REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 1/2015

In the matter between:

NEDBANK NAMIBIA LIMITED **APPELLANT**

and

DUNCAN M ARENDORF **FIRST RESPONDENT**
B M SHINGUADJA **SECOND RESPONDENT**
THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Nedbank Namibia Limited v Arendorf* (LCA 1/2015) [2017] NALCMD 9 (16 March 2017)

Coram: PARKER AJ
Heard: **27 January 2017**
Delivered: **16 March 2017**

Flynote: Labour law – Arbitration tribunal – Appeal from – Appeal restricted to questions of law only in terms of Labour Act 11 of 2007, s 89(1)*(a)* – What constitutes – Whether decision of arbitrator was one which a reasonable arbitrator could make taking into account all the evidence, leaving nothing out – In our labour law the process of resolution of an industrial dispute involving a complaint of unfair

dismissal goes along a statutory continuum starting with charging an employee with misconduct and every point on the continuum is relevant and important, including any record of proceedings at every point of the continuum – In our labour law at arbitration proceedings evidence which is relevant includes evidence of the findings of internal first-instance and appeal disciplinary hearings which appear on the records of those hearings and which form part of the record before the arbitrator – Arbitrator not entitled to disregard such findings of law and fact without justification – Where arbitrator rejects such findings and there is no other evidence adduced at the arbitration proceedings contradicting those findings the arbitrator has acted arbitrarily and his decision would not be a decision that a reasonable arbitrator could make – Such decision is arbitrary or perverse and stands to be upset by the court. Principle in *Mashale Paulus Malapane v The State* Case No. CA 58/2001 (HC); and *Kamaya & Others v Kuiseb Fish Products* 1996 NR 123; and *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) applied.

Summary: Labour law – Arbitration tribunal – Appeal from – Appeal restricted to questions of law only in terms of Labour Act 11 of 2007, s 89(1)*(a)* – What constitutes – Whether decision of arbitrator was one which a reasonable arbitrator could make taking into account all the evidence, leaving nothing out – In our labour law at arbitration proceedings evidence which is relevant includes evidence of the findings of any internal first-instance and appeal disciplinary hearings which appear on the record of those hearings and which form part of the record before the arbitrator – Arbitrator not entitled to disregard such findings of law and fact without justification – Appellant was employer of first respondent – Internal first-instance disciplinary hearing found first respondent guilty of some of the charges of misconduct preferred against him and recommended first respondent's dismissal – Internal appeal hearing confirmed findings and decisions of the internal first-instance hearing – First respondent lodged a complaint of unfair dismissal with Labour Commissioner – Conciliation meeting failed to resolve the dispute and dispute was accordingly referred to arbitration – Arbitrator disregarded decisions of first-instance and appeal hearings – Significantly, first respondent failed to testify under oath during the arbitration and three appellant witnesses testified – No evidence was led during the arbitration proceedings to contradict findings of the internal hearings and testimony of the three witnesses – Court found that arbitrator was wrong when he

disregarded findings of fact and law by the internal disciplinary hearings when there was no evidence justifying such conduct – Court concluded that by deciding the way he did when there was no evidence to contradict the findings of the internal disciplinary hearings and testimony of the three appellant witnesses the arbitrator acted arbitrarily or perversely – Court concluded accordingly that arbitrator came to a conclusion which no reasonable arbitrator could reach – Consequently, court upheld the appeal.

ORDER

(a) The appeal is upheld.

(b) The award by the arbitrator in Case No. CRWK#792-14 is set aside.

(c) The dismissal of the first respondent by appellant is accordingly confirmed.

(d) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] We have before us an appeal in terms of s 89(1)*(a)* of the Labour Act No. 11 of 2007 ('the Act') against an award made by second respondent ('the arbitrator') in Case No. CRWK#792-14 (dated 24 December 2014).

[2] I do not propose to garnish this judgment with background information and information on matters that led appellant (former employer) to charge first respondent (former employee) with misconduct based on a number of charges and the latter's dismissal after first-instance disciplinary hearing and a subsequent

internal appeal hearing. All the information are set out fully in the record of proceedings of those hearings. I only wish to underline the fact that appellant and first respondent were legally represented at all material times during those internal hearings and during the arbitration proceedings.

[3] I accept submission by Mr Soni SC, counsel for first respondent, that the grounds of appeal should be based on questions of law, within the meaning of s 89(1)*(a)* of the Act; and as counsel himself accepted, the court is entitled to determine whether a particular ground raises a question of law (see *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) at 571E). The result is that I also accept submission by Mr Heathcote SC (with him Ms Campbell), counsel for appellant, that even if a ground put forth by the appellant is overbroad that does not mean that the grounds which answer to the requirement of question of law may not be considered. In any case, Mr Heathcote submitted, the appellant has raised questions of law.

[4] The first respondent raised also the point that 'an appeal against the entire arbitration award is impermissible in law', but in his submission Mr Soni accepted – and rightly so – the principle that such formulation should not prevent the court from considering those grounds which raise questions of law. (*Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC), para 65) This is the manner in which I determine the appeal.

