REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 50/2012

In the matter between:

NAMDEB DIAMOND CORPORATION (PTY) LTD **APPELLANT**

and

BAREND SMITH **RESPONDENT**

Neutral citation: *Namdeb Diamond Corporation (Pty) Ltd v Smith* (LCA 50/2012) [2013] NALCMD 13 (19 April 2013)

Coram: HOFF J
Heard: **05 April 2013**
Delivered: **19 April 2013**

Summary: Question of law – includes a finding of fact made by a lower court which no court could reasonably have made ie where there was no evidence which could reasonably support such 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 that (factual) finding – Rationale underpinning this approach is that the finding in question was so vitiated by lack of reason as to be tantamount to no finding at all.

Respondent dismissed during disciplinary hearing *inter alia* for the unauthorised use of property belonging to his employer (appellant) – The undisputed evidence was that respondent presented a fire-extinguisher belonging to the appellant when respondent took his private motor vehicle for a roadworthy test at NaTIS – Testing officer informed respondent personally that vehicle (a kombi) cannot pass test since fire-extinguisher belonged to a company and was not mounted inside the vehicle as required by law – Testing officer subsequently reported incident to appellant – Respondent never testified in own defence during arbitration proceedings.

Arbitrator failed to make a specific finding in respect of whether or not the evidence presented established the unauthorised use of property belonging to the applicant – This must be inferred from the finding of the arbitrator that the respondent was dismissed without a valid and fair reason.

The undisputed evidence presented at arbitration proceedings does not support the finding that the evidence did *not* establish that the respondent had used the fire-extinguisher in an unauthorised way – This appeal thus relates to a question of law on the basis that the finding of fact made by the arbitrator was a finding (having regard to the undisputed evidence) which no court or arbitrator could reasonably have made.

The appeal succeeds on this basis.

ORDER

(a) The finding by the arbitrator that the appellant did not prove on a preponderance of probability that the respondent was guilty of the unauthorised use of the said fire-extinguisher is set aside.

(b) The finding by the arbitrator that the respondent was dismissed without a valid and fair reason is set aside.

(c) The order by the arbitrator reinstating the respondent ‘with all his benefits before his dismissal’ is set aside.

(d) The award granted in favour of the respondent in respect of losses in the amount of N$143 184 is set aside.

LABOUR JUDGMENT

HOFF J:

[1] The respondent, a senior security officer, employed by the appellant was dismissed at a disciplinary hearing after he had been found guilty of the unauthorised use of company property and the unauthorised use of company time.

[2] After unsuccessful conciliation proceedings the matter was referred for arbitration. The arbitrator held that the dismissal of the respondent was unfair, ordered that the respondent be reinstated and awarded compensation in the amount of N$143 184 in favour of the respondent. The appeal lies against the ruling of the arbitrator.

[3] It is common cause that the respondent was the owner of a motor vehicle described as a kombi and that this motor vehicle was taken to the Namibia Traffic Information System (NaTIS) for the purpose of obtaining a roadworthy certificate.

[4] The motor vehicle was taken by the son of the respondent, Elton John Smith, on 28 December 2011, 3 January 2012 and on 17 January 2012 to NatTIS. The respondent, himself took the motor vehicle to NaTIS on 10 January 2012. What transpired at NaTIS on this day formed the basis of the charges against the respondent at the disciplinary hearing.

[5] Mr Rudolf Kharigub an official employed at NaTIS testified, during the arbitration proceedings, that on 10 January 2012 the respondent brought his kombi for a roadworthy test. His testimony was that the law requires that a motor vehicle which transports passengers must have a fire-extinguisher which must be mounted inside the vehicle. When the respondent's fire-extinguisher, which was not mounted, was retrieved from underneath a seat and handed to him, he noticed that it was marked with a black marker 'Namdeb Head Office'. On further inspection he also noticed a couple of stickers of Namdeb on the fire-extinguisher.

[6] He testified that he told the respondent that he would not accept the fire-extinguisher because it belonged to a company and that it was not mounted inside the vehicle. He then recorded the following defects on his control document: '1. Parking brake. 2. Fire-extinguisher missing (belong to Namdeb) one in vehicle'. He testified that a few days later the son of the respondent returned with the kombi with a brand-new fire-extinguisher on which was engraved 'Smithies or Smithies Transport' and he passed the motor vehicle.

