REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2018/00008

In the matter between:

IMMANUEL EDWARD REUTER **1ST APPELLANT**

DEON HOEBEB **2ND APPELLANT**

and

NAMIBIA BREWERIES LTD **RESPONDENT**

Neutral citation: *Reuter v Namibia Breweries Ltd* (HC-MD-LAB-APP-AAA-2018/00008) [2018] NAHCMD 20 (08 August 2018)

Coram: **PARKER, AJ**

Heard: **20 July 2018**

Delivered: **08 August 2018**

Fly note: Labour law – Arbitrator's award – Appeal against – The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal − The Labour Court will not interfere with arbitration tribunal's findings where no

irregularity or misdirections are proved or apparent on the record – Where there is no misdirection on fact by the arbitrator the presumption is that the arbitrator's conclusion is correct and the Labour Court will only reverse the arbitrator's conclusion on fact if convinced that the conclusion is wrong – Court held that bias forms part of procedural fairness and is established where the suspicion of bias is one which might reasonably be entertained and there is possibility of bias where none is to be expected – Where the arbitrator has exercised his or her discretion on judicial grounds and for sound reason, without bias or without having applied the wrong principle Labour Court ought to be slow to interfere and substitute its own decision – Onus on appellant to satisfy the Labour Court that the arbitrator's decision is wrong and decision ought to have gone the other way – The court held that the purpose of a written warning in the employment situation is to encourage the employee in question to behave and mend his or her ways as employee and not to misconduct himself or herself in a manner that evinces the intention of the employee not to be bound by the employment contract.

Summary: Labour law – Arbitrator's award – Appeal against – The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal the Labour Court will not interfere with arbitration tribunal's findings where no irregularity or misdirections are proved or apparent on the record – Where there is no misdirection on fact by the arbitrator the presumption is that the arbitrator's conclusion is correct and the Labour Court will only reverse the arbitrator's conclusion on fact if convinced that the conclusion is wrong – Court finding that appellants have failed to satisfy the court that the decision of arbitrator in finding that appellants wilfully ignored operational requirements was wrong – Court found appellants have failed to satisfy court that arbitrator's decision is wrong and that decision ought to have gone the other way – Consequently appeal of each appellant dismissed.

ORDER

1. The appeal by each of the appellants is dismissed.

2. There is no order as to costs.

JUDGMENT

PARKER, AJ

[1] The appellants (i.e. 'appellant 1' – Mr Reuter; and 'appellant 2' – Mr Hoebeb) have brought the present appeal from an arbitration award in case number CRWK 511 – 116, wherein the following orders were made:

(1) Applicants' (i.e. appellants') dismissal was for a valid reason and in accordance with fair procedure.
(2) The respondent's (i.e. respondent's in these proceedings, too) decision dismissing applicants is hereby upheld.
(3) There shall be no order as to costs.

[2] The respondent opposes the appeal. Mr Podelwitz represents the appellants, and Mr Dicks the respondent. I commend both counsel for their industry in submitting comprehensive heads of argument.

[3] In considering this appeal, I shall treat seriatim, as I should, the grounds of appeal which appellants rely on. Meanwhile, it is important to set out some material uncontradicted facts that are relevant to the determination of this appeal.

[4] Appellant 1 and appellant 2 were employed by the respondent as supervisors in the Packaging Department, Supply Division, at the respondent's facility at Iscor Street, Northern Industrial Area, Windhoek, until they were dismissed in March 2016 after disciplinary proceedings initiated against them, that is, internal first-instance hearing and appeal hearing.

[5] It is important to note that the respondent is a Namibian brewer, bottler and distributor of beer. When bottling beer for distribution, the respondent does not always use fresh new bottles from some glass factory but cleans bottles that have been used. It needs hardly saying that it is critically important for the respondent to ensure that consumers get clean bottles to drink from. It is not far-fetched to say that if respondents' clientele′ who consume beer brewed and distributed by the respondent do not get clean bottles of beer, the respondent will, not could, be ruined.

[6] A comprehensive quality control at various levels is, therefore, an important feature in the respondent's operations. Moreover, the duties performed by the appellants, as supervisors, collectively formed a critical part of the respondent's quality control mechanisms. It is worth noting that in terms of their written job descriptions, the appellants' duties included completing supervisory check sheets and taking immediate action if parameters are not within the required specification. The supervisory check sheets that must be completed every three hours over a twelve-hour shift, are the respondent's 'first line of defence'. Of course the supervisory check sheets are not the only components of the quality controls for the Packaging Department. There are, for example, various other persons involved such as operators and senior operators. They form part of the comprehensive, multi-layered quality control system. The fact of multi-layered quality control system was not lost on Mr Podewiltz.

