



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 84/2013

In the matter between:

AIR NAMIBIA LIMITED

APPELLANT

and

JOHANNES ANDIMA

1ST RESPONDENT

LABOUR COMMISSIONER

2ND RESPONDENT

Neutral citation: *Air Namibia Limited v Andima* (LCA 84/2013) [2014] NALCMD 37 (26 September 2014)

Coram: UNENGU AJ

Heard: 13 June 2014

Delivered: 26 September 2014

Flynote: Labour law – Appeal against arbitrator’s award in terms of s 89(1)a of the Labour Act 11 of 2007 – First respondent, an employee of appellant dismissed after being found guilty of three counts of misconduct in a disciplinary hearing – Arbitrator in arbitration proceedings of unfair dismissal makes an award in favour of first respondent – In appeal the court upheld the appeal and set aside the award.

Summary: Labour Law – An appeal against arbitrator’s award in terms of s 89(1) of the Labour Act 11 of 2007 – First respondent, an employee of the appellant was

found guilty of misconduct on three charges and was dismissed from employment as a result thereof – During the arbitration proceedings of unfair dismissal, the arbitrator made an award in his favour – In appeal, the court upheld the appeal, set aside the award by the arbitrator and confirmed the ruling by the chairperson in the disciplinary hearing.

ORDER

- (a) The appeal is upheld.
- (b) The award by the arbitrator is set aside in whole and the ruling of the chairperson in the disciplinary hearing re-instated and confirmed.

JUDGMENT

UNENGU AJ:

[1] This is a labour appeal by the appellant against the whole of the arbitral award issued in favour of the first respondent by the arbitrator on 13 November 2013.

[2] The first respondent was an employee of the appellant and worked as a duty controller. On 5 April 2013, a notice of suspension from duty without remuneration was served on him by the appellant. The suspension took effect immediately upon receipt of the letter of suspension, and the first respondent was informed that the suspension was valid until the outcome of the investigation regarding the alleged misconduct against him.

[3] A disciplinary hearing into the alleged misconduct of the first respondent was conducted during August 2012 with Mr Coetzee sitting as the chairperson. On

22 August Mr Coetzee found the first respondent guilty of the following misconduct offences:

- (i) The first main charge: Gross negligence in performing duties.
- (ii) The sixth main charge: Disregard of company rules and regulations;
and
- (iii) The ninth main charge: Dishonesty.

This finding was made after hearing evidence from both the appellant and the first respondent. Subsequently, and in view of the finding of guilty on the three charges, the first respondent was dismissed.

[4] An internal appeal against the dismissal to the Managing Director of the appellant, was unsuccessful and the first respondent, by letter dated 18 October 2012 was informed about the decision of the Managing Director confirming the decision of the General Manager: Airport Services: to terminate his (first respondent) services.

[5] Aggrieved by the decision of the Managing Director, confirming his dismissal, first respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner on 29 November 2012. Mr Kenneth K Humu was designated by the Labour Commissioner as the arbitrator who on 18 November 2012, after hearing evidence and submissions from both parties and upon assessment of such evidence made the following award:

- 'The respondent to re-instate the applicant in his position he held prior to his dismissal or in a comparable position with effect from 02nd December 2013.
- The respondent to pay applicant's salary from the date of dismissal to the date of finalisation of this matter, which is 05th April 2011 to 18th November 2013 = 31 months, 31 months x N\$1500 = N\$46 5000 total due to the applicant: N\$46 5000.

This amount to be paid over to the applicant on or before 13th December 2013 at 10h00 at the Office of the Labour Commissioner in Windhoek. This Arbitration Award is final and binding on both parties and will be filed with the Labour Court in terms of s 87 of the Labour Act 11 of 2007) to be made a court order.'

