REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2021/00082

In the matter between:

COCA-COLA NAMIBIA BOTTLING COMPANY (PTY) LTD **APPELLANT**

and

SIMSON NGHIYOONANYE **FIRST RESPONDENT**
N N HAMUKWAYA **SECOND RESPONDENT**
LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Coca-Cola Namibia Bottling Company (Pty) Ltd v Nghiyoonanye* (HC-MD-LAB-APP-AAA-2021/00082) [2023] NALCMD 24 (7 June 2023)

Coram: PARKER AJ
Heard: **28 April 2023**
Delivered: **7 June 2023**

Flynote: Labour Law – Arbitration – Award – Appeal against – Power to interfere circumscribed – Court upholding the arbitrator's decision that dismissal is unfair and awarding reinstatement of employee – Court finding award appropriate in the circumstances – Court finding dismissal to be unfair and awarding reinstatement – Court upholding the arbitrator's decision.

Summary: Labour Law. Employee found guilty of gross insolence by first-instant internal disciplinary hearing body. An internal appeal body confirmed the guilty verdict and the punishment of dismissal. The charge of gross insolence arose from the employer's white Regional Logistics Manager **B** overhearing the employee and his co-employees making comments that the Covid-19 pandemic was brought to Namibia by white people, and so all white people should be sent out of the country to the places from where they came to Namibia. **B** approached the group of workers and asked the said remarks to be repeated. The first respondent repeated the remarks, whereupon he was charged with gross insolence. The arbitrator found that the statement was not directed at **B** or any other white manager or white employee. It was a general statement directed to no person in particular. The arbitrator found that the charge was unproved and, therefore, the employer had no valid and fair reason to dismiss the employee. The court upheld the arbitrator's decision that the employee's dismissal was unfair, within the meaning of s 33 (1)*(a)* of the Labour Act 11 of 2007. The arbitrator ordered reinstatement of the employee. Court found reinstatement to be an appropriate remedy in the circumstances.

Held, where there is no misdirection on the fact, the presumption is that the arbitrator's conclusion is correct and the court will only reverse a conclusion of fact if convinced that it is wrong.

Held, further, court entitled to interfere only if the arbitrator has exercised discretion wrongly based on applicable principles or when discretion was exercised capriciously and in a biased manner and not on judicial grounds or for a sound reason.

Held, *further*, insolence in the employment situation is based on the employee's obligation to show common respect and good manners towards his or her employer; and has been described as impudence, cheekiness, disrespect and rudeness directed to the employer; and 'employer' includes managing directors, managers, supervisors and suchlike officials standing in authority over the employee in question.

ORDER

1. The arbitrator's order that the first respondent's dismissal is unfair is upheld.

2. The arbitrator's order that the first respondent be reinstated is upheld; and the appellant must on or before 10 July 2023 reinstate the first respondent in the same position or a reasonably comparable position as that in which he had been before his dismissal.

3. The arbitrator's order granting compensation to the first respondent is upheld, but the amount is replaced with the following:

   The appellant must on or before 31 July 2023 pay to the first respondent's legal representatives of record in favour of the first respondent an amount equal to the first respondent's remuneration at the time of his dismissal for 12 months, plus interest thereon at the rate of 20 percent per annum, calculated from the date of this judgment to the date of full and final payment.

4. There is no order as to costs.

5. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The first respondent ('the employee') was an employee of the appellant ('the employer') from 2 January 1990 to 26 March 2020 (that is, a period of 30 years) when he was dismissed. The main charge of misconduct of which the employee was found guilty and dismissed was gross insolence. He was found guilty and

dismissed by the first-instance disciplinary hearing body. An internal appeal body confirmed the conviction and punishment.

[2] Aggrieved by the decision to dismiss him, the employee referred a complaint to the Labour Commissioner. At a subsequent arbitration, the arbitrator found the dismissal to be unfair – substantively and procedurally. The employer has appealed against the whole arbitration award that was issued on 30 November 2021 under Case No. CRWK555-2. Mr De Beer represents the appellant, and Mr Marcus the first respondent.

[3] As I have said previously, the principal misconduct with which the employee (the first respondent) was charged is gross insolence. To the credit of the arbitrator, I shall say this. In the award, the arbitrator laid out a sufficient and satisfactory summary of the evidence of the employee and that of the employer. He weighed both versions properly.

