

REPUBLIC OF NAMIBIA



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

CASE NO: LCA 11/2016

In the matter between:

ABB MAINTENANCE SERVICES NAMIBIA (PTY) LTD

APPELLANT

And

LAZARUS MOONGELA

RESPONDENT

Neutral citation: *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (LCA 11/2016) [2017] NAHCMD 18 (07 June 2017)

Coram: **UEITELE, J**

Heard: 20 January 2017

Delivered: 07 June 2017

Flynote: *Dismissal*—Substantive and valid reason must exist for dismissal.-
Dismissal—For Fraud —What constitutes fraud.

Labour law - Reinstatement - What constitutes - Reinstatement placing employee in position employee would have been in had there not been dismissal - Meaning—Word 'reinstate' or 'reinstatement' not carrying automatic retrospective connotation.

Summary: Mr. Lazarus Moongela, was employed by the ABB Maintenance Services Namibia (Pty) Ltd as a boiler maker since 1 September 2012 until 16 March 2015 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 Moongela's dismissal was procedurally and substantively unfair. The arbitrator ordered the appellant to reinstate the respondent with full benefits as well as full salary benefit payments as from the day of termination of services up until re-employment. This is an appeal by the appellant against the whole of the arbitration award made by the arbitrator, under s 86(15) of the Labour Act, 2007. The respondent opposed the appellant's appeal.

Held that, in respect of the first charge, the context in which the respondent allegedly shouted at De Wee was not placed before the chairperson of the disciplinary enquiry. The court also found that the evidence by Gouws that '*Stanley [i.e. De Wee] gave me his statement and I drafted mine*' reveals that, the evidence of Gouws and De Wee was 'tailored' to prove the allegations against the respondent. The chairperson of the disciplinary was, in the circumstances under an obligation to disregard both De Wee and Gouw's statements and evidence.

Held further that, the arbitrator was correct when she found that the respondent could not have been found guilty on the charge of 'Abusive/insulting language, signs or behaviour, including serious disrespect, impudence or insolence.'

Held further that, in respect of the second charge, one of the essential ingredients of the charge, namely that the respondent was under the influence of intoxicating substances while on the appellant's premises was not satisfied. The court found that the respondent was not on the appellant's premises, he was refused access to the premises and turned

away. For this reason the finding of guilt and the resulting sanction cannot be sustained and is set aside.

Held further that, in respect of the third charge the appellant's Disciplinary Code and Procedures does not contain a definition of fraud or fraudulent time keeping. In the absence of any specific definition in the appellant's Disciplinary Code and Procedures, fraud must be given its ordinary meaning within the general law applicable in the country.

Held further that, the unlawful and arbitrary actions of the appellant were directly linked to the respondent's reaction, the impasse between appellant and the respondent arose as a result of this unlawful 'lock out'. The court further held that it could not, in the absence of a notice to the respondent be expected of him to know that he has been suspended from work and that he was not allowed to access the premises.

Held further that, there was no evidence placed before the chairperson of the disciplinary enquiry to the effect that the respondent misrepresented or misled the appellant with respect to his attendance or non-attendance at work, or with respect to the hours which he rendered or did not render services to the appellant. There was equally no evidence that the respondent fraudulently clocked in another employee. The chairperson of the disciplinary enquiry could therefore not find the respondent guilty of fraudulent timekeeping, including clocking in another employee or allowing another employee to clock one in.

Held further that, since the appellant has not established a valid reason for the dismissal of the respondent, the question of irretrievable break down of the working relationship does not arise. *The court thus found* it just and fair to order the appellant to reinstate the respondent with back pay.

Held further that, the question whether or not a dismissed employee mitigated his or her losses is a question of fact and is therefore not appealable. It follows therefore that the appellant cannot appeal on that ground to this court.

ORDER

- 1 The dismissal of Lazarus Moongela is substantively unfair.
 - 2 The appellant, ABB Maintenance Services Namibia (Pty) Ltd, is ordered to reinstate the respondent, Lazarus Moongela, 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.
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JUDGMENT

UEITELE, J

Introduction and background

[1] Mr. Lazarus Moongela¹ was employed as a boilermaker by ABB Maintenance Services Namibia (Pty) Ltd a private company incorporated and registered in accordance with the laws of Namibia² since 1 September 2012. The appellant is contracted by Dundee Precious Metals (Pty) Ltd at a smelter plant located in Tsumeb, Namibia. The incident which gave rise to this appeal occurred on 12 February 2015 at the smelter plant in Tsumeb and that incident led to other events occurring over the following weeks.

[2] On 12 February 2015 a morning meeting took place at a workshop of Dundee's premises where the appellant was contracted. At that meeting a certain Mr. Ronald Stramis (who I will in this judgment refer to as Stramis) was being asked by the employees of the appellant who were his subordinates as to why he allowed an

¹ Lazarus Moongela is the respondent in this appeal and is, in this judgment, referred to as 'the respondent'.