[7] With these facts in my mind's eye, I now proceed to consider the grounds of appeal. In that regard, the following important principles are borne in mind:

(a) The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall…

> 'The notice also serves to inform the respondent of the case it is required to meet …. Finally, it crystallises the disputes and determines the parameters within which the Court of Appeal will have to decide the case (*S v Kakololo* 2004 NR 7 (HC), per Maritz J).'

(b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal; and the Labour Court will not interfere with the arbitrator's court's findings of credibility and factual findings where no irregularity or misdirections are proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).)

(c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on fact if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion it must uphold the trier of fact.' (See *Nathinge v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014.)

(d) Principles justifying interference by an appellate Court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision' (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-1).) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have been the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555)

The Labour Court applied *Paweni and Another* and *Powell v Stretham* in *Edgars Stores Namibia Ltd v Laurika Olivier and Labour Commissioner* Case No. LCA 67/2009.

Ground 1

[8] I accept Mr Dick's argument that ground 1 is not a ground. It does not inform the respondent what case it has to meet (see *Kakololo*). If anything, this ground, as Mr Dicks correctly submitted, concerns the method of the arbitral hearing, that is a defect in the arbitration proceedings within the meaning of s 89 (4) and (5) of the Labour Act 11 of 2007; and so, it was proper to bring it on review. See *Ellen Louw v The Chairperson, District Labour Court and J Snyman & Partners (Namibia)* (Pty) Ltd Case No. LCA 27/1998 where the court relied on Van Winsen, *The Civil Practice of the Supreme Court of South Africa*. Accordingly, ground 1 is rejected.

Ground 2

[9] Ground 2 stands in the same boat as ground 1. And I wish to add that I did not find anywhere in the arbitration award where the arbitrator on his own volition treated 'the applicable legal principles in respect of the failure by a party to testify'. The arbitrator merely accepted respondent employer's counsel's submission on the principle which is sound and cannot be faulted. In any case, in the absence of the appellants' testifying, the arbitrator considered the evidence of appellants' witnesses, Keith Jafta and Boas Makaya, and concluded, after weighing their evidence, that they were not credible witnesses. I have no reason to fault the arbitrator's finding of credibility (see *S v Slinger*). It follows that ground 2 should also be rejected, and it is rejected.

Ground 3

[10] Appellants have failed totally to persuade the court in what manner the arbitrator misdirected himself on the facts, and what irregularities he committed in the weighing of

the evidence. That being the case I should assume that the arbitrator's conclusions are correct unless the appellant has persuaded me that they are wrong, but they have not. It follows that I should accept the conclusions of the arbitrator (see *Nathinge v Hamukanda*).

[11] Indeed, this is not a case where the arbitrator reached conclusions without weighing properly the evidence placed before him. To the credit of the arbitrator, I should say, he gave considerable thought to the evidence, and it has not been established that he did not. Nowhere in his award does the arbitrator assign duties to the appellants when they were not responsible for those duties. The evidence is overwhelming and unchallenged that in terms of their written job descriptions, appellants' duties included completing supervisory check sheets and taking immediate action, if parameters are not within the required specification (see paras 5 and 6 above). Appellant 1 and 2 were on duty on 4 February 2016 – appellant 2 on day shift and appellant 1 on night shift. None of them reported any concerns regarding any parameters, including caustic conductivity, not being within the required specification.

[12] Appellant Reuter does not deny it was his duty; except that, according to him, he was too busy to carry out his duty about completing the critical check sheets. For appellant Hoebeb, he did not see the need to complete the check sheets, but does not deny it was part of his contractual duties at the respondent's workplace.

[13] I hold that appellants have failed to satisfy this court that the decision of the arbitrator is wrong in finding that appellants wilfully ignored operational requirements, i.e. charge 1.

Ground 4

[14] The chapeau of ground 4 is, with respect, meaningless. In the law of arbitration, failure to carry out the reference means the arbitrator failed to deal with the dispute that was referred to him. No one can seriously argue that the arbitrator did not carry out the

reference. The award he made speaks for itself; and so the content of the chapeau is rejected as turning on nothing.

Ground 4 (a)

[15] In virtue of what I have said in pars 10 to 13 above, I reject ground 4 (a). The arbitrator's weighing of the evidence and conclusion thereon cannot be faulted. No misdirection and irregularities were committed by the arbitrator there anent (*see S. v Slinger*).

Ground 4 (b)

[16] I accept Mr Podelwitz's submission that the facts used to establish charge 1 were the same facts used in proving charge 2; thus, offending the rule against the duplicity of charges and conviction. Mr Dicks graciously conceded the point. Be that as it may, on the authority of *Namibia Tourism Board v Kauapirura – Angula* 2009 (1) NR 185, I hold that this fact alone does not necessarily impact upon the fairness of the findings in the disciplinary hearings or at the arbitration. The misconduct under either charge 1 or charge 2 is very serious, considering that the offence under charge 1 or charge 2 would have had health implications, if respondent had not taken prompt remedial measures at considerable cost. It follows that this fact alone cannot take the appellant's case anywhere.

