



IN THE LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: LCA 53/2017

In the matter between:

NOVANAM LIMITED

APPELLANT

and

JAFET ISAAK

RESPONDENT

Neutral citation: *Novanam Ltd v Isaak* (LCA 53/2017) [2018] NAHCMD 27 (19 October 2018)

CORAM: USIKU, J

Heard: 23 March 2018 and 08 June 2018

Delivered: 19 October 2018

Flynote: Labour Law – Dismissal – Fairness of – S33(4) of the Labour Act 11 of 2007 containing presumption of unfair dismissal – Employer bearing onus to prove fairness of dismissal – In present case, employer leading no evidence during arbitration proceedings – Court finding that arbitrator acted reasonably when he found dismissal unfair.

Summary: The Appellant noted an appeal against an arbitration award in favour of Respondent. The court found that the arbitrator acted fairly when he found the dismissal to be unfair. Appeal dismissed.

ORDER

In the result, it is ordered that:

1. The appeal is dismissed;
2. The arbitrator's award is amended to read as follows:
 - 'a) The Respondent reinstates the Applicant in the position he held before his dismissal;
 - b) The Respondent pays the Applicant remuneration in the amount equal to the monthly remuneration, which the Applicant would have received had he not been unfairly dismissed, calculated from the date of his dismissal to the date of his reinstatement;
 - c) There is no order as to costs.'

JUDGMENT

USIKU, J:

Introduction

[1] This is an appeal against the whole of the arbitration award made by an arbitrator under s 86(5) of the Labour Act, 11 of 2007 on 25 July 2017.

[2] The Appellant is Novanam Limited, a company registered as such in accordance with Namibian Company laws, represented in these proceedings by Mr. Philander. The Respondent is Jafet Isaak, a former employee of the Appellant, represented here by Ms. Nambinga.

Background

[3] The Respondent was an employee of the Appellant for about twenty years at the date of his dismissal. During or about the year 2016, the Appellant conducted certain renovation works at its premises in Luderitz, to meet certain international standards applicable to its operations. At the renovation area, upright partitions made of plastic sheets, were installed to screen off the renovation site.

[4] It is common cause that on or about October 2016, the Respondent, together with other employees, cut off pieces of plastic sheet, at the construction site. This action resulted in his suspension and he was charged with a) theft of company property, b) attempting to remove goods belonging to his employer without permission, c) serious damage to company property and d) willful disregard of employer's internal rules. The Respondent appeared before a disciplinary committee during 27 October 2016 - 03 November 2016; was found guilty of misconduct and dismissed with immediate effect. The Respondent without success appealed against the result of the disciplinary enquiry.

[5] He then took the matter to the Labour Commissioner for arbitration on grounds of unfair dismissal and unfair labour practice, through his NAFAU (Namibian Food and Allied Workers Union) representative, on 16 May 2017. At the arbitration proceedings, the Appellant was represented by Thabo Moncho ('Mr. Moncho'), its industrial relations manager and the Respondent was represented by Johannes Thomas ('Mr. Thomas'), branch organizer of Namibia Food and Allied Workers Union.

[6] At the arbitration proceedings, the arbitrator found in favour of the Respondent and ordered that:

- a) the Respondent be re-instated by the Appellant in the position he held before he was dismissed;
- b) the Appellant pays the Respondent the remuneration he should have received from the date of his dismissal until the date of re-instatement;
- c) the Appellant activates the terms and conditions of employment as if there was no dismissal;
- d) the Appellant issues a final written warning valid for twelve months commencing on the date of re-instatement, i.e 10th August 2017; and
- e) the Respondent be trained on supervision and leadership.

[7] Unhappy with this arbitral award, the Appellant lodged an appeal to the Labour Court.

The Arbitration hearing

[8] The Appellant's representative at the arbitration proceedings, did not call witnesses or adduce evidence. He merely made an opening statement narrating what he read as transpired at the disciplinary enquiry. Himself not having been part of those proceedings, he mentioned that the Appellant's evidence or position is encapsulated in the record, prepared during the disciplinary hearing.

[9] The Respondent at the arbitration proceedings testified under oath. He testified that he found other employees cutting pieces of plastic sheets. The Respondent proceeded to cut a piece of plastic sheet and put such piece in his locker on the company premises. Prior to his cutting the plastic sheet, he testified that he had sought and obtained permission from his supervisor, Mr. Snyman, to do so. He put the plastic sheet in his locker to obtain a gate pass from Mr. Snyman the following working day, once Mr. Snyman had inspected the piece of plastic sheet he cut off. The following working day, before he could seek the gate- pass in question, he was suspended and was later charged and was dismissed after disciplinary proceedings were conducted.

[10] The Respondent also testified that he did not have the intention to steal or to act wrongfully. According to him, when he requested permission from Mr. Snyman, Mr. Snyman agreed that the Respondent could have the plastic sheet once the contractors who were engaged to do the renovation works, had completed their work. The Respondent contended that he had acted in accordance with the agreement he had with Mr. Snyman.

