



REPORTABLE

CASE NO: LCA 46/2011

IN THE LABOUR COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

**HOUSE AND HOME**  
**(a trading division of Shoprite (Pty) Ltd)**

**APPELLANT**

and

**RICARDO MAJIEDT**

**1<sup>ST</sup> RESPONDENT**

**BM SHINGUADJA N.O.**

**2<sup>ND</sup> RESPONDENT**

**CORAM: HOFF, J**

**Heard on: 17 February 2012**

**Delivered on: 22 August 2012**

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**LABOUR JUDGMENT**

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**HOFF, J:** [1] This is an appeal against an award given by the arbitrator (second respondent) in favour of the first respondent on 27 April 2011.

[2] This appeal lies against the arbitrator's findings that:

- '(1) the internal disciplinary hearing preceding the first respondent's dismissal was fatally defective in respect of procedural fairness;
- (2) the appellant failed to prove the charge of extreme poor stock control against the first respondent, thus the dismissal of the first respondent lacked substantive fairness;
- (3) the appellant shall reinstate the first respondent in his position as branch manager, which position he held before his dismissal on 10 September 2010, by not later than 9 May 2011;
- (4) the appellant's failure to remunerate the first respondent at the same level of "the other" branch manager, is grossly unfair and amounts to unfair discrimination, contrary to sections 5(1)(g) and (2) of the Labour Act 11 of 2007; and
- (5) the appellant shall pay the first respondent all his overtime differences, which were not paid according to his basic salary of a branch manager for the period 1 October 2009 until 10 September 2010.'

### **The question of law**

[3] In terms of the provisions of section 89(1)(a) of the Labour Act, 11 of 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award "on any question of law alone".

[4] The full bench of the High Court (per Mtambanengwe J) in *Rumingo and Others van Wyk* 1997 NR 102 at 105D – E stated the following on the issue of a question of law:

"The test in appeals based on a question of law, in which there has been an error of fact was expressed by the South African Appellate Division in *Secretary for Inland Revenue v Guestyn Forsyth & Joubert* 1971 (3) SA 567 (A) at 573 as being that the appellant must show that the Court's conclusion 'could not reasonably have been reached'."

[5] The full bench of the High Court (per Hannah J) in *Visagie v Namibia Development Corporation* 1999 NR 219 at 224 stated that the Labour Court was the final

arbiter on issues of fact and that it was not open to a Court on appeal to depart from a finding of fact by that Court. Hannah J referred with approval to the decision of the Supreme Court of Appeal in South Africa in the matter of *Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd* 1998 (3) SA 349 (SCA) where Scott JA said the following at 405F – 406A:

“In the present case, of course, this Court, by reason of the provisions of s 17 C(1) (a) of the Labour Relations Act 28 of 1956, is bound by the findings of the LAC. According, the extent to which it may interfere with such findings is far more limited than the test set out above. As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have been made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 *et seq*; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666 B – D). The enquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all. The limitation on this Court’s ordinary appellate jurisdiction in cases of this nature apply not only to the LAC’s findings in relation to primary facts, i.e. those which are directly established by evidence, but also to secondary facts, i.e. those which are established by inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact. (See *Magmoed v Janse Van Rensburg and Others* 1993 (1) SA 777 (A) at 810H – 811G). It follows that it is not open to this Court to depart from a finding of fact by the LAC merely on the grounds that this Court considers the finding to be wrong or that the LAC has misdirected itself in a material way or that it has based its finding on a misconception. It is only where there is no evidence which could reasonably support a finding of fact or where the evidence is such that a proper evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made the finding that this Court will be entitled to interfere.”

[6] This Court therefore, on the strength of these authorities, is required to determine as question of law whether on the material placed before the arbitrator during the arbitration proceedings, there was no evidence which could reasonably have supported such findings and/or whether on a proper evaluation the evidence placed before the

arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings.

[7] It was submitted by Mr Maasdorp, who appeared on behalf of the appellant, that the appropriateness of this approach becomes clear when one considers the alternative, namely, that if conclusions that no reasonable court could agree with are indeed effectively untouchable on appeal, it will mean that this Court will have to close its eyes (figuratively speaking I may add) and ignore clear instances where the evidence on record presented in the arbitration proceedings clearly does not support one or more factual findings by the arbitrator.

[8] The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances.

