

REPUBLIC OF NAMIBIA



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: LCA 30/2015

In the matter between:

NAMIBIA DIAMOND CORPORATION (PTY) LTD

APPELLANT

And

HENRY DENZIL COETZEE

RESPONDENT

Neutral citation: *Namibia Diamond Corporation (PTY) LTD v Henry Denzil Coetzee*
(LCA 30/2015) [2016] NALCMD 45 (06 December 2016)

Coram: **UEITELE, J**

Heard: 02 October 2015

Delivered: 10 February 2016

Reasons released: 06 December 2016

Flynote: *Labour Law* –Unfair dismissal - misconduct - Employee accused of misconduct cannot be dismissed in these circumstances without fair hearing.

Labour Law - Recommendation 119 - Termination of Employment (1963) of the International Labour Organization or Termination of Employment Convention 158 (of June 1982) are applicable and is applied - More specifically - Article 7 of Convention 158.

Summary: Mr. Henry Denzil Coetzee, was employed by the Namibia Diamond Company (Pty) Limited as a senior diamond sorter from 1 March 2010 until 1 December 2014 when he was dismissed from his employment on allegations that he committed acts of misconduct. He, in terms of s 85 of the Labour Act, 2007 referred a dispute of unfair dismissal and unfair labour practice to the Labour Commissioner.

The Labour Commissioner appointed an arbitrator to conciliate and arbitrate the dispute. The arbitrator found that Mr. Coetzee was unfairly dismissed and order the employer to compensate him for 16 months' loss of income as a result for the unfair dismissal. This is an appeal by the appellant against the whole of the arbitration award made by an arbitrator, under s 86(15) of the Labour Act, 2007. The respondent opposed the appellant's appeal and simultaneously filed a cross-appeal arguing that the arbitrator erred by not ordering the appellant to reinstate him.

Held that an employee who is accused of certain acts of misconduct or poor performance must be given a chance to account for his or her behavior. Where management prematurely decides that the employee is guilty and does not give that employee an opportunity to say anything in his defence, this would be entirely unfair.

Held further that Section 33 (4) places the *onus* of proving the employee's misconduct on the employer, that is to say, it is not the responsibility of the employee to prove his innocence. He has a right to challenge any statements which are detrimental to his or her credibility and integrity. The court found that the appellant has failed to discharge that *onus*.

Held further that the approach taken by the Hearing Official is inconsistent with an adjudicative process and a clear negation of the applicant's right to a fair hearing encapsulated in the *audi alteram partem* principle.

Held further that there is no evidence before court that the Hearing Official, Mr. Bessinger, was a head of a department or above the level of a head of department. Mr. Bessinger thus had no authority to preside over the case where the respondent faced a charge of breach of trust. The court found that when, Mr. Bessinger, so presided he assumed powers that he did not have and everything that flowed from that was invalid.

Held, further, regarding the question of waiver, that there had been no proof that the applicants had waived their rights.

Held, further, that in the present matter the reason for the finding of guilt, is inextricably linked to the procedure followed by the appellant. The appellant has thus, on a balance of probabilities, failed to prove that the respondent was actually guilty of misconduct.

Held that in this matter the arbitrator made a finding that not only did the appellant not follow a fair procedure when it dismissed the respondent, but also that the appellant did not have a valid reason to dismiss the respondent. The court thus found that the arbitrator contradicted himself when he found that the relationship of trust between the employer and the employee had irretrievably broken down and that therein lied the arbitrator's error.

Held furthermore that without a link between the respondent and the disappearance of the 'rare diamond' there is no evidence that the employment relationship between the parties cannot be sustained. It follows then that the general rule, which gives primacy to reinstatement as the preferred remedy for unfair dismissal, must prevail.

ORDER

- 1 The appeal is dismissed.

- 2 The cross appeal succeeds and the arbitrator's award is amended to read as follows:
 - 2.1 The dismissal of Henry Denzil Coetzee is substantively and procedurally unfair;

2.2 The appellant (Namibia Diamond Corporation (Pty) Ltd) is ordered to reinstate Mr. Henry Denzil Coetzee and to pay him an amount equal to the monthly remuneration he would have received had he not been unfairly dismissed.

3 There is no order as to costs.

JUDGMENT

UEITELE, J

Introduction and background

[1] This is an appeal against the whole of the arbitration award made by an arbitrator, under s 86(15) of the Labour Act, 2007, on 16 April 2015 holding that the respondent was unfairly dismissed by the appellant and, for that reason, ordering the appellant to compensate the respondent for 16 months' loss of income. The arbitration award was received by the appellant on 20 April 2015.

[2] The background to this matter is briefly as follows. Mr. Henry Denzil Coetzee (I will, in this judgment, refer to him as "the respondent"), was employed by the Namibia Diamond Company (Pty) Limited (I will, in this judgment, refer to this company as "the appellant") as a senior diamond sorter from the 1st of March 2010 in Oranjemund until the 1st of December 2014 when he was dismissed, on charges of misconduct, from his employment.

