REPUBLIC OF NAMIBIA REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LCA 78/2013

In the matter between:

1.1.1.1. **LIFE OFFICE OF NAMIBIA LTD (NAMLIFE)**
APPELLANT

and

JOEL AMAKALI **FIRST RESPONDENT**
LABOUR COMMISSIONER **SECOND RESPONDENT**

Neutral citation: Life Office of Namibia Ltd (Namlife) v Joel Amakali (LCA 78/2013) [2014] NALCMD 34 (8 August 2014)

Coram: SMUTS, J
Heard: 25 July 2014
Delivered: 8 August 2014

Flynote: Appeal against an arbitrator's award under s89 of the Labour Act, 11 of 2007. A preliminary point was taken that the award was a nullity because it

was issued more than 30 days after the conclusion of proceedings and outside the time limit period within which awards are to be issued, as prescribed by s86(18) of Act 11 of 2007. Reliance was placed upon *IUM v Torbitt* (LC 114/2013) [2014] NALCMD 6 (20 February) which had made a ruling to that effect. The court found that the approach in *IUM v Torbitt* was clearly wrong and declined to follow it. The court found that the remedy to be invoked if an award is late is to bring a *mandamus* against the arbitrator. On the merits of the appeal, the court found that the arbitrator's finding of a dismissal for sexual harassment being substantively and procedurally unfair was one which no reasonable arbitrator could have reached. The court upheld the appeal and set aside the award.

ORDER

The appeal against the arbitrator's award succeeds and the first respondent's dismissal is confirmed. The award in favour of the first respondent is set aside. No order is made as to costs.

JUDGMENT

SMUTS, J

(b) This is an appeal under s 89 of the Labour Act[1] against the award of an arbitrator (cited as the second respondent) reinstating the first respondent in his employment with the appellant.

(c) The first respondent was charged on two counts of sexual harassment of

[1]Act 11 of 2007

two female employees and one count of using foul and abusive language towards another female colleague. He was found guilty in an internal disciplinary enquiry. In the finding on sanction, it was pointed out to the first respondent that, in terms of clause 17 of the appellant's disciplinary code, management may impose a stricter or more lenient measure than that proposed by the chairperson of the disciplinary enquiry whose sanction was that the first respondent be suspended without pay for 30 days and two final written warnings valid for 12 months. The first respondent was also informed that he had the opportunity to appeal against the sanction or findings of the disciplinary enquiry.

(d) The Chief Executive Office ("CEO") of the appellant thereafter gave the first respondent notice under clause 17 of the disciplinary code that he intended to impose a more severe sanction in the form of dismissal by virtue of the fact that the recommended sanction for sexual harassment under the appellant's Disciplinary Code is dismissal.

(e)

(f) The CEO accordingly gave the first respondent notice of his intention to impose such a sanction and afforded him the opportunity to make written representations on the issue. The first respondent made use of that opportunity and addressed the CEO on sanction and profusely apologized for what had occurred. The first respondent in fact stated that the "finding of the chairman was reasonable" and stated "I am very, very sorry for what happened that day". He further stated that it was not his intention to offend anyone and apologized to those affected for his conduct. He further stated that "things like this will never happen again in future" and requested forgiveness.

(g) The first respondent did not appeal against the findings of guilt.

(h)

(i) Despite his plea and his apologies, the appellant's CEO decided, in view of the seriousness of the charges, to dismiss him.

(j) The charges stemmed from an end-of-year office function held at Midgard and concerned offences which happened there and on the way back to Windhoek on a bus.

(k) The first respondent referred a dispute concerning his dismissal to the Office of the Labour Commissioner. The matter proceeded to arbitration. In the award, the arbitrator found in favour of the first respondent. He found that his dismissal was both procedurally and substantively unfair and for no valid reason. The arbitrator reinstated the first respondent to his position with effect from 1 November 2013 and directed that the appellant pay the amount of N$102 000 representing a large portion of his salary from the date of dismissal to reinstatement.

(l) The appellant appeals against that award.

