during the four days period' in question.

[47] In respect of the attack against the award of compensation by the arbitrator in favour of the respondent to the effect that the respondent failed to prove the losses suffered by himself during the period he was unemployed, the court *a quo* drew a distinction between the proof of damages and an award of compensation an arbitrator may make in terms of the provisions of s 86(15)(e) of the Labour Act. In this regard the court *a quo* found that the respondent in the circumstances was 'entitled to compensation which is 'reasonable, fair and equitable'.

[48] In respect of the reinstatement, the court *a quo* accepted the reasons advanced by the arbitrator in making the order of reinstatement, namely that the appellant acted on unsubstantiated information and unreasonable suspicion to dismiss the respondent, therefore there could not have been an irretrievable breakdown in their work-relationship.

[49] The court *a quo* referred to s 33(4) of the Labour Act which provides that in any proceedings concerning dismissal, the employee must establish the existence of the dismissal and if established, the dismissal is presumed to be unfair, unless the contrary is proved by the employer. The court *a quo* found that the employer (appellant) did not, on the evidence placed before the arbitrator, prove that the dismissal was for a valid and fair reason and that a fair procedure was followed.

Submissions by the parties on appeal

By the appellant

[50] It was submitted by Mr Heathcote, that the first ground of appeal is founded on the premise that the arbitrator erred in law when he held that the appellant did not prove that the respondent was guilty of breach of trust and gross negligence leading to diamond theft in circumstances where:

- (a) on no less than 3 occasions, being 13 July 2013, 1 August 2013 and 2 August 2013, the respondent was on duty as a security guard, together with one Winkler;
- (b) on all these occasions both the respondent and Winkler were aware that people entered a 'red area' or 'restricted area' where rough and uncut diamonds could be stolen;

- (c) on all 3 occasions both the respondent and Winkler knew that, at the end of their shifts, an entry by any person into the restricted area had to be recorded in the occurrence book;
- (d) on all 3 occasions both the respondent and Winkler knew, when they left their shift, no one (and they could and had to do so) recorded the entrance of people into the red area into the occurrence book;
- (e) both of them (the respondent and Winkler) must have known that, if such entries were indeed made into the occurrence book, the appellant would have been able to establish, at a later stage, who entered the red area, and would then also have been able to establish whether those persons who entered had the required authority to do so;
- (f) as a result of their omission not to record the entries into the occurrence book, or to report each other for not doing so, (if either of them was of the view that it was not his, but rather his co-security guard's duty to make the entry), they foresaw or had to foresee (like any reasonable security guard) that the appellant could have suffered harm because the appellant would have no record of persons entering the restricted area, prejudicing any investigation by the appellant in and to unauthorised entrance into the restricted area;

(g) on all 3 occasions, the people who entered the red-zone, were indeed in cahoots with the respondent's co-security guard, Winkler, and were involved in stealing or attempting to steal rough and uncut diamonds from the appellant.

In respect of the second ground of appeal it was submitted that the arbitrator erred in law when he held that the appellant had to pay an amount of N\$291 953 to the respondent in circumstances where:

- (a) no evidence was led as to how the amount was made up, calculated or arrived at;
- (b) no evidence was led by the respondent as to how the respondent mitigated his losses from the date of his dismissal until the date the award was made; and
- (c) the figures used by the arbitrator to calculate the amount of N\$291 953 must have been obtained by the arbitrator, from outside the arbitration proceedings, as exhibit 17 (on which the arbitrator based his calculations) was not handed in during the arbitration proceedings.

By the respondent

[51] It was firstly submitted by Mr Phatela on behalf of the respondent, that the appellant failed in its obligation to prove the misconduct which culminated in the

dismissal of the respondent. It was submitted that if reliance is placed on a rule (as in this case) the existence of a valid and reasonable rule must be proved. The employer must prove that the employee was or should reasonably have been expected to be aware of the rule and that the rule was consistently applied.

