REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 44/2012

In the matter between:

SCHMITZ SERVICES CC **APPELLANT**

and

MAGADHI K TITUS **FIRST RESPONDENT**

LABOUR COMMISSIONER **SECOND RESPONDENT**

Neutral citation: *Schmitz Services CC vs Titus* (LCA 44/2012) [2013] NALCMD 12 (16 April 2013)

Coram: PARKER AJ

Heard: **15 March 2013**

Delivered: **16 April 2013**

Flynote: Labour law – Arbitral award – Appeal against – Court rejected arbitrator's finding that employee first respondent's dismissal is unfair – Court finding that the uncontradicted evidence before the arbitrator does not account for the arbitrator's finding that the dismissal is unfair.

Flynote: Labour law – Employer's payment of severance pay in terms of s 35(1) of the Labour Act 11 of 2007 – In virtue of s 35(2) payment of severance does not apply to each and every employee who separates from his or her employment.

Summary: Labour law – Arbitral award – Appeal against – Employee charged with misconduct of bursting into his principal's office unceremoniously and negatively interrupting a meeting between the principal and an invaluable client and pointing his finger at the client and calling him a liar for an incident that had occurred outside the workplace – Employee was dismissed after a disciplinary hearing – Arbitrator found that hearing was unprocedurally unfair and also that the employee's guilt was not proved – Court rejected arbitrator's findings because the evidence placed before arbitrator did not account for the arbitrator's finding – Court therefore rejected arbitrator's finding that the dismissal is procedurally and substantively unfair – Court concluded that on the facts and in the circumstances of the commission of the misconduct the dismissal is fair within the meaning of s 33(1) of the Labour Act 11 of 2007 – Consequently court set aside arbitrator's order for payment by the employer of monetary compensation and severance pay to the employee whose dismissal is fair.

Summary: Labour law – Severance pay – Payment to employee who separates from his or her employment – In the interpretation and application of subsection (1), read with subsection (2), of s 35 of the Labour Act 11 of 2007 payment of severance pay does not apply to each and every employee who separates from his or her employment – In the instance case the court held that since the employee's dismissal for misconduct is fair payment of severance pay does not apply to him in virtue of s 35(2) of the Labour Act.

ORDER

(a) The appeal succeeds.

(b) The dismissal of the first respondent is fair.

(c) Paras 1, 2, 3 and 4 of the order in the arbitration award no. CRWB 31-12 (dated 7 August 2012) are set aside and replaced with the following:

(i) The appellant must not later than 30 April 2013 pay the first respondent any accrued leave pay that is due to the first respondent up to the date of his dismissal (ie 17 October 2011), if such payment has not been made already.

(ii) The appellant must not later than 30 April 2013 pay the first respondent remuneration for the days that the fist respondent worked before his dismissal on 17 October 2011, if he has not been paid already.

(d) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The appellant, represented by Ms Visser, brings this appeal against the entire arbitration award granted by the arbitrator ('the first respondent'), appointed by the second respondent, dated 7 August 2012 (arbitration award no. CRWB 31-12) ('the arbitration award').

[2] In October 2011 the appellant (employer of the first respondent) charged the first respondent (the employee) with the following misconduct:

'Actions detrimental to the interest of the employer after you, on or about the 12th of October 2011 got involved in an argument with Mr Frank Keller from Woermann Brock, Mr Keller is major client. The argument arose because of the fact that Mr Keller reported your loitering about the premises of Woermann Brock.
This report proved to be true according to video footage, yet you called Mr Keller a liar in the presence of your supervisor Mr Schmitz.

Your actions caused the company great embarrassment and could have resulted in the loss of a client.'

[3] The disciplinary hearing set up by the appellant to deal with the first respondent's misconduct was held on 17 October 2011. The disciplinary hearing found the first respondent guilty of misconduct and dismissed him. Thereafter, the first respondent sought the services of Trustco Insurance in order to appeal the decision of the disciplinary hearing. In pursuit of the first respondent's desire to appeal the said decision, in October 2011 Trustco Insurance requested the appellant to forward to it the minutes (record) of the disciplinary hearing. SEESA Labour Namibia (a private labour consultants), which had been contracted by the appellant to conduct the aforementioned disciplinary hearing on its behalf, made available to Trustco Insurance via facsimile transmission the minutes. Thereafter, no further correspondence or Notice of Appeal were communicated to SEESA or the appellant. What followed was the first respondent referring a dispute of unfair dismissal to the Labour Commissioner. Arbitration proceedings took place and the arbitrator delivered an award on 7 August 2012. In the award the arbitrator made the following order:

'The dismissal of the applicant was procedurally and substantively unfair therefore I order that;

1. The respondent Schmitz Services pay to the applicant Magadhi Titus remuneration for nine months equal to his monthly salary (from October 2011 till 25 June 2012) for loss of income for the said months on or before 20 August 2012.
2. Equally pay to the applicant remuneration equal to one week for each completed twelve month cycle as severance payment.
3. Accrued leave payment from the time of termination till 25 June 2012.
4. Payment on the number of days worked before termination of employment. The above need not to be paid if payment has already been made to the applicant.