[3] The events which led to the dismissal of the respondent are briefly that on 17 July 2014, while sorting diamonds in the Geological laboratory at the appellant's mining premises in Oranjemund, the respondent discovered an oversized diamond of 77.36 carats. The respondent did not immediately record this significant find on the worksheet. On the 6th August 2016 the aforementioned diamond was reported missing. Pursuant to an investigation by the security department, the respondent was charged with gross negligence, breach of trust, providing false evidence and non-compliance with policies

and procedures. The negligence charge was subsequently amended to read "gross negligence".

[4] On the 18th of August 2014 the respondent was suspended from work pending the investigation of the charges leveled against him. On 29 October 2014 the respondent was informed (by letter) that the disciplinary hearing with respect to the charges of misconduct levelled against him will take place on Monday the 3rd of November 2014 at 09H00 in the Services Conference Room. On Saturday 1 November 2014 the respondent was telephonically informed that the disciplinary hearing was postponed to 5 November 2014 and also that he could collect the case documents the following day (i.e. on Sunday 2 November 2014).

[5] The disciplinary hearing commenced as scheduled on Wednesday 5 November 2014 at 09H00 in the Services Conference Room. At the commencement of the hearing the respondent's union representative raised an objection to the fact that the Security Department was the complainant in the matter. The respondent's representative based his objection on the ground that the respondent was not, in terms of the appellant's Policy PO –SE-01 charged with theft of diamond. The respondent's representative argued that according to that policy it should be line management who must initiate and be the complainant in the matter and not the Security Department. The chairperson of the disciplinary hearing overruled the objection.

[6] From the documents available in respect of what transpired at the disciplinary hearing it appears that after the ruling by the chairperson of the disciplinary hearing a discussion ensued and thereafter a recess was taken. After the recess, the Hearing Official informed the respondent and his representative that there were two options open to the respondent namely that the respondent either proceed with the hearing with Namdeb Security as the complainant or not and if the respondent opted for the option that the Namdeb Security should not be the complainant in the matter, the disciplinary hearing will proceed in the absence of the respondent. The minutes of the disciplinary hearing simply state that 'The Hearing Official necessarily needed to leave the room and proceeded with the case in the adjacent room.' The hearing proceeded in the absence of the respondent, in the room other than the room where it was scheduled to take place and after the conclusion of the hearing the respondent was found guilty on all four charges of misconduct.

[7] On 1 December 2014 the respondent was informed that his services with the appellant had been terminated after being found guilty of misconduct. On the 3 December 2014 the respondent lodged an appeal against the findings of the disciplinary committee to the appellant's Disciplinary Review Committee but was unsuccessful. On 18 December the chairperson of the appellant's Disciplinary Review Committee wrote to the respondent informing the respondent that he 'found no reason to overturn the original disciplinary hearing outcome and that the decision to dismiss is upheld.'

[8] On 5 February 2015 the respondent referred a dispute of unfair dismissal, unfair labour practice, improper interpretation and application of the collective agreement to the Labour Commissioner. On 9 February 2015 the Labour Commissioner designated a certain Mr. Joseph Windstaan as the arbitrator. The Labour Commissioner, on the same day (i.e. on 9 February 2015) also notified the parties that a conciliation meeting or arbitration hearing will take place on 10 March 2015 at the Ministry of Labour and Social Welfare's offices at Oranjemund.

[9] From the record before me it is not clear whether a conciliation meeting preceded the arbitration hearing or not. What is, however, clear is that the arbitration hearing commenced, as scheduled on 10 March 2015. At the arbitration hearing both the appellant and the respondent presented oral evidence to the arbitrator, they also called witnesses and cross-examined those who testified against them. Both parties were represented during the arbitration proceedings, and the representatives made written submissions at the close of the leading of evidence on 13 March 2015.

[10] On 16 April 2015 the arbitrator, after he evaluated and assessed the evidence placed before him, delivered his award, the appellant, however, alleges that it only received the award on 20 April 2015. In the award the arbitrator found that the respondent's dismissal was procedurally and substantively unfair. The arbitrator refused to order the appellant to reinstate the respondent because, so the arbitrator reasoned, the relationship of trust between the appellant and the respondent had irretrievably broken down 'from the original complaint of the loss of the diamond till now.' The arbitrator instead ordered the appellant to compensate the respondent for the loss of 12 months' salary because "the respondent could possibly have worked for the appellant until "retirement". The arbitrator furthermore ordered the appellant to pay the respondent

for the loss of income for a period of four months and thirteen days. The total monetary value of the award being the amount of N\$ 242 111 -67. The appellant was aggrieved by the finding and decision of the arbitrator and it is that award that the appellant is appealing to this court.

[11] On 19 May 2015 the appellant filed its notice of appeal (the appellant has labelled this notice of appeal as erroneous but has not withdrawn it). That notice of appeal (i.e. the one dated 19 May 2015) was, however, followed by another notice of appeal dated 20 May 2015 in which the appellant states that the appeal is based on questions of law and is against the failures of the arbitrator with regard to his findings and orders. On 20 July 2015 the appellant after having received the record of the arbitration proceedings, amplified its notice of appeal.

[12] The grounds of appeal contained in the amplified notice of appeal are three in total, with ground one divided into 28 paragraphs and the second ground divided in 12 paragraphs. In a nutshell the first ground of appeal is that the arbitrator, on the evidence that was placed before him erred in law by making the findings he did. The second ground of appeal, in summary, is that the arbitrator on the evidence that was placed before him erred in law by failing to find that the respondent was properly found guilty of the charges of misconduct. The third ground of appeal is that the arbitrator allegedly erred in law in finding bias and impartiality on the part of the Hearing Official and consequently declaring the disciplinary hearing null and void.