² ABB Maintenance Services Namibia (Pty) Ltd is the appellant in this appeal and is, in this judgment, referred to as 'the appellant'.

employee of the appellant to, contrary to company policy, drive an electric machine without a driver's license. A certain Mr. Stanley De Wee (the Manager of the workshop), who was also in the workshop but was not part of the meeting overheard the questions that were directed to Mr. Stramis. According to De Wee the questions were not work related so he walked to the meeting and called aside one of the employees a certain Mr. Amweele who at that point was the one asking the questions.

[3] As Mr. De Wee attempted to walk away with Mr. Amweele the respondent raised up, followed them and shouted that point 3 of the Golden rules provides that no employee may drive an electric machine if that employee was not in possession of a driver's license. Mr. De Wee then instructed the respondent to go back to the meeting. The respondent initially ignored that instruction but after De Wee raised his voice and shouted at the respondent to go back to the meeting the respondent backed off and returned to the meeting.

[4] After the meeting but later in the course of the day (in the afternoon) the respondent was summoned to the offices of one, George Gouws (the supervisor at the workshop). In the office of Gouws the respondent was presented with a notice to attend a disciplinary hearing for alleged use of abusive language and insolence. The respondent protested that he did not understand why he had to be charged and attend a disciplinary hearing and he refused to sign acknowledgment of the letter inviting him to attend the disciplinary hearing. After the respondent refused to sign acknowledgement of the letter he returned to his duty station and proceeded with his duties.

[5] At around 15:55 a certain Scholtz Marscha addressed an electronic mail to four other persons being, C Witbeen, P Kahuku, B Radford and L Strydom. In the mail Marscha requested these persons to *'please block the entry access of L Moongela (Co. #: A5032) until further notice. He may exit today but he may not enter until further notice,'* Following that electronic mail the respondent's access to the workplace was blocked. After completing his duties on that day and after he had knocked off for the day he proceeded to the exit gate to leave the premises. It is only when he wanted to leave the premises that he realized that he could not exit the premises because his access card was blocked and rendered non-functional.

[6] When the respondent realized that he could not exit the premises he asked a co-

employee by the name of Henok to let him out. Henok assisted the respondent and the respondent exited the premises with Henok's assistance. The following day, that is, on 13 February 2015 the respondent reported for work and he again found that he could not enter the premises. He had, however the previous evening, made an arrangements with another co-employee for that employee to let him into the premises. The co-employee than facilitated the respondent to enter the premises.

[7] As soon as the respondent had entered the premises the security guards at the entrance gate noticed him, followed him and removed him from the premises before he reached the offices of the trade union representative that were situated on the premises. After the respondent was removed from the premises by the security guards he was served with a letter of suspension and another notice (which notice he acknowledged receipt by signing it) to attend a disciplinary hearing³ relating to the charge of 'use of abusive language and insolence'. The disciplinary hearing was scheduled to take place on 17 February 2015.

[8] The disciplinary hearing that was scheduled for 17 February 2015 did not take place, because the applicant, on that day (i.e. on 17 February 2015), allegedly arrived at the premises while he was under the influence of intoxicating substances and was thus denied access to the premises. The first disciplinary hearing was accordingly postponed to 19 February 2015. The disciplinary hearing proceeded as scheduled, on 19 February 2015 and after evidence was led the respondent was found guilty and was issued with a final written warning.

[9] Six days after being found guilty of an act of misconduct, the respondent was, on 25 February 2015, charged for the second time. The second charge related to the incident that occurred on 17 February 2015 when he allegedly arrived at the work place under the influence of intoxicating substances. The respondent was summoned to a second disciplinary hearing relating to the second charge (i.e. being under the influence intoxicating substances) scheduled for 3 March 2015.

[10] At the second disciplinary hearing the respondent pleaded guilty to charge of arriving under the influence of intoxicating substance at the work place. The respondent was, on his plea of guilt, found guilty and a sanction of a recorded warning was imposed

³ I will in this judgment refer to this hearing as the first disciplinary hearing.

on him. But a day (that is on 2 March 2015) before he attended the second disciplinary hearing he was, for the third time, charged with another act of misconduct. The third charge of misconduct related to the incidents of 12 February 2015 and 13 February 2015 when he asked his co-employees to facilitate his exit and entrance to the premises. The charge of misconduct that was levelled against him relate to his alleged 'fraudulent timekeeping, including clocking in another employee or allowing another employee to clock one in'.

[11] The respondent was summoned to a third disciplinary hearing in respect of the third charge of misconduct. The third disciplinary hearing was scheduled for a day (that is on 4 March 2015) after the respondent appeared at his second disciplinary hearing. For one reason or another which does not appear on the record the third disciplinary hearing was postponed to 16 March 2015. After evidence was led at the third disciplinary hearing the respondent was found guilty on the charge of fraudulent timekeeping, including clocking in another employee or allowing another employee to clock one in, and he was dismissed from the appellant's employment. The respondent appealed against the findings and the sanctions of dismissal but his appeal either failed or was not heard.

[12] Following his dismissal the respondent, on 11 May 2015, lodged a compliant/dispute of unfair dismissal and unfair labour practice with the office of the Labour Commissioner. The Labour Commissioner, on 20 May 2015, designated a certain Ms. Sarafina Kandere as the arbitrator. The Labour Commissioner, on the same day (i.e. on 20 May 2015) also notified the parties that a conciliation meeting or arbitration hearing will take place on 11 June 2015 at the Offices of the Labour Commissioner in Tsumeb.

