



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 39/2015

In the matter between:

JOHANNES DE KLERK

APPLICANT/APELLANT

And

NAMPOST (PTY) LTD

RESPONDENT

Neutral citation: *De Klerk v Nampost (Pty) Ltd* (LCA 39/2015) [2017] NALCMD 3
(07 February 2017)

Coram: UNENGU AJ

Heard: 11 November 2016

Delivered: 07 February 2017

Flynote: Labour law – reinstatement application – appeal – appeal was dismissed based on an error – accordingly application for reinstatement of the appeal granted –appellant was dismissed for misappropriating company funds – he appealed – test is whether the arbitrator’s conclusion is one which could have been reasonably reached – if so, court should not interfere with award – on the evidence produced, respondent discharged the onus – the appeal is dismissed.

Summary: The appellant was charged with misappropriating company funds and was dismissed at a disciplinary hearing held. He referred a dispute of unfair dismissal to the Office of the Labour Commissioner, whereby the arbitrator issued an award in favour of the respondent. Accordingly, the appellant appealed to the Labour Court. The Labour Court removed the matter from the roll erroneously and an application for reinstatement was filed. The Labour Court reinstated the appeal and heard the merits of the matter. *Held*, that the version of the appellant is untrue and unlikely. *Held*, that the conclusion drawn by the arbitrator is reasonable in light of the evidence produced and accordingly the court should not interfere with the award.

ORDER

- (i) The appeal is hereby reinstated.
- (ii) The appeal is dismissed.
- (iii) No order as to cost made.

JUDGMENT

UNENGU AJ:

Introduction

[1] The appellant noted an appeal on the 16 June 2015 pursuant to section 89(1) of the *Labour Act, No 11 of 2007* (hereinafter referred to as the 'Act') from the Office of the Labour Commissioner against the whole award by Mr Phillip Mwandingi, issued on the 20 April 2015, but received by the parties on 18 May 2015 under the case number: SRMA 42-12, in which he seeks the following relief:

- '1. An order that the Arbitrator erred in law by finding that the dismissal was fair;
2. An order declaring the dismissal of the Applicant to be a unfair, ordering reinstatement and payment for the loss of income.

3. An order that the arbitration award is set aside;
4. Further and or alternative relief as the court deems meet.¹

[2] The grounds of appeal relied upon by the appellant are as follows:

‘1.1 The Arbitrator erred in law by not granting the primary remedy of reinstatement;

1.2 The Arbitrator erred in law by failing to pay due regard to the charges of the appellant he was charged with misappropriation of Funds instead of Negligence;

1.3 The arbitrator erred also in law in that should he have carefully considered the facts and the law he would have found that as a matter of law the charge of negligence would have been more fitting charge and in the circumstances would have resulted in a written warning for the Appellant and not necessarily a dismissal.

1.4 The arbitrator erred in law in finding that the respondent has discharged the onus of proving that the appellant had in fact misappropriated funds as alleged when the appellant had not recorded in a surplus during the period he is alleged to have misappropriated the said funds.²

[3] Further, the appellant filed an application for reinstatement of the appeal on the 11 December 2015 as the matter was removed from the roll on the 16 October 2015, by Geier, J.

[4] Accordingly, before me stands not only an appeal for adjudication, but also an application for reinstatement of the appeal.

Background

[5] The applicant/appellant in the present matter is Mr Johannes De Klerk, an adult male, former employee of the respondent (hereinafter referred to only as the appellant). The respondent is Nampost (Pty) Ltd, a company duly incorporated in

¹ Record filed under the Amended index of Court File, p6. Also in the Notice of Appeal from Arbitration Award, p2.

² Record filed under the Amended index of Court File, p6 - 7.

terms of the laws of the Republic of Namibia with its registered place of business at 175 Independence Avenue, Windhoek, Republic of Namibia.

[6] In summary, the appellant was employed as a courier driver at the respondent. He worked for the respondent for more than twenty-three (23) years, of which the last five (5) years he worked in the courier office receiving parcels from the public and payments in respect thereof as well as receipt books and waybills from the courier drivers.

