CASE NO.: LCA 34/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

NAMIBIA DAIRIES (PTY) LTD **APPELLANT**

and

ELIAS HANGOMBE **1st RESPONDENT**
REINHOLD NAKALANGA **2nd RESPONDENT**

CORAM: **MULLER J**

Heard on: 4 February 2011

Delivered on: 4 February 2011

REASONS FOR JUDGMENT

MULLER, J.: [1] Three employees of the appellant were dismissed after a disciplinary hearing. These three were the two respondents as well as a certain Nikanor. The disciplinary hearing was held on 26 November 2008 and presided by an employee of the appellant.

The respondents unsuccessfully appealed against their dismissal. Thereafter each the respondents filed a complaint in the District Labour Court on the ground of an unfair dismissal.

[2] The hearing in the District Labour Court commenced on 14 May 2009 with both complainants (respondents) legally represented by Ms Shilongo of the firm Sisa Namandje Legal Practitioners and by Mr Mark Kutzner of the firm Engling, Stritter and Partners who appeared for the appellant. After hearing evidence on behalf of the appellant and the respondents, the District Labour Court found in favour of the

respondents, namely that the dismissals of both respondents were unfair and ordered their reinstatement, as well as making compensatory orders.

[3] This appeal is against the decision of the District Labour Court. Heads of arguments were filed on behalf of the appellant and the respondents. In this court appellant was represented by Advocate Bassingthwaighte and the respondents by Ms Shilongo, respectively.

[4] At the commencement of the appeal and before hearing the arguments the court indicated to Ms Bassingthwaighte ,on behalf of the appellant, that the court requires her to address in the first instance a point raised by the court *mero moto,* namely whether the procedure followed by the Chairman of the Disciplinary Committee in dismissing the respondents from their employement had not been so procedurally unfair that it constituted a nullity. Ms Bassingthwaighte could not convince the court otherwise and in fact received instructions to accept the court's indication that the dismissal of each respondent constituted a nullity. The appeal was therefore dismissed. The following are the reasons for the dismissal of the appeal.

[5] Article 12 of the Namibian Constitution provides that any person is entitled to a fair trial by a court or a tribunal. A fair trial embraces the right of the person to be treated fairly, which includes the right to be present in the court or tribunal when he is tried and to respond to allegations made against him. Act 12(1)(d) specifically provides:

> "*All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.*"

[6] In the case of *Cape Dairy and General Livestock Auctions v Sim* 1924 AD 167 in respect of the sale of livestock on a Sunday, prohibited by an Act no. 28 of 1896, which Act made such a sale not only a crime, but an unlawful transaction, the court

referred to what the trial judge in the TPD had said, namely:

> "*It is the duty of the court not to enforce any contract which is in violation of the law, whether or not the parties raise the question.*"

(Eastwood v Shepstone 1902 TS 294: *Mahomed v Ispanhani* 1921, 90 L.J. K.B 821) In the same *Cape Dairy* case Innnes CJ said the following at 170:

> "*When a Court is asked to impose or uphold a contract which the law expressly forbids, it is not only justified but bound to take cognisance of the prohibition and consequent illegality. And that course has been repeatedly followed by the South African Courts.*"

In *Strydom v Die Land-en Landboubank van Suid Afrika* 1972 (1) SA 801 A it was held that where a statutory body acted *ultra vires* an Act, it has not acted in law, furthermore if the action of the statutory body is *ultra vires* and void, no cause of action can be founded on it against the statutory body. (Also *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA). The Appeal Court of South Africa further stated in *Yannakou v Apollo Club* 1974 (1) 614 (A) at 623G-624D that:

> *"…..it is the duty of the court to take the point of illegality mero moto, even if the defendant does not plead or raise it;…*"

[7] It is common cause that in considering whether a dismissal was fair or not, the court should first decide whether the procedure was fair and thereafter the court considers whether the dismissal was fair, or not. It is also common cause that the *onus* rests on the employer in respect of the question whether the employee had been unfairly dismissed or not. *(SPCA v Terblanche* NLLP 1998 (1) 148 NLC at 150). The court is also conscious of previous decisions of this court that in certain cases the dismissal of an employee had been considered not to be unfair, although the employer could not prove that a fair procedure had been applied, because there existed a fair reason for the dismissal. *(Kamanya and Other v Kuiseb Fish Products Ltd* 1996 NR 123 (LC); *Kahoro and Another v Namibia Breweries Ltd* 2008 (1) NR 382 (LC) and the unreported case of *H.S. Limbo v Ministry of Labour* in the Labour Court of Namibia, no LCA 01/2008, delivered on 10 February 2010.)

[8] The history of the matter that led to the charges against the respondents is briefly that they did not return 450 items of butter to the appellant, which items were apparently sent back by a client, Woerman and Brock. The respondents were respectively the lorry driver and assistant driver, charged with the delivery of products of the appellant (including butter) to its clients in Windhoek. Upon their return to the appellant's premises Nikanor signed for the return of the butter. All three of them were charged with the following charges, to which they all pleaded not guilty:

"*Charge 1: Dishonesty/Breach of Trust.*

Charge 2: Theft, alternatively unauthorised possession of company product."

