



NOT REPORTABLE

CASE NO: SA 39/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JUSTY MOSES

Appellant

and

HANGANA SEAFOOD (PTY) LTD

First Respondent

MAXINE KROHNE N.O.

Second Respondent

Coram: MAINGA JA, SMUTS JA, and HOFF JA

Heard: 23 June 2023

Delivered: 28 July 2023

Summary: This is an appeal against a decision of the Labour Court. Mr Justy Moses (the appellant), is a former Manager: Fleet Operations at Hangana Seafood (Pty) Ltd, the first respondent (Hangana). The appellant was suspended and eventually dismissed by Hangana on 2 March 2018 after a disciplinary process on charges of misconduct (ie dishonesty and/or gross negligence and with breach of trust). He was found guilty and dismissed. The appellant had failed to declare his private business interests in businesses in the fishing industry which conflicted with his work at Hangana. His contract of employment precluded that and he was also required to

declare interests in other businesses. He filed an unfair dismissal dispute with the Office of the Labour Commissioner which was referred to arbitration. On 19 February 2019, the arbitrator found in favour of the appellant. The arbitrator found the following: that the charges against the appellant did not set out sufficient particulars to enable him to prepare his defence which thus rendered the disciplinary hearing procedurally unfair; that on substantive fairness, the appellant's conduct did not relate to an alleged breach of a declaration policy and employment contract which he was charged with; that Hangana had failed to prove on a balance of probabilities that the appellant's failure to report his private business interests was deliberate and careless; that the appellant's conduct was not unreasonable and had not caused Hangana any harm; that there was no evidence as to what entails breach of trust in the appellant's contract of employment. The arbitrator concluded that the appellant's dismissal was both procedurally and substantively unfair and ordered his reinstatement and compensation for the period from dismissal to reinstatement. Hangana appealed this decision and the Labour Court found in its favour in April 2021. The appellant appealed the Labour Court's decision to this Court.

The Labour Court found that the arbitrator was correct to find that it was procedurally unfair. The court *a quo* however went on to find that Hangana had a fair and valid reason to dismiss the appellant and that reinstatement should not be ordered for that reason.

On appeal, the issue is whether the Labour Court erred in overturning the arbitrator's finding of the dismissal not being for a valid and fair reason and in upholding the appeal. There was no cross-appeal noted in respect of the Labour Court's finding that the appellant's dismissal was procedurally unfair by Hangana.

Held that, the Labour Court correctly found that the evidence presented by Hangana was reliable and established appellants misconduct and that the appellant's denials were false.

Held that, the court was correctly satisfied that the appellant's conduct was dishonest and in conflict with that of Hangana's interest and thus amounted to a fair and valid reason for his dismissal. Although not expressly stating that this would amount to a question of law, this was plainly a case where a decision on the facts was one that

could not have been reached by a reasonable arbitrator and thus subject to appellate review

Held that, although the charge sheet was unduly sparse in detail, dishonesty or at least a gross neglect of duty was emphatically established in both the disciplinary proceedings and in the arbitration proceedings.

Held that, the Labour Court was correct in finding that dishonesty on the part of the appellant and an impermissible conflict of interests were established on a balance of probabilities and that Hangana had a fair and valid reason to dismiss him.

Held that, the contractual setting between the appellant and Hangana was one where conflict of interests were not permitted. Interests in private businesses are specifically not allowed except when permission is sought and granted. A duty is placed upon employees to make annual declarations of their interests. A further term requires employees to devote their time to their employer's work and not to pursue private businesses during office hours.

It is held that, the appellant's pursuit of his private business interests was in conflict with his employer. His conduct cast doubt on his ability to act with 'total objectivity with regard to (Hangana's) interest', particularly in the light of his failure to disclose his private business interests in the fishing industry.