Ground 4 (c)

[17] It cannot be within the power of the court or indeed an arbitration tribunal *a quo* to prescribe to every employer the composition of its internal disciplinary hearings. In the absence of proved lack of *audi alteram partem* and proved qualifying bias in relation to the charged employee, the court or tribunal cannot interfere. In the instant case, appellants charge the disciplinary committees with bias and in their ground of appeal they say: 'The arbitrator failed to consider the allegation of bias'. The appellant's

ground is that the arbitrator misconstrued his task and failed to deal with the substantial merits of the dispute presented – whatever that means – because 'the arbitrator failed to consider the allegation of bias'. To go back to the reference on this issue, this is what both appellants referred to the Labour Commissioner:

'12. The same "team" consisting of the same chairperson, Victor de Wees as initiator, Greyling Koopman as chairperson, Bjorn Ebrecht as witness and Hayley Sauer as HR practitioner attended to two separate but related cases involving the applicant and another employee called Mr. Deon Hoebeb. These hearings were conducted at the same time and for almost the same allegations and incident. In the circumstances the "team" did not act objectively and hence returned the same verdict in respect of both the applicant and the other employee.'

[18] The appellants are palpably wrong in their contention. The fact that 'bias' is not mentioned does not mean that it was not considered (see *R v Dhlumayo* 1948 (2) SA 977 (A)). Indeed the arbitrator was alive to the reference as contained in the referral form. It is crystal clear that the arbitrator considered procedural fairness (see para 92 of the award); and bias forms part of the determination of the issue of procedural fairness. In any case, in our law, disqualifying bias is established where –

> '…the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker,…'

[BTR Industries South Africa (Pty) Ltd and Others v Metals and Allied Workers Union and Another 1992 (3) SA 673 (A) at 694, per Hoexter JA]

[19] In the instant case, I do not find it established that the suspicion of bias on the part of appellant is 'one which might reasonably be entertained' on the facts of the case. Accordingly, ground 4 (c), too, is rejected. I now proceed to consider ground 4 (d).

<u>Ground 4 (d)</u>

[20] I stand by what I have said under para [18], namely, that the appellants are palpably wrong in their contention. The fact that 'bias' is not mentioned does not mean that it was not considered (see *R v Dhlumayo* 1948 (2) SA 977 (A)). Indeed the arbitrator was alive to the reference as contained in the referral form. This ground is based on para 13 of the reference;

> '13. The respondent is applying selective discipline and is inconsistent in its approach.'

[21] The arbitrator did not find that respondent applied 'selective discipline and is inconsistent in its approach', and I do not find that the decision of the arbitrator is wrong on this aspect. The arbitrator, after weighing all the evidence in a judicious and just manner, concluded that the appellant's dismissal was for a valid reason and in accordance with fair procedure, and confirmed the punishment of dismissal. I have no good reason to interfere with the arbitrator's decision. I cannot do any better than to repeat the words of Van Wyk AJ in *Standard Bank v Gaseb* 2017 (1) NR 121 on giving different punishment to employees guilty of similar offences. This principle was also confirmed by Van Niekerk J in *Southern Sun Hotels Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (CC)) with these words:

> 'Similarity of circumstances is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.'

[22] On the facts of this case, the appellant had a valid reason for dismissing appellants and not dismissing the other employees who were found guilty of the same charges. Those other employees (Petrus and Derick) were remorseful. They admitted their misconduct. Appellants did not. John Grogan in his work, *Dismissal, Discrimination and Unfair Labour Practices*, 2nd edn, p190 has treated the

consequences of such dissimilarity of attitude by errant employees found guilty of similar charges in these felicitous words:

'Employees accused of misconduct are thus faced with a stark choice: they can either deny the commission of the offence in the hope that the employer will not be able to prove it; or they can 'confess' and apologise in the hope that their remorse will count in their favour when mitigation is considered. The Labour Appeal Court has made it plain that the employee who chooses the former option, and fails, cannot expect sympathy. The court observed in this regard:

> ''It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrong-doing is the first step towards rehabilitation. In this absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great." '

[*Dismissal, Discrimination and Unfair Labour Practices*, 2nd edn, p190]

[23] The remorse of Petrus and Derick counted in their favour. The appellants did not, and their defence failed. They cannot expect sympathy. I do not find the decision of the employer to be wrong; and the arbitrator also upheld the decision of the employer. The ground of 'applying selective discipline' and inconsistent disciplinary measures must fail, and it fails. Consequently, ground 4 (d) is rejected. I proceed to consider ground 5.

