REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 1/2013

In the matter between:

DHL INTERNATIONAL NAMIBIA **APPELLANT**

and

ZEDEKIA KURITJINGA **FIRST RESPONDENT**
PHILIP MWANDINGI N.O. **SECOND RESPONDENT**
THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *DHL International Namibia (Pty) Ltd v Kuritjinga* (LCA 1/2013) [2014] NALCMD 1 (24 January 2014)

Coram: **UEITELE, J**
Heard: **21 June 2013**
Delivered: **24 January 2014**

Flynote: **Labour law** – Arbitration - Appeals from arbitrator's award- Such only permissible on questions of law - Requirements for Court to determine when erroneous findings of fact not substantiated by evidence fall under rubric of questions of law restated.

Summary:

First respondent was dismissed after a disciplinary hearing for allegedly physically assaulting a fellow employee. After unsuccessful internal appeal proceedings, first respondent, on 10 August 2011, referred the matter to conciliation and arbitration, submitting that his dismissal was both procedurally and substantively unfair. The arbitrator held that the dismissal of the first respondent was procedurally and substantively unfair and ordered that the first respondent be reinstated and awarded compensation in the amount of N$96 900-00 in favour of the respondent. The appeal lies against the award of the arbitrator.

Held that in determining whether an appeal lies on a question of law alone, the question is whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances.

Held further that the finding by the arbitrator that once the respondent raised the issue of ‘self-defence’, the chairperson of the disciplinary hearing ought to have entered a plea of ‘not guilty’ and afford the respondent an opportunity to place its version of events before the disciplinary committee and call witnesses to testify as to what really transpired, and whether he acted in ‘self-defense’ or ‘retaliation’ can in the Court’s view, not be faulted.

Held further that the arbitrator considered the substantive fairness of the dismissal of the respondent. The arbitrator made a factual finding that the appellant did not discharge the burden resting on it and there was accordingly no valid reason for the dismissal. The second ground of appeal was found to be without merit and dismissed.

Held further that the court was not convinced that the finding by the arbitrator was vitiated by lack of reason warranting this court to interfere with that finding.

Held further that it is the appellant who wanted to rely on the CCTV footage to proof that the respondent unprovoked assaulted Mr Brussels. The Court further found that in the absence of the production and viewing of the CCTV footage the evidence of Mr De Jager is inadmissible hearsay evidence.

ORDER

(a) The appeal is dismissed. For the avoidance of doubt, the award of the arbitrator dated 13 December 2012 is varied (where necessary) to read:

(1) The dismissal of Zedekia Kuritjinga by DHL Express Namibia (Pty) Ltd is both procedurally and substantively unfair.

(2) The appellant is ordered to reinstate the respondent in the position in which he would have been had he not been so dismissed, i.e. retrospectively to the date of his dismissal which is 11 May 2011.

(3) The appellant is ordered to pay to the respondent back pay for the whole period of dismissal (being 11 May 2011 to 24 January 2014).

(b) No order as to cost.

JUDGMENT

UEITELE, J

A Introduction

[1] This is an appeal against an award given by the second respondent (I will, for ease of reference, in this judgment refer to the second respondent as the arbitrator) in favour of the first respondent on the 13th December 2012.

[2] This appeal lies against the arbitrator's findings that:

> '1. the dismissal of Zedekia Kuritjanga by DHL Express Namibia (Pty) Ltd is both procedurally and substantively unfair;
>
> 2. the respondent DHL Express Namibia (Pty) Ltd, must either reinstate the Applicant Zedekia Kuritjanga, in the position earlier occupied by him, with compensation for loss of income covering the period from his unfair dismissal date, 10 May 2011, to the date of award, (N$ 5 100.00 x 19 months), being an amount of N$96 900.00. Alternatively the Respondent must re-employ the Applicant in an equivalent position, with same conditions of service. Reinstatement or re-employment 1st January 2013.
>
> 3. payment of the amount of N$96 900.00 to be made at the office of the Labour Commissioner, by cheque made out in Applicant's name by not later than the 30th December 2012 alternatively a legally acceptable proof be provided to the Labour Commissioner /Arbitrator, that such payment was made directly to the applicant, by no later than the 30th December 2012.'

[3] I will first set out the background facts which gave rise to the arbitrator making the award as quoted above, thereafter I will set out the grounds upon which the appellant's appeal is founded, then the applicable legal principles and I will then finally apply the legal principles to the facts of this appeal.

B Background

[4] The first respondent (I will for ease of reference, in this judgment refer to the first respondent as the respondent), was on 01 October 2008 employed by the appellant as a courier driver. On 01 May 2011 an incident occurred at the appellant's business premises. The incident is an alleged assault by the respondent of a fellow employee. On

03 May 2011 the respondent was suspended with full pay from his employment and on that same day (i.e. 03 May 2013) he received a notice to appear at the disciplinary hearing scheduled for 10 May 2011.