This Court upholds the Labour Court's decision in finding that Hangana had established a fair and valid reason for Mr Moses' dismissal.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

Introduction

[1] The appellant, Mr Justy Moses, is a former Manager: Fleet Operations of the first respondent, Hangana Seafood (Pty) Ltd (Hangana). Mr Moses was dismissed by Hangana on 2 March 2018 following a disciplinary process. He reported an unfair

dismissal dispute to the Office of the Labour Commissioner. That dispute was referred to arbitration after conciliation. The arbitrator found in his favour on 19 February 2019 and ordered his reinstatement together with his remuneration for the period from the date of dismissal to reinstatement. Hanganana's appeal against that award succeeded in the Labour Court in April 2021. Mr Moses has, with the leave of that court, taken its decision on appeal to this Court.

Background facts

[2] Mr Moses was appointed by Hanganana as an assistant fleet manager with effect from 1 August 2014. During 2017 he was promoted to a senior managerial position of operations manager of Hanganana's fleet of vessels at an annual remuneration of N\$650 000 as a cost to company.

[3] As its name would suggest, Hanganana is a concern engaged in Namibia's fishing industry at Walvis Bay. It does so as a quota rights holder for the commercial harvesting of hake and by-catch. The latter includes crab and monk fish. To this end, Hanganana operates a fishing fleet and a land-based fish processing factory. Hanganana is part of the Ohlthaver & List (O&L) group of companies, a large conglomerate engaging in various sectors of the Namibian economy.

Mr Moses' employment contract

[4] Clause 11 of Mr Moses' contract of employment, under the heading 'Protection of company interests' provides:

'The Employee agrees not to divulge any of the secrets of the company, nor do anything likely to damage its business in any way.'

Should the Employee be found guilty of a breach of any provision contained in this paragraph or included in the common law principles applicable to the employment relationship, this may render the Employee liable to instant dismissal.

The Employee agrees to devote his/her whole time during the working hours to the business of the Company and shall do all in his/her power to promote, develop and extend the business of the Company. The Employee agrees to maintain trust and good faith and shall not enter into competition with the company in any capacity whilst in employment.' (Emphasis supplied)

[5] Also relevant for present purposes is clause 17, entitled 'Disclosure', which is to the following effect:

'The Employee agrees to disclose to his/her direct superior any potential conflict of interest or other interests that might be relevant to the employment relationship. Conflict of interest is defined as any circumstance that could cast doubt on the Employee's ability to act with total objectivity with regard to the Company's interest.

It is agreed that the Employee may not engage in private work either for a separate enterprise or a self-owned enterprise without the written permission of the Managing Director, if such work:

- 17.1 In nature is directly or indirectly related to the business of the Company and/or;
- 17.2 Is conducted during working hours and/or;
- 17.3 Utilizes Company information which may be deemed of a confidential nature.

All private business interests, whether deemed a conflict of interest or not, must be disclosed in writing to the Managing Director.'

[6] Mr Moses' employment was also governed by Hangan's declarations policy (forming part of the employment contract of employees) which is prefaced thus:

'In order to protect the interest of the O&L Group of Companies in the best possible manner, Customers/Clients and Employees, the O&L Group will not entertain any situation that may lead to an actual, potential or perceived conflict of interest.

A conflict of interest in terms of this policy will be deemed as any circumstance that could cast doubt on an Employee's ability to act with total objectivity with regard to the Company's interest.'

[7] The relevant portions of that policy are contained in clauses 6.3.2 under heading 'Private business' which provides:

'Employees who engage in private work may only do so upon successfully applying to the Office of the Chairman / CEO or Managing Director (if it is an Operating Company) to engage in such private work and if such an application has been approved. Upon approval the employee must complete the Declaration Form and forward this to his / her Human Capital Manager for filing on his / her personal file. A copy of the said Declaration should be sent to the Company Secretary for record purposes.'

and clause 6.5, headed 'Renewal of Declarations':

'All Employees who have applied for and declared private business interests, will be required to renew such declarations on an annual basis and submit it to their Human Capital Manager for record purposes at the beginning of a financial year. A copy of all declarations should be forwarded to the Company Secretary.'

[8] In these proceedings, Hangana not only relies on these terms which formed part of Mr Moses' contract of employment, but also upon implied terms which arise in every employment contract under the common law to the effect that an employee has a duty not to work against an employer's interest and that an employee is precluded

from using his or her position to start or operate a business in competition to their employer's business.

