

**REPUBLIC OF NAMIBIA**



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

Case no: LCA 01/2017

In the matter between:

**COCA-COLA NAMIBIA BOTTLING  
COMPANY (PTY) LTD**

**APPELLANT**

and

**JOHANNES THOMAS  
PHILLIP MWANDINGI N.O**

**FIRST RESPONDENT  
SECOND RESPONDENT**

**Neutral citation:** *Coca-Cola Namibia Bottling Company (Pty) Ltd v Thomas & Another* (LCA 01/2017) [2017] NALCMD 37 (27 December 2017)

**Coram:** USIKU, J  
**Heard on:** 21 July 2017  
**Order Delivered on:** 8 December 2017  
**Reasons released on:** 27 December 2017

**Flynote:** Labour law – unfair dismissal – Court finding that the dismissal was procedurally and substantively unfair.

**Summary:** The Respondent was employed by the Appellant – Respondent was charged with misconduct – He requested postponement of disciplinary hearing to allow him to be represented by a trade union representative – Appellant agreeing to the request for postponement on condition that any penalty imposed on the respondent shall be back-dated to the date on which disciplinary hearing was initially scheduled – Respondent declined to agree to the condition – Appellant proceeding with disciplinary hearing in absence of the respondent – Court holding that the dismissal of the respondent was procedurally and substantively unfair.

---

### ORDER

---

1. The Appellant's non-compliance with Rule 17(25) is condoned.
2. The lapsed appeal is reinstated.
3. The appeal is dismissed.
4. The arbitrator's award is amended to read as follows:
  - 4.1 the dismissal of Johannes Thomas is procedurally and substantively unfair;
  - 4.2 Coca-Cola Namibia Bottling Company (Pty) Limited is ordered to reinstate Johannes Thomas forthwith, and to pay him an amount equal to the monthly remuneration he would have received, from the date of his dismissal to the date of his reinstatement, had he not been unfairly dismissed.
5. There is no order as to costs.

---

## JUDGMENT

---

USIKU, J

### Introduction

[1] On the 8<sup>th</sup> of December 2017, I gave the order as set out above and undertook to release my reasons therefor on the 27<sup>th</sup> of December 2017. Appearing hereunder are the reasons for the above order.

[2] This is an appeal against the whole of the arbitration award made by an arbitrator under s 86(15) of the Labour Act, 2007<sup>1</sup> (“the Act”), on the 8<sup>th</sup> of December 2016.

[3] The arbitrator found that the Appellant had dismissed the First Respondent, procedurally and substantively unfairly, and ordered that the Appellant reinstates the First Respondent by paying him what he would have earned from the date of the dismissal to the date of reinstatement.

[4] The Appellant, aggrieved by the award aforesaid, noted the present appeal, principally on the ground that the award is not justified by the evidence presented before the arbitrator.

[5] The First Respondent opposed the appeal. The Second Respondent (“the arbitrator”) did not oppose the appeal. I shall therefore make reference to the First Respondent as “the Respondent” herein except where the context indicates otherwise.

### Background

[6] The Respondent was employed by the Appellant, as a full time shop steward. On or about the 8<sup>th</sup> of December 2014 he was suspended by the Appellant from his employment pending an investigation into alleged misconduct cases.

---

<sup>1</sup> Act No. 11 of 2007.

[7] The suspension of the Respondent was a sequel to an NBC crew that visited the premises of the Appellant on the 8<sup>th</sup> of December 2014. It appears that the NBC crew's interest in the Appellant-company was aroused by alleged inconsistencies in the Appellant's Affirmative Action Report, as by then reports had appeared in newspapers alleging that the Appellant: -

- a) showed no interest in training and developing the local work-force;
- b) abused and discriminated against its Namibian employees; and
- c) engaged in racist-practices as Namibians are not given opportunity to occupy senior managerial positions, even though they have necessary qualifications.

[8] It was further alleged that, as a result of the concerns expressed by employees of the Appellant-company, the Employment Equity Commission had decided to put the Appellant's compliance certificate on hold.

[9] On the 15<sup>th</sup> of December 2014 the Respondent was served with a notice for disciplinary hearing scheduled for the 17<sup>th</sup> of December 2014.

[10] On the 16<sup>th</sup> of December 2014 a trade union representative, acting for the Respondent contacted the Appellant, requesting the latter to postpone the disciplinary hearing to the 19<sup>th</sup> of January 2015 on account that the offices of the trade union closed on the 15<sup>th</sup> of December 2014 for December Holidays. Due to the holidays in question, the union representative chosen to represent the Respondent at the disciplinary hearing would not be available during December 2014.

