REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00063

In the matter between:

FISHERIES OBSERVER AGENCY **APPELLANT**

and

WILLIE STANISLAUS EVERSON **FIRST RESPONDENT**

EMMA NIKANOR **SECOND RESPONDENT**

Neutral citation: *Fisheries Observer Agency v Everson* (HC-MD-LAB-APP-AAA-2018/00063) [2019] NALCMD 20 (7 August 2019)

Coram: ANGULA DJP

Heard: **3 May 2019**

Delivered: **7 August 2019**

Flynote: Labour Appeal – Unfair dismissal – Section 33(1) – Arbitration award – Questions of Law – Section 89(1)*(a)* – Compensation based on hearsay evidence – Compensation in the purview of the employer – Employee required to lead evidence to prove loss of earning – Compensation can be arithmetically calculated between the employee and employer and not by the court.

Summary: This is an appeal against an arbitral award – The first respondent, Mr Everson was employed by the appellant as Head: Human Resources – In the

absence of the substantive Chief Executive Officer ('the CEO'), he was appointed as Acting CEO – During his acting period a year-end function was held – He could however not attend the year-end function as he had to attend a funeral out of town the following day – On Friday afternoon he went to the premises of the company which was rendering the catering service for the function and requested that he be given his portion of the food and drinks – He also took his colleague's portion of food and drinks who could also not attend the year-end function as he was on duty – He signed a receipt in respect of the goods he received – Thereafter he telephonically informed a member of the planning committee that he had taken the said items.

He was subsequently charged and found guilty of acting in bad faith; not preserving the interest of the appellant; and breach of trust. He appealed but his appeal was dismissed by the appellant's board. He then filed a complaint with the Office of the Labour Commission alleging that he had been unfairly dismissed. The arbitrator found that the process followed by the appellant to dismiss the first respondent was fair but the reasons for dismissing him were invalid and the dismissal was thus substantively unfair.

Held, that the appellant had no written rule or policy in place which the first respondent had breached.

Held, further, that based on the evidence adduced by the appellant, the arbitrator correctly found that it had failed to discharge the *onus* upon it to prove that the reason for its dismissal of the first respondent was substantively fair.

Held, further, that the arbitrator's finding that the reasons for dismissing the first respondent could not be said to be perverse that no reasonable arbitrator considering the same facts would have come to a different conclusion.

Held, further, that the arbitrator's order to order compensation, which includes benefits in the absence of evidence led by the first respondent relating to the amount of loss of such benefits, such order was perverse and the court was entitled to interfere by amending the order so as to exclude the payment of benefits.

ORDER

1. The appeal is dismissed.

2. The arbitrator's order insofar as compensation is concerned is varied to read:

   'The appellant is ordered to pay first respondent his monthly salary that he would have earned from the date of his dismissal to the date of this Court Order.'

3. There is no order as to costs.

4. The matter is removed from the roll and considered finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an appeal against an arbitral award of the second respondent handed down on 16 November 2018, in favour of the first respondent against the appellant.

Parties

[2] The appellant is Fisheries Observer Agency, a statutory body duly incorporated in terms of the provisions of the Marine Resources Act, 27 of 2000. In this judgment, I will refer to the Agency as 'the appellant'.

[3] The first respondent is Willie Stanislaus Everson, an adult male person. The arbitral award which is the subject matter of this appeal was made in his favour. I will refer to him as 'the first respondent' throughout this judgment.

[4] The second respondent is Emma Nikanor, an adult female. She is an arbitrator, employed as such by the Office of the Labour Commissioner. She presided over the arbitration proceedings and subsequently made the arbitral award which is the subject of this appeal.

Factual background

[5] The first respondent was employed by the appellant as the head of the human resources department for the period October 2005 to August 2017, when he was dismissed. During 2016, he was designated as Acting Chief Executive Officer ('CEO') for the period as the substantive CEO was on leave. It was during his tenure as acting CEO that the appellant hosted a year-end function for the employees. The Friday afternoon preceding Saturday, the day on which the year-end function was due to take place, the first respondent approached the catering company that was entrusted with the rendering of the catering service for the year-end function. He then requested the manager of the catering company to give him his and another colleague's portions of the food and drinks that were to be catered at the year-end function as they would not be able to attend the function the following day. The manager acceded to the first respondent's request. The first respondent then took a bottle of Amarula liqueur, one six-pack of Hunters Gold, two packets of braai meat and two packets of salad. He signed the receipt form in respect of the items he received.