Nikanor admitted to his senior Mr Albina Mbindina that he received the butter back, but sold it to a certain Portuguese speaking man. The respondents throughout denied their guilt and were adamant that they did return the butter to the appellant.

[9] At the end of the disciplinary hearing all three (the respondents and Nikanor) were found guilty and dismissed. It is not clear what happened to Nikanor subsequently. He apparently left Windhoek, but it is certain that he did not take the matter further. As mentioned, the respondents unsuccessfully appealed internally and thereafter lodged complaints in the District Labour Court. In that court several issues were dealt with, i.a. the fact that they were convicted on all the charges against them in the disciplinary hearing, the receipt of the butter by Nikanor, the time it would normally take to make deliveries, etc. These issues all pertain to the merits of the matter. However, in respect of the fairness of the disciplinary hearing, it seems that that important consideration was never in issue, except for the appellant's contention that because the chairman of the disciplinary committee worked according to a check list, a fair hearing was conducted.

[10] The disciplinary hearing was recorded, but Mr Justin Joe, who was responsible for the tape recording thought it wise to provide minutes of the hearing according to these notes, which he apparently verified against the tape recording. The minutes prepared by him were the only record of the proceedings available. There is no transmitted record of the disciplinary hearing. Mr Joe is an employee of the appellant

and testified in the District Labour Court to this effect on behalf of the appellant.

[11] The record of the disciplinary proceedings clearly indicates that the two respondents (and Nikanor) were not afforded a fair hearing and the procedure followed by the chairman of the disciplinary committee was fundamentally unfair. The following extracts from the minutes illustrate that the proceedings were so unfair that it constituted a nullity. On page 36 of the minutes of the disciplinary hearing the following appeared after the charges had been put to the two respondents and Nikanor:

"*Mr R Nakalonga and Mr E Hangombe were excused.*" That means that both respondents had to leave the room and with only Nikanor remaining. During that time the employer presented evidence by the head of the warehouse, Mr Albina Mbindama who gave evidence in respect of exactly the same situation that let to the charges against the respondents. His evidence was also used against the two respondents. On page 41 of the record, and apparently after Nikanor's case had been finalised, the following appears:

"*Mr David Nikanor was then excused and Mr Elias Hangombe was called in.*"

Evidently the second respondent still remained outside when Nikanor was sent out. The first respondent was then brought in and his case was dealt with. It is significant that Mr Albina Mbindama did not testify again and neither the first nor the second respondent heard his evidence and could cross-examine him. On page 44 of the record the following appears:

"*Mr Elias Hangombe was then excused and then Mr Reinhold Nakalonga was called in.*"

Evidently the first respondent had to leave the room and join Nikanor outside while the case of the second respondent was dealt with in his presence only. All three were then found guilty as charged. On page 47 of the record two inscriptions appear when the issue of mitigation regarding Nikanor and the two respondents were dealt with. The first inscription reads:

"*Mr Nikanor was excused and Mr E Hangombe called.*" This occurred after evidence by Nikanor was given in respect of mitigation. The first respondent then

repeated in mitigation that he does not understand why he was found guilty and did not provide anything in respect of mitigation. The second inscription reads:

"*Mr E Hangombe was excused and Mr R Nakalonga called.*"

[12] From the minutes of the proceedings in the disciplinary hearing of Nikanor and the two respondents it is abundantly clear that the chairman considered it fair procedure if only the person with whom he dealt with at a particular stage remains in the room and the other persons charged are sent out. They could consequently not hear what the evidence of a crucial witness, Mr Mbindama, was and were also not afforded the opportunity to cross-examine that person. Their constitutional rights were obviously infringed.

[13] What makes it obvious that the procedure followed by the chairman of the disciplinary hearing was procedurally wrong and unfair and prejudicial to the respondents is underlined by what happened during the cross-examination of the first respondent in the District Labour Court. The first respondent was criticized because he did not put certain questions to Mr Albina Mbindama during the disciplinary hearing. Mr Kutzner, representing the appellant at that stage, referred to Mr Mbindama's evidence. The first respondent stated that he heard that for the first time in the District Labour Court. Only when Mr Kutzner wanted to dispute this statement by the first respondent by referring to the minutes of the disciplinary hearing, did he realise that he could not pursue this line of questioning, because the respondent was not present when Mr Mbindama gave evidence before the disciplinary hearing. On page 267, line 26, to page 268, line 4, the following is recorded in the record of the proceedings of the District Labour Court:

> "*No, no, no I said Nikanor went to Mr Albina on a Sunday to confess that the botter (butter) did not come back to stock that is what Mr Albina testified whether he can recall that? ....<u>However, it was the first time to hear that yesterday when it was mentioned in this court. It was not even testified to in the hearing.</u>*
>
> *Interesting may I ask you to turn to page 38 please. <u>My apology Mr Chairman</u>*

he could not have heard that because he was not present at that time.