[13] On 4 June 2015 the respondent gave notice that he will oppose the appellant's appeal. Earlier on 29 May 2015 the respondent had filed a cross-appeal, but the cross appeal was limited to the issue that the arbitrator erred in law by not granting the respondent the "primary remedy" of reinstatement because according to the respondent, the trust relationship between the parties had not broken down. The respondent opposed the appeal, mainly on four grounds, namely:

- (a) That in terms of the appellant's policy the security department was not entitled to be the initiator at the hearing, but only line management, so according to him the Hearing Official wrongly overruled his objection;
- (b) That the disciplinary proceedings were conducted in his absence;

- (c) That the Hearing Official was biased; and
- (d) That three days before his disciplinary hearing appellant changed his charges from gross negligence in the loss of a diamond to simply gross negligence.

The issues that are up for determination

[14] In my view the issues that are up for determination in this appeal and in the cross appeal can be narrowed down to two simple questions namely:

- (a) Did the arbitrator, on the evidence that was placed before him, err in finding that the appellant unfairly (for want of a fair procedure and substantive reason) dismiss the respondent?
- (b) Did the arbitrator, on the evidence that was placed before him, err in finding that the relationship of trust between the appellant and the respondent has irretrievably broken down?

The applicable legal principles

[15] Labour Relations in Namibia are governed by the Labour Act, 2007¹ the section that is relevant to the dispute in this matter is s 33. That section reads as follows:

'33 Unfair dismissal

(1) An employer must not, whether notice is given or not, dismiss an employee-

- (a) without a valid and fair reason; and
- (b) without following-
 - (i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34(1); or
 - (ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.

¹ Act No. 11 of 2007.

- (2)
- (4) In any proceedings concerning a dismissal-
 - (a) if the employee establishes the existence of the dismissal;
 - (b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.'

[16] In addition to the Labour Act, 2007, Recommendation 119 on Termination of Employment (1963) of the International Labour Organization or Termination of Employment Convention 158 (of June 1982) are applicable. Article 7 of Convention 158 states that:

'...the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity'.

[17] It is thus clear that an employee who is accused of certain acts of misconduct must be given a chance to account for his or her behavior. Where management prematurely decides that the employee is guilty and does not give that employee an opportunity to say anything in his defence, this would be entirely unfair. Section 33 (4) clearly places the *onus* of proving the employee's misconduct on the employer, that is to say, it is not the responsibility of the employee to prove his innocence. He has a right to challenge any statements which are detrimental to his or her credibility and integrity. It is now accepted that other important ingredients of a fair disciplinary hearing would include²:

- (a) the right to be told the nature of the offence or misconduct with relevant particulars of the charge;
- (b) the right of the hearing to take place timeously;
- (c) the right to be given adequate notice prior to the enquiry;

² *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC) at 357.

- (d) the right to some form of representation (the representative could be anyone from the work-place; either a shop steward, works council representative, a colleague or even a supervisor, so as to assist the employee and ensure that the discipline procedure is fair and equitable);
- (e) the right to call witnesses and to cross examine those who testified against him or her;
- (f) the right to an interpreter;
- (g) the right to a finding (if found guilty, he or she should have the right to be told the full reasons why);
- (h) the right to have previous service considered;
- (i) the right to be advised of the penalty imposed (verbal warnings, written warnings, termination of employment); and
- (j) the right of appeal, i.e. usually to a higher level of management.

[18] The second requirement for a dismissal to be regarded as fair is that the employer must have a valid reason for the dismissal. A valid reason for terminating the employment includes the following ingredients:

- (a) Proof of the offence

This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct. This involves proving that a rule existed, and that the employee broke that rule. Proof that the employee actually committed the offence charged presupposes a proper investigation of the allegation against the employee, and the presentation of evidence that links the employee with the offence. Proof on a balance of probabilities means that the evidence points more probably to the conclusion that the employee committed the alleged misconduct, than to his or her innocence. However, a mere suspicion of guilt does not satisfy the test of proof on a balance of probabilities.

(b) Reasonableness of the rule

The second requirement for a fair dismissal for misconduct is that the rule the employee is dismissed for breaking must be valid and reasonable. Generally speaking, a workplace rule is regarded as valid if it falls within the employer's contractual powers and if the rule does not infringe the law or a collective agreement. A workplace rule is regarded as reasonable if it is operationally justified-i.e. if it serves to promote the employer's business and the welfare of employers generally-and if it does not impose an unreasonable burden on the employee.

(c) Knowledge of the rule

The third requirement for a fair dismissal for misconduct is that, the employer must prove that the employee was or could reasonably be expected to have been aware of the rule. This requirement is self-evident; it is clearly unfair to penalise a person for breaking a rule of which he or she has no knowledge.

(d) Consistency

The fourth general requirement for a fair dismissal is consistency. The labour court have for many years stressed the principle of equality of treatment of employees-the so-called parity principle. Other things being equal, it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past (historical inconsistency), or to dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency).