[7] Mr Kharigub testified that after the respondent had left on 10 January 2012 he phoned a person at Namdeb, one Immanuel Basson, and enquired from him whether Namdeb 'nowadays' gave old fire-extinguishers to employees to use. Mr Kharigub, who was previously employed by Namdeb, stated that the practice at Namdeb was that property which the company did not need any more would be stored in a salvage yard in order to be auctioned at some later stage. Mr Kharigub testified that he explained to Immanuel Basson what had happened when the respondent's vehicle was brought in for a roadworthy test.

[8] Mr J J Esterhuizen (an employee of Namdeb and respondent's supervisor) testified that during the afternoon of 10 January 2012 a report was made to him telephonically and he was informed that the respondent was at NaTIS that afternoon where he had tried to put his private motor vehicle through a roadworthy test and

that the respondent presented a fire-extinguisher that was marked ‘Namdeb Head Office’.

[9] Two days later, on 12 January 2012, he informed the respondent about the allegation and respondent replied that it was untrue. They drove to the residence of the respondent where the respondent opened his motor vehicle and presented to him two fire-extinguishers, one very small and a new 1,5 kilogram fire-extinguisher. None of these fire-extinguishers bore any marks of Namdeb. He informed the respondent that he would in any event investigate the allegation.

[10] Mr Esterhuizen testified that he subsequently obtained a statement from Mr Kharigub of NaTIS in which Mr Kharigub confirmed the allegation against the respondent. In the statement Mr Kharigub also confirmed that the fire-extinguisher in question was a 1,5 kilogram fire-extinguisher and that when he confronted the respondent he was informed that it was an old fire-extinguisher.

[11] Mr Kharigub also presented him with a copy of the certificate of roadworthiness where it was indicated that the time when the roadworthy test took place was between 15h42 and 16h00. Mr Esterhuizen testified that during his investigation he established that the respondent bought a new 1,5 kilogram fire-extinguisher from Nova Marine on 11 January 2012.

[12] The son of the respondent testified during the arbitration proceedings in respect of occurrences other than on 10 January 2012 and his evidence was of no assistance to the respondent since the incident on 10 January 2012 formed the basis of the subsequent disciplinary hearing and was also the relevant incident in respect of which the arbitrator based her findings.

[13] The respondent himself did not testify during the arbitration proceedings.

[14] Mr Coetzee, who appeared on behalf of the respondent, submitted that the issue for determination by the arbitrator was firstly, whether the respondent was in

possession, albeit unauthorised possession, of the appellant's fire-extinguisher on 10 January 2012, and secondly, whether the respondent's dismissal was fair having regard to the provisions of section 33 of the Labour Act 11 of 2007.

[15] The arbitrator in her analysis of the evidence presented during the arbitration proceedings criticised the evidence of Mr Kharigub in the following respects:

Firstly, the arbitrator recounted that during cross-examination Mr Kharigub testified that 'we decided to report the matter' and that Mr Kharigub when referring to 'we' meant that himself and his supervisor, but never during the arbitration proceedings the witness Kharigub mentioned that he informed his supervisor. I shall accept that what the arbitrator meant by 'arbitration proceedings' is a reference to the evidence-in-chief, since Mr Kharigub during cross-examination testified that before reporting the incident to Namdeb, he had first informed his supervisor about it. I can find no merit in this criticism.

[16] Mr Kharigub testified that he had given the respondent a document which he called a 'receipt' on which he had recorded the defects of the motor vehicle of the respondent. The arbitrator during her analysis of the evidence stated that when Mr Kharigub was asked during cross-examination what had happened to the receipt that the applicant had brought back to him he said that he was not sure whether the applicant brought the receipt back or not, but he could not remember what had happened to the receipt'.

The arbitrator in her analysis continued as follows:

> 'The witness Mr Kharigub stated that he could remember the incident very well but his evidence pertaining to the receipt was vague'.

[17] What is clear from the evidence is that the receipt given to the respondent is a document for the convenience of the respondent and is not an important document needed by NaTIS. The only benefit in returning such a document when a vehicle comes for a re-testing is that it makes it easier for the testing authority to locate the

control document in respect of a particular motor vehicle. In my view the fact that Mr Kharigub was, in view of the arbitrator vague in respect of his evidence relating to the receipt, is of no consequence.