[6] Upon his return from leave, first respondent was served with a charge sheet by the appellant. He was charged with three counts. It is not necessary to set out the nature of the charges, save to say that at the end of the disciplinary hearing he was found guilty in respect of an alternative count, being – 'not acting in good faith, not preserving the interests of the employer and breach of trust'. He was dismissed with effect from 5 August 2017. He filed an internal appeal but the appeal was dismissed by the board of directors of the appellant.

[7] Aggrieved at the outcome of the disciplinary hearing and the result of his subsequent appeal, the first respondent filed a complaint with the Office of the Labour Commissioner claiming that he had been unfairly dismissed. The arbitrator

found in his favour, holding that the dismissal was substantively unfair, in that there was no valid reason justifying his dismissal. Accordingly, the arbitrator ordered that first respondent be re-instated and compensated for his loss including benefits.

[8] It is against the foresaid arbitrator's order that this appeal is directed.

Proceedings before the arbitrator

Appellant's version

Testimony of the substantive CEO: Mr Kruger

[9] Appellant's first witness at the arbitration proceedings was Mr Erwin C F Kruger, the substantive Acting CEO of the appellant. He was on leave when the year-end function took place. The first respondent was acting in his position. It was his evidence that another staff member of the appellant, Ms Scholtz, informed him that first respondent 'bought' food and drinks before the year-end function. According to him, he was handed a 'till slip' signed by first respondent for receipt of food and drinking items. He further testified that first respondent was not authorized to take the food and drinking items before the food and drinks for function were bought.

[10] It was Mr Kruger's further testimony that another employee had been dismissed a year before for doing the same thing that the first respondent did, but that employee was ordered to be re-instated after arbitration proceedings.

[11] Mr Kruger further testified that the year-end function was planned by a committee and the members of that committee were the ones authorized to collect items from the catering company; and that the items were not intended for personal consumption. Furthermore, that according to the company financial policy, the company's money may not be utilised for personal use. When the arbitrator asked him to refer to a specific provision in the company's policy, he was not able to do so and responded that the policy was not explicit in that regard.

[12] As regards to whether the first respondent could not have approached the board for permission to take the items, he pointed out that the function of the board was to give guidelines and not for the day-to-day running of the company.

Testimony of the chairperson of the disciplinary committee: Mr Ikanga

[13] He testified that after finding first respondent is guilty on the one of the charges, he recommended dismissal as the trust relationship between the appellant and first respondent had broken down. He elaborated further that he found it wrong for the acting CEO to collect the food and drinking items without the board's authorization. According to him, first respondent's act of buying food and drinking items for his personal use with company money was made in bad faith and was not in the interest of the company.

[14] I should interpose here to observe that I consider it improper for the chairperson of the internal disciplinary hearing to have to testify at the arbitration hearing. In my view, his evidence amounts to self-corroboration. It has no probative value. It would have sufficed to simply have handed in evidence, the records of the internal disciplinary hearing. The record speaks for itself.

<u>The first respondent's version</u>

Testimony of first respondent

[15] It was first respondent's evidence that he was employed by the appellant from 3 October 2005 to 5 August 2016, when he was dismissed. He testified that he was designated as the acting CEO for the period that the substantive acting CEO was on leave. According to him, the Friday morning preceding the year end function, they held a staff meeting. At that meeting, some staff members enquired whether they could get their portions of the food and drinks before they departed for their work stations at sea. He informed them that they could get the food, but not the alcohol. It needs mentioning in this connection that most of the employees' work-stations are at sea.