[13] From the record before me it is not clear whether the conciliation meeting preceded the arbitration hearing or not. What is, however, clear is that the arbitration hearing commenced, on 08 October 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.

[14] On 10 October 2015 the arbitrator, after she evaluated and assessed the evidence placed before her, delivered her award. In the award the arbitrator found that the respondent's dismissal was procedurally and substantively unfair. The arbitrator ordered the appellant to reinstate the respondent with 'full benefits as well as full salary benefit payments as from the day of termination of services up until re-employment. That the reinstatement to be effective from the 1st November 2015.'

The appeal, the grounds of appeal and the grounds opposing the appeal

[15] The appellant is aggrieved by the award made by the arbitrator and on 17 February 2016 the appellant filed its notice of appeal. After it received the record of the arbitration proceedings the appellant amended its grounds of appeal. The grounds of appeal contained in the amended notice of appeal are three in total. The first ground of appeal is divided into five paragraphs and the second ground of appeal is divided into five paragraphs and three subparagraphs, while the third ground of appeal is divided into three paragraphs. The first ground of appeal relates to the finding that the dismissal of the respondent was substantively unfair. The second ground of appeal relates to the finding that the dismissal of the respondent was procedurally unfair. The third ground of appeal relates to the relief (i.e. the reinstatement order and the payment of the salary and other benefits) ordered by the arbitrator. I will in the course of this judgment return to the grounds of appeal.

[16] The respondent opposed the appeal. The basis on which the respondent opposed the appeal is that the appellant did not discharge the *onus* resting on it to prove that it had a substantive reason to dismiss the respondent. The second ground of opposition is, in summary, that the arbitrator was correct in finding that the appellant did not follow a fair procedure when it ultimately decided to dismiss the respondent. The third ground of opposing the appeal is, in summary, that the arbitrator was correct in ruling that the appellant must reinstate the respondent.

[17] It is therefore clear that the issues which this court must resolve are:

- (a) Whether, on the evidence placed before the arbitrator, was she correct in finding that the appellant did not prove that it had a valid and fair reason to dismiss the respondent?

- (b) Whether, on the evidence placed before the arbitrator, was she correct in finding that the appellant did not follow a fair procedure when it took the decision to dismiss the respondent? and
- (c) Whether, on the evidence placed before the arbitrator, was she correct in ordering the appellant to reinstate the respondent?

[18] I find it appropriate to, albeit briefly, before I consider the issues which I am called upon to decide in this appeal briefly set out the legal principles governing those aspects.

The applicable legal principles

[19] Labour Relations in Namibia are governed by the Labour Act, 2007⁴ 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.
- (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.'

⁴ Act No. 11 of 2007.

[20] Section 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.

[21] Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words the reasons why the employer dismisses an employee must be good and well grounded, they must not be based on some spurious or indefensible ground.⁵ This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule.⁶ 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.

[22] The requirement of substantive fairness furthermore entails that the employer must prove that the employee was or could reasonably be expected to have been aware of the existence 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. The labour court has 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).⁷

[23] Apart from complying with the guide-lines for substantive fairness, an employee must be dismissed after a fair pre-dismissal enquiry or hearing was conducted. In the South African case of *Mahlangu v CIM Deltak*⁸ the requirements of a fair pre-dismissal hearing were identified as follows: the right to be told of the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the enquiry; the right to some form of representation; the right to call witnesses; the right to an interpreter; the right to a finding (if found guilty, he or she should be told the full reasons why); the right to have previous service considered; the right to be told of the penalty imposed (for instance,

⁵ Collins Parker: *Labour Law in Namibia*, University of Namibia Press, at p 143. Also *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC).

⁶ *Namibia Breweries Ltd, v Hoaës NLLP* 2002(2) (LC).

⁷ *SVR Mill Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2004) 25 ILJ 135 (LC).

⁸ (1986) 7 ILJ 346 (IC).

termination of employment); and the right of appeal (usually to a higher level of management). Although these principles are not absolute rules, they should be regarded as guide-lines to show whether the employee was given a fair hearing in the circumstances of each case.⁹ (Underlined for emphasis)

[24] 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.¹⁰ 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 an employee, the dismissal is unfair if the employer fails to prove that it followed a fair procedure.¹¹ Also see the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*¹² 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.’

Applying the legal principles to the facts of the matter

[25] Turning to the substantive fairness of the dismissal in this matter, the essential question is whether, the facts of this matter, warrant the conclusion that, on a balance of probabilities, the respondent, Lazarus Moongela, broke the appellant’s rules and was guilty of (a) *Abusive/insulting language, signs or behaviour, including serious disrespect impudence or insolence*, (b) *Alcohol Intoxication*, and (c) *Fraudulent timekeeping, including clocking in another employee or allowing another employee to clock one in*.

The first charge of misconduct (Abusive /insulting language)

[26] The appellant maintains that it had a fair and valid reason to dismiss the respondent. The appellant’s case is that, on 12 February 2015 the respondent used

⁹ *Bosch v T H U M B Trading (Pty) Ltd* (1986) 7 ILJ 341 (IC)).