The above payments must be paid on or before 20th August 2012.

The parties' claimed that the trust relationship is broken down irreparably therefore I would not order any re-instatement for the applicant.

The Arbitration Award is binding upon the parties hereto and becomes the order of the Labour Court upon filing the Award in terms of s 87 of the Labour Act (Act 11 of 2007).'

It is the award which the appellant now appeals from.

[4] The following is the order that this court made after hearing the appeal on 15 March 2013 ('the 15 March 2013 order'):

'1. The late filing of the notice of appeal against the arbitration award no. CRWK 13-12 (dated 7 August 2012) is condoned.

2. The execution of the aforementioned arbitration award is stayed with immediate effect pending the finalization of the appeal.

3. Judgment in the appeal is reserved and will be delivered at 10h00 on 16 April 2013.'

The present judgment is in pursuit of para 3 of the order.

[5] On the papers I am satisfied beyond doubt that every reasonable step was taken to serve the Notice of Set Down on the first respondent. Added to the appellant's efforts is the court's effort described in the 15 March 2013 order. It follows that the first respondent has himself to blame if the present appeal was heard without his appearance in court. The train of justice did not wait for him to board at his whims and caprices. For the first respondent to refuse to accept any documents, including the Notice of Set Down from Louis Francois La Grange and sign acknowledgement of receipt thereof is in itself an affront to the dignity of the court and derogates the proper administration of justice. And so it was that the first respondent did not appear in person or by counsel at the hearing of the appeal. Despite that for the reasons given previously I decided to hear the appeal. As I said in *Namib Mills (Pty) Ltd v Angula Shigwedha* Case No. LCA 34/2012 (judgment delivered on 22 February 2013 (Unreported)) para 1 –

'It must be remembered that according to rule 17(25) of the rules (the Labour Court Rules) such appeal must be prosecuted within 90 days after the noting of the appeal, and

unless so prosecuted, it is deemed to have lapsed. This rule infuses a sense of urgency and expeditiousness in the prosecution of appeals in the Labour Court; and so the court ought not – unless good reasons exist – delay the determination of an appeal because the delay might thwart the appellant's effort to prosecute the appeal within the statutory time limit.'

[6] I now proceed to consider the late noting of the appellant's notice of appeal. The appellant sought condonation for the late noting of the appeal by notice of motion supported by affidavit of Bodo Schmitz (the sole member of the appellant). On good cause shown in the affidavit I condoned the late noting of the appeal. I now proceed to consider the grounds of appeal.

[7] As many as 12 grounds of appeal are raised by the appellant; but, as I see them, many of them are interrelated and ground 1 is an omnibus ground and so I shall consider the grounds on that score.

[8] On the record, I find that the arbitrator is, with respect, wrong in her conclusion that 'the disciplinary hearing did not come from him (the first witness (Schmitz) but from SEESA Labour'; whatever that means. It would seem it is the arbitrator's view that SEESA Labour initiated the disciplinary hearing and that, for the arbitrator, that constitutes procedural unfairness. The record of the arbitration proceedings does not account for such conclusion. I find rather that, as I have intimated previously, being a small business, the appellant commissioned SEESA Labour (an independent labour consultants) to conduct on its behalf the disciplinary hearing; and I do not see such arrangement to be offensive of the Labour Act 11 of 2007.

[9] Furthermore, I fail to see how such arrangement violates the common law rule of natural justice, that is bias; on the contrary, the arrangement conduces to obedience of the rule against bias by the appellant. Additionally, there is no legal basis for the arbitrator's surmise that '[O]ne cannot just charge an employee without first finding out from the employee what his/her side of the story is after which a formal charge can be formulated and a disciplinary inquiry instituted to finally deal with the matter'. I should point it out that what the arbitrator proposes is a general

principle, and it does not find application immutably in all situations. *In casu*, the facts point irrefragably to a situation where the employee was found with his hand in the till, so to speak. In that case an investigation was unnecessary. In this regard, the employee (the first respondent) was served with a charge, and he understood it. Moreover, the employee had his day in the disciplinary hearing in order to tell 'his side of the story'.

[10] In the notice of disciplinary hearing whose receipt the first respondent acknowledged the rights of the first respondent at the disciplinary hearing are clearly set out and the first respondent stated that he understood the notice. They are these; that is, the right –

> '(a) to be represented at the hearing by a union representative or a fellow employee.
>
> (b) to cross-examine witnesses called on behalf of the employer.
>
> (c) to present your case by testifying on your own behalf.
>
> (d) to call witnesses in support of your own case.
>
> (e) to an interpreter to interpret the proceedings, if the hearing is not conducted in your mother tongue.
>
> (f) access to all relevant information intended to be used as evidence by the employer.'

