NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: LCA 30/2013

In the matter:

ROSH PINAH ZINC CORPORATION (PTY) LTD **APPELLANT**

and

IMMANUEL NAUKUSHU **RESPONDENT**

Neutral citation: *Rosh Pinah Zinc Corporation (Pty) Ltd v Naukushu* (LCA 30/2013) [2014] NALCMD 12 (7 March 2014)

Coram: UNENGU, AJ

Heard: 8 November 2013
Delivered: 7 March 2014

Flynote: Labour law – appeal against arbitrator's award – Award issued in favour of the respondent – On appeal, the finding of the arbitrator set aside and appeal upheld.

Summary: The appellant has appealed against the arbitral award issued in favour of the respondent by the arbitrator. The respondent, an employee of the appellant who worked as an operator at the mining division was charged with and found guilty

of misconduct for being absent from work for 5 days at the disciplinary hearing and was dismissed. However, the arbitrator, after the arbitration proceedings, found in favour of the respondent and issued an award ordering his re-instatement and compensation. On appeal, the Court found that the arbitrator made a wrong conclusion from the evidence presented before him – upheld the appeal and the award set aside.

ORDER

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(1) The appeal is upheld.

(2) The arbitration award by the arbitrator issued on 12 March 2013 is set aside.

JUDGMENT

UNENGU, AJ: [1] The appellant is appealing against an award by the arbitrator in favour of the respondent following the provisions of section 89(2)[1] read with rule 17(1)(c) of the Labour Court Rules.

[2] As the appeal was noted two days outside the prescribed time, condonation for the late noting of the appeal was applied for and the legal practitioner for the appellant gave reasons why the appeal could not be noted within the prescribed time of 30 days. Respondent did not oppose the condonation application by the appellant therefore, there is no reason why the application should not be granted. The late filing of the appeal did not cause any prejudice to the respondent at all. The application for condonation is granted as prayed for in paragraphs 1 and 2 of the Notice of Motion dated 29 October 2013.

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[1] Labour Act, 11 of 2007

[3] Now, a brief summary of what transpired between the appellant and the respondent.

[4] The respondent was employed by the appellant for nine years as an operator in the mining division. During the period late August to early September 2012, he went on leave without permission or authority from the appellant as his application for vacation leave to attend a wedding of his niece was not granted.

[5] On his return, the respondent was charged with misconduct of being absent from work for 5 days consecutively, found guilty and was dismissed from employment.

[6] His internal appeal against the conviction and dismissal was unsuccessful as the finding of dismissal by the chairperson in the disciplinary hearing was confirmed. That being the case, the respondent referred the matter to the Office of the Labour Commissioner as a dispute of unfair dismissal.

[7] The Labour Commissioner appointed Matheo Rudath as an arbitrator on 30 January 2013, who on 12 March 2013 set aside the finding of the disciplinary hearing and issued an award in favour of the respondent. It is the award so granted by the arbitrator the appellant is appealing against, on the following questions of law supported by the grounds listed here under:

> ‘Appellant’s appeal on questions of law is as follows:
>
> 8.1 Whether the Arbitrator could have come to the decisions contained in the award on the evidence presented during the arbitration proceedings?
>
> 8.2 Whether the Arbitrator on the facts common between the parties in law could have come to the conclusion that Respondent is not guilty on a charge of absence of 5 or more consecutive days?
>
> 8.3 Whether the Arbitrator was in a position, on the facts before him to conclude that Respondent must be reinstated?

8.4 Whether the Arbitrator was in a position, on facts before her to conclude Respondent is entitled to payment of N$61 800.00 being an amount equal to six months' salary?

9.

The grounds on which the questions of law are based are:

9.1 On the facts common to the parties the arbitrator erred in law in concluding that Appellant dismissed respondent from employment in contravention of section 33(a) of the Labour Act, 2007 (Act 11 of 2007) or dismissed Respondent unfairly and has, as such no legal basis for such conclusion;

9.2 On the facts presented as evidence during the arbitration proceedings on the arbitrator erred in law in concluding that Appellant must reinstate Respondent and that Appellant must pay respondent an amount of N$61 800.00.'

[8] At the hearing of the appeal, Messrs de Beer and Daniels acted on behalf of the appellant and the respondent respectively. Both counsel submitted written heads of argument which they supplemented with oral submissions.

[9] It is apparent from the grounds on which the questions of law are based that the appellant is attacking the award, firstly because the arbitrator, according to the appellant, on the evidence presented, could not have concluded that the appellant dismissed the respondent from employment in contravention of section 33(a) of the Labour Act, 2007, or has dismissed the respondent unfairly, which, according to the appellant, does not have any legal basis.

