REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 27/2012

In the matter between:

CORNELIUS SHILONGO **APPELLANT**

and

VECTOR LOGISTICS (PTY) LTD **RESPONDENT**

Neutral citation: *Shilongo vs Vector Logistics (Pty) Ltd* (LCA 27/2012) [2014] NALCMD 4 (5 February 2014)

Coram: PARKER AJ
Heard: **17 January 2014**
Delivered: **5 February 2014**

Flynote: Labour law – Unfair dismissal – Compensatory payment in terms of s 46(1)*(a)(iii)* of the repealed Labour Act 6 of 1992 – Such compensation is aimed at redressing a labour injustice and not at enriching the dismissed employee – Court held that no evidence is needed to prove losses where compensation is equal to what employee could have been paid which is in the domain of the employer – But where losses include loss of benefits like medical aid and loss of a house the employee should call evidence to prove what the losses entail – Court set out certain important factors a court or tribunal should take into account in determining a reasonable amount of compensation.

Summary: Labour law – Unfair dismissal – Compensatory payment in terms of s 46(1)*(a)(iii)* of the repealed Labour Act 6 of 1992 – Such compensation is aimed at redressing a labour injustice and not at enriching the dismissed employee – Court held that no evidence is needed to prove losses where compensation is equal to what employee could have been paid which is in the domain of the employer – But where losses include loss of benefits like medical aid and loss of a house the employee should call evidence to prove what the losses entail – Court set out certain important factors a court or tribunal should take into account in determining a reasonable amount of compensation – Appellant's dismissal by respondent's disciplinary hearing and appeal disciplinary hearing bodies was confirmed by the district labour court in terms of the repealed Labour Act 6 of 1992 – Court found that there was evidence of appellant's (employee's) monthly salary and appellant did not prove any losses – On appeal court found that the district labour court's decision was wrong and so set it aside – Court found further that appellant made no effort to mitigate his losses – Above all, court found that appellant contributed to a great extent to his dismissal – Taking these and other factors into account and the appeal having succeeded the court awarded compensatory payment equivalent to appellant's four month's salary.

Flynote: Labour law – Unfair dismissal – In terms of the repealed Labour Act, 6 of 1992 – Grounds of appeal – Court held that the word 'grounds' in rule 19(2)*(c)* of the repealed Labour Act has no esoteric meaning – The word 'grounds' means reasons why the appellant attacks the entire judgment or part of the judgment delivered by the district labour court and the reasons (or grounds) must be set out with sufficient particularity to enable the respondent to know the case he or she has to meet.

Summary: Labour law – Unfair dismissal – In terms of the repealed Labour Act, 6 of 1992 – Grounds of appeal – Court held that the word 'grounds' in rule 19(2)*(c)* of the repealed Labour Act has no esoteric meaning – The word 'grounds' means reasons why the appellant attacks the entire judgment or part of the judgment delivered by the district labour court and the reasons (or grounds) must be set out with sufficient particularity to enable the respondent to know the case he or she has

to meet – Appellant set out five grounds of appeal on Form No. 14 in terms of rule 19(2) of the District Labour Court rules – Court found that those grounds, except the fifth ground, complies with rule 19(2) of the District Labour Court rules – Accordingly, the court reject the respondent's preliminary objection that all the grounds were not rule compliant.

ORDER

(a) The appeal succeeds, and the order of the district labour court is set aside.

(b) The respondent must on or before 20 March 2014 pay to the appellant an amount of N39 296 (being an amount equal to appellant's four months' salary).

(c) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The appellant appeals from the judgment of the district labour court under case no. 391/2007. The complaint lodged with the district labour court ('DLC') was 'unfair dismissal', and the relief claimed was 'Losses in terms of s 46 of the Labour Act 6 of 1992' ('the repealed Labour Act'). The DLC found that the appellant's dismissal was fair, and, accordingly, made an order dismissing the appellant's complaint and made no order as to costs.