[11] The arbitrator, considering the evidence before him, found that:

- a) the Respondent was denied the right to an interpreter and that this rendered the procedure adopted at the disciplinary hearing, unfair;
- b) the Respondent did not have the intention to steal the plastic sheet, as he wished to show same to the Manager and get a gate pass from the said Manager; and
- c) the action of the Respondent did not warrant a dismissal, because of:
 - i) lack of intent;
 - ii) length of service, and
 - iii) clean record of service.

Analysis

[12] At the present, this court is required to determine, as question of law, whether on the material placed before the arbitrator during the arbitration proceedings, there was no evidence which could reasonably have supported the findings made by the arbitrator and/or whether on a proper evaluation of the evidence placed before the arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings.¹

[13] Section 33 (4) of the Labour Act, 11 of 2007 provides that: '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.'

[14] At the arbitration proceedings, the arbitrator correctly found that, the Respondent merely had to establish that he was employed by the Appellant and was dismissed. The burden then immediately shifts to the employer, the Appellant, to show that the dismissal was not unfair.²

[15] This onus is normally discharged, by adducing evidence showing that the dismissal in question was both substantively and procedurally fair. As was stated earlier the Appellant did not lead evidence at arbitration proceedings, but only made an opening statement. That, therefore, left the evidence given by the Respondent uncontroverted.

[16] The Appellant is now required to establish that the finding of the arbitrator was one that no reasonable arbitrator could have made, on the evidence presented during arbitration proceedings.

¹ *House and Home (Trading Division of Shoprite (Pty) Ltd) v Majiedt and Another* 2013(3) NR 333 (LC) at para. 6.

² *House and Home (Trading Division of Shoprite (Pty) Ltd) v Majiedt and Another* 2013(3) NR 333 (LC) at para. 33.

[17] In the present matter, there was no evidence presented before the arbitrator to indicate that the Respondent had intention to act wrongfully or unlawfully. To put it differently, no evidence was led by the Appellant during arbitration proceedings to prove that when the Respondent cut-off a piece of plastic sheeting, and put it in his locker, he did so with an intention to steal it from his employer. Nor was there evidence that his intention was to act wrongfully in any manner.

[18] The evidence by the Respondent that he acted in accordance with their agreement with Mr. Snyman, to cut off the piece once the contractors had finished and that he only did so once the contractors had finished, (or so he believed), was not contradicted by evidence to the contrary.

[19] Furthermore, there was no evidence before the arbitrator that the Respondent, when he did what he did, did not act in good faith. All indications on the evidence on record point in the direction that the Respondent honestly believed he had permission to remove the plastic piece, and did so remove it under the belief that the contractors had finished, and all he could do was to wait for the gate-pass from the supervisor. There is no evidence that his conduct was incompatible with an honest belief he claims to have had.

[20] In the absence of evidence contradicting the version of the Respondent, it cannot be said that the Appellant has rebutted the presumption of unfair dismissal created under s 33(4) of the Labour Act, 11 of 2007. For the above reason, I cannot fault the finding of the arbitrator to the extent that he found that the dismissal of the Respondent was unfair.

[21] However, the arbitrator went beyond that, he further found that:

a) the dismissal of the Respondent was unfair on account that the Respondent was not afforded an interpreter during disciplinary proceedings. This finding is not

based on the evidence that was presented before the arbitrator. On the record there is no indication that the Respondent required the services of an interpreter during disciplinary proceedings. Such a finding cannot therefore stand;

b) in his award, the arbitrator ordered that the Appellant issues the Respondent with a written warning valid for twelve months, commencing from the date of reinstatement. On the evidence, there is nothing showing that the Respondent acted with wrongful intention or that he did not act bona fide. That being the case, there is no basis for exacting punishment where there was no wrongful intention. There is no evidential basis on which a penalty of a written warning should be exacted on the Respondent;

c) in his award the arbitrator directed that the Appellant trains the Respondent on supervision and leadership. There was no evidence adduced before the arbitrator to justify such an award, nor did the arbitrator justify his reasons why he felt it necessary to make such training requirement as part of the award.

[22] On the abovementioned issues which are not supported by evidence, the award of the arbitrator needs to be amended.

[23] In conclusion, I find that on the evidence placed before the arbitrator, the Appellant did not rebut the presumption of unfair dismissal created by s 33(4) of the Act and therefore the dismissal of the Respondent was an unfair dismissal.

[24] I am satisfied that, reinstatement is a just remedy in the circumstances of this case. The appeal therefore stands to be dismissed. In view of the findings I have made above, the arbitrator's award stands to be slightly amended.

Conclusions

[25] In the result, it is ordered that:

- a) The appeal is dismissed;
- b) The arbitrator's award is amended to read as follows:
 - 'i) The Respondent reinstates the Applicant in the position he held before his dismissal;
 - ii) The Respondent pays the Applicant remuneration in the amount equal to the monthly remuneration, which the Applicant would have received had he not been unfairly dismissed, calculated from the date of his dismissal to the date of his reinstatement;
 - iii) There is no order as to costs.'

B Usiku
Judge

APPEARANCES

APPELLANT: R Philander
Of ENSAfrica, Windhoek

RESPONDENT: S Nambinga
Of AngulaCo. Inc., Windhoek