[18] The arbitrator also made much of the fact, in her analysis, that the witness, Mr Kharigub, only wrote on the receipt the two defects and did not write on the receipt, as he did on the control document, that the fire-extinguisher belonged to Namdeb. If Mr Kharigub failed to write on the receipt that the fire-extinguisher belonged to Namdeb this, for the same reason stated supra, is of no consequence. What is important in my view, and to which the arbitrator herself referred to, is that the respondent was informed by Mr Kharigub that he would not accept the fire-extinguisher because it belonged to Namdeb and that it was not mounted inside the motor vehicle.

[19] The arbitrator remarked that on ‘material matters’ the witness Kharigub were not sure of the facts. The material and a crucial aspect of the arbitration proceedings was whether or not the respondent presented a fire-extinguisher belonging to Namdeb in his effort to obtain a roadworthy certificate from NaTIS.

[20] In respect of this very important issue the arbitrator made no categorical finding.

[21] What the arbitrator referred to as ‘material matters’ when read in context of the testimony presented at the arbitration proceedings were in my view irrelevant matters.

[22] The arbitrator also in her analysis relies on the fact that the witness Esterhuizen found no supporting evidence (ie evidence supporting the evidence of Kharigub) that the respondent presented a fire-extinguisher belonging to Namdeb on 10 January 2012.

[23] In my view it is not surprising that Esterhuizen found no fire-extinguisher marked ‘Namdeb’ or ‘Namdeb Head Office’ in the motor vehicle of the respondent. What would have been surprising if there were evidence that such a fire-extinguisher, with Namdeb markings on it, had indeed been found in the vehicle of the respondent on 12 January 2012.

[24] On the issue of the lack of supporting evidence, the evidence by Mr Kharigub that he had recorded on the control document (exhibit 2) that the fire-extinguisher belonged to Namdeb, was never disputed. Supporting evidence, in my view, which was also not disputed was the fact that the next day (ie on 11 January 2012) the respondent had purchased a brand new fire-extinguisher. Surely this purchase must have been necessitated by the fact that something was wrong with the fire-extinguisher presented by the respondent the previous day.

[25] If one has regard to the unchallenged incriminating evidence presented on behalf of the appellant during the arbitration proceedings against the respondent one would have expected of the respondent to testify in his own defence.

[26] The fact that the respondent did not testify during the arbitration proceedings is significant in the sense that there was no evidence presented during the arbitration proceedings gainsaying the evidence of Mr Kharigub that the respondent presented a fire-extinguisher with Namdeb marking on it on 10 January 2012 when he brought the motor vehicle for a roadworthy test.

[27] The fact that Mr Esterhuizen testified that he found no fire-extinguisher with Namdeb markings on it when he inspected the vehicle of the respondent two days later (on 12 January 2012) does in my view in no way detract from the veracity of the undisputed evidence of Mr Kharigub.

[28] The arbitrator, in my view, erred in law in not accepting such evidence despite the respondent not challenging such evidence, or put differently, had the arbitrator

taken this evidence into account she would not have arrived at the conclusion that the respondent (applicant in the arbitration proceedings) was 'entitled to his claims'.

[29] In *Namibia Power Corporation v Gerald Nantinda* an unreported judgment of the Labour Court in case no. LC 38/2008 dated 22 March 2012 at para [28] Smuts, J stated the following:

'In earlier written argument filed on behalf of the respondent (and not raised before me), the question was raised as to whether the appeal was one which relates to a question of law. In my view, it clearly constitutes a question of law if an applicant can show that the arbitrator's conclusion could not reasonably have been reached. In doing so I respectfully follow the approach of the full bench of this court in *Rumingo and Others v Van Wyk.* The full bench in that matter made it clear that a conclusion reached (by a lower court) upon evidence which the court of appeal cannot agree with would amount to a question of law. This approach is also consistent with that of a subsequent full bench decision in *Visagie v Namibia Development Corporation* where the court, in my respectful view, correctly adopted the approach of Scott JA in *Betha and Others v BTR Sarmcor* that a question in law would amount to one where a finding of fact made by a lower court is one which no court could reasonably have made. Scott JA referred to the rationale underpinning this approach that the finding in question was so vitiated by lack of reason as to be tantamount as be no founding at all. That in my view aptly describes the finding of the arbitrator in this matter. As was further stated by Scott JA, it would amount to a question of law where there was 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 that finding . . . . '

(See *Rumingo & Others v Van Wyk* 1997 NR 102 (HC) at 105D-E; *Visagie v Namibia Development Corporation* 1999 NR 219 (HC) at 224C-H; *Betha and Others v BTR Sarmcor* 1998 (3) SA 349 (SCA).