[2] The appellant noted an appeal in terms of rule 19(1) of the District Labour Court Rules ('DLC rules'). He set out five grounds in terms of rule 19(2)*(c)* of the DLC rules. The appellant represents himself. Mr Jones represents the respondent.

[3] The respondent has raised a preliminary objection respecting those grounds. Counsel's point is simply this. The grounds set out in the notice of appeal are not grounds but conclusions. Counsel refers the court to three decided cases in support of his contention. It is my view that *African Consulting Services CC v Gideon* (LCA 60/2012) [2013] NALCMD 46 (26 November 2013) cannot assist the respondent. That case was decided in terms of the Labour Court Act 11 of 2007. There the appeal failed because the applicant did not comply with the substantial and peremptory requirements prescribed in subrule (1)*(c)*, read with subrule 3(a) and (b), of rule 17 of the Labour Court Rules whose non-compliance with the court was not entitled to condone. In that regard, the court concluded that there was no notice of appeal properly before the court in terms of the Labour Act 11 of 2007. Those rules are a far cry from the relevant DLC rules which are at play in the instant proceeding. The facts and ratio decidendi of *African Consulting Services* are rehearsed materially in *Pathcare Namibia (Pty) Ltd v Du Plessis* (LCA 87/2011) [2013] NALCMD 28 (29 July 2013). The conclusion is, therefore, inescapable that these two unreported cases referred to me by counsel are of no assistance on the point under consideration.

[4] The third case referred to me by counsel is *Standard Bank Namibia v Grace* 2011 (1) NR 321. Inasmuch as it enunciates the principle that a notice of appeal should clearly specify the grounds upon which the appeal is based, *Grace* is good law even if decided in terms of the Labour Act 11 of 2007 and the Labour Court rules made thereunder. Appeals under the repealed Labour Act is governed by s 21(b) of that Act and rule 19 of the DLC rules made thereunder. Rule 19 provides:

> '(2) An appeal under this rule shall be noted by delivery, within a period of 14 days of the date of judgment or order, of a notice of appeal (form 14) which shall set out –
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> (a) whether the appeal is from the judgment or order in whole or in part, and if in part only, which part;
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> (b) the point of law or fact appealed against; and

(c) the grounds upon which the appeal is based.'

[5] I find that the appellant has complied with the requirement contained in the chapeu in Form No. 14, that is: 'Take notice that the Appellant (Complainant/Respondent in the above-mentioned case) hereby gives notice of appeal against the *entire judgment/part of the judgment delivered … (*Delete which is not applicable)'. What follows the chapeu is this: 'The grounds of appeal are as follows:'

[6] The appellant has complied with the chapeu requirement because he indicates in his notice of appeal that the appeal is against the entire judgment. And he proceeds to itemize with specificities what he is not happy about respecting the judgment of the DLC. Unlike the appellant in *Grace*, the appellant in the instant case does not say that he appeals against 'the whole of that part of the decision or order …. whereby it was decided that ….' As I have found previously, the chapeu of the appellant's notice conforms with Form No. 14. Additionally, the appellant sets out clearly and sufficiently the reasons or grounds upon which he attacks the DLC judgment.

[7] In this regard, it must be remembered that the word 'grounds' has no esoteric meaning. As used in rule 19(2)*(c)* of the DLC rules, it means the reasons why the appellant attacks the entire judgment or part of the judgment delivered by the DLC; and the reasons (or grounds) must be set out with sufficient particularity to enable the respondent to know the case he or she has to meet.

[8] Thus, the purpose of grounds of appeal as required by the rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to these issues. (See *S v Gey van Pittius and Another* 1990 NR 35 at 36H.) *Gey van Pittius* concerns criminal appeal but I see no good reason why it cannot apply with equal force to appeals in Labour matters. Based on this analysis, it is my view that the only ground in the appellant's notice of appeal (in terms of Form No. 14) that cannot pass as a ground within the meaning of rule 19(2)*(c)* of the DLC rules is Ground 5. The appellant makes a statement without more, and so the respondent

would not know what case it has to meet as respects Ground 5. I cannot emphasize it enough that this conclusion cannot on its own render defective the entire notice of appeal which contains four other grounds which conform with the requirements of the repealed Labour Act and the DLC rules made thereunder.