[52] Secondly, it was contended that the test on appeal is stringent and in order to succeed the appellant has to satisfy this court that there has been 'some serious miscarriage of justice or violation of some principle of law or procedure'. I must interpose and state that Davis AJA in *Rex v Dhlumayo & another*² (referred to by Mr Phatela), in his summary of principles which should guide an appellate court, stated:

'In order to succeed, the appellant has *not*³ to satisfy an appellate court that there has been "some miscarriage of justice or violation of some principle of law or procedure".'

If the appellate court is merely left in doubt as to the correctness of the conclusion reached, it was submitted, then it will uphold the court *a quo*'s decision.

[53] It was submitted by Mr Phatela that the legal question which this appeal turns on is whether the appellant had proved that the respondent was guilty of the charges of breach of trust and negligence leading to theft of diamonds. It was submitted that the charge of breach of trust is vague and unreasonable.

² 1948 (2) SA 677 (AD) at 706.

³ Emphasis provided.

[54] It was submitted that, though Fisch testified that a source revealed theft at the railway recovery bin, such source was not brought forward to testify before the arbitrator; that in spite of video footage of the activities outside the DCR being available, the appellant failed to avail such video footage; that shockingly there were absolutely no procedures (no written requisition) at the sensitive red area as to how employees interact with security, except that employees had to be accompanied by one security official; that the task to record in the occurrence book seems to have been optional as it was not commonly and consistently applied, and that in the absence of any procedure or training there was a paucity of evidence that the rule in fact existed; that there was no way in which the respondent could have known on the days in question that the visits to the restricted area by the relevant teams were irregular; that Fisch dismally failed to produce procedures applicable to the DCR despite repeated requests to produce those procedures; that the court *a quo* correctly distinguished between an award of damages by the arbitrator and compensation authorised by s 86(15)(e) of the Labour Act, and that the court *a quo* correctly ordered appellant to pay respondent compensation in the form of salary and benefits (including bonus, salary increment and adjustments) and any other benefits the respondent was entitled to during the period of his unfair dismissal.

Evaluation of arbitration proceedings and judgment of the court *a quo*

[55] It must be stated that certain important and relevant aspects of the testimony of Riekert was never disputed during cross-examination. Firstly, his testimony that he informed the respondent of the procedures at the DCR and the duties of a security

officer when on shift. Secondly, the process of how access is normally obtained to the red area and the duties of a security officer explained in this regard. Thirdly, testimony that the importance of entering information in the OB was explained, was not disputed. Fourthly, his testimony that it was the responsibility of both security officers to record incidents in the OB was not disputed. Fifthly, his testimony that the respondent knew how to complete the OB, was not disputed. It is further common cause that the core function of a security officer is to report any irregularity or any incident of suspected diamond theft.

[56] In respect of the question of substantive fairness the arbitrator found that the security inside the DCR would not be in a position to confirm the validity of the authority of employees who enter the restricted area. There is no foundation for such a finding. The undisputed evidence was that it was a longstanding practice that the security officer(s) inside the DCR is/are informed in advance of the reason why access to the restricted area was requested and the identity of the employees who would access the area. On each of the relevant days in question, the respondent was on duty inside the DCR and had there been any requests for access made, he would have known about such a request as well as the purpose for such access. Riekert testified (assuming no requests for access were received) that a security officer should take note if he sees employees accessing the restricted area in the presence of a fellow security officer and should immediately enquire from the metallurgy or engineering section who they were and what work they were due to perform. This was not done by the respondent.

[57] The arbitrator found that the security inside the DCR was forced to trust his fellow security officer who accompanied personnel into the restricted area in order to ensure that the personnel were busy with legitimate activities. The court *a quo* also asked the rhetorical question why the respondent could not have trusted Winkler. The only possible support for such a finding by the arbitrator, in my view, was the testimony of the respondent that he could not watch his 'security colleague' whilst the latter was in the restricted area with employees. This is incompatible with respondent's own testimony that he had been informed by Riekert that if someone went into the red area the security officer must keep an observation. The purpose of the observation, would in my view, be consistent with the respondent's testimony that his general duty as a security officer was to prevent theft. The aforementioned finding by the arbitrator is not supported by any evidence. The question is not why the respondent could not have trusted Winkler, but whether the respondent in those particular circumstances failed in his general duty as a security officer namely to safeguard the property of the appellant.