Conduct which gave rise to disciplinary proceedings

[9] At the end of 2017, the principal of Wynnlic Maritime Services CC (Wynnlic) a client of Hangana, informed Hangana that Wynnlic was unable to pay mooring fees to Hangana of some N\$120 000 because of its 'bankruptcy' brought about as a result of a fraudulent transaction it had entered into with Mr Moses' business, Shamrock Investments Number Fifty Two CC ('Shamrock'). The management of Hangana investigated this allegation. It emerged that Mr Moses was the sole member of Shamrock, which had been registered by him on 28 January 2015, some six months after starting his employment with Hangana.

[10] Shamrock's principal business was described as 'maritime' in its registration documentation. Shamrock was registered for tax purposes and had a certificate of good standing from the Receiver of Revenue for 'tender purposes'. It was also registered with the Employment Equity Commission and as an SME with the Ministry of Trade and SME Development.

[11] It also emerged that on 21 May 2017, Mr Moses entered into a partnership agreement with two others including Wynnlic's principal to commence on that date and operate through Lochmar Fishing CC (Lochmar) in respect of a crab fishing quota. Shamrock had been awarded a crab fishing quota on 29 May 2017 for 800 metric tons and a quota for 800 metric tons for monk fish.

[12] It also transpired that emails were sent by Mr Moses during his working hours concerning the joint venture established through Lochmar. Mr Moses had been instrumental in securing his joint venture partner (Wynnic's principal) to pay a certain Mr Gustav Kaitjirokere N\$1 272 000 as a consideration for a fishing licence. Under this arrangement, Mr Kaitjirokere was to supply that licence, given his apparent family connection to the Minister (of Fisheries). The licence did not however materialise and Wynnic's principal and his partner lost their money. That gave rise to his complaint to Hangana concerning Mr Moses and of bankruptcy, and his statement that Wynnic would not as a consequence of this apparently corrupt transaction be able to pay Hangana's mooring fee of N\$120 000.

Disciplinary proceedings

[13] After the matter was reported to Hangana by Wynnic's principal, Mr Moses was suspended and subsequently charged with misconduct. He was charged with dishonesty and/or gross negligence and secondly with a breach of trust, stated in these terms:

- '(i) Dishonest and or Gross Negligence – It is alleged that you have neglected to report your involvement in external business interest as required.
- (ii) Breach of Trust – It is alleged that you did not report your external business interest as you were required.'

[14] At the commencement of the proceedings, Mr Moses applied to be represented by a legal practitioner and also complained that the charges against him were not sufficiently specified. When his application to be represented by an external lawyer was turned down, he applied for further time to prepare his defence. He was informed

that he could be represented by a fellow employee at Hangana or within the broader O&L Group which he declined and his application for a postponement was turned down.

[15] During the ensuing disciplinary proceedings, it also transpired that Mr Moses at the time held an interest in two further close corporations registered to do business in the fishing industry, Tses Fishing CC (Tses) and Aruab Fishing CC (Aruab). These corporations were registered on 1 June 2017. The evidence at the disciplinary enquiry was that Shamrock as well as these two further close corporations had not been declared by Mr Moses, as required by the declaration policy. He had in 2015 declared two other entities, engaged in scrap metal and construction respectively and was given permission by Hangana to pursue those interests.

[16] In the disciplinary proceedings, Mr Moses did not contest his involvement and interest in Shamrock and in the fishing entities (Tses and Aruab).

[17] Mr Moses however asserted that he had declared his interest in Shamrock but did not testify that he declared his interest in Tses and Aruab. He called a fellow employee in support of that assertion but the fellow employee was not able to support his evidence to that effect.

[18] The chairperson of the disciplinary enquiry found Mr Moses guilty as charged. The sanction imposed was that of dismissal. Mr Moses exercised his right to an internal appeal against the finding and sanction. That appeal was not successful and he reported a dispute of unfair dismissal to the Office of the Labour Commissioner which proceeded to arbitration.

Arbitration proceedings and award

[19] In the arbitration proceedings, Hangana called several witnesses including Wynnics' principal, Hangana's managing director, its human capital manager, Mr Moses' immediate superior when he was assistant fleet manager and Ms Marais, the chairperson of the disciplinary enquiry which found Mr Moses guilty and imposed the sanction of dismissal.