[9] In all this the test as to whether a 'ground' set out in a notice of appeal is a ground properly so called within the meaning of rule 19(2)*(c)* of the DLC rules is not whether the appellant can in due course establish what he sets out as the ground or reason upon which he or she attacks the entire judgment or part of the judgment delivered: it is whether the appellant has set out a ground, ie a reason, with sufficient particularity, as the basis upon which he or she attacks the judgment or part of the judgment so as to enable the respondent to know what case he or she is to meet. As I say, Grounds 1 to 4 in the appellant's notice of appeal meet the test. This conclusion compels me to reject the respondent's preliminary point respecting the first four grounds of appeal. Having so concluded, I now proceed to consider Grounds 1 to 4 of the notice of appeal.

[10] I shall consider Grounds 2 and 3 first because they are interrelated; and more important, because they relate to fundamental concerns of justice and fairness, and if I uphold those grounds that would on its own be dispositive of the appeal in favour of the appellant.

[11] As to Grounds 2 and 3 and upon a consideration of the record of proceedings in the DLC; I make the following findings and conclusions.

[12] The appellant was employed by the respondent in a managerial position as the respondent's transport manager and upon the occurrence of that which gave rise to the dispute between the appellant and the respondent, the appellant had been employed for at least 30 years. At the time of his dismissal the appellant earned a monthly salary of N$9 824. The respondent is a distribution company which distributed food items on behalf of its mother company (based in South Africa) to local retailers and franchised restaurants and food outlets. Without a doubt, the respondent is a small operation.

[13] Furthermore, the cause of dispute arose as follows. According to the charge-sheet under which the appellant was charged before the respondent's disciplinary hearing, the appellant was charged with 'Dereliction of duties and responsibilities: Deliveries to SPUR'S and PANAROTI'S in Windhoek was not executed during the course of Friday the 26th resulting in these Franchises being without stock/products during the course of the weekend and customers complaining about service endangering the SPUR national account resulting in these organizations being without stock or products during the weekend and customers complained about services, endangering the SPUR National account'.

[14] I should at the threshold make the following significant observation arising from the interpretation and application of s 45(1) of the repealed Labour Act. The word 'procedure' in s 45(1) is not restricted a hearing. It refers to a whole gamut of processes, beginning with the employer advising the employee of the precise charge of labour (or industrial) offence he or she is alleged to have committed (that is, the preparation and issuance of a charge sheet to the employee) and going up to the holding of a disciplinary hearing and an appeal hearing and ending with the delivery of the decisions of these hearings. And it follows as a matter of course that every step of the continuum of processes should be fair, that is, fairly executed in order for the procedure to be statute compliant in terms of s 45(1) of the Act.

[15] To start with; in the instant case, the charge sheet which is contained in the respondent's 'NOTICE OF DISCIPLINARY HEARING' is dated 26 January 2007. The working hours of the respondent's business are 08h00 to 17h00 but deliveries could take up to 21h00. In the instant case, the appellant had until 17h00 (at the close of his normal working hours) or, latest, 21h00 to execute the deliveries, but – and this is significant – at 16h00 the respondent had already drafted the aforementioned 'Notice of Disciplinary Hearing' and had made an unsuccessful attempt to serve it on the appellant at that hour. What is more, on the previous day, that is, Thursday, 25 January, Psakarris (the Sales and Marketing Manager of the respondent) and Fourie (the direct supervisor of the respondent) had 'talked about possible disciplinary measures' to be meted out to the appellant, and yet the invoices

that were necessary and required for the appellant to execute the deliveries in question were given to the appellant only on that same Friday, 26 January. Indeed, on the previous day, 25 January Psakarris assured Fourie then that 'he will initiate a disciplinary hearing'.