[7] During the period of February - March 2012, Ms. Mutotwa was the appellant's supervisor and acted as postmaster as Ms. Nitschke, the postmaster, was on maternity leave. Upon the postmaster's return, queries were forwarded to her office regarding certain unpaid waybills. As a result, she inspected the respondent's books, repertoire system and certain waybills and indeed found a number of unpaid waybills.³

[8] Accordingly, the postmaster immediately requested the appellant to assist her in investigating the matter, however, he redirected her to the acting postmaster and stated that he had given her all monies received by him during that period. The postmaster conducted an investigation on her own and discovered that the waybills queried were not recorded on the computer system and further compared such unpaid waybills with the respondent's SAP computer system/programme.

[9] When the postmaster sought an explanation from the appellant, via email, regarding the unpaid waybills and consequently the missing funds, he could not recall, alleging that it was too far back and reiterated that all monies he received he handed over to the acting postmaster.

[10] On the same day and the very next day, the appellant opted to pay the amounts outstanding on the waybills to the respondent. It was, accordingly, the view of the postmaster that by making such repayment, the appellant admitted to some wrongdoing. The appellant on the other hand rationed that these repayments made by him were on the instruction of the postmaster herself, and because he failed to record the amounts received for the waybills queried, he accepted that he had made

³ Index of Record of Proceedings, p39. Also, Arbitration Award delivered by Mr Phillip Mwandangi on the 20 April 2015, p2.

a mistake and opted to pay such monies missing, however, that an inference of guilt cannot be drawn therefrom.

[11] Based on the facts before the respondent, a disciplinary hearing was held on the 1st and 2nd October 2012;⁴ and on the 8 October 2012, the appellant was dismissed after he was found guilty for misappropriating company funds.⁵

[12] Aggrieved by the finding of guilty and his subsequent dismissal, the appellant referred a dispute of unfair dismissal and severance package to the Office of the Labour Commissioner on the 21 November 2012.

[13] The matter was firstly set down for the 14 December 2012 before Mr Joseph Windstaan, however, an application for review was filed by the respondent at the High Court, which Court on the 15 November 2013 referred the matter back to the Office of the Labour Commissioner to be heard *de novo* before another arbitrator. Subsequent to that, on 8 January 2014, the respondent withdrew the review application as the parties had reached an agreement consequent to the court order dated 15 November 2013.

[14] Again, the matter was set down for the 11 February 2014, this time before Mr Matheo Rudath. An application for recusal of the arbitrator was argued and granted on the 27 May 2014.

[15] Finally, the matter was set down for the 27 January 2015 before Mr Phillip Mwandangi, who considered the evidence and arguments made by the parties' representatives and issued his award on the 20 April 2015 in favour of the respondent.

[16] In summary, the arbitrator found that the appellant's version that he had surplus money and that such money he gave to the acting postmaster, is doubtful as he should have noted the surplus funds in terms of the respondent's internal procedure. Further, the arbitrator found that the only reasonable inference one could draw, is that the appellant received the money from the drivers and pocketed the

⁴ Index of Record of Proceedings, p187.

⁵ Index of Record of Proceedings, p38. Also, Arbitration Award delivered by Mr Phillip Mwandangi on the 20 April 2015, p1.

amounts missing attached to the waybills which were also not entered into the system. Consequently, the arbitrator held that the subsequent behaviour of the appellant when requested by the postmaster to assist her to investigate the missing amounts, supports this inference so drawn. As a result, the arbitrator found the appellant's version to be false and unlikely and that the respondent had proven on a balance of probabilities, that the appellant in fact misappropriated the funds and under the circumstances, the respondent was justified in imposing dismissal as the ultimate sanction.⁶

[17] This court firstly needs to establish whether there is merit in the appellant's argument for reinstating the appeal. Thereafter, the court must settle the following issues:

(i) Whether the arbitrator erred in law in finding that the respondent had discharged the onus of proof that the appellant had in fact misappropriated company funds.