[5] It is important to note at the outset that in determining the present appeal, with respect, I take no respectable look at the renditions by first respondent on politics of inequality, the political economy of the economically small and weak and the economically big and powerful, and judicial innovativeness. They are not, as Mr Heathcote submitted, statements of grounds for opposing the appeal in terms of rule 17(16)*(b)* of the Labour Court Rules. Thus, in respect of the grounds of opposing the appeal, too, I shall consider only those that are grounds properly so called for opposing the appeal.

[6] As a general rule questions of law are those questions determined by authoritative legal principles: the court seeks to ascertain the rule of law applicable.

(*President of Republic of Namibia and Others v Vlasiu* 1996 NR 36 at 44F-45A) And when it is said that a party may appeal on a question of law, for the purposes of appeal, *Rumingo and Others v Van Wyk* 1997 NR 102 (HC) at 105E tells us that the appellant must show that the impugned decision 'could not reasonably have been reached'. In *Janse van Rensburg* the Supreme Court developed the *Rumingo* principle in this way in paras 43-47:

'[43] I now turn to the language of s 89(1)*(a)*. First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr Janse van Rensburg enter Runway 11 without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record 21 and may not be the subject of an appeal to the Labour Court.

'[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperiled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in Rumingo endorsed, and it echoes the approach adopted by appellate courts in many different jurisdictions.

'[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.

'[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an

overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)*(a)* and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1)*(a)* as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

'[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.'

[7] I accept first respondent's contention that an appeal court 'would be reluctant to upset the factual findings of the arbitrator'. That is so; so long as, I hold, the totality of the evidence accounts for such findings; and in that event, every piece of evidence must be considered, leaving nothing out. See *Mashale Paulus Malapane v The State* Case No. CA 58/2001 (unreported), para 4. The principle was enunciated in criminal proceedings; but I can see no good reason why the principle should not apply with equal force to civil proceedings, including labour proceedings. In arbitration under 'Part C' of the Labour Act what should be taken into account by the arbitrator in the arbitral proceedings, as I have explained previously, are the findings made by chairpersons of internal first-level and appeal disciplinary hearings, which form part of the record before the arbitrator, and the evidence adduced during the arbitral proceedings.

[8] The foregoing leads me to the treatment of a key ground put forth by the appellant; and I consider that first for obvious reasons which will become apparent in

due course. It is that the arbitrator erred in law in not having regard to the findings made by the chairperson of the internal first-instance hearing and the chairperson of the internal appeal hearing.

[9] With the greatest deference to Mr Soni, the proposition of law in the South African case (*County Fair Foods (Pty) Ltd v CCMA*; counsel gave no citation) which counsel put forth has very little application in Namibia. The system of a 'Part C' arbitration in terms of Chapter 8 of our Labour Act is not a duplication of the system of arbitration under South Africa's Labour Relations Act No. 66 of 1995, Chapter VII.

[10] In *Kamanya & Others v Kuiseb Fish Products* 1996 NR 123 at 13, the Labour Court held that it is a requirement of procedural fairness under our law that an employer who conducts an internal disciplinary hearing should keep a proper record of the proceedings. If such record is otiose and plays no role in subsequent arbitration proceedings that may follow when the dispute remains unresolved after conciliation in terms of the Labour Act, why would it matter whether chairpersons of internal disciplinary hearings keep proper records of the proceedings they chair, or they keep no records at all.

[11] It is important to state this crucial point: The process of resolution of an industrial dispute of right under the Labour Act involving a complaint of unfair dismissal, as is in the instant case, goes along a statutory continuum, starting with charging an employee with misconduct, through first-instance disciplinary hearing (if the employee denies the charge), followed by an internal appeal hearing to which the employee is entitled, a referral to arbitration if a party is unhappy with the outcome, where the arbitrator must attempt to resolve the dispute through conciliation before beginning arbitration, up to proceedings in the Labour Court where review of, and appeals from, an arbitration award are determined. Every point on the statutory continuum is important; and so, the record of the proceedings of the internal first-instance disciplinary hearing and the internal appeal hearing are relevant for the purposes of conciliation and arbitration. They are disciplinary proceedings at the workplace and they are necessary: they are required by law; and their records of proceedings are relevant at arbitration: they are also required by law.

[12] As I have shown, an arbitrator cannot, as a matter of law and common sense, ignore the findings recorded in the records of proceedings of the internal disciplinary hearings (ie the first-instance and appeal hearings) when especially the law demands that proper record of proceedings be kept there; and, *a fortiori*, it is at the internal hearings – not at the conciliation or arbitration proceedings – that an employer gets the opportunity to establish that he or she had a valid and fair reason to dismiss the errant employee and that he or she followed a fair procedure in doing so in satisfaction of the requirements of s 33(1) of the Labour Act. I do not think the employer can go to the arbitration with new, sanitized grounds to explain the dismissal. If it is accepted that he or she cannot do that, I fail to see on what basis can anyone argue that an arbitrator can, without justification and without more, disregard the findings of fact and law by the chairpersons of the internal first-instance and appeal hearings, just because, as Mr Soni submitted, the arbitral hearing is a hearing *de novo*. In my view the law required of the arbitrator not to disregard the findings of the internal hearings: after all, they formed part of the record before the arbitrator, as I have said more than once, and they contained evidence as to whether the employer complied with the requirements of s 33(1) of the Labour Act.