[5] On 10 May 2010 the disciplinary hearing commenced as scheduled. At the hearing the respondent purportedly pleaded guilty and was on his own plea found guilty and dismissed. The respondent noted an appeal against the disciplinary chairperson's finding and sanction. The first respondent was unsuccessful in his appeal against the disciplinary chairperson's finding and the appeal was ultimately dismissed and the finding and sanction "*a quo*" was upheld.

[6] After unsuccessful internal appeal proceedings, the respondent, on 10 August 2011, referred the matter to conciliation and arbitration, submitting that his dismissal was both procedurally and substantively unfair. The arbitrator found that the respondent's dismissal was procedurally and substantively unfair and ordered that the respondent be reinstated and awarded compensation in the amount of N$96 900-00 in favour of the respondent. As I indicated above this appeal now lies against that award.

C Arbitration proceedings

[7] The complaint lodged by the respondent with the Labour Commissioner (the third respondent) is one of unfair dismissal. In the brief summary of facts annexed to the referral form, Form LC 21 the respondent amongst others alleged that on 01 May 2011 whilst on duty he was assaulted by his supervisor. He further alleged that immediately after the assault he called his manager and informed the manager that his supervisor has just assaulted him and that the supervisor was threatening to assault him (the respondent). He further stated that as soon as he put down the phone the supervisor again approached him threatening to further assault him, out of self defence the respondent hit the supervisor. As a result of that, he was charged with misconduct, was found guilty and dismissed. The respondent further alleged that the disciplinary hearing held on 10 May 2011 was a 'farce' as no evidence was led and that he was denied the opportunity to be heard by an impartial chairperson.

[8] The appellant on the other hand denied that the disciplinary hearing was a farce, it alleged that respondent was charged with misconduct, given sufficient time to prepare for the hearing which it alleged met the procedural requirements for a fair hearing. As regards the substantive fairness the appellant admitted that the respondent was assaulted by the supervisor. The respondent however later came back and assaulted the supervisor. Appellant argued that if the respondent had not returned and assaulted the supervisor in a retaliatory manner he would not have found himself in the position he was.

[9] At the arbitration hearing the appellant called four witnesses to prove its case. The first witness was a certain Mr De Jager who acted as the initiator at the internal disciplinary hearing. The evidence of this witness mainly dealt with what transpired at the disciplinary hearing. He testified that he investigated the charges against the respondent. This witness further testified that his investigations included viewing camera (CCTV) footage and taking statements from eye witnesses. He testified that at the disciplinary hearing the respondent's rights were explained to him, which included the right to representation by a fellow employee. He further confirmed that the appellant's procedures only allow representation by a fellow employee. He could not recall the respondent having indicated during the hearing that day that he wanted external representation and why.

[10] Mr De Jager further testified that it was on a Sunday when a security guard phoned him, stating that two employees were fighting. He testified that the respondent also phoned him (i.e. De Jager) and informed him that his supervisor just hit him on his face. He also managed to speak to the other person. While he and that person were conversing the phone went silent. He testified that he viewed the video (CCTV) footage which confirmed the altercation between the two, and the fact that it was the supervisor who first hit the respondent. He continued to testify that the video (CCTV) footage revealed that the two were then separated for about 10 minutes, however at one point while the supervisor was walking and conversing on his mobile phone the applicant followed him, and hit him on the face from behind. He testified that from the video footage he could not observe any provocation from supervisor. To his knowledge

respondent pleaded guilty to the charge of assault. It is appropriate to pause here and observe that the video (CCTV) footage testified to by Mr De Jager was never viewed at the internal disciplinary hearing, internal appeal hearing nor was it viewed or submitted as an exhibit at the arbitration hearing.

[11] The second witness to testify on behalf of the appellant was a certain Mr Gebhard Shigwedha who testified that, on Sunday, 01 May 2011 he saw a certain Jeff (the respondent's supervisor) hitting the respondent first and then a fight ensued between them. I pause here to mention that, this person's names appear to be Jeff Russell, but I will, in this judgment refer to him as the witnesses were referring to him (some witness referred to him as Jeff, others as Brussels and another Russell) in their evidence. The witness further testified that Linus (the third witness), separated the fighting parties). The witness continued and testified that almost two to three minutes after the fighting parties were separated, Jeff, who had gone into the warehouse, came out of the warehouse and was busy conversing on his phone. Respondent came running and hit Jeff, on the head from behind.