¹⁰ *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.

¹¹ Collins Parker: *Labour Law in Namibia*, University of Namibia Press, at p 156.

¹² 1998 NR 90 (LC).

abusive insulting language towards the Manager of the workshop, one Stanley De Wee. From the record of proceedings that was placed before me it appears that on 12 February 2015 the respondent was notified to appear before a disciplinary enquiry to answer to a charge of *'Abusive/insulting language, signs or behaviour, including serious disrespect impudence or insolence.'*

[27] A few things are particularly worrisome with regard to the finding by the chairperson of the disciplinary enquiry that the respondent was guilty of 'abusive/insulting language, signs or behaviour, including serious disrespect impudence or insolence'. I now proceed to point out the aspects that are worrisome.

[28] First, the first charge is congested and extremely vague, it consists of at least two different types of acts misconduct (abusive or insulting language is an act of misconduct on its own, so is insolence a separate act of misconduct whilst impudence is a description of a person's behaviour). It is not clear whether the phrase 'signs or behaviour' is meant to qualify the words 'abusive/insulting language' or stands alone. If the phrase stands alone it is meaningless what about 'signs or behaviour'? What does the phrase 'serious disrespect' qualify? Does it qualify the words 'abusive/insulting language' or the words 'signs or behaviour'?

[29] The congestion and vagueness of the charge is compounded by the fact that the charge was just 'thrown' like that at the respondent, no details of the nature of the offence or misconduct or the relevant particulars of the charge were provided to the respondent. How the respondent was expected to answer to such a charge is incomprehensible.

[30] The second worrying aspect is that at the disciplinary enquiry the chairperson of that enquiry enquired from Gouws whether he and De Wee sat together before they drafted their statements with respect to what transpired on 12 February 2015. Gouws replied that: (I quote verbatim from the record of the disciplinary enquiry)

'Stanley [i.e. De Wee] gave me his statement and I drafted mine.'

[31] When Gouws was asked as to what the exact abusive words were which the respondent used against De Wee, he replied as follows:

'It was more the aggressive way he talked to Stanley. There was a shouting to Stanley, not swear words.'

[32] De Wee's testimony was to the effect that: While he was in the workshop he noticed that Ronald Stramis was busy with his meetings, some employees started to ask questions not related to work. He intervened and took away one of the employees (a certain Amweele) who was asking the question at that point in time. At that point the respondent stood up and shouted at De Wee, De Wee asked the respondent to stop and to go back to his meetings but the respondent continued, but after De Wee raised his voice the respondent backed off and went back to his meeting. He (De Wee) testified that:

'When he jumped up from his seat, I told him to go back. He said "Come, come I will show you." As me and Amweele talked about the Golden Rule he again said: "Come, come I will show you." It was aggressive... I felt that Moongela is refusing my orders he does not want to listen to me...'

[33] The respondent's evidence on the other hand is that whilst they were in a meeting with Ronald Stramis a question relating to the handling of subordinates came up. As they were asking questions about the inconsistent application of the company rules, De Wee came in and the respondent showed him the 'Golden rules' and that is when he said he must stop.

[34] Mr. Amweele who was called as a witness for the respondent testified that: (I quote verbatim from the record of the proceedings at the disciplinary enquiry)

'In the morning meeting [of 12 February 2015] we came up with the discussion of the situation of how to deal with subordinates. If you report everything how would you feel if we report you? We asked that to Ronald. We asked that because he can't even read drawings. We talked about Eric's case, Stanley came in and said the law of the country says it doesn't allow people to abuse each other. He asked me where are the cardinal rules. I said on the notice boards and I showed him. Moongela went to the Golden Rules and showed # 3 regarding Eric's dismissal. Stanley said he didn't want to talk to Moongela and said he must go. Stanley asked Ronald to take Moongela away. Ronald and Moongela walked away.'

[35] John Grogan¹³ opines that while it is accepted that the workplace is not a finishing school, there are limits to the language which employees are permitted to use to express their views. He argues that:

‘Swearing and invective are generally considered misconduct, which may in certain cases justify dismissal even on the first occasion. This is especially so when employees use abusive words or phrases that impair the dignity and reasonable sensibility of those against whom they are directed or in whose presence they are uttered. The use by an employee of abusive language in the workplace impacts on the individual employment relationship and also on the employer’s business interest. When such language is addressed to a superior, the employee’s conduct may also amount to insolence or insubordination.’

[36] The learned author continued and with reference to the case of *Union Spinning Mills and ACTWUSA*¹⁴ argued that:

‘It is often very difficult to distinguish between language used on the shop floor which undermines the authority of the employer and that which is jocular or rude. The degree of tolerance for what is sometimes called ‘industrial language’ varies from one plant to another and whether use of the same words constitutes insubordination may differ from plant to plant and circumstances to circumstances.’

[37] In this matter the evidence that was placed before the chairperson of the disciplinary enquiry is that the respondent did not swear at De Wee, he could therefore not have been found guilty of using abusive or insulting language. Is there evidence indicating that the respondent was insolent?