[11] On the record, these factual findings are inescapable. The first respondent was informed of his right to be represented at the disciplinary hearing by a union representative or a fellow employee. It was his choice – indeed, his right – not to have brought a fellow employee or a union representative to represent him. He was permitted to present his case and to cross-examine witnesses called to support the appellant's case. I accept Ms Visser's submission that the appellant cannot be faulted if the first respondent did not exercise his rights, including the right to cross-

examine any of the witnesses called to support the case of the appellant, when, as I have found previously, he was informed of the right to do so which he acknowledged he understood. Furthermore, the first respondent was informed of his right to interpretation of the proceedings of the disciplinary hearing 'in your mother tongue'. There is no evidence that he expressed his desire to pursue this right and denied this right. Additionally, the first respondent pursued his right of appeal, as I have said previously; and at that moment in time he was represented by Trustco Insurance. The appellant cannot take responsibility for the inaction or remissness of the first respondent's representatives.

[12] For all the aforegoing I find that the disciplinary hearing, when judged in their broad perspective, was fair (see *FAWU and Others v C J Smith Sugar Ltd, Noodsberg* (1989) 10 ILJ 907 (IC); PAK Le Roux and A van Niekerk, *The South African Law of Unfair Dismissal* (1994) p 159)). The disciplinary hearing proceedings do, in my opinion, answer to procedural fairness within the meaning of s 33(1) of the Labour Act. Accordingly, the conclusion in the arbitration award that the disciplinary hearing proceedings were procedurally unfair and therefore the dismissal of the first respondent is procedurally unfair cannot be allowed to stand. This conclusion disposes of grounds 2, 3, 4, 6, 7 and part of ground 1. All these grounds concern procedural aspects.

[13] I now proceed to consider the other grounds. The appellant's ground 8 is that the arbitrator erred in law in finding that the witnesses called on behalf the appellant contradicted each other. The arbitrator's conclusion that Schmitz (the first witness) and Keller (the second witness) contradicted each other is based on the arbitrator's misreading of the misconduct as formulated. The contradiction the arbitrator adverts to concerns Schmitz's testimony that Keller had gone to Schmitz's office to complain about the behaviour of the first respondent, and the testimony of Keller is that he had gone to Schmitz's office to discuss with Schmitz 'issues of machinery'. What Keller and Schmitz discussed is immaterial, considering the misconduct with which the first respondent was charged. Any evidence on what they discussed has no probative value. What has probative value is the unchallenged evidence of the misconduct of the first respondent when he burst into Schmitz's office unceremoniously and

shouted at Keller while at the same time pointing his finger at him and calling him a liar. And Schmitz testified that the disciplinary hearing concerned the first respondent's misconduct (as set out in the Notice of Disciplinary Hearing) and for which the first respondent was found guilty by the disciplinary hearing and for which he was dismissed. The first respondent's representatives (Trustco Insurance) set the wheel in motion to appeal the dismissal; but it would seem the appeal was abandoned because the representatives did not pursue it to its conclusion.

[14] The reason for the dismissal is – as I see it on the record – the first respondent's misconduct as set out in the Notice of Disciplinary Hearing; and that the misconduct resulted in the irretrievable breakdown of the employment relationship between the parties. It is important to note that the first respondent himself conceded that 'the relationship between us has broken down because there is not trust anymore and therefore I claim … that the company pay me according to the law, and also pay from the time of service … until the date of finalization of the case by the arbitration'. I understand him to mean that he conceded that the employer-and-employee relationship between the parties had broken down irretrievably. He only wanted to be given any separation payments that was due to him according to the Labour Act. Indeed, the arbitrator also accepted that on the evidence and in circumstances of the case the employer – and – employee relationship has broken down irretrievably.

[15] The evidence that the first respondent had burst unceremoniously into Schmitz's office and negatively interrupted a meeting between Schmitz and Keller and shouted and pointed his finger at Keller aggressively and abusively and called Keller a liar remained unchallenged at the close of the appellant's case during the arbitration proceedings. This has weighty probative value. There is no basis on the record to support the arbitrator's speculative statement that 'no one can just stand up and behave in such a way that would warrant a total ban on continuity on service delivery'. To start with, there is nothing on the record indicating that the arbitrator has some expertise in psychology or human behaviour. The fact that the arbitrator could not explain why the first respondent behaved in the aggressive and abusive manner towards Keller does not mean that it did not happen. Besides, the arbitrator did

disregard the undisputed evidence about the incident at Woermann Brock premises which set the stage for the first respondent's misconduct. And what is more; the arbitrator disregarded the uncontradicted evidence that first respondent's misconduct was witnessed by Schmitz and Keller, the arbitrator came to the conclusion 'that there was no one who had seen the behaviour except the first witness (Schmitz)'. The arbitrator's factual finding is, therefore, palpably wrong: it is not based on the evidence placed before her. As I have intimated previously, the first respondent did not in his testimony deny what Schmitz and Keller testified to as to his misconduct.