[12] The third witness to testify on behalf of the appellant was a certain Mr Linus Kataparo who testified that on Sunday 01 May 2011 the respondent and another employee came out of the office. He then testified that he saw Jeff hitting the respondent on the head. He (the witness) then came and stopped the fight. After he stopped the fight he contacted the manager by telephone and everybody (i.e. the supervisor and the respondent) went back to do their job. Jeff went back in the warehouse and respondent went into the *Kombi* doing his paper work. About five minutes later he saw Jeff coming out of the warehouse and the respondent ran after Jeff and hit him from behind with a fist and Jeff hit himself against the car.

[13] The fourth witness to testify on behalf of the appellant was a certain Mr Tobie Wiese who testified that he was the chairperson at the internal disciplinary hearing. Mr Wiese testified that at the disciplinary hearing:

‘(a) the respondent was asked whether he will represent himself and he answered in the affirmative;

(b) the respondent was asked whether it was fine if the proceedings were to be conducted in the English language and he answered in the affirmative;

(c) the respondent pleaded guilty when he was asked to plead. Mr Wiese further testified that he asked the respondent whether he knew the difference between guilty and not guilty and the respondent again answered in the affirmative;

(d) that after the respondent indicated that he understood the difference between guilty and not guilty he asked the respondent to plead, the respondent pleaded guilty and he accepted respondent’s plea of guilty.

(e) that it is standard practice that when a person pleads guilty no evidence is led because that person would have admitted his or her guilt;

(f) he explained to the respondent that once he has pleaded guilty the hearing will proceed to hear mitigating and aggravating circumstances;

(g) after hearing mitigating and aggravating circumstances he imposed the sanction of dismissal as prescribed in the appellant’s disciplinary code’.

[14] In cross examination Mr Wiese was asked whether the appellant provided him with a copy of the appellant’s disciplinary code and procedures. His answer was that he was only provided with part of that document and not the whole document (i.e. disciplinary code and procedures) itself. He was also asked whether the victim of the alleged assault was present at the disciplinary hearing and his reply was in the negative.

[15] On a question by the arbitrator whether the respondent initially pleaded not guilty to the charge and only later changed his plea to one of guilt Mr Wiese’s reply was as follows and I quote verbatim the exchange between the arbitrator and Mr Wiese:

‘**Chairperson:**

So is it correct that initially he pleaded not guilty?

Mr Wiese:

Yes whereby I came to the impression that the employee was not clear as to what he was pleading, and it is merely on a fact to get certainty from him that he is sure what he is pleading. He by his own accord changed his plea and pleaded guilty.'[1]

[16] After Mr Wiese testified, the appellant closed its case and the respondent had to testify. The respondent testified that he had a fallout with his supervisor who refused to assist him with work-related queries. He testified that he had to collect parcels from the airport but officials at the airport were refusing to give him the parcels because of some discrepancies in the paperwork. He proceeded to testify that whilst he was at the airport he contacted his supervisor Mr Brussels who refused to assist him and instead threatened to assault him if he arrived at the warehouse (appellant's business place) without the parcels.

[17] The respondent further testified that he managed to get some of the parcels from the airport and drove back to the workplace where he met his supervisor who confronted him and later physically assaulted him. He reported the matter to the manager, a certain Mr De Jager who promised to talk to Mr Brussels. The two were separated by the security officials on duty, whereafter each went to do his work. He testified that Brussels went into the warehouse and he went in the *Kombi* to continue with his work. He continued and testified that a few minutes later, his supervisor came out of the warehouse, pushed him and was trying to remove something from his pocket, he did not know what it was. He then hit his supervisor's hand and the object fell from the supervisor's hand, the security guard then came and separated them gain.

[18] He continued and testified that on the 03rd day of May 2011 he was suspended from work and informed to appear at a disciplinary hearing on 10 May 2011, he further testified that when he was handed the suspension letter he was informed that the company does not allow external representation that is why he came without any representative to the disciplinary hearing. He appeared at the disciplinary hearing as instructed and when asked how he pleads to the charge against him he said he pleaded not guilty, after pleading not guilty he was never given opportunity to state his case.

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[1] See page 184 lines12-18 of the record.