[19] The Labour Court has placed so high a value on procedural fairness that in many cases employees were granted compensation or even reinstated because of a lack of proper pre-dismissal procedures, even though the court was satisfied that there would otherwise have been a valid reason for the dismissal.³ Parker has argued that in view of the clear and unambiguous words of s 33(1)(a) and (b) of the Labour Act, 2007 even where an employer succeeds in proving that he had a valid and fair reason to dismiss

³ *SPCA v Terblanche*, NLLP 1998(1) 148 (NLC). *Shiimi v Windhoek Schlachtereij (Pty) Ltd* NLLP 2002(2) 224 (NLC), *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka and Others*; an unreported judgment of the Labour Court of Namibia Case No. LCA 47/2007, delivered on 3 July 2008 and *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR 123.

an employee, the dismissal is unfair if the employer fails to prove that it followed a fair procedure.⁴ Also see the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*⁵ where Karuaihe J said:

'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair.'

The facts of this matter

[20] The material facts in this case are not in dispute. The facts which are not in dispute are these: The respondent was employed by appellant as a senior diamond sorter at the appellant's mine in Oranjemund and that he was dismissed from the appellant's employment on 1 December 2015. On 17 July 2014 and in the course of his employment, the respondent (in the presence of a temporary diamond sorter, one Andreas Andreas) while sorting coarse materials, discovered a large diamond, which the appellant described as a 'rare finding', of 77.36 carats. The respondent did not immediately record the finding on the worksheet. The respondent, however, reported the finding to the acting senior supervisor of the lab a certain Ms. Van Rooi, who also removed the diamond from the oversized box and later placed it in the safe. Ms. Van Rooi in turn also reported the finding to Mr. Loubser the manager of the Geo Lab.

[21] Mr. Loubser requested that a photo of the 'rare diamond' be taken and that the photo be send to him by electronic mail. The respondent after a delay of about a day (he ascribed the delay to the fact that the camera's batteries were allegedly flat so he first had to recharge the batteries of the camera before he could take a picture) send, by electronic mail, the picture of the 'rare diamond' to Mr. Loubser. On 5 August 2014 Ms. Van Rooi detected that the 'rare diamond' was not in the same sample of the other diamonds that were discovered on 17 July 2014. They searched for the 'rare diamond' in other samples but could not find it, she then reported to Mr. Loubser that the 'rare diamond' was missing. The respondent was suspended following the report of the missing 'rare diamond.'

⁴ Collins Parker: *Labour Law in Namibia*, University of Namibia Press, at p 156.

⁵ 1998 NR 90 (LC).

[22] On 5 November 2014 the respondent's disciplinary hearing commenced, at the commencement of the disciplinary hearing the respondent and his trade union representative objected to the fact that the Security Department was the complainant in the matter, they argued that in terms of the appellant's policy the respondent's line manager was supposed to be the complainant and the initiator at the hearing. That objection was overruled, what transpired after the objection was overruled is not so clear, but from the minutes of the disciplinary hearing the following is stated (I quote verbatim from the minutes):

'The representative did not want to accept this ruling despite the fact that the chairman mentioned in the interest of the proceedings that this issue can be raised in an appeal should it be material in the outcome. The discussion and arguments became counterproductive and reached a stalemate situation. The Hearing Official requested the Accused and Representative to reconsider their position and to clearly indicate whether they intent to proceed with the case.

After the recess, the Hearing Official made it clear that there are two options; to either proceed with the case with Namdeb Security as the Complainant or not. Should they decide to not accept the ruling of the Hearing Official the case will regrettably continue in *Abstentia* which provision is made in the disciplinary code. The Hearing Official necessarily needed to leave the room and proceed with the case in the adjacent room.

The Hearing Official informed the ER Official and Complainant that it is evident that the hearing cannot continue with the representative of the accused being present. He further stated that he supports the fact that Mr. James Fisch from the Security Department will be the complainant. This case was widely published in the media and a very rare stone were lost and that the case is diamond related. Therefore, the security official will act as the complainant in this case. Due to the disruptive nature of the representative, the accused and his representative will not be participating in this hearing. We will proceed in *abstentia* and to reach a fair conclusion in this case.'

[23] The Hearing Official moved out of the Service Conference Room into another room and proceeded with the hearing without any participation by the respondent. The respondent was found guilty as charged. On 6 November 2014 the respondent addressed a letter to the Employee Relations Manager of the appellant in which he raised his objections to the Security Department being the Complainant and initiator in

his case. In that letter the respondent made the following allegation (I quote verbatim from the letter):

'... he (chairman of the disciplinary hearing) instruct the ER Officer (Lebbeus Antindi) and James to walk out from the service conference room for them to find another venue to proceed with the hearing on my absence. Both of them vacate the service conference and leave me and my representative alone in the conference.

Therefore I request your office to advice and arrange the complaint to be in line with MRM line supervisor as per IR Procedure for the parties to apply free and fair proceedings.'

[24] The appellant's Employee Relations Manager one Henry C Bruwer responded to the respondent's letter on 7 November 2014. In his letter the Employer Relations Manager did not deny the allegations made by the respondent. He amongst other things stated the following (I quote verbatim from the letter of 7 November 2014):

'Hearing Official –the Hearing Official, Tony Bessinger, with the advice provided by the Employee Relations Officer Lebbeus Antindi, acted with prudence and without prejudice to you in the application of good governance of the company's policies and procedures.