[11] The Appellant agreed to the requested postponement on condition that if any penalty is imposed on the Respondent in January 2015, such penalty shall have retroactive effect as from the 17<sup>th</sup> of December 2014 (the date of the originally scheduled disciplinary hearing). The Respondent declined to accept the condition attached by the Appellant to the granting of the postponement. Then the Appellant

decided to go ahead with the disciplinary hearing on the 17<sup>th</sup> of December 2014, in the absence of the Respondent.

[12] On the 17<sup>th</sup> of December 2014 the Respondent received a text message informing him that the hearing was postponed to the 18<sup>th</sup> of December 2014. The Respondent did not attend the 18 December 2014 proceedings on account that his union representative would not be available in December 2014.

[13] On the 24<sup>th</sup> of December 2014 the Respondent received a text message to the effect that he was dismissed from employment pursuant to the disciplinary hearing conducted on 18 December 2014.

[14] The Respondent appealed internally, and his dismissal was upheld on 9 February 2015.

[15] On the 10<sup>th</sup> of June 2015 the Respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner for conciliation and arbitration.

#### Arbitration Hearing

[16] Following unsuccessful conciliation meeting, the arbitration hearing was conducted in Windhoek on 6 September 2016 and finalized on 16 November 2016.

[17] The arbitration was called upon to decide whether:

- a) The dismissal was substantively and procedurally fair, and
- b) In the event of the dismissal being found to be unfair, what the appropriate relief should be.

[18] One witness gave evidence during the arbitration proceedings, on behalf of the Appellant, namely Mr Jacobus Johannes Van Zyl, the Human Resources Manager of the Appellant. On the part of the Respondent, only the Respondent testified at the arbitration proceedings.

[19] The arbitrator found it common cause between the parties that the Respondent was entitled to representation by a union official at his disciplinary hearing. The Respondent had secured representation of a union official, however the union official could only represent the Respondent as from the 19<sup>th</sup> of January 2015. The Appellant could only grant postponement of the disciplinary hearing on condition that the Respondent agreed that, if any penalty is imposed on him in January 2015, such penalty shall be back-dated to the 17<sup>th</sup> of December 2014. The Respondent refused to accept such condition and the Appellant decided to proceed with the disciplinary hearing in the absence of the Respondent.

[20] The arbitrator further found that the request for the postponement of the disciplinary hearing by the Respondent was fair and reasonable in the circumstances, as it was based on a valid reason. The arbitrator held that there was no evidence presented before him that the Appellant would suffer prejudice if the postponement was granted without any condition. On the contrary, it was apparent that if the postponement was refused and the disciplinary hearing proceeded in the absence of the union representative, potential prejudice would befall the Respondent in that he would be deprived of union-representation to which he is entitled. The arbitrator found that the Respondent's refusal to accept the condition attached to the granting of the postponement was justified and reasonable, and that the decision by the Appellant to push ahead with the disciplinary hearing in the absence of the Respondent was unfair in the circumstances. As such, the arbitrator found the dismissal of the Respondent was procedurally unfair.

[21] In regard to the subsequent internal appeal, the arbitration held that the appeal did not cure the procedural defects inherent in the initial disciplinary hearing. At the internal appeal, the Respondent was not afforded opportunity to meet the charges against him, hear evidence against him and challenge such evidence. The arbitrator observed that the appeal was supposed to replace the initial disciplinary hearing which technically was not a "hearing".

[22] Insofar as substantive fairness is concerned, the arbitrator found that the Appellant did not prove any of the misconduct with which the Respondent was charged.

[23] According to the Appellant, the Respondent was charged with the following misconduct, namely:-

a) deliberate breach of company safety and security rules: in that the Respondent provided members of the media access to the Appellant's premises;

b) insubordination: in that the Respondent acted contrary to established grievance and dispute resolution procedures and failed to return an Affirmative Action Report as instructed by Senior Management on the 17<sup>th</sup> of November 2014;

c) breach of a confidentiality clause in employment agreement: in that the Respondent undermined business operations of the Appellant by not following grievance resolution processes and made unilateral statements to media.

[24] The arbitrator found that the evidence adduced before arbitration did not prove any of the aforesaid misconduct and the arbitrator found that the dismissal of the Respondent by the Appellant was without valid and fair reason and therefore, was substantively unfair.