CHAIRPERSON: Ja, because they were then called one by one." (My underlining)

[14] It is a fundamental failure not to afford a person charged of an offence, even in a disciplinary hearing, to be present when evidence is given that involves him to hear such evidence and to cross-examine such a witness. One can only imagine what the situation would be if three accused are charged in a criminal trial and only one is allowed to be present when evidence is given involving him and the others sent out and not afforded the right to hear such evidence and to cross-examine that witness. S 158 of the Criminal Procedure Act, no 51 of 1977, as amended, (CPA) provides:

> "*Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.*"

In *S v Roman* 1994(1) SACR 436(A) the decision by the trial judge to order the removal of one accused because his presence in court made the other accused uncomfortable, was set aside on appeal, because it was held that the trial judge had no discretion to order the temporary removal of the other accused. The Appeal Court held that the provisions of S 158 are peremptory. *(Schmidt - Law of Evidence* at 9-47). Although S 158 of the CPA deals with criminal trials and is only mentioned by way of illustration, the same basic principle applies in respect of proceedings before a tribunal. This principle is emphasised by the provisions of Art 12 of the Namibian Constitution, referred to above, which specifically includes a tribunal.

[15] It is trite that the procedure to be followed in a disciplinary hearing is more flexible than that in a magistrate's court. *(Grogan - Dismissal, Discrimination and Unfair Labour Practices* - second edition, p 324). However it is fundamental that the person charged should be able to cross-examine any witness and he can only do that if he is present and able to hear what such witness testified. To simply follow a check list, while ignoring that fundamental right of the person charged does not make the

proceedings fair. In respect of the practice to follow a check list to constitute fair procedure *Grogan, supra,* has the following to say at p 332:

> " *It is difficult, if not impossible, to set out a complete list of the requirements of a fair procedure, and it may be dangerous to assume that fairness can be attained simply by following a prescribed checklist. Procedural fairness is a subtle concept; an employer who assiduously follows a prescribed procedure may nevertheless overlook some small but important step, which omission may prejudice the employee. Furthermore, a minor procedural lapse at the start of the process may infect subsequent stages of the procedure.*"

The two respondents' rights were infringed and they were undoubtedly prejudiced by the procedure followed by the chairman of the disciplinary committee. The consideration expressed in the *Kamanya case, supra,* that there was a reason for the dismissal, although the procedure in the disciplinary

hearing might not have been fair, it is not applicable here where a basic requirement of natural justice was absent. The respondents were clearly prejudiced by this unfair procedure.

[16] The law is in my opinion clear as set out in the cases referred to earlier herein. If the action not allowed by legislation or an agreement it is *ultra vires* and illegal, any decision in that regard constitutes a nullity. In the same vein the decision by the chairman of the disciplinary committee in respect of the two respondents (and Nikanor) constituted a nullity. From the minutes it appears that the chairman did not recommend to the employer that they be dismissed. He dismissed them. They could not have been dismissed and any actions taken by the chairman in that regard is illegal, constitutes a nullity and has no force and effect. This court is not only entitled to raise this issue *mero moto,* but is in fact duty bound to do it. It is surprising that it was never picked up that the dismissal of the two respondents by the chairman of the disciplinary committee was a nullity, namely after the disciplinary hearing, during the proceedings before the District Labour Court and even thereafter. In the light hereof the decision can not stand and the appeal against the decision of the District Labour Court has to be dismissed.

[17] When the current situation is approached from the view of whether an irregularity had been committed by the chairman of the Disciplinary Committee one cannot come to any other conclusion as the one that this court has arrived at. In the case of *S v Shikunga and Another* 1997 NR 156 (SE) Mahomed CJ considered not only the effect of the general, as well as the exceptional categories of irregularities committed during a trial, but also whether such an irregularity would constitute a constitutional breach. He came to the conclusion that it did not and that the common law in this regard remained unaffected since the adoption of the Namibian Constitution. If an irregularity was of the kind committed by the chairman of the Disciplinary Committee in respect of the respondents was committed in a criminal case, it would have been an exceptional category. Mahomed CJ formulated it as follows

> "*This was elaborated on in Mkhise (supra) where the court stated that in order to decide whether an irregularity falls into the exceptional category the enquiry is whether the nature of the irregularity was so fundamental and serious that the proper administration of justice and the dictates of the public policy regime it to be regarded as fatal tot he proceedings in which it occurred.*"

(S v Shikunga, supra at 165 J - 166A). In my opinion the principle remains the same, whether such an irregularity is committed in a criminal trial or in disciplinary proceedings before a tribunal. Such a fatal irregularity constituted a result that was a nullity.

[18] I have been tempted to award costs against the appellant, because the proceedings by the employer might be regarded as vexations and frivolous concerning the expenses that the respondents were forced to incur, namely to appoint a legal representative to represent them in this appeal. However, because even the respondents' legal representative did not detect the nullity of the conduct by the appellant's disciplinary committee, I have decided against such an order.

[19] In the result the appeal was dismissed.

MULLER, J.

ON BEHALF OF THE APPELLANT: **ADV**

BASSINGTHWAIGHTE

INSTRUCTED BY: **ENGLING, STRITTER & PARTNERS**

ON BEHALF OF THE RESPONDENT: **MS SHILONGO**

INSTRUCTED BY: **SISA NAMANDJE & CO. INC.**