[19] After the evidence was led and the representatives of the parties submitted arguments, the arbitrator found that the disciplinary hearing was procedurally flawed and therefore procedurally unfair. He justified his conclusions as follows (I will in detail quote his reasoning):

> 'The parties reached consensus that the hearing which was conducted did not comply with the stipulations of the Respondent's procedures. Specifically the procedures stated on page 4 para 6.2.2…
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> The other issue highlighted during the hearing was the question of how the Applicant pleaded during the inquiry. There was conflicting testimonies, as to what really transpired. One would expect two witnesses both of whom were present at the said hearing to corroborate each other on what transpired. However one witness testified that the Applicant pleaded not guilty when he was asked how he wanted to plead. The chairperson then had a discussion with him which either resulted in the applicant changing his plea to guilty plea, or simply the chairperson decided to enter a guilty plea for whatever reason.
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> However, another witness equally called by the respondent testified that the applicant pleaded guilty right away. Now I am not sure whom to believe. To add insult to injury, the chairperson of the appeal hearing on page two of his finding stated the following:
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> > "In studying the recorded minutes, it is evident that the applicant at first ***pleaded not guilty***, then after proper explanation by the chairperson as to the allegation and…"
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> Furthermore, in the chairperson's own minutes, on page six, (although these minutes were never admitted into record, having only been attached to respondent's heads of arguments, delivered some days after the arbitration was concluded, in the applicant's absence, and as such the applicant did not see what was submitted by the respondent) it is clear that when the applicant was asked to plead, he pleaded: "not guilty". A long argument with the chairperson then ensued on why he was pleading 'not guilty' etc. it was only after these long arguments that the applicant changed his plea from 'not guilty' to 'guilty'. The applicant, after his 'not guilty' plea, made it clear that it was because he was acting in self-defense as the victim wanted to assault him. The chairperson however

came up with other issues of ‘mitigating circumstances’, which the applicant at one point indicated that he did not understand what it was.

Under normal circumstances, since the applicant was raising the issue of ‘self-defence’, one expected the chairperson to enter the plea of ‘not guilty’ as initially pleaded by the applicant. He would then call witnesses to testify as to what really transpired, and whether it was a ‘self-defense’ action or ‘retaliation’ by the applicant.

The applicant would then have been accorded opportunity to call witnesses, especially having earlier indicated that he wanted to call one witness, as well as to hear the evidence the respondent had against him and importantly cross examine those witnesses. It would have been only after the conclusion of this procedure that the chairperson would be in a position to make a finding of either guilty or not guilty …

The Applicant’s contention is that he acted in self-defense when he did whatever it is which he did that day. His contention is further that, Mr Bussel who had earlier assaulted him, was threatening to assault him again when he acted in self-defense which is regarded as retaliation by the Respondent. The fact is at no point did the Applicant admit that he was retaliating when he assaulted Mr Bussels. Therefore it is my finding that, the chairperson of that hearing misdirected himself when he decided to enter the guilty plea after the Applicant has pleaded not guilty to the assault charges after was read out to him.

The other issue is the fact that no proper investigation was conducted, as far as no statement from the Applicant was obtained by the investigation Officer. This compounded with the alteration of his guilty resulted in a situation where his version of what really took place that day, including his witness he earlier indicated he wanted to call to testify was never taken into consideration.

It is subsequently my finding on a balance of probabilities that the dismissal of the Applicant cannot be said to procedurally fair for the many reasons stated herein above’.[2]

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[2] See page 321- 323 of the record.

[20] As regards the question whether or not the respondents' dismissal was for a valid reason, the arbitrator made the following finding :(I again quote the arbitrator verbatim):

> 'The lengthy arguments between the parties relate to whether the Applicant was retaliating when he punched Brussel or he acted in self-defence as Brussel wanted to attack him again. I also found the witnesses called by the Respondent somehow unreliable in their testimony and thus not credible. I will thus be careful as to how much weight to attach to their testimony.
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> It is important to mention that the Respondent carried the burden to prove that the dismissal was effected in accordance with a correct and fair procedure and that such dismissal was effected for a fair and valid reason. While the respondent claimed that there were some video footage covering the incident, which could have made it easier to see whether indeed the applicant retaliated, or acted in self-defense when Brussels was again threatening to attack him, the respondent is unable to realize that it was for it to prove that and not Applicant. Subsequently the claim that the video footages, dvd, was given to the Applicant, (which in any event he denied), does not help the respondent's case. It is not clear why the video footage concerned was not viewed by the chairperson of the disciplinary hearing, to resolve the claim of self-defense and the counterclaim of retaliation.
>
> What is clear is that the parties are unable to agree whether the applicant acted in self defence or he did retaliate. He could only plead guilty if he agreed that he did retaliate which does not seem to be the case. It is also important to note that Mr Brussels whom the Respondent alleged to have been unprovoked assaulted by the Applicant was never called to testify as to exactly how he was assaulted. This could have enabled the applicant to put questions to him. It is not clear why he was not called, initially at the disciplinary hearing and then also at the arbitration.
>
> It is subsequently my finding that the respondent failed, on a balance of probabilities to discharge the *onus* to prove that the dismissal of the applicant was substantively fair.'[3]

D Grounds of Appeal

[3] See page 323- 324 of the record.