(m) **Appellant's preliminary point**

(n) Before referring to the arbitration proceedings, and the grounds of appeal, a preliminary point, taken by Mr JPR Jones on behalf of the appellant that the arbitrator's award was delivered out of time and is as a consequence a nullity, is first dealt with.

(o)

(p) It is common cause that the arbitration was heard and concluded on 22 April 2013. The award, however, was only forthcoming and delivered on 15 October 2013. Mr Jones pointed out that the award was, under s 86(18) of the Act, to be delivered within 30 days of the conclusion of the proceedings. He submitted that the award should have been delivered by 22 May 2013 and was as a consequence some five months late. The arbitrator had stated that the lateness of the award was occasioned by a computer virus.

(q) Mr Jones submitted that s 86(18) is peremptory. It provides:

> 'Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator.'

(r) Mr Jones further referred to a decision of this court in *International*

University of Management v Torbitt[2] where Parker AJ held that the provisions of s 86(18) are peremptory and that non-compliance with those provisions results an award given outside of that time period being a nullity. He reasoned as follows:[3]

'Furthermore, it is not insignificant, neither is it aleatory that 'must' and not 'shall' is used in s 86(18) of the Labour Act. It is to take it out of the hands of the over activist judge who may be minded to put forth the theory that depending upon the context, 'shall' may mean 'may', thus creating a directory or permissive status for 'shall' in addition to its natural, peremptory and mandatory status. Thus, given its ordinary grammatical meaning by context (see *HN and Others v Government of the Republic of Namibia* 2009 (2) NR 752 (HC)), s 86(18) means that the statutory command in s 86(18) is couched in peremptory terms. That being the case, it is a strong indication, in the absence of considerations pointing to another conclusion (as that canvassed by Mr Ncube and Mr Vlieghe, which I have rejected) that the Legislature intended disobedience of the time limit prescribed by s 86(18) of the Labour Act to be visited with a nullity.'

(s) The point was thus taken that the award, having been given outside the 30 day time period required by s 86(18), was accordingly a nullity on the basis of the decision by Parker AJ in *IUM v Torbitt*.

(t) In the course of his reasoning, Parker AJ referred to the legislative purpose behind this section and concluded that it was that arbitration awards are to be issued expeditiously. That is entirely correct. He points out that the use of the term "must" casts an obligation upon an arbitrator to deliver an award in that 30 day period. He concludes that the use of the term "must" is mandatory and peremptory and not permissive or directory. I respectfully agree with all of those sentiments. But I do not agree with the conseqence which he found followed upon non-compliance with this statutory injunction of delivering the award within 30 days. The consequence which he visits upon non-compliance with s 86(18) is invalidity of an award delivered beyond the expiration of that period.

---

[2](LC 114/2013) [2014] NALCMD 6 (20 February 2014).

[3]*Supra* at par 16.

(u) The statutory intention is plainly to ensure that arbitration awards are delivered expeditiously. But according to Parker AJ the consequence of failing to do so means that the award is a nullity if an award is delivered a day, a week, a month or five months out of time. That consequence certainly could not, in my respectful view, ever have been the statutory intention. Parker AJ does not deal with the consequences of a declaration of invalidity of the award. What about the referral and the proceedings themselves? The most benevolent consequence would be for the arbitration proceedings to commence again *de novo*. But that could never accord with the statutory intention. This would result in considerable further expense and delay for the parties and an entirely unnecessary duplication of work for a different arbitrator. Another consequence which could arise would be that the complainant would need to refer a dispute afresh. That would in most instance result in the referral being out of time and the complainant being non-suited for that reason, even though he or she would have been entirely innocent in the cause of the delay which occurred in issuing the award.

(v)

(w) In either event, a considerable further delay would result and the very real spectre of potential injustice in the event of a referral being time barred as a consequence. Furthermore, there would be uncertainty, extra expense and entirely unnecessary duplication of effort on the part of the Labour Commissioner's office. These consequences could never accord with the statutory intention behind s 86(18).

