REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 67/2015

In the matter between:

OSCAR KAKUNGHA **APPELLANT/APPLICANT**

and

DUNDEE PRECIOUS METALS TSUMEB **FIRST RESPONDENT**
ALEXINA MAZINZA MATENGU **SECOND RESPONDENT**

Neutral citation: *Kakungha v Dundee Precious Metals Tsumeb* (LCA 67/2015) [2016] NALCMD 37 (29 September 2016)

Coram: PARKER AJ
Heard: **8 July 2016**
Delivered: **29 September 2016**

Flynote: Labour law – Unfair dismissal – Appellant employee who was also union workplace representative wrote to the President and to print and electronic media outlets that employer planning to entrench 40 percent of its employees and causing environmental degradation – Appellant found guilty of bringing employer's name into disrepute at internal disciplinary hearing and confirmed by internal appeal body – Arbitrator accordingly finding that dismissal was substantively fair and also procedurally fair – Court finding that appellant being union workplace representative

should have made representations to employer as he was entitled to do or to his union – Having failed to do that court concluded appellant had intention to bring employer's name into dispute – Upon application of an objective test court held that any reasonable person reading the contents of the letter and the emails would think that the employer was not acting properly – Consequently, court upheld arbitrator's decision that the appellant's conduct brought the name of the employer into disrepute – Court found the sanction imposed to be fair and reasonable – Court held that it lies within the province of the employer to set the standard of conduct of its employees and to determine the sanction for any misconduct and the court will interfere with sanction only if sanction is unfair and unreasonable. *National Unions of Public Service and Allied Workers v National Lotteries Board* 2014 (3) SA 544 (CC); and *Model Pick 'n Pay Family Supermarket v Mwaala* 2003 NR 175 (LC) applied.

Summary: Labour law – Unfair dismissal – Appellant employee who was also union workplace representative wrote a letter and emails to the President and some print and electronic media outlets – Contents of letter and emails gave information that employer was planning to retrench 40 percent of its employees and that some employees have suffered burns on their bodies as a result of toxic materials that have been dumped at the workplace – Court found that as union workplace representative he was empowered by the Labour Act 11 of 2007 to make representations to the employer about matters that affected employees under his charge and any environmental degradation as a result of employer's conduct – Appellant did none of these – By writing to the President and the media outlets he had the intention to bring the name of the employer into disrepute – Employer therefore had a valid and good reason to dismiss appellant – Court did not find any procedural unfairness in the manner employer handled the disciplinary hearing and the appeal hearing – Court held further that the sanction of dismissal was appropriate – Consequently, court refused to interfere with decision of arbitrator.

ORDER

(a) The appeal is dismissed.

(b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] This is an appeal against an arbitration award granted by the arbitrator (second respondent) in case no. NTRS 28–15, delivered on 9 November 2015, wherein the arbitrator concluded that the dismissal of the appellant was substantively and procedurally fair. The appellant appeals against the arbitrator's finding that the appellant's dismissal was substantively fair.

[2] These facts are apparent on the record. Mr Oscar Kakungha, the appellant, was employed by Dundee Precious Metals Tsumeb, the first respondent, on 1 December 2010. He was elected a workplace union representative in 2014. The circumstances that led to Kakungha's dismissal was that on 24 July 2014 and in August 2014, he signed and co-authored a letter (Exhibit F), in his capacity as a workplace union representative, which was sent to the President. It was alleged in the letter that the first respondent intended to retrench 40 per cent of its workforce.

[3] Kakungha also sent a letter on the 25 September 2014 by email (Exhibit C), with an attachment that contained a picture of the dumpsite of the first respondent, and pictures of some workers with rashes on their bodies. Kakungha sent this email to two media outlets, namely, the Namibian Broadcasting Corporation (NBC) and Namibia Press Agency (NAMPA).

[4] As a result of Kakungha's conduct he was charged by the first respondent with five counts of misconduct on 15 October 2014 by the first respondent. He was asked to appear before a disciplinary hearing. The charges levelled against him were (a) misuse of company property, (b) non-compliance with established procedure, (c) giving false information, (d) uttering and confirming fraudulent or false statements or documents and (e) bringing the company's name into disrepute.