[21] As I have indicated above the appellant on 07 January 2013 gave notice of its intention to appeal against the above findings by the arbitrator. Its grounds of appeal were set out in the Notice of Appeal and that Notice was amended on 26 February 2013 and the grounds are that:

(a) the arbitrator erred in law in finding on the facts that the respondent's dismissal had been procedurally unfair;

(b) the arbitrator erred in law in finding that he did not have to 'dwell on issues of substantive fairness' due to him having already found that the disciplinary hearing had been procedurally unfair;

(a) the arbitrator erred in law in finding on the facts that the respondent acted in self-defence and that his combined actions did not amount to assault;

(b) the arbitrator erred in law in finding that due to the fact that certain CCTV footage of the alleged incident was not made available by the appellant, that this had caused the appellant not to discharge its onus to prove the respondent's guilt respectively;

(c) the arbitrator erred in law in finding on the facts that the respondent had proved that he did indeed suffer damages in the amount of N$96,900.00.

[22] In terms of the provisions of section 89(1)(a) of the Labour Act, 2007[4] a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 '*on any question of law alone*'. The question which is confronting me in this appeal is the question whether the appellant's appeal lies on questions of law alone. Before I answer that question I will briefly restate how this court has pronounced itself on appeals based on 'questions of law alone'.

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[4] Act 11 of 2007.

E The question of law

[23] The provisions of section 89 of the Act were considered by this Court in the unreported judgment of ***Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo[5]:*** where Parker, J said:

> 'The predicative adjective 'alone' qualifying 'law' means 'without others present'. (*Concise Oxford Dictionary*, 10th ed) Accordingly, the interpretation and application of s. 89(1)(a) lead indubitably to the conclusion that this Court is entitled to hear an appeal on a question of law alone if the matter, as in the instant case, does not fall under s. 89(1)(b). A 'question of law alone' means a question of law alone without anything else present, e.g. opinion or fact. It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is 'not a matter of form but a matter of substance … necessary to enable appeals to be justly disposed of (*Johnson v Johnson* [1969] 1 W.L.R. 1044 at 1046 *per* Brandon, J).

[24] The full bench of the High Court (per Mtambanengwe, J) in *Rumingo and Others van Wyk*[6] stated the following on the issue of a question of law:

> 'The test in appeals based on a question of law, in which there has been an error of fact was expressed by the South African Appellate Division in *Secretary for Inland Revenue v Guestyn Forsyth & Joubert* 1971 (3) SA 567 (A) at 573 as being that the appellant must show that the Court's conclusion 'could not reasonably have been reached'.

[25] The full bench of the High Court (per Hannah, J) in *Visagie v Namibia Development Corporation*[7] stated that the Labour Court (in this matter the arbitrator) was the final arbiter on issues of fact and that it was not open to this Court on appeal to depart from a finding of fact by that Court (in this matter the arbitrator). Hannah, J

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5 Case No. LCA 02/2010.
6 1997 NR 102 at 105D – E.
7 1999 NR 219 at 224.

referred with approval to the decision of the Supreme Court of Appeal in South Africa in the matter of *Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd*[8] where Scott, JA said the following:

> "In the present case, of course, this Court, by reason of the provisions of s 17 C(1)(a) of the Labour Relations Act 28 of 1956, is bound by the findings of the LAC. According, the extent to which it may interfere with such findings is far more limited than the test set out above. As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have been made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 *et seq*; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666 B – D). The enquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all. The limitation on this Court's ordinary appellate jurisdiction in cases of this nature apply not only to the LAC's findings in relation to primary facts, i.e. those which are directly established by evidence, but also to secondary facts, i.e. those which are established by inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact. (See *Magmoed v Janse Van Rensburg and Others* 1993 (1) SA 777 (A) at 810H – 811G). It follows that it is not open to this Court to depart from a finding of fact by the LAC merely on the grounds that this Court considers the finding to be wrong or that the LAC has misdirected itself in a material way or that it has based its finding on a misconception. It is only where there is 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 the finding that this Court will be entitled to interfere.'

[26] This Court therefore, on the strength of these authorities, is required to determine as question of law whether on the material placed before the arbitrator during the arbitration proceedings, there was no evidence which could reasonably have supported such findings or whether on a proper evaluation the evidence placed before the

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[8] 1998 (3) SA 349 (SCA).

arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings. Hoff, J[9] put it as follows

> 'The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances'.

F Consideration of the different grounds of Appeal

The first ground of appeal

[27] It must be remembered that the appellant's first ground of appeal is that the arbitrator erred in law in finding on the facts that the respondent's dismissal had been procedurally unfair. It thus follows that I have to consider whether, on the evidence that was placed before the arbitrator, the factual conclusion (namely that the dismissal of the respondent was procedurally unfair) which he (the arbitrator) reached was a reasonable one.