#### Prosecution of the appeal

[25] The arbitrator delivered his award on the 8<sup>th</sup> of December 2016. The award was served on the Appellant on the 9<sup>th</sup> of December 2016. The Appellant noted the present appeal on the 5<sup>th</sup> of January 2017. The appeal was only prosecuted on 31 May 2017. In terms of Rule 17(25) of the Rules of the Labour Court, an appeal must be prosecuted within a period of ninety days from the date it was noted. If the appeal has not been prosecuted within ninety days from the noting thereof, the appeal lapses. An appeal is prosecuted when application is made to the Registrar for the allocation of a hearing date.<sup>2</sup>

[26] In view of the foregoing, it can be deduced that the ninety days period expired on or about the 6<sup>th</sup> of April 2017.

---

<sup>2</sup> Rule 17(17) of the Labour Court Rules.

[27] As a consequence of the failure by the Appellant to prosecute the appeal within the required period, the Appellant has applied for condonation for the late prosecution of the appeal, and for the extension of the time within which the appeal is to be prosecuted as well as for the reinstatement of the appeal. The application for condonation is unopposed.

[28] From the explanation provided for the failure to prosecute the appeal within the prescribed time-limit, I am of the view that the condonation prayed for should be granted and the appeal be reinstated.

#### The grounds for appeal

[29] As stated earlier, the grounds of appeal advanced by the appellant can be condensed to a statement that the arbitrator's award is not justified by the evidence presented before the arbitrator.

#### Legal principles

[30] Section 33 of the Act sets out two requirements for a valid dismissal, namely:-

- a) there must have been a valid and fair reason for the dismissal and,
- b) the employer must have followed fair procedure before s/he dismissed the employee.

[31] Thus, for a dismissal to qualify as being in accordance with the law, the dismissal must be both substantively fair and must have been preceded by a fair procedure.<sup>3</sup> Even where the employer succeeds to prove that he had a valid and fair reason to dismiss an employee, the dismissal would be unfair if the employer fails to prove that it had followed a fair procedure.<sup>4</sup>

---

<sup>3</sup> *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (Unreported) (LCA11/2016) delivered on 7 June 2017 at para [24].

<sup>4</sup> *Ibid* para [24].



[32] A valid reason for terminating employment includes<sup>5</sup>:-

a) Proof of the misconduct

The employer must prove on the balance of probabilities that the employee is guilty of misconduct. Mere suspicion of guilt is not enough.

b) Reasonableness of the rule

It must be proved that the dismissed employee had broken a valid and reasonable rule.

c) Knowledge of the rule

The employer must show that the employee was or should reasonably be expected to have been aware of the rule.

d) Consistency

It is unfair to dismiss an employee for a misconduct which the employer had habitually condoned in the past.

[33] The requirements for a fair procedure include<sup>6</sup>:

a) the right to be informed of the nature of the misconduct contravened;

b) the right to be given adequate notice prior to the disciplinary hearing;

c) the right to some form of representation;

d) the right to call witnesses and to cross-examine witnesses who have testified against the employee;

e) the right to be informed of the penalty imposed;

f) the right of appeal.

### Analysis

[34] In this matter the arbitrator found that the Appellant did not follow a fair procedure when he dismissed the Respondent, and that the Appellant did not have a valid reason to dismiss the Respondent. I now turn to consider the question whether

---

<sup>5</sup> *Namibia Diamond Corporation (Pty) Ltd v Coetzee* (Unreported) (LCA30/2015) Reasons Released on 6 December 2016, para [18].

<sup>6</sup> *Ibid*, para [17].

on the evidence placed before the arbitrator his finding that the Appellant did not follow a fair procedure and did not have a valid reason to dismiss the Respondent, is a finding which no reasonable decision-maker could have reached.

#### Procedural fairness

[35] As was stated before, the disciplinary hearing which preceded the dismissal took place in the absence of the Respondent. The Respondent had expressed his wish to be represented by a union representative during the disciplinary hearing; and had requested a postponement for that purpose. The Appellant had attached certain conditions, as already pointed out, to the granting of the postponement. The arbitrator found that the request for the postponement by the Respondent was fair and reasonable and was based on valid reasons. The arbitrator further found that the Respondent's refusal to accept the condition attached to the request for postponement was reasonable and justifiable in the circumstances. The arbitrator therefore found that the Appellant's insistence that the disciplinary proceedings take place in the absence of the Respondent, in the circumstances, rendered the ensuing dismissal procedurally unfair.

[36] I cannot fault the decision of the arbitrator as stated above. Such a decision is unassailable and accords with the evidence placed before the arbitrator. The arbitrator's finding that the dismissal of the Respondent was procedurally unfair, must accordingly stand.