[6] Emanating from this award though is this appeal by the appellant in terms of s 89 of the Labour Act¹ on the grounds:

1. The learned Arbitrator, erred in law in ruling that the dismissal of the First Respondent was unfair;
2. The learned Arbitrator, erred in law and misdirected himself in law in ruling that there was not convincing evidence to proof that the applicant printed the boarding passes at any of the Respondent's stations dismissal on the First Respondent was unfair;
3. The learned Arbitrator mis-directed himself in law in concluding and ruling that there was no proof that Applicant was solely responsible for the safe-keeping of the petty cash box;
4. The learned Arbitrator erred in law in finding that the dismissal of the First Respondent was unfair as on a proper evaluation of the all the evidence placed before the learned Arbitrator, the aforementioned findings, judgment and/award should not have been made;
5. The learned Arbitrator, erred in law in finding that the dismissal of the First Respondent was unfair and ordering that the Applicant re-instate the First Respondent;
6. The learned Arbitrator erred in law in concluding and ordering the Appellant to pay the First Respondent an amount of N\$465 000.00; and that
7. In coming to the decision and the award, the Arbitrator was influenced by extraneous considerations which were not part of the evidence before him.'

It is trite law that an appeal brought in terms of s 89(1)(a) of the Labour Act, lies on questions of law alone.

[7] In his statement of opposition in terms of Rule 17(16)(B), the first respondent, with the exception of appeal ground 1, all the remaining grounds (2 – 7) were denied in the main to constitute questions of law.

¹ Act 11 of 2007

[8] As already said, the first respondent was found guilty of the main counts 1, 6 and 9 by the chairperson during the disciplinary hearing. The first main count concerns the alleged failure by the first respondent to safe-guard the petty cash box by leaving it unsupervised and or in an unsafe place whilst knowing that the cash box contained money of about N\$7000 which money could not be accounted for. Main count 6 has to do with the alleged disregard of Company Rules and Regulations in that the first respondent disregarded the checking in and boarding procedures in respect of certain passengers while the main charge 9 was about dishonesty, alleging that the first respondent during 21 and 22 April 2012, dishonestly checked in and issued boarding passes to passengers to board flight SW285 from Windhoek to Germany.

[9] During the arbitration proceedings, eight witnesses testified for the appellant. They were Mr E E Coetzee who was the chairperson in the disciplinary hearing who found the first respondent guilty of the charges indicated above. He testified that the first respondent was represented during the disciplinary hearing but no objection was raised that he was bias or partial. He denied having any close relationship with the appellant.

[10] The second witness Ester Munjondjo is an employee of the appellant. She worked at the Eros Airport as a cleaner under the supervision of the first respondent. She testified that she knew the first respondent well and at times, ironed his clothes when he requested her to do so. Ms Munjondjo testified that one day, the first respondent came to her house, handed to her an envelope to take to the Hosea Kutako International Airport which she handed over to three kids, a boy and two girls. The first respondent did not tell her what was in the envelope, but she opened it and saw boarding passes in. According to her, she agreed to take the envelope because she thought it was work related. She further testified that Mr Andima (first respondent) provided transport and driver to take her to the Airport where she delivered the envelope to the people whose names were written on the envelope. A telephone number was also written on the envelope which she called for the people

to meet her, to collect the envelope. Later she heard that these people were arrested for using fake boarding passes.

[11] The third witness to testify is Ernst Lyamine who worked at the Eros Airport as a security guard. He stated that on a Saturday afternoon while doing duty at the Airport, the first respondent came there and without saying anything sat next to him and two computers. He then saw the first respondent printing four boarding passes and left without talking to anybody. Mr Lyamine was with a cleaner at the time the first respondent printed the four boarding passes. Thereafter, he reported the incident to the police, to Silas and Basson who were the appellant's officials.

[12] Kate du Toit amongst others testified that she works for the appellant at the Hosea Kutako International Airport as a duty officer. She further testified that she was requested by Mr Shihepo to collect the petty cash box from the safe. When she opened the safe, the petty cash box was nowhere to be found. According to her only the first respondent had the responsibility to safe-guard the box even though Mr Shihepo also had keys to it. It is also her evidence that due to problems regarding Namibian citizens going to Canada and applying for asylum while there, it was resolved by the appellant in a meeting attended by all duty controllers and the Canadian High Commissioner to Namibia to carefully scrutinize documents of Namibians flying to Canada. On 20 April 2012 Willemina reported to her a passenger who did not follow all the processes. On 22 April 2012 she discovered that three passengers were about to board a flight without proper documents, who also have not been screened. She testified that when the passengers were questioned on how they obtained their tickets, they reported to her that they got the tickets from a lady in the parking area of the Airport. She opened a criminal case against the three persons on behalf of the appellant and they were arrested and taken into custody by the police. Her testimony was corroborated in many respects by Willemina Sakaria with regard the cash box, to the effect that the first respondent was entrusted to take care of it, and the three passengers who were arrested for not having proper documents.