[58] It must be stated as a general proposition that in the security industry if any experienced security officer (respondent was so employed for more than 19 years) is of the view that his obligation to ensure that his employer's (Namdeb's) diamonds are not stolen by anybody other than a co-security officer such an understanding must in itself be considered grossly negligent or a careless attitude which would invariably result in a breach of trust. What the respondent himself in essence says, is that

should he see his co-security officer assisting diamond thieves, he does not need to report him.

[59] The arbitrator stated that the respondent should not be held accountable where the appellant failed to put mechanisms in place eg by providing the security officers with 'written authority certificate'. My understanding of this statement is that the appellant should have provided the security officers in the DCR with written proof of the purpose whenever access was requested. This statement is, however, inconsistent with the undisputed evidence about a long standing practice as to how access is gained to the restricted area. The respondent from his own testimony was well aware that security officers are contacted telephonically or by radio whenever access was required in certain circumstances. It is nevertheless common cause that such requests must be recorded or written in the relevant registers, including the OB. This was not done by the respondent nor by Winkler.

[60] The arbitrator erred by finding that there was no evidence indicating that the respondent failed to follow procedure when engineering and metallurgic personnel entered the railway bins. This is an important feature of the case against the respondent, namely, to make vital entries in the relevant registers. It is common cause that no entries were made on the relevant dates in the respective registers reflecting requests for access. The respondent testified that on 13 July 2013 he became aware of an intended visit by operators because they (security officers) had been informed about it by a two way radio and by telephone. The evidence by the

respondent that there was 'no work procedure to be followed inside the DCR' is gainsaid by the testimony of Riekert and respondent's own testimony that Riekert had informed him about 'the workings with the DCR'.

[61] It is trite law that a party who calls a witness is entitled to assume that such a witness's evidence has been accepted as correct if it has not been challenged in cross-examination. In *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438E-G the following was said in respect of this aspect:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct. . . . unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.'⁴

The arbitrator and the court *a quo* should have approached Riekert's testimony on this premise. The testimony of Riekert referred to in para 51 (*supra*) was not only unchallenged but in my view also plausible.

⁴ See also *President of the Republic of South Africa & others v South Africa Rugby Football Union and others* 2000 (1) SA 1 CC at 36J-38B – 'cross-examination not only constituted a right; it also imposed certain obligations'.

[62] Not much turns on the finding by the arbitrator that the OB and other registers had been completed incorrectly as the evidence showed this only related to the omission of time when an incident had occurred.

[63] The observation by the arbitrator that Fisch was unable to identify or refer to a specific rule in a book which had been breached by the respondent was echoed by the court *a quo* when it pointed out that Fisch failed to refer the arbitrator to any rule of 'Namdeb Security' which obliges an employee to report an irregularity or an incident of suspected diamond theft. In this court, Mr Phatela also latched onto this refrain by submitting that Fisch 'dismally' failed to produce procedures applicable to the DCR despite repeated requests to do so.

[64] There appears in my view a misconception that in proceedings of this nature,⁵ an employee may in certain circumstances only be convicted of misconduct where it has been proved that such an employee has transgressed a specific rule, to be found in the code of conduct of the employer, applicable to such employee.

[65] An employee has a fiduciary duty or a duty of trust which involves an obligation not to work against his or her employer's interest. This was made clear by Smuts J, in *Novanam v Willem Absalom & others*⁶. In the *Novanam* matter the labour court

⁵ Instituted in terms of the relevant provisions of the Labour Act.

⁶ An unreported judgment of the labour court delivered on 30 April 2014 in the case no's LC 101/2013 and LCA 47/2013.

referred with approval to *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks & others*⁷ at 462G-463A where the following is stated:

'There is in most, if not all contracts of service, whether it be an employment contract or a contract of agency, an implied fiduciary duty on the part of the employee or agent towards the employer or principal as the case may be. In *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler & another* 1971 (3) SA 866 (W) at 867, Hiemstra J, quoting with approval Hawkins J in *Robb v Green* [1895] 2 QB1 at 10-11, said as follows at 86H-868A:

"There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in the contract of employment to that effect. It is stated thus in the leading case of *Robb v Green* (1895) 2 QB 1, per Hawkins J at 10-11:

"I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters not appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service."