### **Arbitration proceedings**

[9] The appellant, House & Home is a furniture and appliance store operating under the Shoprite Group of Companies in the Republic of Namibia. The first respondent was employed by the appellant as a branch manager until his dismissal on 10 September 2010.

[10] Mr Blessing Nyandoro a regional administration manager employed by OK Furniture (also belonging to the Shoprite Group of Companies) was the chairperson of the disciplinary hearing.

[11] He was called to testify in the arbitration proceedings regarding what transpired during the disciplinary hearing.

[12] The first charge as it appears on the record of the disciplinary hearing proceedings was: "Paying petty cash on job numbers, quotations and receipts. Doing split payments on one invoice". The second charge reads: "Extreme poor stock control resulting in a loss to the company of N\$154 839.72".

[13] It is common cause that a notice of suspension was served on the first respondent on 6 September 2010 at 16h00 and thereafter at 17h00 a notice to attend a disciplinary hearing on 9 September 2010. Mr Frans Breuer, a regional administration manager, was the initiator in the disciplinary hearing.

[14] Mr Nyandoro testified in respect of the first charge that the petty cash facility is intended mainly for the purchase of small items. The branch manager may authorise withdrawals from the cashier up to the amount of N\$250.00. In respect of expenses between N\$250.00 and N\$1 000.00 authority by means of an authority code must be obtained from the regional administration manager.

[15] Payments may only be made on the original tax invoice and not on the basis of a job card, a quotation or a receipt. It is also prohibited to split an invoice. Splitting occurs where an amount exceeds the amount of N\$250.00. For example an invoice (exhibit 50) was for an amount of N\$880.00. Instead of obtaining the required authority code, document numbers showed the splitting of the amount of N\$880.00 into withdrawals of N\$250.00, N\$250.00, N\$250.00 and N\$130.00. Exhibits of other splittings and payments on job cards, quotations and receipts authorised by first respondent were received during the disciplinary hearing. The arbitrator found the first respondent guilty in respect of the

first count. There was no cross-appeal by the first respondent in respect of this conviction.

[16] In respect of the second charge Mr Nyandoro testified that the evidence was that stocktaking was done on 22 June 2010. The eventual amount short was N\$154 839.72. The regional manager as well as the first respondent part took in the stocktaking. The evidence was that sectional stocktaking was done during February 2010, April 2010 and May 2010 with small shortages well within the accepted limits set by the appellant. In February 2010 there was a shortage of N\$1 490.62, in April 2010 a shortage of N\$1 650.00 and in May 2010 there was no "variance".

[17] Sectional stocktaking involves the stocktaking of the whole stock taken on a weekly basis. For example during the first week of a month stock is taken only of fridges and stoves, in the second week only of bedroom suites etc so by the end of the month all the stock in the store had been taken.

[18] On 23 August 2010 stocktaking was done in respect of all the stock in the store. There was a loss of N\$3 089.80, again well within the limits set by the appellant. The limit in respect of stock losses set by the appellant is calculated by dividing the total loss by the total sales for a specific period, expressed as a percentage, should not exceed .02%.

[19] Mr Nyandoro testified about exhibits 86 – 89 which had been received as exhibits during the disciplinary hearing of the first respondent. These exhibits relate to the training of trainee managers. Exhibit 86, (FTM 1) is a training register in respect of manual procedures at the appellant. (FTM is an acronym for Further Training for Management); Exhibit 87 (FTM 2) relates to stock take procedures; Exhibit 88 (FTM 5) relates to HP and cash office procedures; Exhibit 89 (FTM 3) relates to stock movement. All these exhibits had been signed by the first respondent. Exhibit G, a training record signed by the first

respondent on 19 November 2009, indicated that the first applicant had received training *inter alia* in respect of stocktaking procedures from the period 6 February 2008 until 12 November 2008. At the bottom of Exhibit G is a section with the heading: "Panel Review Comments". Underneath this heading appears the following:

"Ricardo Majiedt has been tested, and found to be competent in all the above modules, and thus to be appointed as a branch manager with House & Home."

[20] Mr Nyandoro during cross-examination testified that damaged stock (d-codes) could not have attributed to the loss of stock discovered during the June 2010 stocktaking. A d-code item is marked down but it cannot affect stock take as long as such item is in the store. It can only affect stock take where such item is missing.