[20] Wynnics' principal testified to the transaction referred to. Much of his testimony is not properly transcribed in the record. (This is but one of several unsatisfactory features in the record to which I return). Much of his account was not put in issue although it was put to him that Mr Kaitjirokere was not related to Mr Moses or his wife but was instead someone known to Mr Moses and his wife.

[21] The evidence of Hangana's managing director, Mr Moses' erstwhile immediate superior and the human capital manager all related to the terms of employment concerning the requirement to report private business interests of employees. Their evidence was also to the effect that Mr Moses had not at all declared his interests in Shamrock, Tses and Aruab as he was required to do.

[22] They also testified that he had properly reported his interest in the scrap metal and construction entities in 2014-2015 shortly after he joined Hangana and was given permission to conduct those businesses. Their evidence was that he had not been given permission to conduct the Shamrock or other fishing businesses and would not have been given permission because of the conflict with Hangana's business.

[23] The human capital manager also testified that confidential information relating to Hanganá's operations had been supplied by Mr Moses to his business partners in those other entities.

[24] The chairperson of the disciplinary enquiry, Ms Marais, testified that within the O&L Group, external legal representation is not permitted in internal disciplinary proceedings but that employees are entitled to be represented by fellow employees with Hanganá as well as those within the entire O&L Group in accordance with policies and procedures followed within the group. Those options were offered to Mr Moses but declined by him. As to the lack of specificity in the charge sheet, her evidence was that although Shamrock was not stated in the charge sheet, when the hearing proceeded Mr Moses was aware that the charge related to Shamrock, stating that he 'had no issues with Shamrock' and said 'it was an open secret'. Ms Marais further stated in this regard he did not deny any of the information as we proceeded'. When pressed on this issue, Ms Marais stated that although Shamrock was not mentioned in the notice of hearing, 'but again I am of the opinion that Mr Moses knew exactly what this was all about'.

[25] In cross-examination, her evidence to that effect was not put in issue.

[26] In his evidence Mr Moses stated that he had made the required declarations of his interests in Shamrock. He acknowledged that he was required to declare that interest and asserted that he had done so but admitted that he had not received permission to carry on that business. He did not testify that he had made declarations of Tses and Aruab.

[27] Mr Moses called an employee relations officer of O&L Group who observed the disciplinary proceedings but her evidence did not advance his case, except in respect of the particularity of the charges.

The Arbitrator's award

[28] The arbitrator found that the charges did not set out sufficient particulars to enable Mr Moses to prepare his defence. The arbitrator found that this rendered the disciplinary hearing unfair.

[29] As to the complaint that it was unfair to refuse Mr Moses external legal representation, the arbitrator found that Mr Moses' entitlement to representation from any employee within the O&L Group did not result in unfairness in the procedure.

[30] The arbitrator also found that the refusal to grant a postponement to Mr Moses, after turning down his preliminary points concerning the insufficiency of particularity in the charges and the request for legal representation, amounted to unfairness in the procedure.

[31] Turning to the question of substantive fairness, the arbitrator found that Hangana had not established a valid reason 'to charge Mr Moses with dishonesty or gross negligence or breach of trust . . . because his conduct in question did not relate to an alleged breach of a declaration policy and employment contract which he was not charged with'. The arbitrator also found that Hangana had failed to prove on a balance of probabilities that (Mr Moses') failure to report (his private business interests) was deliberate or careless' The arbitrator found that Mr Moses' conduct was not so unreasonable that 'it caused Hangana any harm'. In this regard,

the arbitrator found that Wynn's principal had entered into a partnership with Mr Moses 'in his personal capacity' and that the agreement was not with Wynn, which is a separate legal entity.

[32] Finally, the arbitrator found that there was no evidence as to what entails a breach of trust on Mr Moses' part and that there was no evidence that Mr Moses' conduct 'created mistrust to such an extent that (Hangana) was harmed in any way'.

[33] The arbitrator concluded that Mr Moses' dismissal was both procedurally and substantively unfair and ordered his reinstatement and pay for the period between the dismissal and reinstatement.