(x) Clearly the evil to be addressed in s86(18) was the problem of delays in the handing down of awards. Hence the need to require arbitrators to deliver their awards promptly in mandatory terms. But to visit such a delay with a late award being a nullity in my view most certainly undermines that statutory intention and certainly does not follow from the injunction to deliver the award within 30 days. The consequence of non-compliance with mandatory provisions is to determined within the context of the statutory provision and its intention construed in that context. This has been addressed in a different setting with regard to the completion of a referral form in *Auto Exec CC v Van Wyk and*

another[4] and *Purity Manganese (Pty) Ltd v Katjivena*.[5]

(y)

(z) Whilst I agree with Parker AJ that the legislature intended s 86(18) to be binding and mandatory upon arbitrators, it would not in my view follow that an award given beyond that time period would be visited with invalidity as a consequence. On the contrary, it would seem that the legislature intended other remedies to be available to parties where an award is late. Either of the parties to the dispute could for instance bring an application to this court to compel the arbitrator to hand down the award by way of a *mandamus* and possibly seek an appropriate costs order. The Labour Commissioner would also appear to have standing to compel the arbitrator to do so by way of a *mandamus* if the matter were reported to him or come to his attention. That would be the nature of a remedy available to a party and the Labour Commissioner as a consequence of non-compliance on the part of an arbitrator with the statutory injunction to hand down an award within the 30 day period prescribed by s 86(18).

(aa) It would follow that the approach in *IUM v Torbitt* is in my view clearly wrong and I decline to follow it. It would further follow that the preliminary point raised by the appellant is dismissed.

(bb)

(cc) I turn to the arbitration proceedings, the award by the arbitrator and the submissions raised on appeal before analysing them.

The arbitration proceedings

(dd) In the arbitration proceedings the three complainants in respect of the

[4](LC 150/2013) [2014] NALCMD 16 (16 April 2014).

[5](LC 86/2012) [2014] NALCMD 10 (26 February 2014) these cases expressly differed with the sentiments expressed in *Waterberg Wilderness Lodge v Uises and 27 others* LCA 16/2011 unreported 20 October 2011 at par 10-12, *Springbok Patrols (Pty) Ltd t/a Namibian Protection Services v Jacobs and others* LCA 70/2012 unreported 31 May 2013 at par 7 and *Agribank of Namibia v Simana and another* (LC 32/2013) [2014] NALCMD 5 (17 February 2014) at par 19 and 23.

three counts upon which the first respondent had been found guilty in the internal disciplinary inquiry gave evidence, as well as another witness who, to an extent, corroborated one of the complainants.

(ee) The first respondent gave evidence and called 3 witnesses to support his version.

(ff) The complainant in the first incident which had occurred that day, was a certain Ms Cogill. She testified that at the proceedings at Midgard, the first respondent had stared at her incessantly in a manner which made her feel uncomfortable. After staring at her in this manner, she testified that he approached her and told her that she was beautiful and proceeded to put his arm around her shoulder. Her evidence was further that the first respondent backed away when her boyfriend intervened. She testified that she did not know the first respondent. They worked in different departments of the appellant. She testified that the incident made her feel extremely uncomfortable and that her personal space had been violated and invaded by his conduct.

(gg)

(hh) The first respondent admitted that he looked at Ms Cogill and that he had approached her. He also admitted that he told her that she was beautiful. But he denied putting his arm around her. One of his witnesses, Mr Simeon Amuyeluka, testified that he had been with the first respondent most of time and had never seen him assaulting or harassing any woman. He further testified that he had not heard the first respondent telling any person that she was beautiful. He admitted, however, that there were times when he had not been together with the first respondent. The other two witnesses called by the first respondent stated that they had not seen him touch Ms Cogill or speak to her.

(ii)

(jj) The further incidents which formed the subject matter of the charges against the first respondent occurred on the bus back to Windhoek and shortly after its arrival in Windhoek.