[66] Therefore, the mere fact that Fisch could not identify any specific rule which obliges an employee to report an irregularity or an incident of suspected diamond theft is no basis for a finding that respondent has not breached a rule of 'Namdeb

⁷ 2004 (4) SA 458 (C).

Security'. The duty of a security officer to protect property is implied and the respondent was well aware thereof.

[67] The finding by the arbitrator that there was no evidence presented indicating negligence on the part of the respondent since it was the duty of Winkler to record the incidents on the relevant days, is misplaced. The undisputed evidence was that it was the duty of both security officers. Assuming that permission to gain access to the red area was requested on each of the relevant days there is no plausible explanation by the respondent why such requests were never recorded in the OB and other registers. The only reason apparent from the evidence why nothing was recorded in the registers was that on the relevant days there were no requests or instructions for work to be done in the restricted area.

Similarly, the finding by the court *a quo* that it was 'reasonable possibly true' that because of Winkler's seniority Winkler was expected to make the necessary recordings in the OB, is not supported by the undisputed evidence of Riekert. As pointed out earlier although this was the stance of the respondent, the testimony of Riekert was never disputed and such evidence must thus be accepted as correct. This finding of the court *a quo* amounts to speculation.

[68] Given the fact that there were no requests for any work to be done in the restricted area and the fact that Winkler escorted unauthorised individuals, the respondent should have been on high alert. He would have been aware that no

requests for access had been received and therefore, should have made enquiries as testified by Riekert. Furthermore, the fact that no entries had been made in the OB and other registers by Winkler (if respondent's version is accepted that it was Winkler's duty to do so), the respondent should have reported these failures to his superiors as any reasonable and conscientious security officer would have done. There was unsurprisingly no explanation by the respondent why he failed to report Winkler, given the respondent's attitude that it was not his duty to watch his co-security officer.

[69] The respondent's version that he did not watch the monitor screens which showed activities inside the red area because he was too busy watching the other screens inside the DCR has a hollow sound. The respondent must have been on his alert in the circumstances and must have been curious to see the activities inside the restricted area in view of the fact that there was no request for work to be done in that area. No reasonable security officer would have missed such an opportunity and any suggestion that he did not see any of those occurrences on no less than three occasions is by itself an admission of gross negligence. It is grossly negligent not to comply with the very reason for being present in the DCR, namely to monitor activities in the red area. In my view, the respondent conveniently simply turned a blind eye.

[70] The court *a quo* found that information received by Fisch regarding suspected theft of diamond was hearsay evidence, since the source of the information was not called as a witness during the disciplinary and arbitration hearings and could

therefore not have been relied upon by the arbitrator to uphold the finding of the disciplinary hearing. I must point out that there are exceptions to the hearsay rule one of them being that hearsay evidence may be presented in order to explain subsequent conduct, or to give a background of unfolding subsequent events and therefore, admissible for that purpose.

[71] The court *a quo* found that, the failure to record events in the OB and the swapping of shifts with a senior co-security officer cannot lead to an inference that the respondent reconciled himself with what others had been doing in the bins area. The importance of recording of events had been explained and serves a legitimate purpose. Evidence must be considered in context and holistically. Firstly, in respect of the swapping of duties – it is too much of a coincidence that on each occasion unauthorised and unrecorded access was given to an area where rough and uncut diamonds could be stolen. On those occasions individuals acted in cahoots with Winkler and were involved in stealing or attempting to steal rough and uncut diamonds. Although there is no rule against the swapping of duties the swapping of duties was indicative of a *modus operandi* which could not have escaped the respondent considering that on those days improper access was gained to the railway bin area and the bins themselves. The omission to record very suspicious incidents in the OB, or the failure to report each other for not doing so the respondent as well as his co-security officer must have foreseen (like any reasonable security guard) that the appellant could have suffered harm because the appellant would have had no

record of persons entering the restricted area, prejudicing any investigation by the appellant in and to unauthorised entrance to the restricted area.