[28] Mr Jones who appeared for the appellant argued that the respondent was afforded all his rights at the disciplinary hearing and therefore no procedural irregularity could have occurred. He further argued that the portion of the appellant's policy which the arbitrator held had not been complied with refers to the investigation that should be undertaken to determine if the complaint was one of misconduct or one of incapacity and poor work performance. He thus concluded that the complaint's disciplinary policy and procedure which the arbitrator accused the appellant of not 'slavishly adhering to' find no application in the present matter.

[29] I do not agree with Mr Jones' submission. The crux of the procedural irregularity lies not in the fact that, the appellant did not 'slavishly adhere to' its disciplinary policy but in the fact that the respondent did not get an opportunity to put its version of events

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[9] *House and Home v Majiedt and Others* (LCA 46/2011) [2012] NALC 31 (22 August 2012) at para [7].

to chairperson of the disciplinary hearing. The finding by the arbitrator that once the respondent raised the issue of 'self-defence', the chairperson of the disciplinary hearing ought to have entered a plea of 'not guilty' and afford the respondent an opportunity to place its version of events before the disciplinary committee and call witnesses to testify as to what really transpired, and whether it was a 'self-defense' action or 'retaliation' by the respondent, can, in my view, not be faulted and is therefore not unreasonable.

[30] I say the finding of the arbitrator cannot be faulted for the following reasons. Section 33 (4) of the Labour Act, 2007 in material terms provides as follows:

> '(4) In any proceedings concerning a dismissal-
>
> (a) if the employee establishes the existence of the dismissal;
>
> (b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.

[31] On a proper construction of section 33(4), it is self-evident that, where an unfair dismissal is alleged against an employer, the *onus* to proof the alleged misconduct lies upon the employer. The employer must thus lead evidence to prove the existence of an act of misconduct. In criminal proceedings the State is absolved by section 112 of the Criminal Procedure Act[10] 1977 from the obligation to establish a crime committed by an accused and an accused person can be convicted on the strength of admissions made by him or her. The Labour Act, 2007 has no provision which is equivalent to section 112 of the Criminal Procedure Act, 1977. The appellant's disciplinary code also does not have a provision which is equivalent to section 112 of the Criminal Procedure Act, 1977. The appellant's disciplinary code sets out the procedure which must be followed at a disciplinary hearing[11]. The steps outlined in the disciplinary code are not the steps

[10] Act 51 of 1977.

[11] Paragraph 10.2 of the Appellant's Disciplinary code amongst others provides as follows:

> '**10.2 Procedure**
>
> **10.2.1 Step 1**
>
> Open the hearing by reading the name and Company number of the alleged offender from the Complaint Form and ascertain they are correct. If the alleged offender is not represented (and the Service Centre is unionized), check that he understands his right to representation and that he has in fact waived that right. His/her replies to be recorded.

followed by the chairperson of the disciplinary hearing. There is no provision in the appellant's disciplinary code for the respondent to be found guilty of misconduct on his own plea of guilt. I therefore find that the first ground of appeal is not on a question of law and must thus fail.

The second ground of appeal

10.2.2 Step 2

Read out the complaint. Ask the accused if he/she understands the charge. Ask the offender to plead either guilty or not guilty to each charge.

10.2.3 Step 3

Witnesses for the complaint will be brought in individually to give their evidence. (The presiding officer should make notes of this evidence).

Note:

A witness can be asked, or may prefer to make a written statement that must be attested by him (this means that the witness who made the statement must testify to facts in the statement). Such statements should be regarded as strictly confidential until the Hearing date. The alleged offender must be allowed to cross-question the witness.

10.2.4 Step 4

Witness nominated by the alleged offender should be allowed, and evidence taken as in Step 3 above. Note that a witness may be requested to testify but cannot be forced to do so.

10.2.5 Step 5

The presiding officer is to ask the alleged offender and complaint to leave the room while he/she considers the evidence.

10.2.6 Step 6

Having satisfied himself clearly in his own mind, the presiding officer will inform the accused of his finding of guilty or not guilty on each charge.'

[32] The appellant's second ground on which it basis its appeal is that the arbitrator erred in law in finding that he did not have to 'dwell on issues of substantive fairness' due to him having already found that the disciplinary hearing had been procedurally unfair. Mr Jones who appeared for the appellant argued that even if the disciplinary hearing inclusive of the appeal hearing could be seen to be procedurally flawed, the arbitrator was not entitled to rely on *Rossam v Kraatz Welding Engineering (Pty) Ltd* [12] because that case dealt with dismissal for poor work performance and in that case the employee had not been afforded any hearing at all.