[5] The chairperson of the disciplinary enquiry found Kakungha guilty on all five counts of misconduct, and the penalty recommended was dismissal. Of course, the count (e), is merely the consequence of counts (a), (b), (c) and (d). Following an unsuccessful internal appeal against the outcome of the internal disciplinary process, Kakungha referred on 19 March 2015 to the offices of the Labour Commissioner at Tsumeb a dispute of unfair dismissal in terms of the Labour Act 11 of 2007. The dispute was eventually referred to arbitration. The arbitrator (second respondent) found the dismissal to be substantively and procedurally fair. The arbitrator found that 'the risk of continuing the employment relationship between the parties was a risk unacceptably great to take especially in view of the seriousness of the offence'. The arbitrator concluded that the relationship between the parties 'is irreparably damaged'.

[6] The appellant lodged an amended notice of appeal on the 27 January 2016 against the arbitration award. The grounds of appeal are set out verbatim:

> 'Ground 1
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> The appellants contends that the arbitrator erred in law in failing to consider the role and involvement of the appellant in dealing with the possible arsenic deposits at the 1st respondent's smelter at the time. In doing so, failed to apply the appropriate test to the facts in determining the appellant intended to publish fraudulent and false evidence about the 1st respondent and bring the 1st respondent's name into disrepute, taking into account the historical background, the various communications held between appellant and the Office of the President regarding possible arsenic deposits, and the media's previous involvement on various occasions relating to the investigations about possible arsenic deposits.
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> Ground 2
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> The arbitrator erred in law in finding that the appellant should have followed grievance procedure with the respondent instead of transmitting the aforementioned emails without properly considering under which circumstance and for which matters a grievance procedure may be followed. The arbitrator completely failed to consider any grounds at all and the process and circumstances under which grievance

procedures relating to the ventilation of an unhappiness which an employee feels about certain conditions in his employment whereas this case deals specifically with an issue which was previously widely ventilated. Taking into account the history of the issues relating to arsenic, the arbitrator could not have come to such a conclusion.

Ground 3

The arbitrator erred in law in finding that the conduct of the appellant warranted a dismissal. No evidence was forthcoming that in terms of the respondent's Disciplinary Code and Practice, a first offence for any of the charges levelled against the appellant constituted a dismissible offence. The arbitrator further erred in accepting that the charges levelled against the appellant were competent, whereas the charges constituted a duplication of charges against the appellant.'

[7] The first respondent opposed the appeal on these grounds; also set out verbatim:

'2.1 There is sufficient evidence on record to support the arbitrator's conclusions, which are conclusions that a reasonable arbitrator could reach on the material before her that the appellant's conduct for which he was charged breached his duties toward his employer and combined with his approach to the charges, irreparably damaged the relationship between the parties.

3.1 On the material before the arbitrator and her arbitration award, this 'question of law is unfounded.

3.2 There was sufficient material before the arbitrator to support the first respondent's case that the appellant had other legitimate avenues to address his concerns and breached his implied and express contractual duties to his employer.

3.3 Even if it is accepted that the 'issue relating to arsenic' were 'previously widely ventilated', there was no evidence of any previous ventilation of unhappiness by the appellant (or any employee or the Union) in any of the available internal avenues, regarding the alleged decision to retrench 40% of the first respondent's workforce and target sick employees for retrenchment.

3.2 There was sufficient material before the arbitrator to support the first respondent's case that the appellant had other legitimate avenues to address his concerns and breached his implied and express contractual duties to his employer. . .

4.1 There is sufficient material on record to support the arbitrator's finding – that the appellant's conduct warranted his dismissal – as one a reasonable arbitrator could make when applying the law to the material before, (him or her).

4.2 For its case against the appellant, the first respondent relied, amongst others, on the terms of the appellant's employment agreement and in particular clauses 1 and 2 of the service agreement (exhibit H), its corporate information system security policies (exhibit C) and email policy (exhibit D).

4.3 The record reflects at least three separate sets of events that led to the charges. It is not understood from the notice of appeal which charges were incompetent or duplicated and there is no record of any such objection before the arbitrator.'

Did the arbitrator err in law by failing to apply the appropriate test to the facts in determining whether the appellant intended to publish fraudulent and false evidence?

[8] Mr Kamanja, counsel for the appellant, contends that the arbitrator failed to consider 'the appropriate test to the facts in determining whether the appellant intended to publish fraudulent and false evidence about the first respondent.' The response of Mr Maasdorp, counsel for the first respondent, was that the appropriate test is the objective test. To support his contention, counsel relied on *Gordon Timothy v Nampak* [2010] 8 BLLR 830 (LAC), where Davis J held that an objective evaluation as to whether a reasonable decision marker would find that the employee brought the company into disrepute is required.