[72] The finding by the court *a quo* that no evidence was presented to the effect that requests for permission to access the recovery area were made but were ignored and never recorded by the respondent in the OB 'during the four days period' does not raise an issue simply because the undisputed evidence was that on those days no requests were made for access to the restricted area – such 'evidence' could thus never have been presented by the appellant.

[73] The court *a quo* found that on 'the evidence of Mr Fisch alone' no reasonable arbitrator or court could have come to any other conclusion than the conclusion reached by the arbitrator and that the arbitrator could not have been expected to find the respondent guilty of negligence 'on the evidence of Mr Fisch'. It is trite law that in the evaluation of evidence whether in civil proceedings, criminal proceedings or labour proceedings all the evidence presented must be considered. The court *a quo* came to support the conclusion by the arbitrator that on the evidence of Mr Fisch, the arbitrator could not have found the respondent guilty of negligence. This in my view was a misdirection because Fisch was not the only witness called by the appellant. The court *a quo* should have found having regard to *all* the evidence that no reasonable arbitrator could not have come to any other conclusion that the respondent was dismissed for a valid and fair reason.

[74] In respect of procedural unfairness, the arbitrator found the unfairness to be based on the alleged failure to comply with prescripts governing investigative procedures, something which falls outside the issue of procedural unfairness during disciplinary hearings. In addition it was found as a procedural unfairness the fact that appellant failed to provide video footage of the conduct of the respondent inside the DCR during the relevant dates. In respect of the latter the evidence was clear – it was simply not possible since the cameras inside the DCR had not been selected to record. This can hardly be categorised as a procedural unfairness. On the contrary, it relates to the issue whether there was corroboration for the testimony that the respondent must have seen the activities on the monitors depicting the activities of individuals inside the restricted area on the relevant days. This is a factor to be considered in order to determine whether or not the appellant had proved the commission of misconduct on the part of the respondent.

[75] It does not appear from the arbitration award in which way failure to comply slavishly with the industrial relations policy amounted to procedural unfairness and whether such failure in any way prejudiced the respondent. According to the arbitrator no reason was provided why the respondent was charged two months late, but he acknowledged that the 'purpose of an investigation is to first gather all evidence and then through the investigation prove the offences'. The fact that the respondent was charged at a later stage *per se* is not indicative of a failure to comply with a fair procedure.

[76] In the present matter it appears that an agreement on industrial relation policies and procedures had been incorporated, by reference, into appellant's code of conduct. In the matter of *City Council of Windhoek v Pieterse*⁸ the labour court referred to a work by the authors Johan and Ronell Piron,⁹ to the effect that where an 'employer had introduced certain procedural standards to be followed prior to dismissal, the employer will normally be held to those self-imposed standards'. Reference was also made to decisions to the effect that such self-imposed procedural standards remain guidelines rather than binding rules.

[77] I agree with the observation,¹⁰ that a 'court should guard against an elevation of a disciplinary code into an immutable set of commandments which have to be slavishly adhered to'. I also agree that where there is a departure from such a code it should not be to the detriment of an employee. In my view, the overriding consideration should be whether the employer had complied with, in the particular circumstances of the case, a fair procedure.

[78] In respect of the disciplinary hearings themselves, the respondent was convicted of misconduct in his absence on 14 October 2013. The respondent was initially represented during the proceedings but the representative and the respondent left the proceedings after an objection by the representative was overruled. The respondent was dismissed at the conclusion of the proceedings.

⁸ 2000 NR 196 (LC) at 200.

⁹ Johan & Ronell Piron *Managing Discipline and Dismissal* at 200E.

¹⁰ By Silungwe J at 201B-C.

[79] The respondent subsequently appealed against his dismissal. The appeal was heard by a disciplinary review committee. The proceedings at the disciplinary hearing was found to be procedurally unfair and the respondent was reinstated on 6 November 2013. On the same date the respondent received a notice of suspension pending the re-hearing of allegations of misconduct scheduled for 2 December 2013.