[21] Mr Nyandoro also testified in relation to the salary advices (payslips) of the first respondent which has been received as exhibits during the disciplinary hearing. Exhibit C (dated 30 November 2009) reflects the basic salary of the first respondent in the position of sales manager as N\$11 123.98. Overtime (non standard) is reflected as N\$1 960.00. Exhibit 92 (dated 31 December 2009) reflects his basic salary in the position of branch manager as N\$11 123.98. Travel/car allowance was N\$3 200.00. Merit bonus was N\$5 560.00. Mr Nyandoro testified that although the basic salary remained the same, a branch manager was entitled to additional benefits e.g. a car allowance and an incentive bonus for which a sales manager was not entitled to. Mr Nyandoro denied during cross-examination that there would be an automatic increase in the basic salary should an employee be promoted from the position of sales manager to that of branch manager

[21] Mr Nyandoro testified that two managers, one of the Walvis Bay branch and one from Katima Mulilo branch had been dismissed on charges similar to count 1. He conceded although it appears from the disciplinary hearing record that the respective

parties (i.e the first respondent and the initiator) were required to address him the next day after his ruling on the merits in respect of the two charges, that he was not sure whether he had received any evidence in mitigation of the sanction, either in writing or orally from the first respondent.

[22] It must be accepted in my view in the absence of any documentary proof, that the first respondent had not been given the opportunity to address the chairperson of the disciplinary hearing prior to the announcement of the sanction imposed.

[23] Mr Nyandoro testified that the first respondent started to work for the Shoprite Group of Companies during October 2002.

[24] The second witness called by the appellant (respondent during the arbitration proceedings) is Cecilia Otto who testified that she was an administration supervisor employed by the appellant. She confirmed that exhibits 86 – 89 were manuals and that employees had to study those manuals and that she, together with first respondent, had written tests on those manuals. She testified that the information contained in those manuals were sufficient, to enable her to perform her duties. She testified about the procedure regarding petty cash withdrawals. She further admitted that she was given a written warning for not following procedures in connection with petty cash withdrawals. She was not subjected to a disciplinary hearing prior to receiving this written warning.

[25] The first respondent testified that he was employed at House & Home from 30 March 2006 until the end of April 2007 when he resigned. He returned on 10 March 2008 when he was again offered the position of sales manager. On 10 September 2010 he was dismissed. He testified that he started at Maerua Mall branch and was thereafter transferred to the Wernhill branch in Windhoek. His explanation regarding the huge stock loss of N\$154 839.72 was that there was a big sale of second hand stock at the Lafrenz



Warehouse to the value of N\$144 000.00. Furthermore there was no proper stock handover when he was transferred from Maerua branch to Wernhill branch. There was according to him, also no investigation as to what had happened to the missing stock. He denied receiving any formal in service training, stating that they were required to study manuals and that he wrote tests, sometimes. He admitted that he signed exhibit G on 19 November 2010 but that in spite of his signature appearing on this document he was not competent or qualified in respect of the manuals referred to in that document. He testified that he was instructed to sign this document and that "they" would come back to him on the question of training. He testified that he signed Exhibit G during August 2010 after he had been instructed by Mr Frans Breuer to do so. He testified that he resigned on 10 November 2009 and the document was signed on 19 November 2009 under the following circumstances: He resigned because his salary was not sufficient and he received a position at Pep Stores as a manager. First respondent then testified as follows: "So I said to the guys otherwise you, otherwise, or you give me the branch or sign me off whatever training must be done or I go. They said okay, okay, okay, we will make up something, we will sign that the training has been done and everything and you sign and then you stay with us".

[26] It is not clear from the record who the "guys" were to whom first respondent referred to. He further testified that he was promised a minimum raise of N\$1 500.00 per month raise in salary plus a car allowance in his position as branch manager.

[27] Mr Mbaeva who appeared on behalf of the first respondent in this appeal submitted with reference to the provisions of section 33(1)(a) of the Labour Act 11 of 2007 that the test for a valid dismissal is two-fold, namely, it must be substantially and procedurally fair. Regarding procedural fairness, he submitted that the requirements are that an employee must be informed of the charges against him or her, the misconduct

must be explained to the employee, and that the employee must be afforded the opportunity to answer to the charges.

[28] Mr Mbaeva further submitted that there was no proper disciplinary hearing at all, alternatively the disciplinary hearing was not procedurally fair for the following reasons:

- (a) appellant failed to produce a valid charge sheet;
- (b) the first respondent was not asked to plead to any charges;
- (c) the first respondent did not plead to any charge; and
- (d) the chairman of the disciplinary hearing failed to follow a fair procedure by omitting to invite the first respondent to present mitigating factors prior to the pronouncement of the sanction imposed.