Therefore, no bias could be detected in the handling of the proceedings thus far.

I therefore urge you to continue to attend to the hearing without prejudice to your rights.'

[25] After the letter of 7 November 2014 the respondent heard nothing from the appellant until on the 1st of December 2014 when he received a letter from the Hearing Officer, Mr. Tony Bessinger in which letter Mr. Bessinger states the following (I quote verbatim from the letter of 1 December 2014):

'This is to confirm that due to your representative's unruly and disrespectful behaviour, the hearing had to continue in *absentia*. During the hearing you were granted the opportunity to either control your representative /get alternative Representation or to state your own case.

Due to the continued unruly and disrespectful behaviour of the representative, the hearing official had no other alternative but to continue the hearing in *absentia*.

You were found guilty on the charges of Gross Negligent loss of a diamond, Breach of Trust, False evidence and Non - Compliance with policies and procedures. Your employment with Namdeb has therefore been terminated with effect from 1 December 2014.'

[26] In the letter of 1 December 2014 the respondent was reminded of his right to appeal within two working days of him having received that letter. On 3 December 2014 the respondent noted his appeal to the Disciplinary Review Committee. I find it appropriate to, in detail, quote the respondent's grounds of appeal which amongst other things read as follows:

'Background:

I was summoned to a hearing on 05th November 2014 whereby I was charged as per the complaint memorandum signed by the complainant, J G Fisch:

Charge 1: Gross Negligence...

Charge 2: Breach of Trust ...

Charge 3: False evidence ...

Charge 4: Non Compliance ...

My grounds of appeal are ...the following

1. Dispute of guilt

The Hearing Official found me guilty in *absentia* on the charges of:

A. **Gross negligence of the loss of a Diamond**-the Disciplinary Code does not make provision for such a charge hence, I cannot be found guilty as such. This constitutes an unfair labour practice and violation of the policy. The temporary worker was not assigned to me to be his supervisor. I was made to understand that he did the same work at De Beers Marine. I believe that he was appointed based on his competencies and therefore does not require close supervision. I was not informed of any Policy making provision that a temporary worker is not to be left alone to perform his duties.

- B. **Breach of trust-** the IR Policy describes breach of trust clearly that there should be extraneous evidence. This evidence I would like to be made available to me. I never acted in any suspicious or dishonest way in my approximately 7 years in that section.

- C. **False Evidence-**I provided the investigation officer with my statement which truthfully indicates my actions of that day in question. I would like to be given the evidence which contradicts my testimony.

- D. **Non-Compliance:** I humbly request the said standing instruction which I did not comply with as indicated on the complaint memorandum.

I maintain I am not guilty of any of these charges levelled against me and kindly request evidence to the contrary.

I would further request that the Hearing Official and complainant please prove any criminal intent in my action as alleged.

2. **Procedural inconsistency**

A. **Complaint memorandum**

I have received two separate complaint memorandums, one dated 16 October 2014 signed by Gideon Shikongo-Senor Security Officer and another one dated on 16th October 2014 signed by JG Fisch S/S/O.

I am confused since I don't know which one is the correct one and which one was used by the Hearing Official since he conducted the hearing in absentia whilst both my Representative and I was available.

B. **Behaviour of Hearing Official**

The Hearing Official conducted the hearing in such a manner that it was impossible for me and my representative to respond. He left the hearing with the following words: "the same old story" referring to the previous hearing held. He instructed the ER Official to get another hearing venue without us being notified of the location and he continued the hearing without us. This behaviour is aggravated by the senior position held by the hearing official and violation of our Company Value of **RESPECT.**

The Hearing Official mentioned that he acknowledged our objection to the following:

- The Hearing Official being implicated and therefore not unbiased as per the provisions of ER Policy Section 2.3.4 (c).
- That the charges levelled do not warrant the Security Department to be the Complainant but should be the investigator and submit their findings to the relevant Head of Department as per 2.3.3(b) (these Charges are not related to PO_SE01 as per 4.4.7).

The Hearing Official although acknowledging our legitimate request for another hearing official to conduct the hearing still opted to continue with the hearing in absentia.

- C. I observe that the Hearing Official conclude the hearing in absentia on the same day (05th November 2014) whilst we did not receive any written feedback on our objection.
- D. The response to our written objections received from the ER Manager dated 07th November 2014 reads as follow: "I therefore urge you to continue to attend the hearings without prejudice to yourself". I was never invited or received any correspondence relating to the hearing which he urges me to attend. This gives me the impression that the hearing official with a premeditated outcome in mind. This constitutes an unfair labour practice.
- E. I never gave written consent to conduct my hearing in absentia as per ER Practise...'

[27] The chairperson of the Disciplinary Review Committee addressed a letter dated, 18 December 2014, in response to the respondent's notice of appeal of 3 December 2014 that letter (of 18 December 2014), amongst other things, reads as follows:

'After due consideration of the information presented to the Disciplinary Review Committee, I have come to the conclusion set out below based on the following facts:

- Procedural Inconsistencies:
Clause 2.3.4 (c) – No new evidence was presented to the DRC to substantiate your position that the disciplinary hearing chairperson is implicated or biased towards you or the proceedings.

