REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 8/2014

In the matter between:

NAMIBIA CUSTOM SMELTERS (PTY) LTD **APPELLANT**

And

SIMON MUPETAMI **FIRST RESPONDENT**

ALEXINA M MATENGU N.O **SECOND RESPONDENT**

Neutral citation: *Namibia Custom Smelters (Pty) Ltd vs Mupetami* (LCA 8/2014) [2015] NALCMD 7 (16 April 2015)

Coram: PARKER AJ

Heard: **13 March 2015**

Delivered: **16 April 2015**

Flynote: Labour law – Arbitration award – Appeal against orders made in award – Court held that substantive unfairness in terms of s 33(1) of the Labour Act 11 of 2007 is established where employer dismisses employee without valid and fair reason – The terms 'valid' reason and 'fair' reason explained – Court confirmed arbitrator's finding that on the facts employer satisfied requirement of 'valid' reason – But court found that the arbitrator misdirected herself when she sought to prescribe to the employer (appellant) what punishment to impose on the errant employee (first respondent) – Court held that what punishment should be imposed on an errant employee is squarely within the discretion of the employer, with the caveat that the

punishment imposed should be fair – Fairness of punishment should be assessed upon all the factors – In instant case court found that the nature of the misconduct for which employee (first respondent) was found guilty merited dismissal – Consequently, court concluded that the employer (the appellant) had fair reason to dismiss the employee (first respondent) – Appeal was therefore upheld and arbitrator's orders set aside.

Summary: Labour law – Arbitration award – Appeal against orders made in award – Court held that substantive unfairness in terms of s 33(1) of the Labour Act 11 of 2007 is established where employer dismisses employee without valid and fair reason – First respondent dishonestly appropriated appellant's property and attempted to take it outside through the gates of appellant's premises in breach of appellant's company rules – Court held that such misconduct is serious as it went to the root of the employment contract – Appellant therefore had valid reason to dismiss the first respondent – Moreover such misconduct leads to the conclusion that mutual trust and confidence between the appellant and the first respondent have clearly disappeared beyond recall – Appellant therefore had also fair reason to dismiss the first respondent – Consequently, court found that appellant had valid and fair reason to dismiss the first respondent – Appeal therefore upheld and arbitrator's orders were set aside.

ORDER

(a) The order made by the second respondent in the award, dated 23 January 2014, in Case No. NRTS 51-13 is set aside.

(b) The dismissal of the first respondent is fair.

(c) The appellant must not later than 18 May 2015 pay to the first respondent any outstanding terminal benefits, sounding in money, that are due to the first respondent in terms of the Labour Act 11 of 2007.

(d) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] In her arbitration award in Case No. NRTS 51-13, dated 23 January 2014, the arbitrator, the second respondent, decided that the dismissal of the first respondent (employee) was substantially unfair, and made an order for reinstatement and compensation. The arbitrator's award was based on her determination that the appellant dismissed the first respondent without valid and fair reason, within the meaning of s 33(1)*(a)* of the Labour Act 11 of 2007. The appellant appeals against the order made by the arbitrator.

[2] According to s 33(1)*(a)* of the Labour Act, the reason for dismissing an employee must be valid, eg, where the employee commits a serious breach of a duty to the employer or where he or she commits any breach of a term of the contract that goes to the root of the contract. And the reason must be fair. The validity of the reason relates to the facts on which the reason is based, that is, the facts that are placed before the tribunal or disciplinary body (of the employer), and the fairness of the reason relates to whether the sanction imposed on the errant employee was 'appropriate in the circumstances'. See *Namibia Beverages v Hoaës* 2002 (2) NLLP 380 (NLC) at 382.

[3] The grounds on which the appellant relies for relief are four, and in essence they are (a) that the misconduct of the employee was serious, and the second respondent erred in law in finding that despite the seriousness of the misconduct the appellant should not have dismissed the first respondent; and (b) that the arbitrator erred in law in finding that the punishment of dismissal was inappropriate on the basis that the appellant ought to have applied 'corrective measure' and not 'punitive

measure'. The appellant contends further that the second respondent erred in law in not finding that as a result of the serious misconduct the employee-employer relationship had broken down irretrievably. And, according to the Notice, the appellant appeals against only the orders in the arbitration award. These, in essence, are the grounds of appeal that the appellant relies on for relief in compliance with rule 17(2) of the Labour Court Rules ('the rules'). In terms of rule 17(16) of the rules the respondents must in turn deliver a statement stating the grounds on which they oppose the appeal, together with any relevant documents. The second respondent has not filed any such notice.

[4] The first respondent has put forth what he considers to be such grounds; and there are four of them. I should, with the greatest respect, say that only ground 1 appears to be a ground within the meaning of rule 17. Ground 2 is irrelevant because the second respondent found that the appellant (respondent in the arbitral proceeding) 'ensured that the procedural aspects of dismissal were complied with'; and so, the second respondent concluded only that 'the applicant's (ie the first respondent's) dismissal was substantively unfair'. Grounds 3 and 4 are not grounds: they are conclusions drawn by the draftsman without setting out reasons therefor. See *S v Gey van Pittius and Another* 1990 NR 35 (HC), which relates to criminal procedure but which ought to apply with equal force to appeals brought in terms of the Labour Act. (*Mokwena v Shinguandja* (LC 52/2011) [2013] NALCMD 10 (28 March 2013), para 16)

[5] I now proceed to apply the principles enunciated in *Namibia Beverages v Hoaës* to the facts of the present case. The facts accepted by the first respondent were these. The first respondent was caught with a pair of overalls at the gates of the appellant's premises by a security guard when he was about to leave the premises, and that the first respondent was aware of the procedure that required him to declare any personal item before entering the company (ie the appellant's) premises, but he had not done that when he entered the company premises to work. The first respondent was unable to give an adequate and satisfactory explanation as to why company property (the pair of overalls) was found in his possession while he

was exiting the company premises, which constituted misconduct. The second respondent cannot be faulted for making those factual findings, findings which should inevitably lead to the conclusion that the appellant had satisfied the requirement of 'valid reason' under s 33(1)*(a)* of the Labour Act.