[80] On 2 December 2013, the respondent was again represented. After the conclusion of the disciplinary hearing the respondent was found guilty of the charges of breach of trust, and gross negligence leading to diamond theft, and his employment with the appellant was terminated. The respondent's appeal to the disciplinary review committee was unsuccessful.

[81] I could not find in the analysis of the evidence by the arbitrator nor the evaluation of the court *a quo* any finding that the second disciplinary hearing was procedurally unfair. Two members of the first disciplinary review proceedings also sat in the second review proceedings but in my view, this does not in itself indicate procedural unfairness, since the first review panel found in favour of the respondent.

[82] Even if it is assumed that non-adherence by the appellant to pre-disciplinary hearing procedures were procedurally unfair, the crucial question is whether the arbitrator was justified in the circumstances to order the reinstatement of the respondent. In *Kamanya & others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC) O'Linn P concluded (at 127I-128C):

'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 would be open to the District Labour Court to find that the employee has not been "dismissed unfairly".

. . .

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 s 46(1)(c), not to grant any of the remedies provided for in s 46(1)(a) and (b), but to confirm the dismissal or to decline to make any order.'

[83] This court in the matter of *Kahoro & another v Namibia Breweries Ltd*¹¹ per Damaseb AJA, remarked as follows:

' . . . As I understand the position, *Kamanya* is authority for the proposition that even if an employer fails to prove that 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. . . .'

[84] This court, however, found having regard to the particular circumstances of *Kahoro* that it cannot subscribe to the view that the absence of a fair procedure can under no circumstances impact on the validity of the reason for a dismissal and found that there may be circumstances in which the procedural fairness and substantial fairness of a dismissal are so inextricably linked that the dismissal cannot be fair in the absence of a fair procedure. This is however, not the contention by the respondent.

¹¹ 2008 (1) NR 382 (SC) at 394 para 40.

[85] In *SPCA v Terblanche*,¹² the labour court found the employee's dismissal unfair, yet set aside the district labour court's order of reinstatement on the basis that the working relationship between the employee and employer had irretrievably broken down.

[86] In *Pupkewitz Holdings (Pty) Ltd v Mutanuka & others*¹³ the labour court cautioned that 'to force an employer to reinstate his or her employee is already a tremendous inroad into the common law principle that contracts of employment cannot normally be specifically enforced. Indeed, if one party has no faith in the honesty and integrity or loyalty of the other, to force that party to serve or employ that other one is a recipe for disaster. Therefore, the discretionary power to order reinstatement must be exercised judicially'.

[87] Grogan,¹⁴ with reference to case law, emphasised that 'in employment law, a premium is placed on honesty because the conduct involving moral turpitude by employees damage the trust relationship on which the contract is founded'.

[88] It was held¹⁵ that trust is the core of the employment relationship, that dishonest conduct is a breach of that trust, and that dismissal is an appropriate sanction.

¹² NLLP 1998 (1) 148 NLC at 156.

¹³ Unreported labour court judgment – (Case No. LCA 47/2007) [2008] NALC 1 (3 July 2008) para 17 by Parker J.

¹⁴ John Grogan In his work '*Dismissal*' (2010) at p 116.

¹⁵ *Foodcon (Pty) Ltd v Schwartz* NLLP 2000 (2) 181 (NLC) per Justice Silungwe.

[89] The following principle is applicable when one considers the appropriateness of the sanction imposed on an employee:

'It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference is only justified in the case of unreasonableness and unfairness.'¹⁶

[90] In *Nampak Corrugated Wadeville v Khoza*¹⁷ the South African labour court held (at 584A) that a court should not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The court *a quo* should, in my view, have refused to confirm the order of reinstatement.

[91] Regarding the award of compensation made by the arbitrator which was based on exhibit 17 it was submitted on behalf of the appellant that it is unclear how this exhibit was introduced into the record since it was not handed in by the respondent. Exhibit 17 purports to be a salary advice of someone not identified on the salary advice neither is the employer identified. It is simply not identifiable as an official Namdeb salary advice.

¹⁶ *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (1999) 20 ILJ 1707 (LAC).

¹⁷ (1990) 20 ILJ 578.