- Complaint Security Department
Due to the Nature of the investigation, being the disappearance of a significant diamond the Security Department formulates and level the charges against offenders and provides an appropriate complainant in accordance with clause 4.4.6 of the Agreement on Industrial Relations Policies and Procedures.
- Dispute of Guilt: The committee could not find any new evidence to influence the outcome of its findings.

Based on a balance of probability, I found no reason to overturn the original disciplinary hearing outcome. The decision to dismiss is upheld.'

Discussion

[28] The respondent's complaint against his dismissal is that his dismissal was procedurally unfair because he was not afforded an opportunity to defend himself against the accusations levelled against him. The appellant admits that the disciplinary hearing of the respondent was conducted in his absence, but Mr. Dicks who appeared for the appellant argued that at his disciplinary hearing the respondent and his representative vehemently objected to the security department acting as the complainant.

[29] Mr. Dicks further argued that the respondent and his representative set certain conditions, failing which they would not participate in the hearing. These were that the charge of gross negligence must be corrected and that line management must be the complainant. The Hearing Official did not give in to their demands and warned them that the proceedings would occur in their absence. When the respondent and his representative refused to participate in the hearing and were disruptive, the hearing moved next door and continued in their absence. The respondent and his representative were fully aware that the hearing was proceeding right next door, but refused to participate. In these circumstances the respondent waived his right to a hearing. Mr. Dicks relied on the cases of *Peace Trust v Beukes*⁶ and *Furniture Mart (Pty) Ltd v Kharughab*⁷ for this submission.

⁶ 2010(1) NR 134 (LC) para's 76 to 78.

⁷ An unreported judgment of this Case No. LCA 48/2012) [2014] NALCMD 21 (delivered on 22 May 2014).

[30] Before I consider Mr. Dicks' submission I find it appropriate to comment that the courts have condoned failure by employers to hold pre-dismissal hearings in two situations. The first is where the circumstances were such that, objectively speaking, the employer could not reasonably have been expected to hold a hearing. Such circumstances might arise when the employer is compelled to dismiss instantly in order to protect lives and property⁸ or to give effect to an ultimatum⁹, and where employees have by their conduct abandoned or waived their right to hearings¹⁰, e.g. by refusing to attend the inquiry or by abusing the employer at the disciplinary hearing.

[31] Its trite law stated Mr. Justice Damaseb, in the matter of *Kiggundu and Others v Roads Authority and Others*¹¹ that the test that must be applied in determining whether there was waiver is:

'To succeed in such a defence the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect to the first respondent.'

[32] The above test seems to have been captured in the appellant's Disciplinary code. Sub Paragraph 2.3.4 (f) of that code reads as follows:

'If the accused does not wish to attend his disciplinary hearing he can make use of a special form available at the Industrial Relations section, to advise and give permission that his case should be heard in his absence. In that event the hearing will proceed and the accused will be informed in writing of the outcome of his hearing.'

[33] I now return to the submissions by Mr. Dicks, first the submission by Mr. Dicks that the respondent and his representative set certain conditions, failing which they would not participate in the hearing namely that the charge of gross negligence must be corrected and that line management must be the complainant, are not borne out by the

⁸ *Lefu v Western Areas Gold Mining Co* (1985) 6 ILJ 307 (IC).

⁹ *National Union of Metalworkers (incorrectly cited as 'Mineworkers') of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC).

¹⁰ *Mfazwe v SA Metal & Machinery Company* (1987) 8 ILJ 492 (IC); *Food & Beverage Workers Union & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC).

¹¹ 2007 (1) NR 175 (LC).

evidence that is before me. I have quoted the relevant portion of the minutes and the portion that I have quoted nowhere reflects that the respondent and his representatives made any demand or set any conditions upon which the disciplinary hearing must proceed. The portion of the minutes that I have quoted indicates that it is the Hearing Official who gave the respondent and his representative an ultimatum. The portion of the minutes further indicate that the hearing officer stated that '*due to the disruptive nature of the representative, the accused and his representative will not be participating in this hearing. We will proceed in absentia ...*' it thus follows that it is the Hearing Official who decided that the respondent and his representative will not participate in the disciplinary hearing.

[34] Secondly the facts in the *Peace Trust v Beukes* matter are briefly that an employee was charged with misconduct. When the employer attempted to hold a disciplinary enquiry the employee raised all sorts of objections and two disciplinary hearings had to be aborted as a result of the employee's obstructive conduct. The court Per Justice Damaseb held that in such an event the employer could not be said to have failed to hold a disciplinary hearing he said:

[75] The first question that arises is whether there was a fair procedure preceding the dismissal. The chairperson of the DLC seems to have concluded that there was not. The appellant takes the view that it was the conduct of the complainant that made the holding of an inquiry impossible as her representative raised all manner of irrelevant and unnecessary objections which resulted in the hearing being aborted.