[10] The respondent, on the other hand, is opposing the appeal on the grounds that, based on the evidence presented at the arbitration hearing and the Labour Act, the arbitrator made a correct decision and award.

[11] In his written heads of argument, Mr Daniels, counsel for the respondent argues that the Labour Act, 2007 provides that an employer may not terminate an employee's employment without a valid reason and in compliance with the procedures. He goes on further and states that in labour matters, evidence is

considered on a balance of probabilities and that the employer bears the onus to prove that the dismissal was procedurally and substantively fair. In support of his contention, he referred to the matter of *House and Home v Ricardo Majiedt*[2] and to Parker, Collins – Labour Law in Namibia[3].

[12] Counsel is correct in both his submission and the authority he had referred to. It is also not in dispute that the employer bears the onus to prove that the dismissal of an employee is procedurally and substantively fair. The employee only bears the onus to prove that he or she was employed by the employer and that he or she has been dismissed.

[13] Therefore, to be able to know that the respondent in this appeal was dismissed for a good reason or not and as whether the arbitrator, on the evidence presented before him, could not have come to the conclusion that the dismissal of the respondent was contrary to the provisions of section 33(a) of the Labour Act, 2007 or has dismissed the respondent unfairly without a legal basis, a brief survey of the evidence presented at the arbitration proceedings has to be conducted.

[14] Collectively, three witnesses testified on behalf of the appellant at the arbitration proceedings. They were Messrs Valombola, Nepaya and Bobeje. Mr Valombola, was first to testify for the appellant. He testified that he worked for the company as a security boss, and the complainant who charged the respondent with misconduct for taking unauthorised vacation leave. He said that in charging the respondent with misconduct, he took into account the company policy which provides how an employee should go about to take his or her annual leave. He read into record clauses 10.1 and 10.2 of the policy which provide, amongst others that the granting of leave is at all times subject to an agreement between the employer and employee but in the absence of any agreement, the employer may determine when an employee will be required to take leave after taking operational requirements into account (emphasis added).

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[2] Case No LCA 46/2011 – p32
[3] At pp 143-147

[15] Mr Valombola continued and read paragraph 10.2 of the policy also into the record, which provides as follows: 'No employee may proceed on leave without completing a leave form and obtaining prior written approval. Application should be submitted in good time in order to permit arrangement to be made for the relief of any employee during any leave period. The employer will advise an employee in writing if the leave application is declined'. (emphasis added)

[16] In this instance, it is not in dispute that the respondent has completed the leave form for five days before going on vacation. Similarly, it is common cause between the parties that the respondent went on leave without his leave application being approved, meaning that no prior written approval of his leave was obtained allowing him the opportunity to go away from his work place.

[17] It is also Mr Valombola's testimony that he did not recommend and approve the leave of the respondent because his co-operator, Mr Ndatipo's leave, almost the same time as that of the respondent, was already approved. According to him, he advised the respondent to fill out another application form to change the dates but respondent insisted that he will go. Thus, the respondent knew that his leave has not been approved, but nevertheless proceeded and went home without permission

[18] The second witness called by the appellant during the arbitration proceedings, was Mr Nepaya who was the Chairperson of the disciplinary hearing. His evidence is essential in that he corroborates the evidence of Mr Valombola and Mr Bobeje. Both Messrs Nepaya and Bobeje testified amongst others that the respondent was obliged to make sure that his leave was approved before going on leave and that the respondent's leave application was declined because his co-operator was granted leave for the same period.

[19] Relevant to the issue in dispute, the respondent in his testimony admitted that he was aware that he has to get something in writing back after submitted his leave application. He also admitted that he knew that his application for leave was not approved, but said that this was due to the incompetency of the foreman, Mr

Valombola. He further denied being told that he could not go on leave because his colleague was already granted leave and that he could make alternative arrangements for his leave.

[20] With these pieces of evidence at his disposal and after listening to submissions from representatives of the applicant and the respondent then, the arbitrator proceeded and issued the following award in favour of the applicant, the respondent in this appeal.

'AWARD

In view of the above, I find that the respondent dismissed the applicant without a valid and fair reason. Therefore based on the evidence placed before me, I find that the respondent dismissed Mr Immanuel Naukushu in contravention with section 33(a) of the Labour Act 11 of 2007.

I therefore order the respondent must reinstatement (sic) Mr Immanuel Naukushu and to pay Mr Immanuel Naukushu his monthly salary in the amount of N$10 300.00 x 6 months equal (=) N$61 800.00 on or before 20 March 2013. This arbitration award is final and binding on both parties'.