(kk)

(ll) The other complainant in respect of a sexual harassment charge was Ms Rochelle Maasdorp. Her evidence was that she was seated on the bus next to

Ms Bellavista Goagoses. It was not contested that the bus had returned after dark and that it was fairly dark inside the bus. Ms Maasdorp testified that she had drifted off to sleep and was awoken by the first respondent kissing her on her face. She testified that she immediately exclaimed and protested against this and pushed the first respondent away from her.

(mm)

(nn) Ms Goagoses stated in her evidence that she was at the time busy sending a text message on her cellphone when this occurred and was disturbed by Ms Maasdorp exclaiming and protesting that the first respondent had kissed her. Ms Goagoses stated that she did not see the first respondent doing so, but saw him in close proximity when Ms Maasdorp had protested. She had merely heard Ms Maasdorp exclaim that this had occurred.

(oo) The first respondent denied kissing Ms Maasdorp. He did not however dispute that he was in her immediate proximity. He stated that he was bent over looking for his sunglasses.

(pp)

(qq) His three witnesses were on their versions near the front of the bus some distance away. They stated that they did not see him kiss anyone on the bus.

(rr)

(ss) After arrival in Windhoek, Ms Maasdorp stated that when she alighted from the bus, the first respondent grabbed her around the waist and that she pushed him away. The first respondent denied doing so. There were no other witnesses to this event.

(tt) The third charge upon which the first respondent had been convicted in the internal disciplinary procedures was the use of foul and abusive language towards Ms Emilie Nghidinihamba, who worked in the appellant's human resource department. She testified that she was sitting near the front of the bus and that the first respondent was standing very close by at the front of the bus. She testified that he had a glass in his hand and was off balance. Ms Nghidinihamba further stated that she anticipated a bumpy ride back to Windhoek in the bus. She was concerned for the first respondent's safety and suggested that he should sit down, offering him her seat. This, she stated, was

met with a stream of abuse directed at her by the first respondent. He made use of obscenities in doing so in both Afrikaans and in Oshiwambo. She testified that she was gravely insulted and aggrieved by the first respondent's extremely foul and abusive language used towards her.

(uu)

(vv) The first respondent denied making use of foul and abusive language to Ms Nghidinihamba. His three witnesses also denied that he had in their presence done so.

(ww) The record of the disciplinary proceedings and the correspondence between the parties following it, which had resulted in the first respondent's dismissal, also formed part of the arbitration proceedings. During cross-examination, the first respondent was questioned at some length about the email he had sent to the CEO in which he had profusely apologized for what had occurred. He confirmed that he had said that the findings were reasonable, but stated that he addressed that email to the CEO because he did not want to lose his job.

The arbitrator's award

(xx) In dealing with the evidence of Ms Maasdorp, the arbitrator referred to the fact that she was asleep at the time and that Ms Goagoses had not seen the first respondent kissing her. He also referred to the fact that nobody else had seen the first respondent kissing Ms Maasdorp. He further referred to the three witnesses called by the first respondent who testified that they had not seen Ms Maasdorp being kissed by him. The arbitrator concluded:

> (yy) 'This would then remain the word of the applicant (first respondent) against that of the witness despite the fact that there were so many other people in the same bus but did not see anything like that ever happening.
>
> Applicant did not deny the fact that he was standing next to Ms Goagoses but he gave an explanation for his presence there and this was supported by the witnesses he had called.

He said he was searching for his glasses.

Based on the evidence given by all these witnesses, I fail to understand why the applicant was found guilty on this charge.'

(zz) In respect of the other charge involving Ms Maasdorp, he stated that

'Once again nobody saw this except herself despite the fact that there were many other people around.'

(aaa) In respect of the charge of foul and abusive language, the arbitrator stated:

'Mrs E Nghidinihamba was verbally insulted by the applicant on the bus full of other people and again surprisingly, it's only her who heard this because there were no other witnesses to support her version.'

He referred to the first respondent's three witnesses who did not hear the insults.

(bbb) As far as the other incident is concerned, he concluded as follows on the facts:

'Ms C Cogill alleges that she was also hugged by the applicant at the bar.