[13] Mr Johannes Nelulu also works for the appellant at the Hosea Kutako International Airport. He knows the first respondent who worked as a duty controller for the appellant at the airport. He testified that on 21 and 22 April 2012 he worked as a team leader at the check-in points and had the overall supervision in that division. He said that the first respondent checked-in passengers using his code and boarded a passenger the same day which is not done normally. Further, Mr Nelulu testified that he called a lady, one of those passengers involved for questioning. While busy questioning the lady, the first respondent disappeared from work and only saw him the following day again. Furthermore, he testified that the first respondent was the only person who had access to his password, therefore, the only one who used his password to check in these passengers.

[14] Mr P A Louw the assistant manager at the appellant, attached to the IT division testified about codes (PAD numbers) used by the appellant to access its Airline system.

[15] In his evidence Mr Moses Shihepo stressed the point that it was a responsibility of duty controllers to safe-guard the petty cash box. As a station manager of the International Airport, he has the overall supervision and management of all the activities at the airport. He said that he had requested the first respondent for money from the cash box to pay a client when the first respondent told him that he did not have his keys to the cash box with him. The following day he looked for the box himself in the safe but could not find it. The first respondent was not on duty when this happened. Thereafter, a criminal matter against the first respondent was opened with the police as he was the duty controller who was responsible for the safekeeping of the cash box. This concluded the evidence of the appellant.

[16] The first respondent also testified and called two other witnesses to support him. They are Rainer Maritshane and Kenneth Abrahams. In his testimony the first respondent told the tribunal that he worked for the appellant as a duty controller at the Hosea Kutako International Airport when he was suspended from work on 5 April 2012. He said that he was charged with misconduct and found guilty of three

charges of being negligent in the performance of his duty, the disregard of company rules and regulations and one of dishonestly. According to him, the charges he was convicted of, were as a result of his alleged failure to safe-guard the petty cash box and that he had issued boarding passes to some passengers. He stated that even though he had signed off for the keys to the petty cash box and that of safe where the box was kept, the keys to the safe was kept at the office where his colleagues had access to them. He further said that he was off-duty when it was discovered that the petty cash box with money was missing from the safe. The first respondent denied that he was negligent as he was not the only person who had access to the safe where the box was kept. He also denied going to the Eros Airport on 21 April 2012 during his suspension, that he had checked in passengers and that he knew Mr Nelulu's access code.

[17] Witness Rainer Maritshane testified that he was with the first respondent on 21 April 2012 from 13h00 until 21h00 enjoying themselves a few drinks together. Meanwhile the evidence of Kenneth Abrahams was very brief and was restricted to whether the numbers used to authorize the printing of the boarding passes belonged to Air Namibia or not. He stated that such numbers did not belong to Air Namibia. The first respondent closed his case after the evidence of Kenneth Abrahams, whereafter the parties made their submissions. As already said the arbitrator then made his award in favour of the first respondent.

[18] In appeal, the appellant's case was argued by Mr Phatela instructed by Mr Kasper of Murorua & Associates while the first respondent's case was argued by Ms Visser instructed by Mr La Grange Legal Practitioners. Both counsel filed written heads of argument which were augmented by oral submissions.

[19] With regard the first ground of appeal namely, that the learned arbitrator erred in ruling that the dismissal of the first respondent was unfair, Mr Phatela, in his heads argued that the arbitrator erred in law and misdirected himself in law in ruling that there was not convincing evidence to proof that the first respondent (applicant) printed the boarding passes at any of the appellant's stations. In attacking this

finding of the arbitrator, Mr Phatela relied on the evidence of Mr Lyamine, the security guard who saw the first respondent at the Eros Airport on 21 April 2012. According to Mr Phatela the evidence of Ms Munjondjo supports the evidence of Mr Lyamine. However the arbitrator, he said, failed to deal with relevant and material parts of her testimony. It is his further submission that the arbitrator completely failed to take into consideration the testimony of Ms Kate du Toit who testified that the first respondent improperly and unprocedurally checked in passengers on Air Namibia flight to Canada. In respect of the boarding passes, counsel submitted that the conclusion by the arbitrator that the boarding passes which were handed in at the hearing as evidence, showed that they were printed at Eros and not at HKIA supports the evidence of the appellant. It is further his submission that the first respondent failed to obey and follow proper policy in respect of processing passengers in transit to Canada by failing to, *inter alia*, screen them to ensure that they met the requirements for entry into Canada. In conclusion counsel argued that the version of the first respondent was clearly baseless and should not have been accepted by the arbitrator and questioned why the arbitrator failed to make proper credibility findings to justify his reasons for disregarding the testimony of the first respondent.