[16] It was further first respondent's testimony that, on that Friday afternoon he visited the premises of the catering company that was contracted to render the catering services for the year-end function. He sought and was granted permission by the manager of the catering company to take some food and drinking items for himself as he had to attend a funeral which was out of town, the following Saturday. He also took food and drinks for his colleague, one Mr Noabeb who could likewise not attend the year-end function as he had to be on stand-by duty at sea. He further testified that, he signed a receipt form for the items he took. He also testified that, after receipt of the items, he called Mr Nekwaya, a member of the planning committee and informed him of the items he had taken as well as the fact that he had signed a receipt for those items.

[17] He testified further that the former CEO of the appellant, one Mr Hafeni Mungungu, used to arrange for his portion of the year-end food and drinks to be delivered to his house as he never attended the year-end functions. He testified that such arrangement happened on numerous occasions in the past. According to him, as an acting CEO he approached the manager of the catering company and was granted permission to take the goods and did not need the permission of the board in this regard as suggested by Mr Ikanga.

Testimony of Ms Angula: Personal Assistant to the CEO

[18] She was instructed by her boss, Mr Kruger, to arrange the year-end function. She then went to the catering company and placed the order for the food and drinks. The total cost was about N$13 000 but the amount budgeted was N$15 000. She testified further that that there was no company policy in place that states that employees may not take food before or after the year-end function. According to her, in previous years, employees used to take leftovers, if there was food left after the function. She testified further that she had no knowledge of an occasion in the past on which employees went to the caterers and requested from them their share of the food intended for the year-end function.

Testimony of Ms Bampton: Manager at the catering company

[19] She testified that the first respondent approached her office and assured her that he was in charge and had the authority to request the food and drinks. She gave him permission to take the items requested. It was her evidence that in the six years that she had been working for that specific catering company, she had never seen an Acting CEO ask for food items before the function.

Testimony of Mr Gawaseb: a Senior Fisheries Observer

[20] He testified that he had been employed by the appellant for fifteen years. It was his evidence that during previous year-end functions there had been incidences when food for the year-end function were taken before, during and after the year-end function. He confirmed the first respondent's evidence that Mr Hafeni Mungungu, the former CEO of the appellant, used to ask employees to take drinks and food and delivered them to his house for his consumption. He further testified that there were times when the appellant would give N$100 to each Observer who was at sea and could thus not attend the year-end function, as a token of the year-end function. He also testified that there was an employee of the appellant who had been dismissed for taking items meant for the year-end function, but that he was subsequently re-instated.

Testimony of Mr Nekwaya: Control Fisheries Observer

[21] He testified and confirmed that the first respondent called him on Friday preceding the day of the year-end function and informed him that he was at the catering company premises and that everything was in order. The first respondent testified further that he instructed Mr Nekwaya that, the following day when they collected the goods they must check the goods before taking delivery. He testified further that the first respondent told him that he had taken his share of the food and drinks at the catering company and that he had signed for it. The following day he went to the catering company, checked and ticked off the goods for the function. He also found the receipt signed by the first respondent and another one for rest of the order. He took it to the finance department for payment. Mr Nekwaya testified further that on Saturday during the function there was a shortage of glasses and 'hot stuff', he called the first respondent for permission to go and buy more; and said that the

first respondent granted him permission. He then went and bought the goods which were in short supply.

Arbitrator's findings and award

[22] The arbitrator made the following findings:

'(a) I am failing to see/understand how the applicant acted in bad faith or not preserving the interest of the employer, or breached the trust, in this regard. It was made clear that the applicant only took his portion and the one for Mr Noabeb, which did not make the function's expense to exceed the budget and he did not hide it.

(b) The respondent (appellant in the present matter) did not dispute the fact that even the former CEO, Mr Hafeni Mungungu, used to ask employees to get his portion and take it to his house, since he never attended year-end functions and this means that it is common practice at the respondent.

(c) It was not disputed that employees took edibles before and or drinks prior to and after the year end function, meaning that it is well known by the respondent, but it did not take steps before.

(d) Again the respondent did not give evidence of a rule or a policy which regulates the year end function things/foodstuff.

(e) I believe that the applicant (Mr Everson) acted within his discretionary powers by virtue of his position as an Acting CEO, and acted in the same way as the former CEO. I also believe that the applicant acted in an honest and transparent manner, because everything he did was not hidden, but he made it known to his colleagues.