Ground 5

[24] This ground concerns appellant Reuter. With the greatest defence to Mr Podewiltz, I fail to see how this ground advances the case of appellant Reuter. I agree

that appellant Reuter was not charged with dishonesty. But nothing prevents a disciplinary hearing committee to conclude that on the facts placed before them with regard to a particular charged offence, an element of dishonesty can be found to exist and then take such finding into account as an aggravating factor when considering an appropriate sanction in respect of the charged and proved offence. I should say appellant Reuter is not fair to the arbitrator. The arbitrator dealt fully with this issue in para 91 of the award. The arbitrator was alive to the fact that Reuter was not charged with the 'misconduct of dishonest'. The arbitrator stated, 'the issue of dishonest was raised by the initiator Mr. De Wee as an aggravating factor *and not as a charge*. (Italicized for obvious emphasis) From what I have said about the charge and the element of dishonesty and the fact that the arbitrator treated the issue fully and properly, I do not find that the 'arbitrator erred in law and misdirected himself' on the issue. The arbitrator's conclusion is correct. Consequently, I cannot reverse the conclusion without offending the principles in *Nathinge v Hamukanda; and Paweni and Another*. It follows that I should reject ground 5, which I do. I now proceed to consider the last ground, i.e. ground 6.

Ground 6

[25] This ground concerns appellant Hoebeb. An employer is entitled to take into account a previous final warning in an instant offence so long as the previous offence for which the final warning was given and the instant offence are reasonably comparable in terms of seriousness of the offences and the nature of the previous offence and the instant offence. To illustrate point; if employee X was given a final written warning for being late at work for 15 minutes, and the lateness did not markedly affect the operations of the employer, the lateness cannot justly and reasonably attract a dismissal; and so if in an instant case, X is found guilty of the misconduct of leaving the workplace earlier than the closing time without prejudice to the employer's operations, which on all account is not a dismissible offence, the employer can take into account the final written warning in considering an appropriate sanction. However the fact of the final written warning cannot render the second offence dismissible, although both offences are akin. On the other hand, if X was given a final written warning in

respect of a dismissible offence, and X in the instant offence commits a similar, though not the same, dismissible offence, the fact of the final written warning should weigh heavily in favour of dismissing X for the second offence.

[26] Take this example. Employee Y was found guilty of theft in the workplace and both the first-instance disciplinary hearing committee and the appeal disciplinary healing committee found Y guilty and recommended Y's dismissal, but for good reason the employer decided to give Y a final written warning. If, in a subsequent offence, Y committed a dismissible offence, e.g. beating his supervisor, Madam Bee Bee, for her giving Y some lawful instructions, the employer is entitled to take into account the final written warning and decide to dismiss Y, albeit theft and beating a supervisor are unrelated offences. They are both dismissible offences. In the instant matter, a final written warning stood against Hoebeb for dereliction of duty, failure to follow company procedures, leaving workstation without permission. In my view, those offences and the instant offence (charge 1) are dismissible offences, considering the cruciality of Hoebeb's duties in the respondent's operations. As Koopman (Chairperson of the disciplinary hearing committee opined, even this (the final written warning) could not move him to comply with what we require of him. His behaviour evinced an intention to be no longer bound by his employment contract.

[27] One should not confuse the giving of final written warnings in the employment relationship with the ordering of suspended sentences in criminal proceedings. The purpose of a written warning in the employment situation is to encourage the employee in question to behave and mend his or her ways as employee and not to misconduct himself or herself in a manner that evinces the intention of the employee not to be bound by the employment contract. Doubtless, it cannot be reasonably expected of an employer to retain an employee by allowing him or her to accumulate a series of final written warnings just because each of the final written warnings was for a different offence.

[28] In all this, we should not lose sight of the principle that –

> ‘It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness’

[Country Fair Foods (Pty) Ltd v Commission for Reconciliation, Mediation and Arbitration and Others (1999) 20 ILT 1707 (CAC)]

[29] I do not find any reason that establishes unreasonableness and unfairness on the part of the respondent in dismissing the appellants. In addition, I do not find that the arbitrator misdirected himself in upholding the sanction imposed by the internal disciplinary hearing committees. That being, the case, I think I should not interfere with the sanction imposed and the arbitrator’s decision to uphold it. In the result, ground 6 is rejected.

[30] Based on all these reasons and having rejected all the grounds as having no merit, the appeals of each appellant fail; whereupon, I make the following order:

1. The appeal by each of the appellants is dismissed.

2. There is no order as to costs.

C. Parker

ACTING JUDGE

APPEARANCES:

For 1st and 2nd Appellants:	Mr O Podewiltz Of Murorua Kurtz Kasper Incorporated WINDHOEK
For Responent:	Adv. G Dicks, Instructed by: Engling, Stritter & Partners WINDHOEK