#### Substantive fairness

[37] The arbitrator also found that the Appellant did not prove that the Respondent committed the misconduct with which he was charged. As stated earlier the Respondent faced the following charges:

a) deliberate breach of company safety and security rules: it was alleged here that the Respondent:

i) provided media access and/or accompanied media onto company premises with the intention that media will conduct filming on the premises, and

ii) actively participated in an interview with the media on company premises without authorization.

b) insubordination: it was alleged that the Respondent failed:

i) to follow grievance and/or dispute resolution procedure, despite being reminded to do so, and

ii) failed to return an Affirmative Action Report as instructed by Senior Management on the 17<sup>th</sup> of November 2014;

c) breach of a confidentiality clause in employment agreement: it was alleged that the Respondent:-

i) undermined business operations of the company by not following available dispute and/or grievance resolution processes and involved the media.

ii) made unilateral statements to the media regarding company matters;

iii) addressed the media on company matters in the presence of members of the public, which statements may be unfounded or untrue.

[38] As regards the first charge of misconduct, Mr Jacobus Johannes Van Zyl (Mr Van Zyl) who gave evidence for the Appellant, at the arbitration proceedings, stated that the security requirements are that:-

a) "No entry without an access permit" and

b) "Visitors to be accompanied by a staff member at all times."

[39] Under cross-examination, Mr Van Zyl acknowledged that the Respondent did not issue the members of the media with access permits<sup>7</sup> and that the Respondent did not accompany the media when they got entry to the company premises.<sup>8</sup> That being the case, there was no basis in alleging that the Respondent "provided access and/or accompanied the media onto the company premises."

---

<sup>7</sup> Page 77 of Record of Proceedings.

<sup>8</sup> Page 79 of Record of Proceedings.

[40] In addition, when the video and audio records was heard at the arbitration hearing, Mr Van Zyl could not identify the voice of the respondent making statements to the media.<sup>9</sup> In view of that, there was no evidence before the arbitration that the Respondent “actively participated in an interview with the media on company premises without authorization.”

[41] Insofar as the second misconduct charge is concerned, there was no evidence presented before the arbitrator as which senior manager gave instruction to the Respondent. When Mr Van Zyl was cross-examined on this aspect, he could not pin-point from the minutes of a meeting held on 17 November 2014, where such instruction was mentioned.<sup>10</sup> Furthermore, there was no proof that the Respondent had in his possession, the affirmative action report in question. From his evidence, Mr Van Zyl testified that he had provided training to staff-members, including the Respondent, on the processes to be followed in respect of expressing grievances.<sup>11</sup> The provision of training is not the same thing as giving instructions, for the purposes of a charge of insubordination.

[42] As regards the third misconduct charge, Mr Van Zyl gave evidence at arbitration that the Respondent’s employment agreement prohibits him from divulging trade secrets or confidential information of the company.<sup>12</sup> However, at no stage did Mr Van Zyl spell out the trade secrets or confidential information that the Respondent divulged to the media during the alleged interview. Indeed when cross-examined on this aspect Mr van Zyl could not state the nature of trade secrets or confidential information that was revealed by the Respondent.<sup>13</sup> Moreover, Mr Van Zyl could not identify the voice of the Respondent in the audio and video clip that was heard at arbitration.<sup>14</sup>

[43] For the above reasons I cannot fault the finding of the arbitrator that the Appellant did not prove that the Respondent committed the misconduct in question.

---

<sup>9</sup> Page 80-81 of Record of Proceedings.

<sup>10</sup> Page 67 of Record of Proceedings.

<sup>11</sup> Pages 42-44 of Record of Proceedings.

<sup>12</sup> Page 37 of Record of Proceedings.

<sup>13</sup> Page 81 and 86 of Record of Proceedings.

<sup>14</sup> Pages 80-81 of Record of Proceedings.

The arbitrator's finding that the dismissal of the Respondent was substantively unfair, must accordingly stand.

[44] I am satisfied that the reinstatement is a just remedy in the circumstances. I will slightly amend, here below, the arbitrator's award to fit the present situation.

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

1. The Appellant's non-compliance with Rule 17(25) is condoned.
2. The lapsed appeal is reinstated.
3. The appeal is dismissed.
4. The arbitrator's award is amended to read as follows:
  - 4.1 the dismissal of Johannes Thomas is procedurally and substantively unfair;
  - 4.2 Coca-Cola Namibia Bottling Company (Pty) Limited is ordered to reinstate Johannes Thomas forthwith, and to pay him an amount equal to the monthly remuneration he would have received, from the date of his dismissal to the date of his reinstatement, had he not been unfairly dismissed.
5. There is no order as to costs.

-----  
B Usiku  
Judge

APPEARANCES

APPELLANT

Mr H Kruger  
Of Kruger Van Vuuren & Co.,  
Windhoek

FIRST RESPONDENT:

Ms NN Shilongo  
Of Sisa Namandje and Co. Inc.,  
Windhoek