[21] Before making this award the arbitrator expressed an opinion with regard the evidence presented before him as follows:

'Based on the evidence before me, I am of the opinion that the foremen (sic), Mr Frank Valombola did not deny the applicant leave because another employee applied for leave before him. It is clear in my view that the applicant supervisor had simply forgot to process the application leave from (sic) as he took leave himself.'

[22] This finding is totally incorrect and contrary to the evidence presented before him. The evidence is that the respondent could not be granted vacation leave for the same period with his co-operator, Mr Ndatipo, whose application for leave was already approved. The respondent was asked to amend the days he wanted to go on leave which he refused to do, because he has to attend a wedding of his uncle's daughter. First he created an impression that the wedding was for his own daughter. There is nothing on record indicating that Mr Valombola forgot to process the respondent's leave application because he himself went on leave. Something close

to that, is the allegation by the respondent that his leave application was not granted due to the incompetency of Mr Valombola. What he meant by this, was not explained. The evidence on record is that the leave application for the respondent was not approved at that time because his co-operator was to go. They could not go at the same time for production purposes. The conclusion by the arbitrator, in my opinion, is not supported by the evidence presented to him.

[23] Once again, the arbitrator, was wrong to conclude that the respondent has a reasonable ground to believe that his leave had been approved as it had always been the practice in the past because he (the respondent) was not informed in writing as prescribed by the leave policy. The respondent was informed personally that his application for leave will not be approved unless he amended the dates and made some relief arrangements. It is not that he was not informed about the refusal of his leave – he knew that his leave application was not approved when he left to attend his niece's wedding. Respondent worked nine years for the appellant, he was thus aware that, according to the company policy, he was not allowed to go on leave without obtaining prior written approval. He knew that if he goes without prior written approval of his leave application, is a serious offence for which he could be charged with misconduct. He cannot now come and allege that the practice of the company allowed him to go before obtaining written approval. He failed to refer to one example where this practice was followed. Be that as it may, the policy of the company forbids employees of the company to go on leave without prior written approval. Therefore, for the respondent to proceed on leave without prior written approval was tantamount to going on leave without permission which he was charged with and found guilty of.

[24] Mr Daniels in his written heads echoed the sentiments expressed by the arbitrator that the only logical conclusion that can be drawn from the whole saga is that Mr Valombola failed to process the respondent's leave application, failed to make arrangements for replacement staff to be available during the period of the respondent's leave and he himself went on leave and as a result of his failure he decided to charge the respondent with absenteeism. I totally disagree with counsel.

Mr Valombola's testimony is loud and clear and satisfactory in all material respects of what transpired between him and the respondent when the latter submitted his leave application. In actual fact, the respondent is not a truthful witness because he told two different versions about whose wedding he had to attend. At one stage he created an impression that the wedding was for his daughter, he must go to hand her over to the in-laws and on another, for a niece or his uncle's daughter. On record, the attitude displayed by the respondent towards his foreman, Mr Valombola, was extremely negative. Such negative attitude from an employee who worked for the company for nine years, betrayed the trust placed in him by the employer and also not good to sound industrial relations and promotion of efficiency and productivity at his work place. His employer suffered production loss as a result of his conduct.

[25] Mr Daniels for the respondent submits that there was a duty on the appellant to inform the respondent in writing that his leave was not approved and that if he was so informed and still went on leave, the guilty finding at the disciplinary hearing could have been justified. However, what Mr Daniels must remember, in case he forgot, is that his client left before the appellant could inform him in writing that his leave application was declined.

[26] Similarly, there was also a duty on his client not to proceed on leave without obtaining prior written approval of his leave application from the employer which the respondent admitted not to have obtained before he left. Having say so and taking into account the evidence presented at the arbitration proceedings, I am of the view that the arbitrator made a mistake in finding that the respondent was dismissed unfairly and without legal basis. This conclusion is contrary to the evidence presented before him.

[27] An employee has a duty, not only to render personal services to his employer while the contract of employment is in force, but also obliged by the contract not to be absent from work without a lawful excuse[4]. In this appeal, the respondent did not

[4] Parker, Collins – Labour Law in Namibia at 42 par 3.3

comply with these requirements making him guilty of misconduct which resulted in his dismissal.

[28] Based on the aforegoing reasons and conclusion, I find it unnecessary to consider the submissions on reinstatement and compensation.

[29] In the result, I find that the dismissal of respondent at the disciplinary hearing was substantively fair and make the following order.

(1) The appeal is upheld.

(2) The arbitration award by the arbitrator issued on 12 March 2013 is set aside.

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PE Unengu

Acting

APPEARANCE

For the appellant: Mr de Beer
Of De Beer Law Chambers

For the respondent: Mr C Daniels
of Clement Daniels Attorneys