(ii) Whether the arbitrator erred in law when he found the appellant guilty of misappropriation of funds instead of negligence after considering the facts of the case.

(iii) Whether the arbitrator erred in law when he found that the appellant's dismissal was substantively fair.

(iv) Whether the arbitrator erred in law when he granted the ultimate sanction of dismissal instead of a written warning in light of the facts of the case.

The reinstatement application

[18] The appellant filed an application for reinstatement of the appeal on the 11 December 2015 as the matter was removed from the roll on the 16 October 2015, by Geier, J. This application for reinstatement became opposed on the 20 January 2016 and was accordingly removed from the unopposed roll/first motion roll to be case managed by Van Wyk, AJ.

⁶ Index of Record of Proceedings, p43 – 44.

[19] This Court finds that there is no reason to waffle or have lengthy discussions on this point as both parties have agreed that the only reason why the appeal was removed from the roll was because my Brother Geier, J was under the mistaken belief that the appeal was filed out of time when in fact it was not.

[20] As per the heads of argument produced by the appellant and similarly confirmed by the respondent before this court, Geier, J calculated the 30 day period referred to in *section 89(2) of the Labour Act* from 20 April 2015, being the date when the arbitrator issued his award and not from the date when the parties were served with the award.⁷ In all fairness to my Brother, the counsel for the appellant was not able to produce evidence that the award was only served by the parties on the 18 May 2016.

[21] It is in the opinion of this court that in light of the facts regarding the application for reinstatement, the court accordingly grants the application although, strictly speaking the appeal never in fact lapsed.

The appeal

Onus of proof

[22] The general principle relating to any civil or labour disputes notes that the burden of proof rests on the party who alleges. Such party must accordingly prove his/her/its claim on a balance of probabilities, unlike in criminal matters, where the burden of proof rests on a higher scale on the State who alleges, that is, beyond reasonable doubt.

[23] However, dismissal cases in labour matters are *sui generis* in that an employee must only establish that he/she was dismissed by his/her employer resulting in the onus of proof shifting to the employer to prove that such dismissal was in accordance with *section 33(1) of the Labour Act*. In other words, a dismissal so established is presumed unfair, until the employer can prove the contrary.⁸

⁷ Read with *Rule 17(4) of the Rules of the Labour Court* published under GN 279 in GG 4175 of 2 December 2008 [15 January 2009] as amended by GN 92 in GG 4743 of 22 June 2011.

⁸ *Labour Act No. 11 of 2007*, section 33(4)(b).

[24] It is common cause between the parties that the appellant was employed at the respondent and dismissed on the 8 October 2012.⁹ Consequently, the burden of proof shifts to the respondent to prove that the appellant's dismissal was for a valid and fair reason and in accordance with a fair procedure.

[25] In order to establish both procedural and substantive fairness, the court is expected to analyse the arbitration procedure and to dissect the evidence produced to conclude whether such evidence supports a charge of misappropriation of company funds on a balance of probabilities and not beyond a reasonable doubt.

Misappropriation of funds

[26] In order to be guilty of an offence of misappropriation of funds or theft, it must be proven that the accused employee had the **intention of permanently depriving** the employer of the use and enjoyment of the goods so stolen or misappropriated. In relation to the offence of theft, Grogan states that:¹⁰

'The necessary mental element is present if the employee was aware that the goods did not belong to him or her and he employee intended to remove the property permanently from the owner, knowing he or she is not entitled to. The physical element of theft is proved if the employee's act gives rise to the conclusion that the employee intended to deprive the owner of possession of the goods. Both elements need to be proven on a balance of probability.'

[26] Both parties have contrary versions as to whether the elements of the offence were indeed met. Counsel for the appellant argues that the respondent failed to prove both the physical and mental elements of the offence in that the respondent could not testify that there was anyone who saw the appellant taking the money and accordingly destroying the receipts and waybills in respect of the outstanding amounts. Rather than the appellant's action being that he admitted to neglecting recording the amounts on the system and through repayment of the outstanding amounts, he shows his remorse. Ms Shilongo accordingly concludes that the behaviour of someone who misappropriates company funds would indicate that he

⁹ Index of Record of Proceedings, p38. Also, Arbitration Award delivered by Mr Phillip Mwangangi on the 20 April 2015, p1.