[16] In my opinion not only is the first respondent's aggressive and abusive behaviour towards Keller unacceptable in employment relations, the aggravating factor is that his misconduct was directed towards a significant customer or client of the employer (the appellant) whose withdrawal of business from the appellant would have serious consequences for the appellant – financially speaking. There is the unchallenged evidence that the appellant could not afford to lose Woermann Brock (Keller's organization) as a client because the business that the appellant gets from Woermann Brock enables the appellant to employ some eight employees. The only reason – as I can see from the award – for the arbitrator concluding that the dismissal is unfair is put forth in para 35 of the award; and it reads:

> 'The respondent testified that the disciplinary hearing was brought about by the fact that the applicant had shouted and pointed a finger at the respondent's second witness and calling him a liar. What have cause that reaction as no one can just stand up and behave in such a way that would warrant a total ban on continuity on service delivery? The applicant further put it to the respondent and witness that it was not true that he had behave in an inappropriate manner seems that there was no one who had seen the behaviour except the first witness.'

[17] I find, as I do, based on the reasons I have given in paras 13 – 16, that the arbitrator is wrong in the findings in her award that the dismissal is substantively unfair: it cannot pass muster. It must be remembered that substantively unfair dismissal is proven where the employer has no valid and fair reason to dismiss the employee; that is, where the employee is not found guilty of the misconduct he or she is charged with and where the misconduct does not justify the ultimate

punishment of dismissal. As I have found previously the finding of guilt by the disciplinary hearing cannot on the evidence be faulted: the appellant had a valid reason to dismiss the first respondent. I should flag the point that, in my opinion, the judgment of the arbitrator was blurred by her fixation on the incident at the Woermann Brock premises and the CCTV footage and her conflating this incident for which the first respondent was not charged and the misconduct in the office of Schmitz which forms the *corpus delicti* of the misconduct which the first respondent met at the disciplinary hearing.

[18] The grave aggressive and abusive conduct of the first respondent and its potential to wreak very serious negative financial consequences for the appellant in the manner described in paras 14 – 16 taken cumulatively justify dismissal. It is my view, therefore, that the appellant had a fair reason to dismiss the first respondent. The test of unfair reason is always this. It is whether the sanction imposed on the employee is one which no reasonable employer would have imposed? Taking into account the circumstances of the commission of the offence and the potentially serious financial consequences for such a small enterprise as the appellant's and for the eight individuals employed by it, I find that the appellant acted reasonably in imposing the punishment of dismissal on the employee. The appellant had, therefore, a fair reason to dismiss the employee. It follows that in my judgement the arbitrator erred in law in finding that the dismissal is substantively unfair. This conclusion disposes of grounds 5, 8, 9, 10 and part of ground 1.

[19] For all the aforegoing, I hold that the arbitrator erred in law in finding that the first respondent's dismissal is unfair – procedurally and substantively: the dismissal is fair within the meaning of s 33(1) of the Labour Act. This disposes of the omnibus ground 1.

[20] I pass to consider the last ground, that is ground 12. It is that the arbitrator erred in law in making an excessive monetary award in paras 1 and 2 of the order in her award. Paras 1 and 2 of the order in the award are based on the arbitrator's conclusion that the dismissal is unfair, which I have found to be wrong. That being the case, the award of compensation in para 1 and severance pay in para 2 are not

available to the first respondent: they fall away – as a matter of course. The payment of severance pay in terms of the Labour Act does not in virtue of s 35(2) of the Labour Act apply to the first respondent because I have found that his dismissal is a fair dismissal on the grounds of misconduct.

[21] In the result I make the following order:

(a) The appeal succeeds.

(b) The dismissal of the first respondent is fair.

(c) Paras 1, 2, 3 and 4 of the order in the arbitration award no. CRWB 31-12 (dated 7 August 2012) are set aside and replaced with the following:

(i) The appellant must not later than 30 April 2013 pay the first respondent any accrued leave pay that is due to the first respondent up to the date of his dismissal (ie 17 October 2011), if such payment has not been made already.

(ii) The appellant must not later than 30 April 2013 pay the first respondent remuneration for the days that the first respondent worked before his dismissal on 17 October 2011, if he has not been paid already.

(d) There is no order as to costs.

C Parker

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Acting Judge

APPEARANCES

APPELLANT:	I Visser Of La Grange Legal Practitioners, Windhoek
RESPONDENT:	No appearance