[16] On the record it seems to me clear that when disciplinary procedures were initiated against the appellant, the appellant had not committed the disciplinable offence. When the 'Notice of Disciplinary Hearing', containing the charge sheet, was drafted the appellant had not committed the disciplinable offence. When an attempt was made to serve the Notice and the charge sheet on the appellant, the appellant had not committed the disciplinable offence. All these facts formed part of the evidence that was placed before the DLC. And they are cogent on any pan of scale in the determination of the issue of procedural fairness; and yet, the DLC did not consider them. I find that the chairperson of the DLC did not consider those cogent pieces of evidence because for the chairperson, procedural fairness under the repealed Labour Act arises only in circumstances 'emanating from the disciplinary hearing'. That is a serious misdirection on the law on procedural fairness, as I have enunciated in para 13 of this judgment. The chairperson is palpably wrong. I hold, therefore, that this misdirection is such a kind as would entitle this court to uphold Grounds 2 and 3 of the Notice of Appeal, and it is such a kind as would entitle this court to conclude that the decision of the DLC that the respondent followed a fair procedure in the circumstances of this case is wrong. Having so concluded I decide that the appeal succeeds. The dismissal of the employee was accordingly unfair procedurally. It serves no purpose to consider the rest of the grounds.

[17] The matter does not end there. Since I have found that the appellant's dismissal was unfair, s 46 of the repealed Labour Act comes into play. Indeed, in his Rule 3 District Labour Court Form 2, the appellant claims relief in terms of s 46 of the repealed Labour Act, that is, 'losses suffered by such employee in consequence of such dismissal or an amount which would have been paid to him had he not been dismissed'. Thus, the appellant's entitlement to such payment under the repealed Labour Act inures by operation of law; and it can be said that he has pleaded the relief on Form No. 2 in terms of rule 3 of the DLC rules. The appellant could have set

out on Form No. 2 the amount claimed. He has not. I am therefore, at large to award any reasonable amount without the benefit of the appellant's input; but not any amount in respect of every loss imaginable. And in doing so, I should take into account certain important factors, among them the following.

[18] First, the business of the respondent is a small operation. Second, the amount awarded should be such that it does not aim at punishing the employer. It should aim at redressing a labour injustice (*Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC). What the court awards must be compensation and not gratuity, enriching the appellant. (*Condons Realty (Pty) Ltd and Another v Hart* (1993) 14 *ILJ* 1008 (LAC)) Third, the appellant has not claimed an amount for loss of certain benefits, eg medical benefits. In that event, he need not establish by evidence what the losses are. I should in the circumstances award an amount that would have been paid to the appellant had he not been dismissed. It is, on that score, not necessary for the appellant to lead evidence to establish the amount involved. The evidence indicates that the appellant earned a monthly salary of N$9 824, and the respondent must know that. (*Pep Stores v Iyambo*) Fourth, a critical and important element that the court should always take into account is the extent to which the employee's own conduct contributed to the dismissal. (*Ferodo (Pty) Ltd v de Ruiter* (1993) *ILJ* 974 (LAC)) In the instant case, the appellant's lethargic and insouciant attitude contributed to a great extent to his dismissal. This conclusion must count heavily against the appellant; otherwise, the court might be seen to be encouraging such negative and centrifugal attitude among employees which in itself is not conducive to sound industrial relations and promotion of efficiency and productivity at the workplace. The fifth factor is the length of service of the employee before his or her dismissal. In the present case, the appellant had, before his dismissal, put in 30 years' service. Sixth, the court should take into account whether the dismissed employee has received any terminal benefits. In the present case, there is no evidence that the appellant has received any such benefits. The seventh factor is whether the dismissed employee has made any efforts to mitigate his losses. The evidence indicates that the appellant has not made any such efforts.

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[19] Based on all these reasons, and taking into account these factors, I make the following order:

(a) The appeal succeeds, and the order of the district labour court is set aside.

(b) The respondent must on or before 30 March 2014 pay to the appellant an amount of N$39 296 (being an amount equal to appellant's four months' salary).

(c) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPELLANT:	In person
RESPONDENT:	J P Ravenscroft-Jones Instructed by GF Köpplinger Legal Practitioners, Windhoek