[76] It is quite clear that the disciplinary hearing was going to get nowhere in view of the stance adopted by the complainant and her representative who seemed to have taken the view that a disciplinary hearing could only materialise on their terms. In my view, to argue that the absence of a disciplinary hearing was the fault of the Trust and that it had to take place at all costs is, against the backdrop of the acrimony which characterised this matter, untenable. On the evidence disclosed by the record, I am satisfied that it would have served no productive purpose to pursue a disciplinary hearing against the complainant. The complainant herself stated, and it was put on her behalf to the other side's witnesses, that the disciplinary hearing initiated by the chairman was illegal. Shipiki testified that during the hearing she chaired it was suggested that the board, not the complainant, had to face disciplinary proceedings.'

[35] In the *Furniture Mart (Pty) Ltd v Kharughab* matter thirty seven employees were charged with participating in an illegal strike. The employees were served with notices of a disciplinary hearing. Prior to the disciplinary hearing taking place the union representative of the employees addressed a letter to the employer informing the employer that the employees will not be participating in the disciplinary hearing. The court further found that, on the evidence before it, on the date that the disciplinary hearing was scheduled to proceed the employees were present at the venue in order to demonstrate, and not to take part in the disciplinary proceedings. The court found that they had waived their right to participate in the disciplinary proceedings.

[36] In the present matter the appellant did not place any evidence before this court to show how the respondent's representative acted unruly and disrespectfully. The statement by the Hearing Official that, 'Due to the continued unruly and disrespectful behaviour of the representative...' is not evidence but conclusions of facts by the Hearing Official without him providing the facts on which the conclusions are based. In addition in this matter there is evidence which is not disputed, that the respondent on 6 November 2014 requested the appellant's Employee Relations Manager to intervene and cause a hearing that is fair to be held. The Employee Relations Manager's reply was to encourage the respondent to attend the hearing, but by that time the hearing was already concluded. The cases *Peace Trust v Beukes* and *Furniture Mart (Pty) Ltd v Kharughab* are, in my view therefore distinguishable on their facts from the present matter.

[37] I find no express waiver on the facts of this case. The appellant seems to suggest that the respondent 'tacitly' waived his rights. The law, stated Mr. Justice Damaseb, requires 'clear proof' of tacit waiver.¹² At the arbitration hearing the appellant did not lead evidence of the Hearing Officer or the Employee Relations Officer as to what exactly transpired at the disciplinary hearing on 5 November 2014. Keeping in mind that the *onus* is on the employer to prove that the dismissal is fair, I am of the view that the appellant has failed to discharge the *onus* resting on him to prove that when the alleged waiver took place, the respondent had full knowledge of the right which he decided to abandon and that the respondent either expressly or by necessary implication abandoned the right to be heard and that he conveyed his decision to that effect to the appellant. The contrary evidence is that the respondent demanded an

¹² *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704F - G).

opportunity to be accorded a fair hearing. I am accordingly satisfied that the appellant has failed to prove waiver against the respondent.

[38] The approach taken by the Hearing Official is inconsistent with an adjudicative process and a clear negation of the applicant's right to a fair hearing encapsulated in the *audi alteram partem* principle. Parker C¹³ argues that an order made contrary to the principles of natural justice is outside jurisdiction and void he said 'a clear violation of natural justice will *in very instance*, violate an order and no room for judicial discretion as to whether to set it aside can, in such circumstances exist.'

[39] There is another aspect which points to a fatal procedural irregularity. Aside from the dispute as to whether the Security Department was the correct entity to initiate and lead evidence, sub paragraph 4.4.6 of the appellant's disciplinary code provides as follows:

4.4.6. Breach of trust

Actions or conduct of an employee that cause a reasonable suspicion of dishonesty or mistrust and for which there exists extraneous evidence to prove a breakdown in the relationship of trust between the concerned employee and the Company. This will include a situation where the conduct of the employee has created mistrust which is counterproductive to the Company's commercial activities or the public interest, thereby making the continued employment relationship intolerable one. (Cases in this category will be handled by officials at the HOD [Head of Department] level and above, including the Managing Director). (Underlined for emphasis)

[40] There is no evidence before me that the Hearing Official, Mr. Bessinger, was a head of a department or above the level of a head of department. Mr. Bessinger thus had no authority to preside over the case where the respondent faced a charge of breach of trust. When he so presided he assumed powers that he did not have and everything that flowed from that was invalid.

[41] As regards the first charge the respondent was charged with gross negligence but he was found guilty of 'Gross Negligent loss of a diamond.' Apart from the fact that the finding is unintelligible the respondent was not charged with the 'gross negligent

¹³ In *Labour Law in Namibia* Unam Press 2012 at 154-155.

loss of a diamond' and he could thus not be found guilty of such an act of misconduct.' In respect to the charge of false evidence I fail to see how the respondent could be found guilty on that charge. I say so for the following reasons, evidence could only be lead at the disciplinary hearing and it is only at the disciplinary hearing that the respondent could have given false evidence, the respondent did not participate in the disciplinary hearing, he gave no evidence, so how could he have been guilty of something that he did not do.

[42] Statements that are obtained from an employee (in this regard the respondent) during the investigation stage are not evidence. What is even worse is that the conclusion reached by the Hearing Officer that the statement given by the respondent was false is the say so of the Security Officer who took down the statement. Both at the disciplinary hearing and at the arbitration hearing the security officer did not provide any positive evidence to contradict the statement made by the respondent.