[29] All these afore-mentioned factors, it was submitted, severely curtailed the first respondent's ability to respond to the action taken against him by the appellant.

[30] Mr Mbaeva submitted in respect of the second count that the appellant had failed to prove the charge of extreme poor stock control. Finally it was submitted that the disciplinary hearing was invalid *ab initio*, thus the dismissal of the first respondent was also invalid *ab initio*.

[31] In terms of the provisions of section 33(4) of the Labour Act, 11 of 2007 in any proceedings concerning a dismissal, if the existence of a dismissal has been established, it is presumed, unless the contrary is proved by the employer, that the dismissal was unfair.

[32] Since it is common cause that the first respondent has been dismissed, the onus is on the appellant to prove on a preponderance of probabilities that the dismissal was fair.

[33] It is accepted that a charge must be clearly specified in order for an employee facing a disciplinary inquiry to answer to such a charge and if an employee is unaware of a specific charge, such employee would be unable to prepare a defence thereto. However a charge for the purpose of a disciplinary hearing need not be drawn up with the precision of an indictment in a criminal trial, as long as the employee is given sufficient information to ascertain the alleged misconduct especially if an employee is aware of the nature of the charges prior to the disciplinary hearing.

[34] The notice to attend a disciplinary hearing received by the first respondent on 6 September 2010 at 17h00 referred to the charges "as per appendix". No such appendix forms parts of the record of the proceedings before the arbitrator. It is for this reason therefore not clear whether or not the first respondent was aware of the nature of the charges prior to the disciplinary hearing and whether he was for this reason unable to prepare his defence. It also does not appear from the record of the disciplinary hearing that the first respondent objected to the fact that he was unaware of the charges against him.

[35] The arbitrator found that the fact that the first respondent was not given the opportunity to plead to the charges and was not requested to submit mitigating factors amounted to an unfair procedure. However regarding the issue of short notice of the disciplinary enquiry, the arbitrator found "no tangible evidence, suggesting that, as a result, the applicant has suffered prejudice..." There was no cross-appeal by the first respondent in respect of this finding of the arbitrator.

[36] In respect of the issue of mitigating factors, the first respondent testified that he would have, given the opportunity during the disciplinary hearing, submitted particulars regarding his personal circumstances, e.g the fact that he was married and the father of two minor children etc. It must be stated that in addition to the personal circumstances of

an employee, a presiding officer at a disciplinary hearing should take into account other factors which may have a bearing on the appropriate sanction to be imposed, such as the length of service of an employee, his or her disciplinary record, the gravity of the offence, and whether the employer could reasonably have expected to continue with the employment relationship. Thus what weight an employer (by means of a disciplinary inquiry) or an arbitrator or a court should attach, if any, to the personal circumstances of an employee in considering whether a dismissal is an appropriate sanction would depend upon various factors. Excessive leniency on the basis of personal circumstances may expose an employer to an attack on the grounds of inconsistency. (See J Grogan *Dismissal, Discrimination and Unfair Labour Practices* 1 ed. (2009) ).

[37] The question whether procedural defects *per se* may render a dismissal unfair must be considered with regard to the presence or absence of substantial fairness. This in turn would entail an enquiry whether the appellant has proved that a valid and fair reason existed for the dismissal of the first respondent.

[38] In respect of the first count the first respondent did not appeal against the finding of the arbitrator confirming the conviction of the disciplinary hearing for paying out petty cash on job cards, quotations and receipts, and doing split payments on invoices. The uncontested evidence during the arbitration proceedings was that two managers who had been convicted of this misconduct had been dismissed. Thus even if it is found that the conviction on the second counts was not for a valid or a fair reason, the dismissal of the first respondent on the strength of a conviction on the first count was done for a fair and valid reason.

[39] Regarding the second count the arbitrator found that appellant failed to prove extreme poor stock control and found that it cannot be safely said that the first respondent was adequately trained.

[40] It is common cause that the first respondent's contract of employment, in paragraph 21 provides as follows:

**"21. Loss Control/Security**

Effective stock control and security are of the utmost importance to the company's business. Stock loss affect the viability of your branch and your job security. In this regard you will be required to:

21.1 ...