[38] After hearing evidence (which I briefly summarized above) the chairperson of the disciplinary enquiry concluded that he looked at everything and that it was clear that there was shouting and thus also disrespect. Parker C¹⁵ argues that insolence is a form of common law misconduct and its basis lies in the employee’s obligation to show common respect and good manners towards his employer. In the case of *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*¹⁶ the court equated insolence with impudence, cheekiness, disrespect or rudeness. The court said:

¹³ In his book *Dismissal* 2010 at 179.

¹⁴ (1988) A.R .B 8.13.2.

¹⁵ In *Labour Law in Namibia* Unam Press 2012 at 57.

¹⁶ (1989) 10 ILJ 311 (IC).

' ... Insolent is defined as: "offensive; impudent or disrespectful". It is clearly a synonym for cheeky which is defined as: 'disrespectful in speech or behaviour; impudent'. Disrespectful (the other synonym for both of these words) is defined as: "contempt; rudeness; lack of respect for". It is clear that insolence, disrespect, rudeness and impudence are birds of a feather.'

[39] There was no shred of evidence before the chairperson of the disciplinary enquiry that the respondent was disrespectful towards De Wee. The chairperson of the disciplinary hearing does not provide the basis or reasons for his finding that there was 'shouting and also disrespect'. The only 'evidence' which may indicate some aspect of insolence is the evidence of both De Wee and Gouws that the respondent shouted at De Wee. First, the context in which the respondent allegedly shouted at De Wee was not placed before the chairperson of the disciplinary enquiry. Secondly, the evidence by Gouws that '*Stanley [i.e. De Wee] gave me his statement and I drafted mine*' reveals that, the evidence of Gouws and De Wee was 'tailored' to prove the allegations against the respondent. The chairperson was, in the circumstances under an obligation to disregard both De Wee and Gouw's statements and evidence.

[40] I therefore come to the conclusion that the arbitrator was correct when he found that the respondent could not have been found guilty on the charge of '*Abusive/insulting language, signs or behaviour, including serious disrespect, impudence or insolence.*'

The second charge of misconduct (Alcohol Intoxication)

[41] The appellant also maintains that it had a fair and valid reason to dismiss the respondent in that on 25 February 2015 the respondent was charged with the offence of 'alcohol intoxication'. As I indicated in the introductory part of this judgment this charge stems from the conduct of the respondent when he, on 17 February 2015, arrived at the appellant's work place while he was under the influence of intoxicating substances. In this case the appellant simply accepted the plea of guilt and without more, found the respondent guilty on the basis of his plea.

[42] The finding of guilt on the second charge has, in my view, also problems of its own. The first difficulty relates to the formulation of the charge. The appellant's Disciplinary Code and Procedure formed part of the record of the arbitration

proceedings that was placed before me. In that code there is no misconduct described as 'Alcohol Intoxication'. The Code describes the following conduct as constituting an act of misconduct. 'Under the influence of alcohol or drugs on company premises.' (Under lined for emphasis).

[43] The second difficulty is that, from the record that was placed before me the evidence is that on 17 February 2017 the respondent arrived at the premises where the appellant conducts its business, as he arrived at the gate the security officers detected that the respondent was under the influence of intoxicating substances and refused him entry to the premises. They turned him away and he left. As a result of the respondent's condition the disciplinary hearing was postponed. I am of the view that one of the essential ingredients of the charge, namely that the respondent was under the influence of intoxicating substances while on the appellant's premises was not satisfied. The respondent was not on the appellants premises, he was refused access to the premises and turned away. For this reason the finding of guilt and the resulting sanction cannot be sustained and is set aside.

The third charge of misconduct (Fraudulent time keeping)

[44] I have indicated above that the third charge which the respondent faced and for which he was dismissed is the allegation or accusation that he was guilty of 'fraudulent timekeeping, including clocking in another employee or allowing another employee to clock one in'. This charge of misconduct relates to the incidents of 12 February 2015 and 13 February 2015 when he asked his co-employees to facilitate his exit and entrance to the premises where the appellant conducts its business.

[45] The facts which gave rise to this charge are not in dispute, they are that; in the afternoon of 12 February 2015 the respondent was summoned to the offices of Gouws. At Gouws' office he was informed that he will have to appear before a disciplinary enquiry for using abusive and insulting language towards De Wee. The respondent indicated that he does not understand what insulting language he allegedly used and he asked Gouws to explain the alleged misconduct, Gouws did not explain as requested. The respondent questioned why he was the one charged with misconduct if he was not the person asking the question at the meeting. He accordingly refused to sign acknowledgement of the letter informing him of the disciplinary enquiry and he left

Gouws' office.

[46] As a result of his refusal to sign acknowledgment of the letter informing him of the disciplinary inquiry his card allowing him to enter and leave the work premises was disengaged he thus could not enter or leave the premises. He was not informed that his access card was rendered non-functional or that he was not permitted to enter the work premises, he was also not informed that he was suspended from work. On 12 February 2015 the respondent requested a fellow employee to assist him leave the work premises. On 13 February 2015 he requested a fellow employee to assist him to enter the premises. When the security officer detected that he had entered the premises they removed him from the premises. Can it be said that on these facts the respondent is guilty of fraudulent time keeping including clocking in another employee or allowing another employee to clock one in?

