



NOT REPORTABLE

CASE NO: LCA 03/2012

IN THE LABOUR COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

NAMIBIA WILDLIFE RESORTS LIMITED

APPELLANT

and

SOFIA IILONGA

RESPONDENT

CORAM: HOFF, J

Heard on: 29 June 2012

Delivered on: 05 July 2012

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**LABOUR JUDGMENT**

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**HOFF, J:** [1] This is an appeal against a reward by the arbitrator in which the appellant was ordered to pay an amount of N\$38 373.83 plus interests to the respondent on or before 1 February 2012.

[2] The respondent was employed by the appellant at one of its resorts at Sesriem. Subsequent to a disciplinary hearing in which the respondent had been charged with and convicted of theft of strong liquor (valued at N\$58.00), respondent was dismissed. The respondent thereafter referred the matter to the Labour Commissioner who respondent by pointing out that the referral of the dispute had prescribed in terms of section 86(2) of the Labour Act, 11 of 2007. One of the initial grounds of appeal raised by the appellant was that since the referral of the complaint to the Labour Commissioner had lapsed, the Labour Commissioner had no jurisdiction to entertain the dispute lodged. It appears from the documents filed that the Labour Commissioner had in spite of the fact that the referral of the complaint had lapsed, referred the dispute for arbitration. Mr Maasdorp who appeared on behalf of the appellant indicated that this ground of appeal has been abandoned by the appellant.

[3] The respondent and her legal representative were, in spite of proper notice, not in attendance when this appeal was argued.

[4] The only issue to be considered in this appeal is whether the arbitrator, erred in law, by finding on the evidence presented at the arbitration hearing, that the appellant had been inconsistent in the application of its disciplinary code as it treated the respondent differently from another of its employees, Limbo Engelbrecht, and thus acted inconsistent with Article 10(1) of the Namibian Constitution and section 33(1) of the Labour Act, 11 of 2007. Article 10(1) of the Constitution states that all persons shall be equal before the law. Section 33(1) of Act 11 of 2007 prohibits the dismissal of an employee without a valid and fair reason and without a fair procedure.

[5] In addition to the award of remuneration, the arbitrator ordered the reinstatement of the respondent solely on the basis of a perceived inconsistent application of disciplinary sanctions in respect of the same transgression.

[6] An employee seeking to rely on the inconsistent application of discipline by the employer must mount a proper challenge. This in turn requires evidence of other similar cases which attracted different and less severe disciplinary sanctions to warrant the inference that the employer had been inconsistent.

[7] John Grogan in his work *Dismissal, Discrimination & Unfair Labour Practices* August 2005 at 225 - 226 stated the following regarding a claim of inconsistency:

“Consistency challenges should be properly mounted. Little purpose is served by employees simply claiming at the beginning of an arbitration hearing that the employer has treated other employees more leniently in some earlier case or cases. Where this occurs, the employer’s representative can justifiably raise the objection that he or she is unaware of the details of the earlier case(s). The arbitrator must then disallow the objection or grant a postponement. Furthermore, a claim of inconsistency can be sustained only if the earlier cases relied on are sufficiently similar to the case at hand to warrant the inference that the employer has indeed been inconsistent. Comparison between cases for this purpose requires consideration not only to the respective employees’ conduct, but also of such factors as the employees’ remorse and disciplinary record, whether the workforce has been warned that such offences will be treated more severely in future, and the circumstances surrounding the respective cases”.

[8] In *Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) [at para 10] the following was said in relation to the issue of inconsistency by van Niekerk J.

“The legal principles applicable to consistency in the exercise of discipline are set out in item 7(b)(iii) of the *Code of Good Practice: Dismissal* establishes as a guideline for testing the fairness of a dismissal for misconduct whether ‘the rule or standard has been consistently applied by the employer’. This is often referred to as the “parity principle”, a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employee apply the penalty of dismissal consistently with the way in which the

penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC) at paragraphs [37] – [38] ). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to a different treatment, usually in the form of a disciplinary penalty less severe than that imposed to the claimant (see *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2001] 7 BLLR 840 (LC) at paragraph [3] ). Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.”

[9] The question which needs to be considered was whether the respondent properly raised an inconsistency challenge during the arbitration proceedings.

[10] The respondent was represented by the Namibian Public Workers Union from the date of referral of the dispute to the Labour Commissioner. The alleged inconsistent treatment was not raised in the summary of the dispute attached to the referral of dispute form (Form LC 21). The alleged inconsistency was not raised in the opening statement made on behalf of the respondent (by Mr Katuuu) at the arbitration hearing.

[11] The applicant called two witnesses during the arbitration proceedings. The first witness was Mr Gerhard Kausiona, the camp manager, and the second witness was Ms Effa Shikupakela, the eyewitness who was in charge of the bar when the respondent consumed and removed the liquor without any permission. The claim of consistency was not raised with either one of them during cross-examination.

[12] The claim of inconsistency was raised for the first time during the respondent's evidence-in-chief. The claim of inconsistency was therefore never raised timeously to enable the appellant to meaningfully respond thereto. In addition the respondent was not present at the alleged hearing of Limbo Engelbrecht. The allegations of Engelbrecht receiving a less severe disciplinary sanction for a similar offence (theft) is hearsay and inadmissible. There was thus no admissible evidence presented on which the arbitrator could conclude inconsistency in the application of disciplinary sanctions for a similar transgression. This error (in law) was further compounded by the arbitrator's improper reliance on *statements* by the representatives of the respective parties as *evidence*, since neither of them had been sworn in or had affirmed that they would tell the truth.

(See *Avbob Namibia (Pty) Ltd v Sedekias Gam-Gooseb and Others* (unreported judgment) Case N. LCA 36/2011 delivered on 8 June 2012).

[13] The question posed afore-mentioned in paragraph 9 must therefore be answered in the negative.

[14] There was thus in my view no admissible evidence, the basis on which a reasonable arbitrator could have arrived at this finding (of inconsistency) and this Court is therefore entitled to interfere therewith as a question of law.

(See *Namibia Power Corporation (Pty) Ltd v Gerald Nantinda*, unreported judgment Case No. LC 38/2008 delivered on 22 March 2012; *Rumingo and Others v Van Wyk* 1997 NR 102 (HC) at 105D – E; *Visagie v Namibia Development Corporation* 1999 NR (HC) at 224G).

[15] Once the basis of the arbitrator's finding is ignored the remaining evidence left unchallenged during the appellant's presentation of evidence during the arbitration proceedings is in my view sufficient to support a conviction of theft and the subsequent dismissal of the respondent.

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

1. The arbitrator's award in Case No. SRMA86-11 is set aside.
2. The dismissal of the respondent is confirmed.

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**HOFF, J**

**COUNSEL ON BEHALF OF THE APPELLANT:**

**ADV. MAASDORP**

**Instructed by:**

**MUELLER LEGAL PRACTITIONERS**

**COUNSEL ON BEHALF OF THE RESPONDENT:**

**NO APPEARANCE**

**Instructed by:**