[33] What Mr Jones does not take cognizance of is the fact that although the arbitrator made mention of the *Rossam v Kraatz Welding*[13] case and of the fact that he does not have to consider the merits of the dismissal, my reading of the record is that the arbitrator in fact went on and considered the substantive fairness of the dismissal of the respondent. The arbitrator made a factual finding that the appellant did not discharge the burden resting on it and there was accordingly no valid reason for the dismissal. The second ground of appeal is also without merit and I thus dismiss it.

The third ground of appeal

[34] The third ground on which the appellant attacks the arbitrator's finding is the allegation that the arbitrator erred in law in finding on the facts that the respondent acted in self-defence and that his combined actions did not amount to assault. Mr Jones argued that the arbitrator acted unreasonably in finding on the facts as testified to and corroborated by at least three witnesses that the respondent had acted in self defence when it was undisputed that he waited for three to ten minutes before he struck his alleged attacker who at the time was standing with his back to the respondent and conversing on his cellular phone.

[35] I am not persuaded by Mr Jones' submission for the following reasons. Firstly, there were not three witnesses that corroborated each other, Mr de Jagger the

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12 1998 NR 90 (LC).
13 Supra 12.

appellant's manager was not an eye witness to the events which occurred on 01 May 2011, so he could not and did corroborate the evidence given by the two security guards (i.e. Gebhard Shigwedha and Linus Kataporo). Secondly, it is not correct to say that it is undisputed that the respondent waited for three to ten minutes before he struck Mr 'Brussels'. I say it is incorrect, 'to say that it is undisputed that the respondent waited for three to ten minutes before he struck Mr Brussels' because the respondent testified, at the arbitration hearing, that after they were separated Mr Brussels again approached him in a threatening manner. By that testimony the respondent is clearly disputing the allegation that he waited for three to ten minutes before he struck Mr Brussels. Thirdly, I have read the arbitrator's award and nowhere in the award does the arbitrator make a finding that the respondent acted in self defence. What the arbitrator found is that, once the respondent indicated that he was acting in self defence there was no basis upon which the chairperson of the disciplinary hearing could be satisfied that the respondent had pleaded guilty to the charge of assault.

[36] The arbitrator made a credibility finding and Mr Jones did not attack that finding by the arbitrator and I also could not find how the arbitrator misdirected himself in that regard. I thus agree with Mr Rukoro who appeared for the respondent when, he argued that the finding by the arbitrator cannot be faulted as unreasonable because there were indeed some discrepancies in the evidence of the two security guards who were allegedly eye witnesses to the assault of Mr Brussels by the respondent. The discrepancies may seem minor but they are material. The discrepancies were pointed out by Mr Rukoro as being the following: Mr Shigwedha testified that he saw Mr Russell passing the respondent when he was assaulted from behind by the respondent. Mr Kataporo on the other hand testified that, he saw the respondent run after Jeff and hit him from behind with a fist and Jeff hit himself against the car. I am therefore not convinced that the finding by the arbitrator is vitiated by lack of reason warranting this court to interfere with that finding and I accordingly also dismiss the third ground of appeal.

The fourth ground of appeal

[37] The fourth ground on which the appellant attacks the arbitrator's finding is the allegation that the arbitrator erred in law in finding that due to the fact that certain CCTV footage of the alleged incident was not made available by the appellant, that this had caused the appellant not to discharge its *onus* to prove the respondent's guilt. I fail to see how the arbitrator acted unreasonably by finding that the failure by the appellant to produce the CCTV footage led to the appellant failing to discharge the *onus* resting on it.

[38] What Mr Jones fails to appreciate is the fact that, it is the appellant who wanted to rely on the CCTV footage to proof that, the respondent unprovoked assaulted Mr Brussels and that the appellant was the producer of the CCTV footage. I refer in this regard to the evidence of Mr De Jagger at the arbitration hearing where he testified that:

> '**MR DE JAGER:** It baffles me. It is clear from the *video footage* that Mr Kuritjinga came from behind. There was absolutely no provocation at that point. He came from behind and he hit Mr Brussels in the face.'[14] (Underlined for emphasis)

I have earlier indicated that the CCTV footage was not viewed at the internal disciplinary hearing or the internal appeal hearing. In the absence of the production and viewing of the CCTV footage the evidence of Mr De Jager is clearly inadmissible hearsay evidence. I therefore also dismiss the fourth ground of appeal.