[47] The appellant's Disciplinary Code and Procedures does not contain a definition of fraud or fraudulent time keeping. In the absence of any specific definition in the appellant's Disciplinary Code and Procedures, fraud must be given its ordinary meaning within the general law applicable in the country. Hunt and Milton¹⁷ define fraud as follows:

'Fraud consists in the unlawful making with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudice to another.'

Opperman¹⁸ defines fraud in the Labour Law context as follows:

'An unlawful action perpetrated by a person with the intention to defraud or misrepresent or mislead a party in such a manner that it causes prejudice or potential prejudice to that party.'

[48] It thus follow that for the appellant to succeed, in discharging the *onus* resting upon it and prove that the respondent is guilty of the misconduct of fraudulent time keeping, it had to adduce evidence (on a balance of probabilities) that shows that:

¹⁷ In the *South African Criminal Law and Procedure*.1982, Juta & Co Ltd, Volume II 2nd ed) at 755.

¹⁸ In the book: *A practical Guide to Disciplinary Hearing* (2011 Juta) at p 95.

- (a) The respondent when he requested the co employees to assist him to exit the premises on 12 February 2015 and to assist him enter the premises on 13 February 2015 as they did, made that request unlawfully, misleadingly or made some other misrepresentation; and
- (b) The misrepresentation or misleading action was made with the intention to defraud the appellant; and
- (c) That the misrepresentation or misleading action caused the applicant prejudice or potential prejudice.

[49] Mr. Vliege who appeared for the appellant argued that from her analysis of the evidence, the arbitrator accepted that the respondent knew of the workplace rule relating to 'fraudulent timekeeping, including clocking in another employee or allowing another employee to clock one in' and submitted that the arbitrator found that the respondent breached that rule.¹⁹ He continued and argued that the finding that the respondent breached that rule should have led the arbitrator to the conclusion that the dismissal of the respondent was substantively fair. He said:

'Where the arbitrator appears to have gone wrong is where she found that the Respondent was not guilty of the third offence because the Appellant did not inform the Respondent that his access had been blocked.

The arbitrator nevertheless correctly found that the Respondent knew that his access was blocked. Whether the Appellant informed the Respondent of this, or whether the Respondent knew it anyway, we submit, is irrelevant.

What is relevant is that the Respondent knew that he was not permitted to access the workplace on 13 February 2015, yet he took steps to do so by using another employee's access

¹⁹ Mr.Vliege's submission that the arbitrator found that the respondent breached or broke the appellant's rules is based on the following statement by the arbitrator in her award:

- '11. It is common cause that applicant contravened the company rule and regulations relating to employment. The rule is valid, reasonable clear and understandable and it clearly spells out what is required in the company security policy...
- 13. It is common cause that applicant denied that he was not aware of any rules which said that you can't clock another employee on his/her reporting for duty, which in my view that applicant was very much aware regarding the rules of the company.
- 14. It is also common cause that employee was aware in cases where access has been blocked where to go in the case of applicant the security department is located at the main gate for any access problems which according to my view applicant could approach for assistance instead of asking someone to clock him in which is against the company rules.'

privileges. This conduct was exactly what the workplace rule on security and access prohibited. It also falls squarely within an offence recognized by the Appellant's disciplinary policy. Having found that a workplace rule was breached, the arbitrator was required by law to consider whether the sanction imposed was unreasonable. We submit that the sanction was not unreasonable.'

[50] Section 85 of the Labour Act, 2007 empowers an arbitrator to hear and determine any dispute or any other matter arising from the interpretation, implementation or application of that Act. It thus follow that an arbitrator must, on the facts and evidence placed before him or her and after considering all relevant circumstances decide whether a dismissal was fair or not. Section 89 on the other hand empowers the Labour Court to determine whether the determination by an arbitrator is in law correct or not. I will therefore determine whether on the evidence that was before the arbitrator she was correct in finding that the appellant did not have a valid and fair reason to dismiss the respondent.

[51] Mr. Vliege's assails the arbitrator's finding on the basis that she found that the respondent breached a rule established by the employer. The rule that the respondent breached is particularly serious, it carries with it an element of dishonesty, argued Mr. Vliege. He continued that dishonesty is a generic term embracing all forms conduct involving deception on the part of employees. This is destructive of the employment relationship. The trust which the employer places on an employee is basic to and forms the *substratum* of the relationship between them. Many of the other forms of misconduct are rooted in the notion that if the misconduct is proven, for instance theft, the use of property of another person or fraud, there is also a breach of trust. Dishonest conduct is also breach of trust. Usually a violation of trust will be visited with dismissal.

[52] I have no qualms with the principles which Mr. Vliege put forward, those principles have in fact been recognized and reiterated by this Court.²⁰ The question that must, however, be asked is whether the arbitrator was correct in finding that the respondent has committed an act of fraudulent time keeping, or fraudulently clocked in another employee or allowed another employee to fraudulently clock him in.