Even though were many other people in the surrounding, none testified that they saw applicant doing this to her.

The three witnesses called by the applicant did not see him hugging and they maintain that he was in their company at all times.'

(ccc) He concluded that a valid reason (for dismissal) had not been established.

(ddd)

(eee) On procedural fairness, he referred to the sanction determined by the chairperson of the disciplinary enquiry and to the provisions of clause 17 of the Disciplinary Code which permitted stricter or more lenient measures depending on the circumstances. He found that the imposition of a more serious sanction by the CEO was in conflict with a decision of this court in *Central Technical Supplies (Pty) Ltd v Kazondunge and another*[6] which had upheld an award in which, the arbitrator said, the court had held that if an MD was considering to depart from a sanction imposed by a disciplinary chair, an employee should first be given another hearing. The arbitrator accordingly ruled that the dismissal was also procedurally unfair. He re-instated the first respondent and directed he receive payment for remuneration as set out above.

Parties' submissions

(fff) Mr Phatela, who represented the first respondent in the appeal, submitted that the attack upon the merits of the arbitrator's award related to and concerned his findings of fact on the three charges in question. He also criticised the formulation of the grounds of appeal. He submitted that the appeal was in essence directed against these findings of fact of the arbitrator and that this was not permitted by virtue of s 89(1) which restricts appeals to this court to questions of law alone.

(ggg) Mr Jones countered that the arbitrator's findings of fact were so vitiated by a lack of reason that they were tantamount to no findings at all and that this would constitute a question of law on the basis of the decisions of the full court in *Visagie v Namibia Development Corporation*[7] and *Rumingo and others v Van Wyk.*[8]

(hhh) These judgments of the full court were followed in this court where it was stated:[9]

---

[6]LCA 69/2011, unreported 22 March 2012.

[7]1999 NR 219 (HC).

[8]1997 NR 102 (HC) at 105 D-F.

[9]*Namibia Power Corporation (Pty) Ltd v Nantinda* LC 38/2008. Unreported. 22 March 2012 par

> '[28] 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 appellant 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 being that the finding in question was so vitiated by a 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…'

(iii) In the arbitrator's award, it is evident from the quoted portions above that the arbitrator was swayed by the fact that the first respondent's three witnesses had not seen the first respondent hugging Ms Cogill, finding that he was in their company at all times. He also attached much height to the fact that these witnesses had also not seen him kissing Ms Maasdorp or heard him insulting Ms Nghidinihamba.

(jjj)

(kkk) The evidence of those witnesses clearly weighed very heavily with the arbitrator. His reliance upon their evidence is, however, fundamentally flawed. Firstly, they did not state that they were in the first respondent's company <u>at all</u>

---

[28].

times as he found. Their evidence was in fact to the contrary in conceding that there were times when he moved on his own. These witnesses further denied that the first respondent had approached Ms Cogill, even though he in fact admitted that he had done so and had told her that she was beautiful.

(lll)

(mmm) It was thus entirely untenable and grossly unreasonable for the arbitrator to dismiss Ms Cogill's version on the basis of the three witnesses called by the first respondent. What compounds this flawed approach, is the fact that the first respondent admitted looking at Ms Cogill and approaching her and telling her that she is beautiful. He thus in significant and material respects corroborated her version. The only deviation is in respect of her testimony that he put his arm around her which he denied. But tellingly, the basis upon which her version is rejected by the arbitrator, is so fundamentally flawed that no reasonable arbitrator could have reached such a conclusion on the facts. This apart from the first respondent's subsequent apology and contrition which was not even considered by the arbitrator.

(nnn)

(ooo) As for the incident on the bus involving Ms Maasdorp, the arbitrator again relies upon the evidence of the first respondent and his witnesses in dismissing her version. This despite the fact that the uncontested evidence was that the bus was in darkness and the fact that the three witnesses were at the front of the bus and would, if seated, have been facing in the other direction. The incident would also have occurred some distance from them.