[30] The arbitrator in her analysis of the evidence stated that 'the witness' (I presume the son of the respondent) testified that he was sent back on more than one occasion and once he had fixed the defects as pointed out by Mr Kharigub another fault was found and then he was sent back again. This evidence the arbitrator remarked was never challenged. The fact that this evidence was not

challenged is also of no consequence. What it pointed to, is that there were numerous defects on the motor vehicle. What the arbitrator did not refer to in her analysis in this regard was that on 28 December 2012 some of the defaults on the motor vehicle of the respondent (as testified by his son) were the defective brakes and that the fire-extinguisher was too small and was not mounted inside the vehicle.

[31] When the respondent arrived with the motor vehicle on 10 January 2012 the brakes were still defective and a bigger (1,5 kilogram) fire-extinguisher was presented (the Namdeb fire-extinguisher) and this fire-extinguisher had still not been mounted inside the motor vehicle. The conclusion from this evidence (which was not challenged) was that the defects on the motor vehicle were not properly attended to and that this was the cause why the vehicle failed the roadworthy tests on more than one occasion.

[32] The respondent was dismissed during the disciplinary hearing *inter alia* because he was convicted of the unauthorised use of company property. During the arbitration proceedings the evidence by Mr Kharigub was that a fire-extinguisher with Namdeb markings was presented during the roadworthy test. This evidence was never challenged during cross-examination. Mr Kharigub also testified that he had informed the respondent that he would not accept the fire-extinguisher so presented because it belonged to a company (Namdeb). This evidence was also not challenged during cross-examination.

[33] Instead the arbitrator allowed herself to be distracted by irrelevant evidence and failed to make specific finding in respect of one the major disputes between the parties, namely whether or not the evidence presented, established the unauthorised use of property belonging to the applicant.

[34] The second issue for determination by the arbitrator was whether, in terms of the provisions of section 33 of the Labour Act 11 of 2007, it was fair to have dismissed the respondent.

[35] In the matter of *Foodcon (Pty) Ltd v Swarts* NNLP 2000 (2) 181 NLC Mr Justice Silungwe stated the following regarding the employer – employee relationship:

'Trust is the core of the employment relationship. Dishonest conduct is a breach of the trust. Accordingly dismissal is the appropriate action. The maintenance of confidence in an employer/employee relationship is so vital that it must enjoy abiding nurturing. A violation of such relationship will normally be visited with dismissal.'

See also *Model Pick 'n Pay Family Supermarket v Mwaala* 2003 NR 175 (LC) at 181 – 182.

[36] One is required to infer that the evidence did *not* establish the respondent had used the fire-extinguisher in an unauthorised way, by the finding of the arbitrator that the respondent was dismissed without a valid and fair reason.

[37] The question whether or not the respondent was fairly dismissed by the appellant lies in the nature of the employer – employee relationship as I have indicated (supra).

[38] Gibson, J in *Oa-Eib v Swakopmund Hotel and Entertainment Centre* 1999 NR 137 at 141 referred with approval to the case of *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union of SA and Another* (1991) 12 ILJ 340 at 344F where the court observed the following:

'This trust which the employer places on the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee . . . . An employer unquestionably is entitled to expect from his employees that they would not steal from him and if an employee does steal from the employer that is a breach of the relationship and of the contract between them and such a gross deviation of duty that dismissal undoubtedly would be justified and fair.'

[39] The unauthorised use of property of another person contains an element of dishonesty and should in my view be visited with the same sanctions as that applicable in respect of a conviction for theft.

[40] I am satisfied that the appellant has established the facts during the arbitration proceedings on a preponderance of probability on which the dismissal of the respondent was founded and that the appeal should succeed.

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

(a) The finding by the arbitrator that the appellant did not prove on a preponderance of probability that the respondent was guilty of the unauthorised use of the said fire-extinguisher is set aside.

(b) The finding by the arbitrator that the respondent was dismissed without a valid and fair reason is set aside.

(c) The order by the arbitrator reinstating the respondent ‘with all his benefits before his dismissal’ is set aside.

(d) The award granted in favour of the respondent in respect of losses in the amount of N$143 184 is set aside.

E P B HOFF

Judge

APPEARANCES

APPELLANT:	G Dicks Instructed by GF Köpplinger Legal Practitioners, Windhoek
RESPONDENT:	E E Coetzee Of Tjitemisa & Associates, Windhoek