²⁰ See the cases of *OA-Eib v Swakopmund Hotel & Casino* 1999 NR 137, *Model Pick 'n Pay Family Supermarket v Mwaala* 2003 NR 175 (LC), *Namdeb Diamond Corporation (Pty) Ltd v Bared Smith*, judgment by the Labour Court delivered on 19 April 2013, Case No LCA 50 / 2013 and *Foodcon (Pty) Ltd v Swarts* NNLP 2000(2) 181 NLC.

[53] I do not think the arbitrator was correct in her finding that the respondent breached the rule. I say so for the following reasons. It is common cause that on 12 February 2015 the appellant's Controller and Human Resources Head, a certain Ms. Marscha gave instruction that the respondent's access to and out of the premises be blocked. The instruction to block the respondent's access was, in my view, tantamount to a 'lock out of Mr. Moongela' and the 'lock out' was in made in contravention of ss 74 and 75 of the Labour Act, 2007. The appellant had furthermore not followed a fair procedure, and had not given the respondent a reasonable opportunity to show why he should not be locked out. The unfairness is not only manifested in the lock out itself, but also in the arbitrary manner in which the lock out was made.

[54] Mr. Vliege attempted to justify the appellant's action (to lock out the respondent) as irrelevant to the determination whether the respondent breached the rule relating fraudulent time keeping. I do not agree, in my view, the unlawful and arbitrary actions of the appellant are directly linked to the respondent's reaction, the impasse between appellant and the respondent arose as a result of this unlawful lock out. I am of the view that it could not, in the absence of a notice to the respondent be expected of him to know that he has been suspended from work and that he was not allowed to access the premises.

[55] Apart from the fact that the appellant acted unlawfully in violation of the Labour Act, 2007 there was no evidence placed before the chairperson of the disciplinary enquiry to the effect that the respondent misrepresented or misled the appellant with respect to his attendance or non-attendance at work, or with respect to the hours which he rendered or did not render services to the appellant. There was equally no evidence that the respondent fraudulently clocked in another employee.

[56] On the charge that he allowed another employee to fraudulently clock him in, the respondent testified that the reason why he requested his co employee to clock him in (that is to facilitate him entering the work place) was that he wanted to go the work place trade union representative to discuss the events of the previous day (the events of 12 February 2015). So this begs the question how did the respondent misrepresent, or misled the appellant and how did he intent to defraud the appellant and what prejudice or potential prejudice did he cause the appellant? On the evidence placed before the arbitrator she could not have found that the respondent breached the rule relating to

fraudulent time keeping. I am therefore satisfied that the appellant did not have a valid and fair reason to dismiss the respondent. In view of my finding that the appellant did not have a valid and fair reason to dismiss the respondent I find it unnecessary to consider whether the respondent was dismissed in accordance with a fair procedure. I will now proceed to determine the relief awarded by the arbitrator.

The relief awarded by the arbitrator

[57] After the arbitrator made her finding that the dismissal of the respondent was both substantively and procedurally unfair she ordered the appellant to reinstate the respondent 'with full benefits as well as full salary benefit payments from the day of termination of services up until re-employment.' Mr. Vliege attacks this award on various grounds but his main attack is that the award of reinstatement is not an award sounding in money and it is uncertain. No evidence was tendered before the arbitrator regarding the remuneration of the respondent, nor any surrounding circumstances relevant to the determination of the compensation to be paid and the order of reinstatement.

[58] Mr. Vliege went on to argue that the order for reinstatement does not mean, by necessity and operation of law, that the respondent was required to be paid all remuneration that he would have been paid had he not been dismissed, the compensation awarded is not even 'estimated in money'. The appellant, so the argument went, is left with having to quantify what amount it should pay the respondent if this appeal is dismissed. The arbitrator erred in this regard as the award should, at a minimum, have been couched in monetary terms.

[59] Another basis on which Mr. Vliege attacks the award is that the Respondent was required to mitigate his losses. He argued that approximately 7 months passed between the date of dismissal and the date of the award. Any income received during this period had to be taken into account so as to ensure that the respondent did not 'profit' from his dismissal, bearing in mind the appellant was ordered to pay the respondent what he would have earned during the period that he was dismissed. The Respondent led no evidence to show that had he had attempted to mitigate his losses, nor did he lead evidence in respect of any other relevant surrounding circumstance, so as to enable the arbitrator to make a just and equitable award.

[60] The last basis of attack is the argument that the respondent was required to place facts before the arbitrator to establish that reinstatement is appropriate in the circumstances. Reinstatement is discretionary and is an inappropriate remedy in instances in which the relationship of trust between the employer and the employee has broken down. Due to repeated misconduct by the respondent, especially the misconduct perpetrated by the respondent in respect to the third charge involving the breach of the security policy, the relationship of trust between the respondent and the appellant has broken down, so the argument went.

[61] I now turn to the criticism that the arbitrator did not express the reinstatement order in monetary terms. The criticism that the arbitrator did not couch the award in monetary terms, is, in my view baseless. I say so for the reason that the Labour Act, 2007 allows for any one of two remedies to be granted to a worker who has been unfairly dismissed namely: the employer may be ordered to reinstate the worker²¹, or the employer may be ordered to pay to the employee compensation.²² Upon a finding of unfair dismissal either one of the two remedies must be granted.