(ppp)

(qqq) On the other hand, Ms Maasdorp's evidence stood up to cross-examination. It was corroborated by Ms Goagoses in a significant and material respect concerning the spontaneity of her exclamation and protestation. Coupled with this, the first respondent admitted being in her close proximity and had bent over her – although to look for his sunglasses on his version.

(rrr)

(sss) The further incident involving Ms Maasdorp, was without any corroboration and was her word against his.

(ttt) In respect of the charge of foul and abusive language, it was also

essentially Ms Nghidinihamba's word against his although the arbitrator relied heavily upon the three witnesses of the first respondent in dismissing her version of events.

(uuu) The process whereby courts resolve two irreconcilable versions was very eloquently summarised by Nienaber JA in *SFW Group Ltd and Another v Martell et cie and Others*[10] in the following way:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

(vvv) Arbitration tribunals are established as tribunals for the purpose of art 12 of the Constitution. Their decision making must be able to stand up to scrutiny

[10] 2003 (1) SA 11 (SCA) at par 5.

and, given the status as tribunals for the purpose of art 12, are to follow the accepted techniques of courts in resolving factual disputes. This is re-inforced by the fact that appeals against their awards to this court are limited to questions of law alone. But if their findings of fact are entirely unsupported by the evidence or made without a proper evaluation of that evidence to the extent that no reasonable court or tribunal could have reached those conclusions, then it would amount to a question of law.

(www) The arbitrator's reasons, set out fully above, show little or no appreciation at all as to how irreconcilable versions of fact are to be resolved. There are no coherent findings on credibility, reliability and probabilities or an appreciation for the determination and consideration of those issues.

(xxx) The arbitrator did not take into account any possible partiality on the part of the three witnesses called by the first respondent. One of those witnesses said that he was very close to the first respondent whilst the other two stated that they were in his company that day and were thus presumably his friends. Significantly, all three were his subordinates in the employment relationship. The arbitrator should clearly have considered potential bias – even latent – on their part in their testimony, particularly when their versions denied that the first respondent had even approached and spoke to Ms Cogill even though he had admitted this – such was their eagerness to provide exculpatory evidence for him. This significant contradiction is not even referred to and would appear to have been completely overlooked by the arbitrator.

(yyy)

(zzz) On the other hand, the arbitrator failed to consider why the four female witnesses in the case, including the three complainants who worked in different departments of the appellant, would have falsely accused him of sexual harassment and of using foul and abusive language. No credible or acceptable explanation why this should have occurred is suggested in the evidence or even considered by the arbitrator. There was no analysis of the probabilities at all. The arbitrator furthermore did not consider the opportunities to observe by the respective witnesses in weighing their versions.

(aaaa)

(bbbb) Furthermore, and most significantly, the arbitrator did not even consider the fact that the first respondent had not appealed against the findings of guilty and confirmed that the Chairperson's findings were reasonable. But more importantly had in fact, in making submissions on sanctions subsequently, repeatedly extended apologies and expressed contrition for what had occurred. This aspect is not even referred to in his reasoning and evaluation of evidence in the award, despite its obvious relevance and even though it had been raised with the first respondent at some length during cross-examination.

(cccc) In short, the conclusions reached by the arbitrator were so unsupported by any proper analysis and evaluation of the evidence – and indeed devoid of that process – that they were tantamount to arriving at no conclusions or findings at all and are certainly amounted to findings that no reasonable court or tribunal could have reached.

(dddd) As for the arbitrator's finding that the sanction was procedurally unfair, it was correctly pointed out by Mr Jones that the case invoked by the arbitrator in support of his approach, did not however support the conclusion he arrived at. In that matter it was found that an employer had acted procedurally unfairly in more than one respect, including imposing a sanction more severe than that contained in its disciplinary code without hearing the employee. That is entirely distinguishable from the facts of this matter. In that matter the following was stated with reference to procedural fairness:

> 'The procedural unfairness of the respondent's dismissal rather arises from the application of the appellant's code and the way in which the sanction was ultimately imposed upon the respondent. The appellant's disciplinary code provides for specific sanctions in respect of infractions. The sanction specified in the code for a first offender for removing company property without permission is that of a final written warning. As I have already pointed out, only in respect of a second offence would a dismissal be the given sanction.
>
> Mr Vlieghe however submitted that these are mere guidelines and not binding upon an employer. But even if there were merely non binding guidelines, (which it does not appear to me from the document in question), it would seem to me at the very least that the chairperson of the enquiry should have motivated why a

> sanction in excess of that contained in the code should be one of his recommendations. In the absence of the motivation in that regard, it would seem to me that his recommendation in respect of sanction was not in accordance with the code. But furthermore, it would also seem to me that if an employer would want to impose a sanction more severe than that contained in its own disciplinary code, then an employee should be entitled to be heard in respect of that issue and be entitled to address an employer as to whether the more severe sanction than that contained in the code should be applied to her. That did not occur. The failure to do is in my view procedurally unfair.'

(eeee)

(ffff) Clause 17 of the appellant's disciplinary code on the contrary expressly authorised management to impose stricter or more leniency sanctions than those recommended by a chairperson of an enquiry. The appellant's disciplinary code understandably viewed sexual harassment in a very serious light. It was an offence for which the recommended sanction would be a dismissal. After pointing this out, the CEO then proceeded to afford the first respondent the opportunity to address him upon the issue of increasing the sanction, unlike the position in *Central Technical Supplies*. The first respondent made use of that opportunity and sought clemency. A sanction of dismissal was, however, imposed.

(gggg)

(hhhh) There is in my view nothing procedurally unfair about this sequence of events. The disciplinary code itself made provision for management to impose a more severe or lenient sanction. The appellant was alerted to this at the conclusion of the hearing. He was subsequently afforded the opportunity to address that very issue when the CEO considered a more serious sanction. The first respondent made use of that opportunity. This did not amount to procedural unfairness. The reliance upon the case cited in the award was not apposite and was incorrect. The finding of the arbitrator of procedural unfairness is likewise flawed.

(iiii) Sexual harassment is after all a serious matter. The legislature has provided for sexual harassment in the workplace in Chapter 2 of the Act, where

special remedies are also provided for discrimination in an employment setting. This is a clear indication of the seriousness with which sexual harassment at the workplace is viewed by the legislature and rightly so. Being subjected to unwanted and unwarranted conduct of a sexual nature not only creates a barrier to equality in employment as is stressed in s2 of the Act, but it also violates an employee's constitutional right to dignity and of the person.

(jjjj) The seriousness of sexual harassment in employment is reinforced by the fact that the failure on the part of an employer to prevent it may even attract delictual liability.[11]

(kkkk) It would follow in my view that the arbitrator's findings in respect of substantive fairness in his award are entirely unsupported by the evidence before him and are emphatically excluded by a proper evaluation of that evidence and the probabilities to such an extent that the findings are in my view of such a nature that no reasonable arbitrator could have made them. They are so vitiated by a lack of reason that they are tantamount to no findings at all.

(llll) The arbitrator's finding with reference to procedural unfairness is a question of law which, as I have demonstrated, was also entirely flawed and also cannot stand. Apart from these blemishes, I was also concerned by the lack of control which the arbitrator exercised over the proceedings. There were incessant interruptions of witnesses and of each other by the parties' respective representatives. Needless to say, the overwhelming majority of these interruptions were entirely unwarranted and would have been eliminated by properly controlling the proceedings.

(mmmm) The following order is made:

> The appeal against the arbitrator's award succeeds and the first respondent's dismissal is confirmed. The award in favour of the first respondent is set aside. No order is made as to costs.

(nnnn)

[11] *Media 24 Ltd v Grobler* [2005] 7 BLLR 649 (SCA) at par 65-76.

2020202020

(oooo)

_____

D SMUTS

Judge

APPEARANCES

APPELLANT:	Adv JPR Jones Instructed by Köpplinger Boltman
FIRST RESPONDENT:	Mr T Phatela Instructed by Shikale & Ass.