[4] The basis of the gross insolence charge is precisely this: The employee and other employees were having a discussion among themselves. Mr Bezuidenhout, the employer's Regional Logistics Manager was passing by the discussion group. He overhead the group saying that white people are the ones who brought Corona Virus into Namibia and that white people should leave the country (Namibia) because they do not belong here. Bezuidenhout, being a white man, went over to the group and asked the employees to repeat the comment. The comment was repeated. The evidence is that after a while, Mr Van Wyk, the employee's supervisor, instructed the employee to go over to Bezuidenhout to apologise to him, because Van Wyk felt that Bezuidenhout had been offended by the statement. The employee obliged because he was instructed by his supervisor to do so. As a matter of law, the apology turns on nothing. The apology cannot on any pan of legal scales make the statement that was repeated to Bezuidenhout amount to 'gross insolence' towards Bezuidenhout.

[5] The point to make is this – and it is based on common sense. On the record, it is incontrovertible that the statement was not directed to Bezuidenhout or any other white manager or employee of the employer. Indeed, when Bezuidenhout asked the

employee to repeat the statement, the statement had been made already. No evidence was adduced to establish that the statement was directed to Bezuidenhout or any named white manager or employee of the employer.

[6] I accept Mr De Beer's submission that insolence is a common law misconduct in the employment situation whether or not the employer's disciplinary code says so. That is all that I accept of Mr De Beer's submission on the point.

[7] Insolence in the employment situation is based on the employee's obligation to show common respect and good manners *towards his or her employer*.[1] (Italicised for emphasis) Insolence has been described as impudence, cheekiness, disrespect and rudeness.[2] To constitute a misconduct in an employment situation, it should be directed towards the employer.[3] The 'employer' includes managing directors, managers and supervisors and suchlike officials who stand in authority over the employee in question.

[8] The arbitrator found as a fact that the statement complained of was not directed towards **B** or any particular white person in the employ of the employer. I do not find a misdirection on the part of the arbitrator on the fact, and so I cannot reverse the arbitrator's conclusion on the fact because I am not convinced that he was wrong.[4]

[9] Accordingly, I cannot fault the arbitrator's conclusion that the statement was a general comment; and that the employer has failed to discharge the onus cast on it by s 33 (1)*(a)* of the Labour Act 11 of 2007. Having so decided, it serves no purpose to consider whether the dismissal was unfair in terms also of s 33(1)*(b)* of the Labour Act 11 of 2007. The reason is simply that even where only the requirement in para *(a)* of s 33 (1) has not been satisfied by the employee, the dismissal in question is unfair.[5]

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[1] PAK Le Roux and A van Niekerk *The South African Law of Unfair Dismissal* (1994) at 138.
[2] *C'CAWASU v Wooltru Ltd t/a Woolworths* (Roundburg) (1989) 10 ILJ 311 (IC).
[3] See footnote 1.
[4] See *Nathinge v Hamukonda* [2014] NAHCMD 348 (24 November 2014) referred to in para 10 above.
[5] See *Rossam v Kraatz Welding Engineering (Pty) Ltd* 1998 NR 90 at 92.

[10] The final written warning that was issued to the employee in August 2019 cannot assist the employer. A final written warning will be an aggravating factor when determining whether there was a fair reason to dismiss when the employee has committed a serious misconduct that otherwise on its own would not have attracted a dismissal.[6] But in the instant case, the issue of a fair reason to dismiss does not arise because the arbitrator found that there was no valid reason to dismiss; and I have not faulted his decision.

[11] In *Germanus v Dundee Precious Metals Tsumeb*,[7] upon the authorities, I applied the following principles on appeals like the instant one:

'[4] Appellant relies on the grounds of appeal put forth in her further amended notice of appeal. Before considering those grounds one by one, I set out, hereunder; some principles that are relevant in these proceedings and that should inform the manner in which I approach consideration of the appeal.

(a) 'The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall…

> "The notice also serves to inform the respondent of the case it is required to meet … Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case (*S v Kakololo* 2004 NR 7 (HC), per Maritz J)."

(b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal being an inferior tribunal. The Labour Court as an appeal court will not interfere with the arbitrator's findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).)