[6] The second respondent did not, however, find that the appellant had satisfied the requirement of 'fair reason' under s 33(1)*(a)* of the Labour Act on the following basis. According to the second respondent, 'considering the nature of the offence 'the respondent (ie the appellant) was suppose (supposed) to impose a corrective measure of disciplinary not a punitive measure', and that the appellant ought to have taken into account the fact that the first respondent had worked for the company for about three years and he had a clean record.

[7] To start with; I fail to see what law the arbitrator relies on when she stated that the employer 'was supposed ('suppose') to impose a 'corrective measure of disciplinary'. The concept is alien to our Labour Law. The Labour Act recognizes the penalty of unfair dismissal (ss 33 and 34). It also recognizes other forms of disciplinary action (s 48). The courts and other tribunals have recognized such other forms of disciplinary action as oral warning, first written warning, final written warning, suspension and demotion (see, eg *Pupkewitz & Sons (Pty) Ltd v Kankara* 1997 NR 70; *Kausiona v Namibia Institute of Mining and Technology* NLLP 2004 (4) 43 NLC; *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC)). I should say that those alternative penalties are punitive measures: they are not 'corrective measures of disciplinary'; whatever that means.

[8] It seems to me clear that the first respondent has not put forth any real ground in opposition to the appellant's ground of appeal on the requirement of 'fair reason'. Be that as it may, it is well entrenched that punishment – dismissal or any alternative punishment – that an employer may impose on an errant employee is squarely within the discretion of the employer. On that score, I accept Mr Rukoro's submission on the point, but with this caveat. The discretionary power of the employer is not absolute. There is the qualification that the punishment imposed must be fair after

the employer has weighed all the factors. (*Pupkewitz v Kankara*) In any case, it would be biting more than it can chew, if the court were to prescribe in each case what punishment an employer should impose on an errant employee.

[9] In *Namibia Tourism Board v Kauapirura-Angula* 2009 (1) NR 185 (LC) the court held that the employer was entitled to dismiss the employee for insubordination, assault and use of abusive language. These were the forms of misconduct the employee in *Lucas Zwane v Tip Top Holdings Swaziland* IC 77/95 (Unreported), at 9 7, which Mr Rukoro, counsel for the appellant, referred to the court, was found to have committed; and there, the Industrial Court of Swaziland held that the employer was entitled to dismiss the employee for those forms of misconduct because they were capable of cancelling any unblemished record of good service. See also *Kausiona v Namibia Institute of Mining and Technology*. On the facts, the forms of misconduct in *Namibia Tourism Board; Lucas Zwane*; and *Kausiona* are different from the form of misconduct in the instant case. Howsoever that may be, the misconduct of which the first respondent was found guilty and which the second respondent accepted, as I have stated above, is an act of appropriating his employer's property dishonestly and in breach of company rules. In that regard, it can be said that mutual trust and confidence between the employer (the appellant) and the employee (the first respondent) had clearly disappeared beyond recall (*Namibia Beverages v Hoaës*), as Mr Rukoro submitted. I conclude therefore that the dishonest act of the first respondent rendered the continuation of the employment relationship insupportable. (See *Commercial Bank of Namibia v Van Wyk* NLLP 2004 (4) 250 NLC.)

[10] In any event, as I have said more than once, the first respondent did not put forth any ground in opposition to the appellant's ground that the second respondent erred in law 'in not finding that the employee-employer relationship between the Appellant and the First Respondent has (been) irretrievably broken down on account of First Respondent's serious misconduct'.

[11] Based on these reasons, I hold that the evidence points inevitably to the conclusion that having weighed all the factors the appellant had a fair reason and valid reason to dismiss the first respondent; and the second respondent should have so held. This is not a case where the first respondent had had a long service with unblemished record. We are here talking of some three years' service. In any case, upon the authorities, I hold that the appellant would still have been entitled to dismiss the first respondent, even if he had had a long period of service with an unblemished record, considering the nature and seriousness of the misconduct. I consider therefore that the evidence does not account for the decision of the arbitrator that the dismissal of the first respondent was substantively unfair. That being the case, the appeal succeeds; whereupon, I make the following order:

(a) The order made by the second respondent in the award, dated 23 January 2014, in Case No. NRTS 51-13 is set aside.

(b) The dismissal of the first respondent is fair.

(c) The appellant must not later than 18 May 2015 pay to the first respondent any outstanding terminal benefits, sounding in money, that are due to the first respondent in terms of the Labour Act 11 of 2007.

(d) There is no order as to costs.

C Parker

Acting Judge

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APPEARANCES

APPELLANT:	S Rukoro Instructed by Engling, Stritter & Partners, Windhoek
FIRST RESPONDENTS:	C Daniels Of Clement Daniels Attorneys, Windhoek
SECOND RESPONDENTS:	No appearance