The approach of the Labour Court

[34] The court below agreed with the arbitrator that it was procedurally unfair that the charge sheet lacked sufficient particularity and to refuse an application for postponement when the application for external legal representation was refused. The Labour Court also found that the refusal to permit external legal representation amounted to procedural unfairness despite the finding of the arbitrator to the contrary and without any cross-appeal on that aspect and providing reasons for that finding.

[35] The Labour Court found however that Hangana had a fair and valid reason to dismiss Mr Moses and that reinstatement should not be ordered for that reason.

[36] Much of the focus of the appeal to the Labour Court concerned whether or not Mr Moses had declared his outside business interests and the effect of not doing so. The court found that on a balance of probabilities, Mr Moses' denials (of his failure to

do so) were false. The court was satisfied that his conduct was dishonest and conflicted with Hangana's interest and that there was thus a fair and valid reason to dismiss Mr Moses.

[37] The Labour Court proceeded to uphold the appeal and made no further order as to whether some form of award should have been made or to remit the matter by reason of the finding that the dismissal was procedurally unfair, as had occurred in the decision relied upon not to order reinstatement although that matter had related to a retrenchment exercise.¹

Submissions on appeal

[38] In his argument, counsel for the appellant built much of his case on the portion of clause 17 which defined conflict of interest as 'any circumstance that could cast doubt on the employee's ability to act with total objectivity with regard to the Company's interest'. It was contended that there was no evidence by Hangana that Mr Moses' partnership with a customer and his private business interests cast doubt or affected his objectivity. In the absence of such evidence, it was contended that Hangana had not discharged the onus to establish a valid and fair reason for dismissal.

[39] Counsel for Hangana referred to the contractual terms which not only required Mr Moses to disclose private business interests annually but also the duty to apply for permission to pursue them. He argued that Mr Moses' denial of failing to disclose his interests was not only unsupported and contrary to the unequivocal evidence of all the witnesses called by Hangana but also internally inconsistent with his own evidence. Counsel also pointed out that the duty to disclose arose whether or not the activity was

¹ *Kahoro & another v Namibia Breweries Limited* 2008 (1) NR 382 (SC) (*Kahoro*).

considered by the employee to be in conflict with Hangana. Counsel also relied upon the contractual term which required employees to devote their time to their work and that private business interests could only be pursued with permission which had not been granted. Counsel also relied upon terms implied by the common law – of an employee not to work against his employer's interests or in competition with his employer.

[40] Counsel for Hangana pointed out that multiple declarations would have been required annually on Mr Moses' part after incorporating Shamrock in 2015 and later when becoming involved in Tses and Aruab. Not only were these interests not declared, but counsel submitted that the reason for not doing so was to conceal them because they were in conflict with Hangana. These failures, counsel contended were compounded by the fact that the interests and conduct involved a client of Hangana and had caused prejudice and embarrassment to Hangana. Counsel argued that Mr Moses' objectivity was impaired because of the level of duplicity in his conduct.

[41] Counsel submitted that the Labour Court was correct in finding that a valid and substantive reason existed for Mr Moses' dismissal and was furthermore correct in not ordering reinstatement because of the breach of trust which had occurred.

Scope of this appeal

[42] The legal framework for this appeal is s 33 of the Labour Act 11 of 2007 read with Chapter 8 of that Act relating to the resolution of disputes, arbitration and appeals to the Labour Court.

[43] Section 33 of the Act concerns unfair dismissal. It provides that an employer may not dismiss an employee without a valid and fair reason and without following a fair procedure. In proceedings concerning a dismissal, s 33(4) provides that if an employee establishes the existence of a dismissal, it is presumed unfair unless the contrary is proved by the employer.

[44] The Act in Chapter 8 provides for the referral of disputes to the Office of the Labour Commissioner, who in turn refers a dispute to an arbitrator. An appeal against an arbitrator's award to the Labour Court is confined to questions of law alone under s 89 of the Act.

[45] The issue to be determined in this appeal is whether the Labour Court erred in overturning the arbitrator's finding of the dismissal not being for a valid and fair reason and in upholding the appeal directed to it.