21.2 comply with any security measures and procedures instituted by the company and familiarise yourself with such measures and procedures."

[41] It is common cause that a branch manager is accountable for the whole stock in his or her branch.

[42] The arbitrator by finding that not all stock losses could be attributed to the first respondent alone failed to properly consider or failed to attach adequate weight to the following factors:

- (a) Mr Nyandoro's uncontested evidence that the first respondent completed sectional stock counts for the Wernhill branch during February, April and May 2010 which showed stock variances at acceptable levels;
- (b) the stock losses for June 2010 amounted to N\$154 839.72 after adjustments;
- (c) stock take during August 2010 confirmed that nothing of the stock loss during June was recovered;
- (d) Mr Nyandoro's undisputed evidence that stock on d-codes (i.e. stock which had to be destroyed, sold at reduced prices or sent back to manufacturers for rebate) had no influence on the June stock loss;

- (e) Mr Myandoro's evidence that while it was possible that d-stock could have been moved from Wernhill branch to Maerua branch such a movement would have had no influence on the June 2010 stock loss at Wernhill branch;
- (f) the first respondent's version that goods had been moved from Wernhill branch to Maerua branch without proper record keeping was never put to appellant's witnesses during cross-examination.

[43] The first respondent assumed duties during November 2009 at Wernhill branch. The first respondent's explanation for the stock loss during June 2010 is the movement of damaged stock in March 2010 to an auction in Lafrenz Industrial area and the movement of damaged stock to Maerua branch, which was done hastily.

[44] The arbitrator found that the first respondent's transfer from Maerua Mall to Wernhill was done hastily and there was no adequate time for handing over stock and that on a balance of probability some stock losses could have occurred prior to the transfer.

[45] If there were stock losses prior to the first respondent's transfer to Wernhill during November 2009 and stock losses during March 2010 when damaged stock had been moved to the Lafrenz auction, the stock losses would have been revealed during the sectional stocktakings in February 2010, April 2010 and May 2010. However the variances during these stocktakings were either non-existent or within acceptable limits. The logical conclusion is that the June 2010 stock loss must have occurred *after* May 2010. The explanation by the first respondent for the June 2010 stock losses does not hold water and accordingly, there is no plausible explanation for these stock losses.

[46] The finding by the arbitrator that the charge of "extreme poor stock control resulting in a loss of the company of N\$154 839.72 was not proven, hence it lacked

substantive fairness” is not a finding any arbitrator could reasonably have reached applying the applicable legal principles, in alternatively that it is not a finding on a proper evaluation of the evidence the second respondent could have reached.

[47] In respect of the issue of training the arbitrator found that the fact that the first respondent wrote a test cannot be safely said that he was trained. With reference to exhibit G (the training record signed by the first respondent) the arbitrator reasoned that first respondent admitted signing that he had been tested in respect of the FTM manuals, but that first respondent denied having received such training. The arbitrator then held that in the absence of any testimony of Mr Frans Breuer, confirming that the first respondent had in fact received the relevant training, first respondent’s denial having received such training “remains unrefuted evidence” that the first respondent was not really trained. Therefore since the first respondent was never properly trained he was not able to understand his responsibilities and duties as a branch manager.

[48] On a proper evaluation of the evidence presented during the arbitration proceedings, no reasonable arbitrator could have made a finding exonerating in effect the first respondent from his accountability in respect of the June 2010 stock losses, and for the following reasons:

[49] Ms Cecilia Otto confirmed that the first respondent wrote the tests as identified in the register with her. It was never disputed during cross-examination that the first respondent wrote the tests with her and neither was it disputed that they ever received the results of such tests. The first respondent admitted that he received instructions to study the manuals in order to enable him to do his work as branch manager but testified that he did not know whether he passed those tests and denied having received any certificates. The first respondent did not during the arbitration proceedings specify which training he did not receive.

[50] The first respondent never prior to the arbitration proceedings complained about this lack of training in his managerial position and did not confront Mr Breuer during the disciplinary hearing that he was never properly trained.

[51] It appears to me that the first respondent attempted during the arbitration proceedings to escape his responsibilities as a branch manager, in particular the consequences of the June 2010 stock taking, by shielding behind his purported lack of training.