[62] In the matter of *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others*²³ this Court held that where an arbitrator awards compensation that is equal to the amount of remuneration that would have been paid to the employee had the employee not been dismissed, it is not necessary for the employee to lead evidence to establish the amount involved. Gibson J said:

‘It is common cause that the respondents had all been in the appellant's employment. The question of what the appellant paid the respondents was not in issue. It was a circumstance which could easily be ascertained without the need for formal evidence from the respondents as it lay exclusively within the purview of the appellant's domain. The failure to lead the formal details is more of a technicality. There cannot be prejudice to the appellant in mere failure to depose to the salaries paid to the workers.’

[63] I now turn to the criticism that the respondent did not place evidence before the arbitrator that he mitigated his losses. In the matter of *Novanam Ltd v Rinquest*²⁴ I

²¹ See section (15) (d).

²² See section (15) (e).

²³ 2005 NR 372 (SC).

²⁴ 2015 (2) NR 447 (LC).

quoted with approval from the Supreme Court Zimbabwe's case of *United Bottlers v Kudaya*²⁵ where that court said:

'A wrongfully dismissed employee has a duty to mitigate damages by finding alternative employment as soon as possible. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. This is the legal position, as stated in the *Zimbabwe Sun* case. The issue was further clarified in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), wherein McNally JA at pp 418H – 419D stated as follows:

"I think it is important that this Court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have been expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased." '

[64] In the *Novanam Ltd v Rinquest* matter I indicated that I have no qualms with the principle enunciated in the *United Bottlers v Kudaya* case and accept it as a correct exposition of the law in Namibia, but indicated that in terms of s 89(1)(a) of the Labour Act, 2007 a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of s 86 'on any question of law alone'. The question whether or not a dismissed employee mitigated his or her losses is a question of fact and is therefore not appealable. It follows therefore that the appellant cannot appeal on that ground to this court.

[65] Finally, Mr. Vliege is correct in his argument that the order for reinstatement does not mean, by necessity and operation of law, that the respondent was required to be paid all remuneration that he would have been paid had he not been dismissed. In the matter of *Transnamib Holdings Ltd v Engelbrecht*²⁶ the Supreme Court accepted the following definition by McNally JA²⁷ of reinstatement:

²⁵ (ZS case No 63/05) [2006] ZWSC 34 (12 September 2006).

²⁶ 2005 NR 372 (SC).

²⁷ In the matter of *Chegutu Municipality v Manyora* [1997 (1) SA 662 (ZS)] (1997) 18 ILJ 323 (ZS).

'I conclude therefore that 'reinstatement' in the employment context means no more than putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding back pay and/or compensation. But mere reinstatement does not necessarily imply that back pay and/or compensation automatically follows.'

[66] It thus follows that it is within the discretion of the arbitrator to decide whether he or she will order the employer to pay the employee back pay. It is trite that the arbitrator must exercise the discretion in a judicious manner. The *onus* is on the employer to prove on a balance of probabilities that the relationship has broken down irretrievably or that serious injustice or other prejudice would occur if the dismissed employee were reinstated.²⁸

[67] Parker²⁹ has suggested that the following are factors which are important in deciding whether to order back pay or not, namely: The nature of the duty that the employee breached, the nature of the misconduct or other offence, how far the breach or misconduct has caused bad blood between the employer and the employee, the likelihood of the employee committing a similar breach or misconduct again if he was reinstated or whether because of the length of time that has elapsed between the date of dismissal and judgment of the court or award of the arbitrator, 'it will be unrealistic to treat the contract of employment between the parties as still being in force.'

[68] In this matter Mr. Vliege's complaint is not directed at the manner in which the arbitrator exercised her discretion but rather at what the legal position is. In, my view there is no indication that the arbitrator improperly exercised here discretion when she ordered the appellant to reinstate the respondent with back pay. Mr. Vliege's halfhearted attempt to argue that the period of seven months between the date of dismissal and the date the order of reinstatement was granted is inordinately long does not hold merit.

[69] It will be remember that the Labour Act, 2007 sets a period of six months as the period within which an aggrieved employee may launch a complaint of unfair dismissal. I therefore find that the period of seven months is not inordinately long, especially where the employee did not delay in instituting the complaint of unfair dismissal. Taking into

²⁸ *Namibia Beverages v Emily*.

²⁹ *Supra* footnote 5 at 192.

account that the appellant has not established a valid reason for the dismissal of the respondent, the question of irretrievable break down of the working relationship does not arise. I am of the view that it is just and fair to order the appellant to reinstate the respondent with back pay.

[70] Consequently, the appeal fails and is dismissed. For the avoidance of doubt, the award of the arbitrator dated 8 October 2015 is varied to read as follows:

- 1 The dismissal of Lazarus Moongela is substantively unfair.
- 2 The appellant ABB Maintenance Services Namibia (Pty) Ltd is ordered to reinstate the respondent, Lazarus Moongela 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:

S Vliege.

Of Koep & Partners, Windhoek.

FIRST RESPONDENT:

S Nambinga

Of AngulaCo, Windhoek.