[46] As there was no cross-appeal noted in respect of the Labour Court's finding that Mr Moses' dismissal was procedurally unfair, this appeal concerns whether there was a fair and valid reason for Mr Moses' dismissal.

[47] The appellant also did not note any appeal in the alternative against the Labour Court for not replacing the award with one providing for some form of compensation for the dismissal being procedurally unfair. This was understandable as there was no evidence given by Mr Moses as to losses or financial prejudice sustained in consequence of the dismissal.

[48] Although not raised by this appeal, the Labour Court's finding that the refusal to permit external legal representation amounted to procedural unfairness cannot stand. In the face of the arbitrator's express and reasoned finding – not appealed against – that the availability of representation by a fellow employee within Hanganá or the entire O&L Group meant that the refusal of representation by an external lawyer was not procedurally unfair, it was not open to the Labour Court to interfere with that finding which would in any event appear to be correct.

[49] The arbitrator's findings of unfairness of the procedure because of insufficient particulars contained in the charges and the refusal to grant a postponement when the application for representation by an external lawyer was refused, were upheld by the Labour Court and not appealed against.

[50] Although no written argument was understandably advanced on the issue of procedural unfairness, the issue was briefly raised with counsel given the fact that it was not addressed by the Labour Court in the form of substituting the award with one to provide a measure of relief in that regard.

[51] The reasons for not doing so may relate to the unchallenged evidence of the chairperson of the internal disciplinary enquiry to the effect that Mr Moses knew what the enquiry was about and the nature of the charge against him, even if Shamrock had not by name been mentioned in it. That was not placed in issue. It would also appear from the record of the disciplinary enquiry that Mr Moses, a senior member of management, was well versed in the terms of his employment contract and was able to deal with the factual issues relating to his involvement in the business of Shamrock and interests in Tses and Aruab which he did not dispute.

[52] The lack of any demonstrable prejudice to Mr Moses may have been the reason why the Labour Court saw fit not to revisit the award to make provision for a measure of relief for procedural unfairness. The Labour Court should however at least have expressly set aside the award although this is implied in its order of upholding the appeal.

[53] As to the question of substantive fairness, the Labour Court was required to consider whether the arbitrator's finding that Hangana had failed to establish substantive fairness for Mr Moses' dismissal amounted to question of law alone and whether it was liable to be set aside or not.

[54] In reaching her finding in this regard, the arbitrator appeared to accept the evidence of Hangana's Chief Executive Officer, its manager of human capital and Mr Moses' immediate superior concerning the contractual terms (including the declarations policy), Mr Moses' knowledge of them and his failure to have made the declarations as alleged. Although no express finding is made to this latter effect, Mr Moses' denials that he failed to make the necessary declarations are not even referred to in this context by the arbitrator. Instead, after referring to the evidence on behalf of Hangana, the arbitrator's finding is made that Hangana had not established that Mr Moses' failure 'to report was deliberate or careless' thus accepting that failure and further that 'no evidence was placed before me to establish that (Mr Moses) was so unreasonable that it caused (Hangana) any harm'. This was stated to be so because Mr Moses' partnership agreement was not with Wynnyc (Hangana's client) but rather with its principal. The arbitrator found that Mr Moses was not charged with a breach of

his employment contract including the declaration policy but rather with dishonesty or gross negligence which were thus not established.

[55] As is already stated, the arbitrator found that a breach of trust had not been established in that there was 'no evidence that Mr Moses' conduct created mistrust to such an extent that Hangana was harmed in any way'. In support of this approach, the arbitrator found that there was no evidence to Hangana's 'disciplinary code as to what entails a breach of trust'.

[56] The Labour Court correctly found that the evidence presented by Hangana was true and correct and that Mr Moses' denials were false. The court was thus also correctly satisfied that his conduct was dishonest and in conflict with that of Hangana's interest and thus amounted to a fair and valid reason for his dismissal. Although not expressly stating that this would amount to a question of law, this was plainly a case where a decision on the facts was one that could not have been reached by a reasonable arbitrator and subject to appellate review.² This would appear to be implicit in the Labour Court's approach and correctly so.