[13] This court is entitled to decide whether the conclusion which the arbitrator reached is one that a reasonable arbitrator could have reached on the record; that it is not perverse on the record. See *Janse van Rensburg*, para 43. Indeed, the facts of the instant proceeding make the case that an arbitrator should not disregard the findings of the internal hearings even stronger: the respondent declined to testify under oath in the arbitration proceedings; and so, what was before the arbitrator was only the evidence of the appellant's three witnesses and the record of proceedings of the internal disciplinary hearings. There was no evidence placed before the arbitrator to confute those internal hearings which would entitle the arbitrator to upset the findings and conclusions and recommendations of the internal hearings; not forgetting that those records of proceedings formed part of the record before the arbitrator.

[14] I have carefully pored over the record of the proceedings of the first-instance internal hearing and I cannot fault the findings made by the chairperson there. I have also carefully considered the findings and conclusions of the chairperson of the

internal appeal hearing. Her decision there runs into 14 pages on full-scap, A-4 sheets. I should say; the decision reads like a judgment of any of our superior courts in terms of content and language, in terms of the weighing of the evidence, and in terms of the application of the law, and in terms of the findings on the facts and the law. I should observe in parentheses: not that that is surprising; the chairperson is an Advocate.

[15] The chairperson of the appeal hearing agreed with the findings and conclusions of the first-instance hearing. And I do not find any item which I can say the chairperson of the appeal hearing misdirected herself on when she found that the chairperson of the first-instance internal hearing did not misdirect himself on the facts; neither do I find that she misdirected herself in that regard.

[16] I hold that the arbitrator was wrong when he disregarded the findings of fact and law by the internal hearings. And by deciding the way he did when there was no evidence to contradict those findings and by upsetting the decisions of the internal hearings the arbitrator acted wrongly. I am aware that so long as an arbitrator has applied his mind properly, the courts will be reluctant to upset his or her award, even if he or she has come to a conclusion which differs significantly from that which the court might have reached (*Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176; *Clerk v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77-78). The Supreme Court enunciated a like principle in *Janse van Rensburg*, para 45. The conclusions I have reached have taken these principles into consideration.

[17] In all this; the chief thing which the arbitrator had no entitlement to arbitrarily overlook is this: first respondent, who had legal representation at all material times, through his legal representative, informed the internal first-instance hearing that 'each and every allegation … is not disputed'. As I understand it, it is recorded in the record of proceedings that first respondent, with legal representation at his disposal at the material time, did not challenge the charges – without any qualification. I append, hereunder, a verbatim extract from the record (p 12) which was the plea of first respondent to the charges, taken by his legal representative upon first respondent's instructions:

'ACCUSED REPRESENTATIVE: And uh it is also my instructions that uh each and every allegation (indistinct) uh what the Initiator says is not disputed. We refer to the Nedbank for each and every one of those allegations (indistinct).

CHAIRPERSON: Alright thank you very much.'

[18] This is the plea which the appellant took; and the evidence of the words is that they mean what they say, and they do not say what the arbitrator states in the award:

'***NB:*** At this stage, the applicant said he was not contesting the charges themselves but he was **challenging and querying the witness re-performances of his reconciliations** coupled to that he was insisting on an **independent third party forensic audit**.'

[Underlining reproduced]

The words uttered by a legal practitioner of considerable standing on instructions meant an unequivocal and unambiguous plea of guilty of the charges brought against appellant, his client. The arbitrator acted perversely when he overlooked the plea and editorialized it to suit his own purposes.

[19] In any case, the record indicates that before the hearing and during the hearing first respondent was invited to inspect the data which Smit (appellant's witness) used to determine whether it correlated with appellant's data or not. First respondent said that he was not interested in doing so. Furthermore, first respondent conceded that there was no indication that someone changed dates and/or documents and/or amounts, and further that there was no evidence that someone wanted to frame him.

[20] By disregarding the findings of fact and law by the internal hearings, when there was no evidence to justify his conclusion, the arbitrator did not properly apply his mind to the reference before him. He came to a conclusion which the evidence could not sustain (see *Rumingo*), a conclusion which could not have been reached on the record by a reasonable arbitrator (see *Janse van Rensburg*).

[21] For the foregoing considerations and conclusions, I hold that the conclusion which the arbitrator reached is one which no reasonable arbitrator could reach on the record; it is perverse (see *Janse van Rensburg*, para 43). This holding is dispositive of the appeal; and so, it serves no purpose to consider the rest of the grounds. There is no rule of law prescribing the number of successful grounds which would entitle the court to find for an appellant.

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

(a) The appeal is upheld.

(b) The award by the arbitrator in Case No. CRWK#792-14 is set aside.

(c) The dismissal of the first respondent by appellant is accordingly confirmed.

(d) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	R Heathcote SC (with him Y Campbell) Instructed by Köpplinger-Boltman Legal Practitioners, Windhoek
FIRST RESPONDENT:	V Soni SC Instructed by Murorua & Associates, Windhoek