[20] In support of his submissions, Mr Phatela cited various cases of this Court and from other jurisdictions as authority. These submissions are also applicable to the ground of appeal that the learned arbitrator erred in law and misdirected himself in law in ruling that there was not convincing evidence to prove that the first respondent printed the boarding passes at any of the appellant's stations.

[21] Ms Visser, counsel for the first respondent on her part, countered the submissions of the appellant as contained in the written heads of argument. In attacking the allegations in ground 1 of appeal, she started off by quoting the provisions of s 33(4) of the Labour Act which provides that in any proceedings concerning dismissal, the employee must establish the existence of the dismissal and if the existence of the dismissal is established, it is presumed, unless the contrary is proved by the employer, (in this instance the appellant) that the dismissal was unfair. This means that the burden of proof therefore lies with the appellant to

justify the dismissal on a balance of probabilities². Ms Visser further submitted that in order for the Court to be satisfied that such dismissal was both procedural and substantively fair, it must be established that the dismissal was in accordance with the law. According to her, the arbitrator found that the first respondent was substantively unfairly dismissed because there was no valid and fair reason justifying his dismissal under the circumstances; that there was no convincing evidence to proof that the first respondent is the one who printed the boarding passes at any of the applicant's stations and that there is no proof that the first respondent was solely responsible for the safe keeping of the petty cash box, as other people had access to the safe in his absence.

[22] I agree with counsel's submission that the arbitrator performs a quasi-judicial function, for he is a 'judge' of the evidence presented to him. That the arbitrator is expected to receive evidence and submissions from parties which he must consider in order to arrive at a fair decision. This the arbitrator must accomplish after an evaluation of the evidence as a whole. It is the cumulative effect of all the evidence together that has to be considered but not to consider every component in the body of the evidence separately and individually.³

[23] The question is was the evidence presented properly considered as a whole by the arbitrator?. I do not think so. In the analysis of the evidence the arbitrator stated that the evidence of Mr Nelulu and that of Mr Lyamine placed doubt in his mind as to where exactly the boarding passes were printed, which is wrong. Because in the same paragraph (paragraph 89), the last sentence thereof, he said the following:

'The boarding passes which submitted (sic) as evidence *clearly* shows that these were printed at Eros Airport and not at Hosea Kutako International Airport.'(Emphasis provided).

That conclusion is in line with and confirms the testimony of Mr Lyamine who testified that he saw the first respondent at the Eros Airport printing boarding passes while in

² Parker, Collins Labour of Namibia UNAM Press 2012, p 140-141;

Hailemo v Security Force Services 1996 NR 99

³ S v Hadebe and Others 1998 91) SACR 422 9SCA) at 426e-g

civic clothes and that of Ms Munjondjo who said that she was given boarding passes by the first respondent to take to the airport to give to one boy and two girls who were arrested by the police later.

[24] A trier of facts, in this instance the arbitrator, cannot reject and accept the evidence of the same witness. Besides no reason was advanced by the arbitrator why he doubted the evidence of both Mr Nelulu and Mr Lyamine who were corroborated by Ester Munjondjo's evidence and accepted the evidence of Mr Kenneth Abrahams whose evidence, in my view, never rebutted the evidence of the appellant about the origin of the boarding passes, in view of the fact the arbitrator himself, already found that the boarding passes were printed at the Eros Airport. Therefore, for him to doubt the evidence he agreed with is wrong in law, the conclusion which could not reasonably have been reached⁴ by any reasonable arbitrator. Similarly, his finding that the first respondent was substantively unfairly dismissed because there was no valid and fair reason justifying his dismissal, because there is no convincing evidence to prove that the first respondent is the one who printed these boarding passes at any of the appellant's stations is also not reasonably supported by the evidence at hand and no reasonable court could have made such a finding⁵. That said, it is my view, that the arbitrator, based on the evidence presented before him, erred in law in ruling that the dismissal of the first respondent was unfair. Also as he found nothing wrong with regard the procedural aspect of the disciplinary hearing held against the first respondent.