[57] Once it was accepted that Mr Moses failed to make the necessary declarations of interest to Hangana which the arbitrator would appear to have accepted to be the case, the context of those businesses being in the fishing industry and in competition with Hangana, given its operations relating to by-catch, and in partnership with a client of Hangana and involving an apparently corrupt deal not denied by him, the inference is inescapable that this is done with a dishonest purpose against his employer's interest. Whilst Mr Moses was charged with breaches of specific contractual terms, his

² *Rumingo & others v Van Wyk* 1997 NR 102 (HC) as approved in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) para 44.

main charge alleged that he 'neglected to report (his) involvement in external business, as required'. The requirement to do so clearly arises from his contractual terms. This he also understood during the hearing. The evidence also established the extent of his neglect or failure in this regard.

[58] Although the charge sheet was unduly sparse in detail, dishonesty or at least a gross neglect of duty was emphatically established in both the disciplinary proceedings and in the arbitration proceedings.

[59] The Labour Court was clearly correct in finding that dishonesty on the part of Mr Moses and an impermissible conflict of interests were established on a balance of probabilities and that Hangana had a fair and valid reason to dismiss him.

[60] The argument advanced on behalf of the appellant that Hangana had not established that his external business interests amounted to an impairment of Mr Moses' ability to act with total objectivity, fails to take into account the context of that phrase in the totality of the contractual scheme with regard to conflict of interest and the duty to make declarations of private business interests as well as the undisputed facts concerning the conflict.

[61] The contractual setting is one where conflicts of interest are not permitted. Interests in private businesses are specifically not allowed except when permission is sought and granted. A duty is placed upon employees to make annual declarations of their interests. A further term requires employees to devote their time to their employer's work and not to pursue private businesses during office hours. It is within this context that the phrase latched onto by appellant's counsel is to be considered.

[62] In this instance, Mr Moses' pursuit of his private business interests were in competition with his employer, compounded by being with a client of his employer with whom he was involved in an undisputed transaction which appeared to be corrupt. There can be no doubt that Mr Moses' conduct cast doubt on his ability to act 'with total objectivity with regard to (Hangana's) interest', particularly in the light of his failure to disclose his private business interests in the fishing industry.

[63] The Labour Court was thus correct in finding that Hangana had established a fair and valid reason for Mr Moses' dismissal and that the contrary finding by the arbitrator amounted to a question of law in that her decision reached on the facts could not have been reached by a reasonable arbitrator and is thus subject to the appellate review contemplated by the Act.

Costs

[64] Both sides accepted that costs should follow the result. The appalling state of the record was raised with appellants' counsel. There were several portions included such as transcribed oral argument and heads of argument in the Labour Court which do not form part of a record on appeal. Furthermore, exhibits in the arbitration proceedings were not properly marked and indicated in the record. To compound matters, some pages in the record were inexplicably missing and were provided as annexures to respondent's counsel's heads of argument for which we are grateful.

[65] All too often are incomplete or incorrectly compiled records filed. This invariably entails considerable inconvenience to this Court. There is no excuse for this continuing remissness on the part of practitioners. The requirements for a record are set out in

some detail in rule 11. These requirements are all too frequently overlooked. Decisions of this Court have repeatedly lamented these failings which have recently resulted in appropriate cost orders.³

[66] In view of the outcome of this appeal, I do not propose to make further adverse cost orders as a result of the poorly put together record but wish to reiterate that appropriate cost orders may be the consequence of this continuing practice with regard to the filing of appeal records.

Order

[67] The following order is made:

1. The appeal is dismissed with costs, including the costs of one instructing and one instructed legal practitioner.
2. The arbitrator's award is set aside.

SMUTS JA

MAINGA JA

³ *WP Transport (Pty) Ltd v G4S Namibia (Pty) Ltd & another* and a similar case 2023 (1) NR 9 (SC).

HOFF JA

APPEARANCES

APPELLANT:

T C Phatela

Instructed by Pack & Co. Inc.,
Windhoek

FIRST RESPONDENT:

G Dicks

Instructed by Engling, Stritter &
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