[92] It was further submitted that, the respondent tendered no evidence regarding his losses or how he had mitigated his losses, and consequently the appellant was denied the opportunity of cross-examining the respondent on these aspects.

[93] The contention that exhibit 17 was introduced after evidence had been tendered was not disputed by the respondent. If this is correct then the arbitrator had no basis upon which to make the monetary award.

[94] The court *a quo* tried to circumvent the requirements that damages must be pleaded and proved by distinguishing between damages under the common law from an award of compensation in terms of s 86(15)(e) of the Labour Act and found that in the circumstances the respondent is entitled to compensation which is 'reasonable, fair and equitable:

[95] In *Fisheries Observer Agency v Namibia Public Workers Union & another*¹⁸ Damaseb JP, stated the following:

'It is incumbent upon a claimant seeking specific damages sounding in money to produce sufficient evidence substantiating the exact amount of his damages. Not only were the damages awarded not properly pleaded; they were intimated for the first time during oral submission after the evidence was led. More importantly, no admissible evidence whatsoever was led in evidence to support the amount of damages awarded by the arbitrator. The manner in which the arbitrator allowed the so-called evidence of the losses suffered after all parties had led evidence, and the appellant had closed

¹⁸ (LCA 12/2011) [2012] NALC 14 (28 May 2012) para 18.

argument, was improper and in breach of the principle of *audi alteram partem* and breached of appellant's right to a fair trial.'

[96] I must accept that exhibit 17 inexplicably found its way into the record after all evidence had been led. It was thus improper for the arbitrator to have used it as a basis for calculating the damages purportedly suffered by the respondent. It is also common cause that the respondent pleaded no amount as damages or compensation in his summary of dispute.

[97] In *Jo-Mari Interiors v Mouton*,¹⁹ the labour court referred with approval to *Esso Standard SA (Pty) Ltd v Katz*,²⁰ where Diemont JA, referred with approval to *Hersman v Shapiro & Co*,²¹ where the following appears at 379:

' . . . There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where the evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. . . .'

[98] In *Springbok Patrols (Pty) Ltd v Jacobs & others*,²² (an appeal in terms of s 89 of Act 11 of 2007) the principle was once again emphasised that where a party seeks to claim an amount owing to him or her under the Act, he or she must not only plead how that amount arose but also lead evidence to prove such an amount. In the

¹⁹ NLLP 2004 (4) 53 (NLC) at 57.

²⁰ 1981 (1) SA 964 AD at 970E-G.

²¹ 1926 TPD 367 at 379 per Strafford J.

²² Unreported judgment of labour court per Smuts J in (LCA 70/2012) [2013] NALCMD 17 (31 May 2013).

present case, the respondent did not even begin to allege that he has suffered any damages (or is entitled to compensation as the court *a quo* found). The onus of proof of any claim of damages or compensation that the respondent might have had as well as the duty to adduce evidence on such claim, rested with the respondent.²³

[99] There was no foundation upon which the court *a quo* could have ordered compensation. In the circumstances, especially in view of the failure of the respondent to discharge the onus of proof, awarding compensation by the court *a quo* was unreasonable, unfair, and inequitable. The court *a quo* should have refused to order compensation.

[100] I am of the view that the evidence presented by the appellant rebuts the presumption of an unfair dismissal contained in s 33(4) of Act 11 of 2007. The evidence proves on a preponderance of probabilities that the respondent was dismissed for a valid and fair reason and in compliance with a fair procedure.

[101] In the result the following orders are made:

- (a) The appeal is upheld with costs, including the costs of one instructing and two instructed legal practitioners.

- (b) The labour court's order is set aside and substituted with the following order:

²³ See *Springbok Patrols (supra)*.

The appellant's appeal against the arbitrator's award dated 13 April 2015 succeeds. The award is set aside, and substituted with the following order:

The applicant's dispute dated 13 March 2014 under case SROR 01-14 is dismissed.

No costs order is made.

HOFF JA

MAINGA JA

SMUTS JA

APPEARANCES

APPELLANT: R Heathcote (with him G Dicks)
Instructed by Köpplinger Boltman, Windhoek

RESPONDENT: T C Phatela
Instructed by FB Law Chambers, Windhoek