[9] In *National Unions of Public Service and Allied Workers v National Loteries Board* 2014 (3) SA 544 the Constitutional Court of South had to determine whether union members who were employee of the respondent and who wrote a harsh article about the Chief Executive Office (CEO) to a local newspaper had brought the company's name into disrepute. The Constitutional Court held at para 63 that what

one has to decide ‘is simply whether anyone reading the contents would think the CEO and the board were not doing their duties properly’. Thus, the Constitutional Court proposed an objective test, and held that the company was entitled to dismiss the employees who did not apologize to the company and its CEO.

[10] In the instant case, from the evidence placed before the arbitrator, particularly the letter addressed to the President and the email sent to the two media outlets, any reasonable person reading the contents of the letter and the e-mail would think that the company is not acting properly. In my opinion, the arbitrator was correct when she found that the conduct of Kakungha had brought the name of the company into disrepute. This ground of appeal should therefore fail.

Did the arbitrator err in law, in finding that the appellant should have followed grievance procedure with the respondent instead of transmitting the aforesaid emails without properly considering under which circumstance and for which matters a grievance procedure may be followed?

[11] For purposes of this appeal, the Court is confined to the record of the arbitral proceedings, the grounds that the appellant relies on for the appeal and the grounds the first respondent relies on for opposing the appeal. (See *Benz Building Suppliers v Stephanus* 2014 (1) NR 283 at para 5.)

[12] Mr Kamanja correctly points out that where the findings of the lower court are vitiated by lack of reason that constitutes question of law. Having read through the arbitration record I can see that first respondent placed cogent and convincing evidence before the arbitrator tending to show that Kakungha, the appellant, did not exhaust internal remedies. It should be remembered that Kakungha was an employee of the first respondent, and he was subject to the discipline of the first respondent; and what is more, he was a workplace union representative; and so, he was entitled to make representations to the first respondent about any effect the workplace conditions were having on the employees he represented and, indeed, anything that harmed the environment. Kakungha did not say that he was stopped from so acting or that he was not permitted to make such representations to the first respondent about these matters.

[13] The first respondent placed sufficient evidence on record during the arbitration hearing, by adducing oral evidence, by submitting documentary evidences as exhibits, and through cross-examination of the appellant. Mr Kamanja's argument that the first respondent did not place evidence before the arbitrator does not hold water. I agree with Mr Maasdorp that sufficient evidence was placed before the arbitrator.

Did the arbitrator err in law in finding that the conduct of the appellant warranted a dismissal?

[14] In *Model Pick n Pay Family Supermarket v Mwaala* 2003 NR 175 (LC) p 179 the court cited with approval *Country Fair Food (Pty) Ltd v CCMA and Others* [1999] 11 BLLR 1117 (LAC) at 1121 E – F the following proposition of law:

> 'It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct by its employees and to determine the sanction with which non-compliance will be visited, interference therewith is only justified in the case of unreasonableness and unfairness.'

Thus, the question should be whether the decision to dismiss the respondent is one which no reasonable employer in the position of the employer first respondent would possibly regard as reasonable and fair.

[15] The question is, therefore this. Will a reasonable employer in the position of the appellant dismiss an employee who wrote defamatory information about the employer to the President and the media on the basis that the employee has brought the name of the employer into disrepute? I think an employer in the position of the first respondent will conclude that its name has been brought into disrepute. In *National Unions of Public Service and Allied Workers v National Loteries Board,* the Constitutional Court held that an employer is justified to dismiss employees who tarnish the name of the employer, because such activities of members of the union were not protected by the Act. In Namibia, too, such any activity of a union workplace representative is not protected by the Labour Act. I find therefore that the first respondent had a valid and good reason to dismiss appellant. And it was not

established that there had been procedural unfairness in the manner the first respondent handled the disciplinary hearing and the internal appeal hearing. I also find, as I have said previously that the sanction imposed is reasonable.

[16] Based on these reasons, I cannot see any good reason to interfere with the arbitrator's award. That being the case the appeal fails.

[17] In the result, I make the following order:

(a) The appeal is dismissed.

(b) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPELLANT/ APPLICANT:	A E J Kamanja Instructed by AngulaCo. Inc., Windhoek
FIRST RESPONDENT:	R L Maasdorp Instructed by Engling, Stritter & Partners, Windhoek