[52] It is significant that the first respondent during the arbitration proceedings admitted to conduct which in my view is akin to extortion when he testified that he informed "the guys" that they should appoint him as branch manager, irrespective of his lack of training as a branch manager, failing which, he would resign. The appellant readily agreed to it, according to the first respondent, and he i.e. first respondent thereafter fraudulently signed the relevant registers (exhibit G) pretending that he had received the relevant training and was thus competent to be appointed as branch manager.

[53] The only reasonable inference from this testimony is that the first respondent's purpose was to obtain financial benefits in circumstances where he was not entitled to such financial benefits.

[54] The first respondent is disingenuous, in the first instance, by assuming the risk of being held accountable for stock losses, in his capacity as branch manager, and then subsequently, manoeuvring to avoid being held accountable on account of his purported lack of competency as a branch manager.



[55] To reward the first respondent, by reinstating him as branch manager, under these circumstances would, in my view, be a perversion of the law and this Court will not allow the first respondent to benefit from his extortion and fraudulent conduct.

[56] It is common cause that the first respondent had a history of poor stock management. He had received a written warning on 15 September 2009 for poor work performance in circumstances where a previous stock taking resulted in a loss of N\$53 856.00.

[57] In respect of the failure to consider any mitigating factors by the chairperson of the disciplinary hearing the learned author Grogan stated the following:

“An employer is not required to take mitigating circumstances into account merely because there evoke sympathy. The test is whether, taken individually or cumulatively, they serve to indicate that the employee will not repeat the offence. Employees accused of misconduct are thus faced with a stark choice, they can either deny the commission of the offence in the hope that the employer will not be able to prove it; or they can “confess” and apologise in the hope that their remorse will count in favour when mitigation is considered. The Labour Appeal Court has made it plain that the employee who chooses the former and fails cannot expect sympathy.”

(See J Grogan *Dismissal, Discrimination and Unfair Labour Practices* 1 ed at 235 – 236).

[58] The first respondent never admitted guilt on either charge. This was a factor which could not have been considered by the chairperson of the disciplinary hearing.

[59] Grogan at 180 (*supra*) confirmed the legal position that there is nothing contradictory about a finding that a dismissal was thoroughly warranted, but unfair because the employer followed an unfair procedure. The distinction between procedural fairness and substantial fairness affects the relief which may be granted, e.g. an

employee whose dismissal is procedurally unfair but substantially fair is not entitled to reinstatement and may, depending on the gravity of the offence, be denied compensation.

[60] This Court in the unreported judgment in *Windhoek Observer Publishers (Pty) Ltd v Alva Mudrovic* (Case No. LCA 44/2008 delivered on 14 October 2011) held that even if a dismissal is tainted by arbitrariness and an unfair procedure, such a dismissal is not necessarily unfair. (See also *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC); *Kausiona v Namibian Institute of Mining and Technology* NNLP 2004 (4) 43 NLC at 50; *Kahoro and Another v Namibia Breweries Ltd* 2008 (1) NR 382 (SC) para. 43).

[61] This Court in *Windhoek Observer Publishers (supra)* referenced with approval to a South-African Labour Appeals Court decision in *De Beers Consolidated Mines Ltd v CCMA and Others* (2000) 21 ILJ 1051 (LAC) at 1059D – E, where the following appears:

“Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of recommitment to the employer’s workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.”

[62] This is exactly what happened in the present matter. The risk of continuing the employment relationship was simply a risk unacceptably great to take especially in view of the seriousness of the offence of stock loss reflected in the second count, the previous conviction of a similar offence, the failure of the first respondent to take remedial action after the previous substantial stock loss, and the irredeemable trust relationship between the appellant and the first respondent.

[63] The arbitrator materially misdirected himself in law by ordering the reinstatement of the first respondent. It is a finding, on a proper evaluation of the evidence a reasonable arbitrator would not have reached. This finding of reinstatement stands therefore for afore-mentioned reasons be set aside.

[64] Regarding the issue of first respondent's salary the second respondent in the analysis of the evidence presented during the arbitration proceedings expresses himself as follows on this issue:

“As for the correct salary of a Branch Manager and benefits associated with thereto, the respondent was at pains to specifically refer the proceedings to its policy in this regard. If the allegation by the applicant that the other Branch Manager is remunerated higher than him is correct and true, then in the absence of a plausible justification, that action, is not only grossly unfair but also tantamount to **unfair discrimination** which is prohibited by the Namibian Constitution *and section 5(1)(g) and (2) of the Labour Act.*”

[65] In his reward the second respondent ordered “that the respondent **House & Home** must make it known its Remuneration policy to its employees in order to avoid discrepancies when it comes to remuneration packages of employees of the same rank (see **section 5 of the Labour Act as a whole**)”.