¹⁰ Grogan, J (2008). *Dismissal, Discrimination & Unfair Labour Practices*. Juta & Co. Ltd, p317.

would have destroyed all possible documents and receipts, instead the appellant forwarded them to Windhoek.

[27] In reply hereto, the respondent's counsel shows the court that the appellant had every intention to permanently deprive the respondent of such funds in that the appellant's version that he had accounted for all alleged surplus amounts to the acting postmaster cannot be accepted as such amounts were not recorded. Also, the appellant could not provide the respondent with a reasonable explanation as to why there were unpaid waybills and finally if the unpaid waybills were not queried by head office, the appellant would have never admitted to having failed to enter information in the system and accordingly would not have repaid the outstanding amounts on the queried waybills.¹¹

[28] That being the case, the court is faced with two differing versions. In such instances, the court has to apply the established tests as outlined in well-known cases.

Test

[29] At this juncture, I keep in mind the legal principles relating to the test in appeals – that is that appeals are based on a questions of law (in which there may also be an error of fact), and the evidence so produced must show that the arbitrator's conclusion is one which he could not reasonably have reached.¹²

[30] In the *National Employers General Insurance v Jagers*, the court outlined the following test:¹³

'Where there are two mutually destructive stories the plaintiff can only succeed ... if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound

¹¹ Record filed under the Amended index of Court File, p42.

¹² *Cenored vs Ikanga Supra* (LCA 13/2013) [2014] NALCMD 18 (30 April 2014), para 11.

¹³ 1984 (4) SA 437 (C) at p440 E-G. Also see the unreported judgment of *The Motor Vehicle Accident Fund of Namibia v Lukatezi Lennox Kulobone* Case No. SA 13/2008 delivered on 05 February 2009.

up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[31] Reasonably weighing up these two mutually destructive versions, the court finds that the arbitrator was reasonable in coming to the decision that he did. In terms of witnesses called on behalf of the respondent, both the acting postmaster and the postmaster's testimony corroborate one another and the court rejects the appellant's version that such witnesses were merely in cahoots because they dislike him and would accordingly do anything to get rid of him. Furthermore, any reasonable person, in light of the fact that the appellant opted to repay the outstanding amounts, notwithstanding that he claims that he is innocent, would believe that such payment was made due to guilt to make up for past wrongdoings. Therefore, the court cannot reasonably believe the appellant when he explains that his reason for repayment was upon the instruction of his supervisor. If this was at all true, the appellant or any reasonable person would have refused to do so demanding his innocence or would pay only under protest conditioning such request be put in writing.

Appropriate sanction?

[32] To conclude, 'It is for the employer to determine the standards of conduct required of its employees and the courts should only intervene when any sanction imposed for breach of these standards if it results in any unfairness: *Maphetane v Shoprite Checkers (PTY 1996) 17 ILJ 964 (IC)*.'¹⁴

[33] It is at this point that this court lends assistance from the common-law: ¹⁵ "at Common Law, theft by employees of the property of their employer is regarded as the gravest form of breach of the duty of fidelity justifying dismissal...an employee needs to be aware of the rule prohibiting removal of the goods in question..."

¹⁴ *Van Wyk v Commercial Bank of Namibia Limited* case number SA 12/2004, delivered on 22/04/2005, p4.

¹⁵ *Cenored vs Ikanga Supra* (LCA 13/2013) [2014] NALCMD 18 (30 April 2014), para 35.

[34] It is for the reasons provided above that the court finds no misdirection or any wrong doing in the award made by the arbitrator and accordingly makes the following orders:

- (i) The appeal is hereby reinstated.
- (ii) The appeal is dismissed.
- (iii) No order as to cost made.

E P UNENGU
Acting Judge

APPEARANCES

APPLICANT/APPELLANT: N Shilongo
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