



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00045

In the matter between:

**HOWARD HOUSE MANUFACTURING (PTY) LTD**

**APPELLANT**

and

**JEREMY SWARTZ**

**RESPONDENT**

**Neutral citation:** *Howard House Manufacturing (Pty) Ltd v Swartz* (HC-MD-LAB-APP-AAA-2018/00045) [2019] NALCMD 16 (5 June 2019)

**Coram:** ANGULA DJP

**Heard:** 25 January 2019

**Delivered:** 5 June 2019

**Flynote:** Labour Law – Appeal against an arbitration award – Appeal unopposed – Failure to conduct a disciplinary hearing – Appellant contends that since the respondent had already been issued with a final written warning there was no need to conduct a disciplinary hearing – Court held: Appellant should have been afforded an opportunity to be heard before the decision to dismiss him – The appellant ought to have complied with the *audi alteram partem* rule: the principle of natural justice – Appeal dismissed.

**Summary:** The appellant who was the respondent at the arbitration proceedings brought an appeal before this court, to have the arbitrator's award set aside – The appeal is unopposed.

The appellant contends that the arbitrator erred in finding that the respondent's failure to follow lawful instructions and his breach of duty of responsibility towards the appellant, which as a result appellant suffered damages, is not a fair and valid reason for his dismissal. Furthermore, it is contended that since the respondent had already been issued with a final written warning, there was no need to conduct a disciplinary hearing. It was further the appellant's case that the compensation awarded to the respondent by the arbitrator is unreasonable and unfair and therefore this court should interfere with the amount of compensation awarded to the respondent.

*Court held:* It is trite that even when the termination of the agreement of employment is due to poor work performance, the termination must take place in accordance with a fair procedure and for a valid reason.

*Held further:* A party should be afforded an opportunity to be heard before a decision was taken to dismiss him or her. Therefore the appellant ought to have complied with the *audi alteram partem* rule: the principle of natural justice. There is no doubt that the appellant failed to comply with the provisions of section 33 of the Labour Act, 2007 which provides that an employer must not dismiss an employee without a valid reason and without following a fair procedure. As a result, the arbitrator was correct in her finding that the respondent's employment was terminated without a valid reason and without following a fair procedure.

*Held further:* Section 86(15) of the Labour Act 2007, confers an arbitrator with a discretion to make an award in the amount for compensation as he or she considers fair, reasonable and equitable, having regard to facts and circumstance of the particular case. An appeal court can only interfere with the exercise of an arbitrator's discretion if it finds that there has been a misdirection or irregularity in the exercise of the discretion. However, if the discretion has been exercised properly and for a sound reason the appeal court ought to be slow to interfere and substitute the trial

court decision with its own. Court arrived at the conclusion that there is no basis for this court to interfere with the amount of compensation made by the arbitrator in favour of the respondent.

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### ORDER

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1. The appeal is dismissed.
2. The matter is removed from the roll and considered finalized.

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### JUDGMENT

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ANGULA DJP:

#### Introduction

[1] This is an appeal against an arbitral award made by an arbitrator in the Office of the Labour Commissioner. The Appeal is unopposed.

#### Factual background

[2] On 22 August 2017 the appellant and the respondent entered into a written agreement of employment in terms whereof the respondent was employed as a Dispatch Manager. The agreement was for fixed-term commencing on 23 August 2017 and terminating on 23 August 2018 unless earlier terminated 'for misconduct, incapacity, poor work performance or for any other reason justified in law'.

[3] As a result of successive stock loss, the appellant asked the respondent to leave the employment on 2 November 2017. According to the respondent, he was not furnished with a notice of termination of his employment. Thereafter he lodged a complaint of unfair dismissal with the Office of the Labour Commissioner on 9

November 2017. He claimed that he be paid the amount he would have received until 23 August 2018 had his contract not been terminated. He further claimed damages in the sum of N\$144 160.03, which he claimed he had suffered as a result of being 'accused by Howard House Manufacturing of stealing in-stock value'.

#### Proceedings before the Arbitrator

[4] In justifying the dismissal of the respondent, it was contented on behalf of the appellant that there had been major stock losses under the supervision of the respondent. It was alleged that the respondent was negligent and did not take sufficient control when the stock was loaded on the trucks as a result and the respondent was issued with a final warning. When the stock losses continued, the appellant asked the respondent to leave. The appellant maintained that because the respondent had already been issued with a final written warning, there was no need to conduct a disciplinary hearing.