(c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on fact if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion, it must uphold the trier of fact. (See *Nathinge v Hamukonda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014.)

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[6] *Kausiona v Namibia Institute of Mining and Technology* NLLP 2004 (4) 43 NLC.
[7] *Germanus v Dundee Precious Metals Tsumeb* 2019 (2) NR 453 (LC).

(d) Principles justifying interference by an appellate court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-1).) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have gone the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555). See *Edgars Stores (Namibia) Ltd v Laurika Olivier and Others* (LCA 67/2009) [2010] NAHCMD 39 (18 June 2010) where the Labour Court applied *Paweni and Another* and *Powell*.

(e) Respondent bears no onus of proving that the decision of the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong. See *Powell v Stretham Manor Nursing Home*. If the appellant fails to discharge this critical burden, he or she must fail.'[8]

[12] It is worth noting that the principle enunciated by the House of Lords in the English case of *Powell v Strethan Manor Nursing Home* referred to in para 9 above has been followed by the court (per Smuts J) in *Witvlei Meat (Pty) Ltd and Others v Disciplinary Body for Legal Practitioners and Others* thus:

'[A]n appeal under s 89 of the Labour Act 11 of 2007 is an appeal in the ordinary sense. It entails a rehearing on the merits but limited to evidence and information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong.'[9]

[13] On the evidence and information on which the decision under appeal was given, I do not find any irregularities or misdirections on the law or fact that are apparent on the record. I rather find that the arbitrator exercised his discretion on judicial grounds and for a sound reason, that is, without bias or caprice or the application of a wrong principle when he found that the dismissal of the employee was substantively unfair in terms of s 33(1)*(a)* of the Labour Act 11 of 2007.

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[8] Ibid para 4.

[9] *Witvlei Meat (Pty) Ltd and Others v Disciplinary Body for Legal Practitioners and Others* 2013(1) NR 245 (HC) para 23.

[14] It remains to consider the award respecting reinstatement and compensation. As respects the award of reinstatement and compensation, too, I should determine the appeal on the principles and approaches set out in paras 9 and 10 above.

[15] As to reinstatement, I should say the following: The purpose of a duly completed Form LC 21, together with the Summary of Dispute, is to inform the other party, in the instant matter, the appellant employer, the case it has to meet at the conciliation and arbitration. In the employee's prayers in his Summary of Dispute, he put the employer on notice that he would ask for reinstatement. The employer was, therefore, called upon properly to meet the employee's claim of reinstatement. Moreover, in his statement of grounds for opposing the appeal, filed in compliance with Rule 17(16)*(b)* of the Labour Court Rules, the employee stated that the arbitrator's order of reinstatement was justified. The appellant was therefore called upon to adduce cogent, that is, sufficient and satisfactory, evidence to resist an order of reinstatement. The employer failed to do so. I do not find any cogent evidence adduced by the employer, tending to establish that the relationship between the two parties, ie the employer and the employee, has broken down, irretrievably.

[16] The arbitrator relied on authority[10] to come to the conclusion that reinstatement of the employee was in the circumstances an appropriate remedy. I cannot fault the reasoning and conclusion of the arbitrator. I cannot, therefore, interfere with his exercise of discretion to order reinstatement of the employee without offending *Paweni and Another v Acting Attorney-General*, *Powell v Stretham Manor Nursing Home*, *Witvlei Meat (Pty) Ltd and Other v Disciplinary Body for Legal Practitioners and Others*,[11] and *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee*.[12]

[17] Mr De Beer submitted that the appellant presented evidence to establish that the work relationship between the appellant and the first respondent has broken down irreparably. The evidence relied on by counsel is this: It is the lone, naked response to a question put to Mr Kroner, the employer's Warehouse Manager, as to how the company viewed the work relationship after this 'incident'. Kroner answered: 'It is damaged, and it will never be repaired again'.

[10] *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee* [2016] NALCMD 45.
[11] See paras 9-10 above.
[12] See *Namibia Diamond Corporation (Pty) Ltd v Henry Denzil Coetzee* footnote 8.