[66] The appellant in its amended notice of appeal stated as one of the grounds of appeal the arbitrator's finding that the appellant's failure to remunerate the first respondent at the same level of “*the other*” Branch Manager, is grossly unfair and amounts to unfair discrimination, contrary to sections 5(1)(g) and (2) of the Labour Act 11 of 2007.

[67] Mr Maasdorp in his heads of argument submitted that the arbitrator erred in law by treating it as a unfair labour practice since unfair labour practices are circumscribed in the

Labour Act, and secondly, that a complainant in a dispute concerning an alleged discriminatory practice in terms of the provisions of section 5(2) of the Labour Act *must establish the facts that prove the existence of discrimination* and that the first respondent has failed to do so. This Court was referred to relevant authorities in this regard.

[68] I do not deem it necessary to consider this ground of appeal and the submissions in support thereof for the following reasons:

firstly, the arbitrator, in my view, if one has regard to the language used in his findings, has never found that the appellant was guilty of an unfair discriminatory practice by differentiating between the salary of the first respondent and the salary of another branch manager.

[69] The arbitrator found that *if the allegation by the first respondent is correct*, without making such a finding. The arbitrator's evaluation of the evidence in this regard is incomplete. It follows therefore, in my view, that since there was no definitive finding in this regard no subsequent award is justified. In order to underline this conclusion one has to look at the claim of the first respondent in this regard and the arbitrator's award in relation thereto.

[70] The first respondent claimed in his particulars of dispute "the amount of N\$86 703.00 being in respect of salary for the position of Branch Manager but not compensation for."

[71] The arbitrator never made an award in this regard but instead ordered the appellant to make known its remuneration policy to its employees. The first respondent did not lodge a cross-appeal in respect of the arbitrator's failure to make any award in respect of the perceived inequality of salaries.

[72] In respect of the issue of overtime the first respondent claimed payment of the amount of N\$20 768.00 being in respect of overtime worked but not compensated for at the appropriate applicable overtime rate. The award by the second respondent stipulates that the appellant must pay the first respondent "all his overtime differences which were not paid according to his basic salary of a Branch Manager".

[73] The award does not state what the basic salary of a branch manager is which should form the basis upon which overtime is to be calculated, in view of the claim that the first respondent is entitled to a higher basic salary in his position of branch manager.

[74] The first respondent in his heads of argument stated his claim in respect of overtime as follows:

"Payment of the amount of N\$1 754.90 for overtime worked not paid for at the correct hourly rate for the period from 1 December 2009 to 30 June 2010.

Payment of the amount of N\$3 277.12 for overtime worked not paid for at the correct hourly rate for the period from 1 July 2010 to 10 September 2010"

[75] The total amount thus claimed for according to first respondent's heads of argument is an amount of N\$5 032.02 which amount differs markedly from the N\$20 768.00 claimed in his particulars of dispute. It is not clear to which amount the arbitrator's award refers to.

[76] There was no evidence before the arbitrator on the exact overtime rate applicable to a "Branch Manager" and there was no finding by the arbitrator what "the correct remuneration rate as a Branch Manager" was.

[77] It is trite law that a judgment must be certain and a logical consequence of this is that a judgment is invalid which does not end a suit, but which is doubtful and gives birth to a fresh suit.

[78] The reward by the arbitrator instead of resolving this part of the dispute simply creates another dispute. On this basis, this part of the awards falls to be set aside.

[79] In the result the appeal is upheld and the reward made by the second respondent on 27 April 2011 is set aside and substituted with the following order:

The first respondent's dispute referred to the second respondent for arbitration on 9 November 2010 with arbitration number CRW 918-10 in respect of an alleged unfair dismissal and unfair labour practice is hereby dismissed.

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**HOFF, J**

**ON BEHALF OF THE APPELLANT:**

**ADV. MAASDORP**

**Instructed by:**

**GF KÖPPLINGER LEGAL PRACTITIONERS**

**ON BEHALF OF THE 1<sup>ST</sup> RESPONDENT:**

**MR MBAEVA**

**Instructed by:**

**MBAEVA & ASSOCIATES**

**ON BEHALF OF THE 2<sup>ND</sup> RESPONDENT:**

**NO APPEARANCE**

**Instructed by:**