The fifth ground of appeal

[39] The fifth ground on which the appellant attacks the arbitrator's finding is the allegation that the arbitrator erred in law in finding on the facts that the respondent had proved that he did suffer damages in the amount of N$96,900. Mr Jones submitted that where a party claims an amount owing to him under the Act, that party must not only plead how those amounts arise but also lead evidence and prove those amounts, thus substantiating the exact extent of the claim. He referred me to the case of *Springbok Patrols (Pty) Ltd v Jacobs & Others*[15], where Smuts, J stated that:

[14] See page 125 of the record.

[15] LCA (702/2012) [2013] NALCMD 17 para [12] an unreported judgment of this Court delivered on 31 May 2013.

> '…this court has made it clear that were the parties seek to claim an amount owing to them under the Act, they must not only plead how those amounts arise but also lead evidence and prove those amounts, thus substantiating the exact extent of the claim…..'

[40] Mr Jones continued and submitted that the respondent did not plead his losses or the quantum thereof in the complaint, did not provide any evidence under oath of his losses or alleged damages, or both losses and damages. He concluded his submission by stating that there is simply no evidence in regard to the quantum of the first respondent's alleged losses. Mr Rukoro countered these submissions by arguing that Mr Jones' submission is without merit because the respondent did testify as to what his monthly salary was and that was not put in dispute.

[41] I have perused the referral form, Form LC 21 and the summary annexed to that form. It is correct that in the referral form the respondent simply stated that the nature of the dispute is one of 'unfair dismissal'. In the brief summary of the dispute attached to the referral form the respondent simply gives a summary of what the dispute is, no mention is made that the respondent is claiming reinstatement or compensation for loss of income. However, at the commencement of the arbitration hearing the following exchange occurred:

'CHAIRPERSON (Arbitrator):	And you are accused of doing what?
FOR APPLICANT (Respondent)	Assault…
CHAIRPERSON	And what do you want now?
FOR APPLICANT	Reinstatement in the previous position or a comparable position to match. And payment in respect of loss of income for the period that he was dismissed.'

[42] I accept and fully agree with the legal principles enunciated in the case of *Springbok Patrols (Pty) Ltd v Jacobs & Others*[16] . I am, however, of the view that the

[16] Supra 14.

facts in that case are distinguishable from the facts in the present matter. In the *Springbok* case the claim was not for unfair dismissal but for alleged wrong deductions from the employees' wages. Furthermore in the *Springbok* case no evidence or even reference was made as to how much was deducted from their wages or what their wages were. I am of the opinion that in view of section 86 (7) of the Labour Act, 2007 which provides that:

> '(7) Subject to any rules promulgated in terms of this Act, the arbitrator-
>
> (a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and
>
> (b) must deal with the substantial merits of the dispute with the minimum of legal formalities.'

The appellant was alerted and knew that the remedy which the respondent is seeking if the arbitrator were to find that the dismissal was procedural and substantially unfair is reinstatement and payment for the months which the respondent was unemployed. The appellant further did not dispute that the respondent's salary was N$ 5100 per month and that he (respondent) was unemployed for 19 months at the time when the arbitrator made his award. I thus agree with Mr Rukoro that Mr Jones' submissions are without merit. I am thus of the view that the arbitrator did not act unreasonably in making the award which he made.

[43] Mr Rukoro alerted me to the fact that the appellant does not object to the order of reinstatement or re-employment. It is indeed so that the appellant has not specifically objected to the order of reinstatement or re-employment but it must be remembered that appellant appealed '*against the entire award*' issued by the arbitrator. I have above indicated that this Court is entitled to hear an appeal on a question of *law alone* if the matter, as in the instant case, does not fall under s. 89(1)(b). I also held that *"the predicative adjective 'alone' qualifying 'law' means 'without others present'*. It thus follows that the notice of appeal in so far as it purports to appeal against the entire award is defective. The fifth ground of appeal accordingly also fails.

[44] Consequently, the appeal fails and is dismissed. For the avoidance of doubt, the award of the arbitrator dated 12 December 2013 is varied (where necessary) to read:

1 The dismissal of Zedekia Kuritjinga by DHL Express Namibia (Pty) Ltd is both procedurally and substantively unfair.

2 The appellant is ordered to reinstate the respondent in the position in which he would have been had he not been so dismissed, i.e. retrospectively to the date of his dismissal which is 11 May 2011.

3 The appellant is ordered to pay to the respondent back pay for the whole period of dismissal (being 11 May 2011 to 24 January 2014).

4 I make no order as to cost.

SFI Ueitele
Judge

APPEARANCES

APPELLANT:	J P Jones Instructed by GF Köpplinger Legal Practitioners, Windhoek.
FIRST RESPONDENT:	S Rukoro Instructed by the Directorate of Legal Aid.
SECOND RESPONDENT:	No Appearance.
SECOND RESPONDENT:	No Appearance.