[18] The arbitrator found that 'no evidence was adduced to suggest that the relationship between the two parties has broken down'. I agree. The aforementioned lone, naked statement by Kroner cannot constitute evidence, in the sense that it cannot be proof or disproof of the fact that the employment relationship between the employer and the employee has broken down irreparably.[13] That statement has no probative value: It is not capable of proving the fact in issue.[14]

[19] In any case, the arbitrator found that the main charge of 'gross insolence' had not been proved, and that the employer has not a valid and fair reason to dismiss the employee, within the meaning of s 33(1)*(a)* of the Labour Act; and I have upheld that decision. It follows inexorably that there is no 'incident' to talk about when considering the claim of reinstatement.

[20] As I say, I cannot fault the arbitrator's exercise of discretion in ordering reinstatement. The arbitrator's decision is not perverse, calling for this appeal court's interference therewith.[15] I now proceed to consider the order of compensation.

[21] As to the amount of compensation ordered, the first thing to say is this: 'The compensation awarded in labour disputes cannot be equated with civil or delictual damages. The purpose of such compensation is not only to provide for the positive or negative interest of the injured party. There is an element of *solatium* present aimed at redressing a labour injustice.'[16] Thus, the order of compensation should follow as a matter of course to redress a labour injustice such as an unfair dismissal', as in the instant matter.

[22] In reaching the amount of compensation, the arbitrator did not rely on any credible and relevant evidence to assist him in exercising his discretion on judicial grounds and for a sound reason.[17] Moreover the order is not based on any acceptable principles and approaches.[18] It should be remembered, an award of

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[13] G D Nokes *An Introduction to Evidence* 4ed (1967) at 4;
[14] P J Schwikkard *Principles of Evidence* (1997) at 16-17.
[15] See *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC).
[16] *Pep Stores (Namibia) (Pty) v Iyambo and Others* 2001 NR 211 (LC) at 223F.
[17] *Paweni and Another v Acting Attorney-General* para 10 above.
[18] See *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 33 (7 August 2014).

compensation is not to punish the errant employer and enrich the employee. It is to recompense the employee in order to redress labour injustice.[19]

[23] I proceed to apply the *Shilongo* principles and approaches[20] in considering a just and reasonable amount of compensation. Like in *Shilongo*, the first respondent had put in 30 years of service before his unfair dismissal. In *Shilongo*, the court found that the employee's conduct had contributed markedly to his dismissal, and awarded an amount equal to the employee's four months' salary. In the instant matter, the court has found that the principal charge of misconduct was not proved. But unlike in *Shilongo*, in the instant matter, the award of compensation is on top of an award of reinstatement. Furthermore, in the instant matter, no evidence was adduced, establishing any efforts that the employee exerted to mitigate his losses.[21] For all these reasons, I hold that an amount equal to the first respondent's remuneration for 12 months meets the justice of the case. In the award, the first respondent's remuneration is shown as N$10 807,55 per month.

[24] Based on the foregoing reasons, the appeal fails except in respect of the amount of compensation. In the result, I order in the following terms:

1. The arbitrator's order that the first respondent's dismissal is unfair is upheld.

2. The arbitrator's order that the first respondent be reinstated is upheld; and the appellant must on or before 10 July 2023 reinstate the first respondent in the same position or a reasonably comparable position as that in which he had been before his dismissal.

3. The arbitrator's order granting compensation to the first respondent is upheld, but the amount is replaced with the following:

   The appellant must on or before 31 July 2023 pay to the first respondent's legal representatives of record in favour of the first respondent an amount equal to the first respondent's remuneration at the time of his dismissal for 12

[19] See *Shilongo v Vector Logistics (Pty) Ltd*; and *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*.
[20] *Shilongo v Vector Logistics (Pty) Ltd*, ibid.
[21] *La Croix Du Sud Holdings (Pty) Ltd t/a Truck & Cab v Indombo N.O.* [2018] NALCMD 29 (30 October 2018).

months, plus interest thereon at the rate of 20 percent per annum, calculated from the date of this judgment to the date of full and final payment.

4. There is no order as to costs.

5. The matter is finalised and removed from the roll.

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C PARKER

Acting Judge

APPEARANCES

APPELLANT:	P De Beer Of De Beer Law Chambers, Windhoek
FIRST RESPONDENT:	N Marcus Of Nixon Marcus Public Law Office, Windhoek