[5] The respondent testified that he was accused of participating in the theft of the stock; and that it was further alleged that his vehicle was spotted at the appellant's warehouse after hours. He complained that he was not given training to operate a warehouse. He denied the accusation. He testified that there was never a proper stock hand over when he took over from the previous stock controller.

[6] At the end of the proceedings, the arbitrator concluded that the appellant had failed to prove on a balance of probabilities that the respondent's dismissal was substantively and procedurally fair. The arbitrator then ordered that the appellant must compensate the respondent by paying him a sum of N\$3 461 which is equal to one week notice; and in addition, the appellant must pay the respondent 9 month's salary for loss of income being the sum of N\$135 000 (N\$15 000 x 9 months).

#### *Proceedings before this court*

[7] Mr Boonzaier appeared on behalf of the appellant. As mentioned earlier, the respondent did not oppose the appeal.

[8] It is submitted on behalf of the appellant that the arbitrator erred in finding that the respondent's failure to follow lawful instructions and his breach of duty of responsibility towards the appellant, which resulted in damages suffered by the appellant, is not a fair and valid reason for his dismissal. In my view, the submission loses sight of the legal principle that even with the termination of the agreement of employment on the ground of poor work performance, the termination must take place in accordance with a fair procedure and for a valid reason.

[9] It is common cause that the appellant did not conduct a disciplinary hearing at which the respondent was charged with poor performance and afforded an opportunity to be heard before the decision to dismiss him was taken. In other words, the appellant ought to have complied with the *audi alteram partem* rule: the principle of natural justice. The agreement of employment between the parties stipulates that the employment may be terminated, 'subject to compliance with the applicable procedures'. The 'applicable procedures' can only be in terms of the provisions of the Labour Act, No. 11 of 2007 which regulates labour relationships. There is no doubt that the appellant failed to comply with the provisions of section 33 of the Labour Act, 2007 which provides that an employer must not dismiss an employee without a valid reason and without following a fair procedure. This court is accordingly satisfied that the arbitrator was correct in her finding that the respondent's employment was terminated without a valid reason and without following a fair procedure. The appellant's ground of appeal in that regard stands to be dismissed. I proceed to consider the ground of appeal relating to the awarding of the quantum.

[10] The appellant complains that the compensation awarded to the respondent is unreasonable and unfair and accordingly this court should interfere with the amount of compensation awarded to the respondent. It is urged upon the court to take into account the fact that the appellant suffered damages in the amount of N\$280 000 due to the negligence of the respondent and that the respondent left the premises whilst the stock was being loaded on the trucks.

[11] Section 86(15) of the Labour Act 2007, vests an arbitrator with a discretion to make an award in the amount for compensation as he or she considers fair, reasonable and equitable, having regard to facts and circumstance of the particular

case. An appeal court can only interfere with the exercise of discretion if it finds that there has been a misdirection or irregularity in the exercise of the discretion. However, if the discretion has been exercised properly and for a sound reason the appeal court ought to be slow to interfere and substitute the trial court decision with its own<sup>1</sup>.

[12] The arbitrator in this matter found that: No proper investigations were carried out by the respondent to ascertain the alleged stock losses that they (were) linked to the applicant. Instead they opted for a short cut, which is to dismiss the employee without valid and fair reasons. I understand this finding to mean that, it was not established as a fact that the alleged loss of stock was attributable to the conduct of the respondent. I have no basis to consider the arbitrator's foregoing finding to be vitiated by an irregularity or a misdirection. Furthermore, no basis to interfere with the arbitrator's said finding was pointed out to me by counsel for the appellant in his heads of argument or during the hearing.

[13] I have therefore arrived at the conclusion that there is no basis for this court to interfere with the amount of compensation made by the arbitrator in favour of the respondent. The appeal stands to be dismissed.

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

1. The appeal is dismissed.
2. The matter is removed from the roll and considered finalized.

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H Angula  
Deputy-Judge President

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<sup>1</sup> *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others* Case No. LCA 47/2007 (unreported) at para 14.

## APPEARANCES:

APPELLANT:

M BOONZAIER

Instructed by Du Pisani Legal Practitioners, Windhoek

RESPONDENT:

No appearance