[43] As regards the charge of not complying with policies and procedure, I have perused both the minutes of the disciplinary hearing and the record of the arbitration proceedings. In those two documents I could not find any evidence led by the appellant as to what policy the respondent allegedly did not comply with. The finding of guilt as regards the charge that the respondent did not comply with policies and procedure is the fact that the respondent did not record the finding of the 'rare diamond' on the worksheet. But there was evidence that sometimes diamonds are recorded on the worksheet later than the date of sorting.

[44] A valid and fair reason for dismissal cannot, in my view, exist in facts which, if a proper procedure were followed, might well have been different. In the present matter the reason for the finding of guilt, is inextricably linked to the procedure followed by the appellant. In the light of all the above the inescapable conclusion is that the appellant, has on a balance of probabilities, failed to prove that the respondent was actually guilty of misconduct. The dismissal of the respondent is unfair, more specifically in respect of the procedures followed in connection with his dismissal. I will now move on to consider the cross appeal.

The cross appeal

[45] I have indicated above that, at the hearing of this matter Mr. Namandje who appeared for the respondent limited the cross appeal to the relief granted by the arbitrator. Mr. Namandje argued that the ordinary and primary remedy available to an employee who has been unfairly dismissed is reinstatement. He argued that in our law it is only in cases where a breakdown of trust has been proven that the Presiding Officer could find the remedy of reinstatement as inappropriate. He proceeded and argued that in this respect clause 4.4.6 of the Disciplinary Code of the appellant makes provision for a finding of guilty only in cases where dishonesty and mistrust was proved through extraneous evidence. The Arbitrator found that there was no extraneous evidence proving breakdown in the relationship. That being the case the Arbitrator erred in opting for damages as opposed to reinstatement of the respondent.

[46] Mr. Dicks on the hand argued that an arbitrator may refuse to order reinstatement, re-employment or compensation where it finds that no fair procedure was followed but is satisfied that the employer proved before it a fair reason for the dismissal, he continued that that principle has been followed in the Supreme Court and numerous subsequent cases in the Labour Court.¹⁴ Mr. Dicks thus submitted that given the circumstances surrounding the theft of the diamond, it is submitted that the appellant is justified in having no faith in the honesty and integrity or loyalty of the respondent. This was, with respect, correctly determined by the arbitrator during the arbitration. He properly exercised his discretion in this regard and his decision should not be overturned continued Mr. Dicks with his arguments.

[47] In the case of *Kamanya and Others v Kuiseb Fish Products Ltd*¹⁵ Mr. Justice O'Linn concluded that:

'The result in my view is that no order for reinstatement, re-employment or compensation should be made by the District Labour Court against the employer, where the employer has succeeded in proving before it a fair reason for the dismissal, whether or not such employer has proved that a fair procedure was applied before the domestic tribunal. In such a case it will be open to the District Labour Court to find that the employee has not been 'dismissed unfairly'.

¹⁴ *Kahoro and Another v Namibian Breweries Ltd* 2008(1) NR 382 (SC) at 390; *HS Limbo v Ministry of Labour*, unreported judgment by Swanepoel J in LCA 01/2008 delivered on 10 February 2010 at par [28]; *Windhoek Observer Publishers (Pty) Ltd v Alva Mudrovic*, unreported judgment by Hoff J in LCA 44/2008, delivered on 14 October 2011 at par [29], [43].

¹⁵ 1996 NR 123 (LC) at (at 127J - 128C): (1998 (1) NLLR 125).

However, there may be instances where failure by the domestic tribunal to apply a fair procedure, would be sufficient for setting aside its dismissal of a complaint, e.g. where no opportunity was given to deal with the question of the appropriate sanction to be imposed and where the misconduct was not so grave as to merit immediate and summary dismissal.

[48] In this matter the arbitrator made a finding that not only did the appellant not follow a fair procedure when it dismissed the respondent, but also that the appellant did not have a valid reason to dismiss the respondent. It is, in my view, thus a contradiction for the arbitrator to find that the relationship of trust between the employer and the employee had irretrievably broken down and herein lies the arbitrator's error. I agree with Mr. Namandje that the arbitrator's conclusion is not based on evidence. There is no evidence that the respondent allowed the loss of a large diamond or that the respondent dishonestly left a temporary worker with a precious diamond. Without a link between the respondent and the disappearance of the 'rare diamond' there is no evidence that the employment relationship between the parties cannot be sustained. It follows then that the general rule, which gives primacy to reinstatement as the preferred remedy for unfair dismissal, must prevail.

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

- 1 The appeal is dismissed.
- 2 The cross appeal succeeds and the arbitrator's award is amended to read as follows:
 - 2.1 The dismissal of Henry Denzil Coetzee is substantively and procedurally unfair;
 - 2.2 The appellant (Namibia Diamond Corporation (Pty) Ltd) is ordered to reinstate Mr. Henry Denzil Coetzee and to pay him an amount equal to the monthly remuneration he would have received had he not been unfairly dismissed.
- 3 There is no order as to costs.

SFI Ueitele
Judge

APPEARANCES

APPLICANT:

Namandje S.

Sisa Namandje & Co Inc, Windhoek.

FIRST RESPONDENT:

Dicks G

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