[25] Regarding the disappearance of the petty cash box, the arbitrator ruled that there was no proof that first respondent was solely responsible for the safe-keeping of the petty cash box because other people had access to the safe in his absence. His counsel again attacked the ground of appeal upon which this is based. She contends that the ground is based on the facts of the matter as testified to by the witnesses and per the documentary evidence placed before the arbitration. Ms Visser submitted amongst others that no substantive evidence was placed before the arbitrator which proved on a balance of probabilities that the first respondent was

⁴ See *Rumingo and Others v Van Wyk* 1997 NR 102

⁵ *Visagie v Namibia Development Corporation* 1999 NR 219 at 224

solely responsible for the safe-keeping of the petty cash box. With due respect, Ms Visser is wrong and I disagree. It is the evidence of Ms du Toit that the first respondent had the sole responsibility of safe-guarding the petty cash box as he was the only duty controller who was issued with the keys to the safe and the petty cash box. Her evidence is corroborated by the evidence of first respondent self when he testified that he signed off for the keys to the petty cash box and the safe keys, but the keys to the safe was kept in a drawer at the office where other colleagues also had access to the safe. Ms Shihepo's evidence is also a testimony to that effect. All these witnesses evidence stands because the arbitrator did not reject it. In any event he could not reject the evidence because it is the evidence of first respondent also. I am of the view that the evidence presented by the applicant, supported by the first respondent if viewed objectively, proved on a balance of probability that the first respondent was solely responsible for the safe-keeping of the cash box.

[26] The conduct of the first respondent to put the keys to the safe in a drawer at the office where his colleagues also had access, was careless, negligent, unreasonable and fell short of the requirements of a standard of a reasonable person in the circumstances. A careful duty controller, entrusted with the sole responsibility of keeping a petty cash box with its keys where money of the appellant was kept, would not have allowed other duty controllers to have free access to the safe where the cash box was kept. The first respondent was supposed to have controlled the access to the safe by keeping the keys to the safe with him, which he did not do.

[27] What was the use then of him signing off for the keys to both the safe where the petty cash box was kept and those of the petty cash box if his colleagues had free access to the safe? In addition, what steps did he take to safe-guard the petty cash box when he was off duty? Nothing. Therefore, it is my view that the arbitrator was wrong in law to conclude that there is no proof that he was solely responsible for the safe-keeping of the petty cash box. He himself allowed free access to the safe by his colleagues. To find that other people had access to the safe in his absence, therefore he is not guilty of the misconduct charges brought against him, is hollow,

which no reasonable court would make based on the evidence of Ms du Toit and the first respondent himself.

[28] In conclusion I must observe that I could not find any reference made by the arbitrator that he had considered the finding of the chairperson of the disciplinary hearing and reasons why he differed therefrom. In the first respondent's summary of dispute which was attached to Form LC 21, he amongst others, in paragraph 5(a) alleged bias on the part of the chairperson. Mr Coetzee, who sat as the chairperson in the disciplinary hearing, was called to testify in the arbitration proceedings but nothing was said by the arbitrator in his analysis of evidence or ruling about the alleged bias even though it was the ground for the procedural unfairness.

[29] That being the case therefore, and in view of the cases referred to, the reasons and conclusions made above, it is my considered view that no reasonable court could have made the finding the arbitrator made on the evidence of the matter, therefore this court will interfere in the finding. In virtue of the conclusion I have arrived at, I find it unnecessary to deal with the aspects of reinstatement and the compensation awarded to the first respondent.

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

(a) The appeal is upheld.

(b) The award by the arbitrator is set aside in whole and the ruling of the chairperson in the disciplinary hearing re-instated and confirmed.

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P E UNENGU
Acting Judge

APPEARANCES

APPELLANT:

T C Phatela

Instructed by Murorua & Associates, Windhoek

FIRST RESPONDENT:

I Visser

Instructed by La Grange Legal Practitioners,
Keetmanshoop