(f) The alternative charge of which the applicant was found guilty is not listed in the Code of Conduct and Disciplinary Procedures which was submitted as Exhibit "H". I do not know how the Chairperson of the Disciplinary hearing determined that the sanction for that charge is dismissal.

(g) Although evidence was led that the applicant acted in breach of section 6(11) of his employment contract which states that “to act in good faith and at all times preserve the interests of the employer”, the respondent did not demonstrate how the applicant breached that section of the employment contract.

(h) Nowhere in the respondent’s financial policies and procedures (Exhibit “D”) mentioned that if an employee went and took food items before the year end party he would be guilty of an offence which could lead to dismissal.

(i) On the facts of this case, with the evidence presented before me, I came to the conclusion that there was no valid reason to dismiss the applicant.’

[23] Having considered the evidence before her, the arbitrator arrived at the conclusion and found that the procedure followed in dismissing the first respondent was fair, however she found that first respondent’s dismissal was substantively unfair. In this connection she held that there was no valid reason to dismiss him. The arbitrator accordingly ordered that the first respondent be re-instated and be compensated with the sum of N$640 500, inclusive of benefits.

Grounds of Appeal

[24] The appellant’s grounds of appeal are repetitive but it is confined to the question of substantive fairness. It can be summarised as follows:

‘1. Whether the second respondent (“the arbitrator”) erred in finding that the substantive fairness of the dismissal of the respondent’s dismissal was unfair and not in compliance with section 33 of the Labour Act, 11 of 2007 (“the Act”).

2. The arbitrator erred in finding that the first respondent did not act in bad faith, did preserve the interests of the appellant and/or did not breach the trust. this was a finding and /or conclusion based on facts which no reasonable arbitrator would have made based on the facts available to the arbitrator in the circumstances of this matter.

3. No evidence was led before the arbitrator that the supplies for the year-end function were ordered in a manner that showed that particular food or drinking

items were intended and/or designated for particular employees and therefore could be separated for consumption in this manner.

4. No evidence was led before the arbitrator to show that the food and drinking items ordered were ordered for any other purpose except the year-end function.

5. The evidence before the arbitrator was that the first respondent used the appellant's resources for his personal benefit without prior authorization.

6. The arbitrator erred in her understanding of the permissible grounds of misconduct for which the sanction of dismissal could be applied in that evidence was presented before her that the misconduct which the first respondent was found guilty of warranted a dismissal and, in any event, in terms of the common law the misconduct for which the first respondent was found guilty of also provides that a dismissal is an appropriate sanction.

7. A dismissal for failing to act in good faith and for breach of trust is not an unreasonable sanction to impose. The arbitrator should not have interfered with the sanction imposed by the appellant.'

Issue for determination

[25] The issue for determination is, whether the arbitrator erred in law when she found that first respondent's dismissal was substantively unfair and not in compliance with s 33 of the Labour Act, 11 of 2007. Particularly whether first respondent acted in bad faith and further, whether he committed a breach of trust between him and the appellant.

Arguments before this court

On behalf of the appellant

[26] Mr Nekwaya, who appeared on behalf of the appellant, submits in his written submissions that when a finding of fact made by a lower court is one which no court

could reasonably have made, the appeals court would be entitled to interfere with what would otherwise be an unassailable finding.

[27] As regards the issue of an appropriate sanction to be imposed, counsel submits that the standard of conduct by employees is set by the employer and so too the sanction which would be attracted by such non-compliance. Furthermore that interference with the sanction imposed is only justified in the case of unreasonableness and unfairness.

[28] Counsel further submits that in determining the amount for compensation, regard should be had to the employee's own contribution towards the dismissal. Furthermore, that when the amount for compensation includes benefits, then the employee should give evidence to prove the loss he has suffered.

[29] Mr Nekwaya further points out that the arbitrator failed to consider that Mr Kruger (witness for the appellant) indicated that one employee of the appellant had been dismissed the previous year for a similar offence.

[30] Counsel further argues that the question which the arbitrator should have asked, but which was not asked, is: could each employee go to the catering company and take what they considered to be their portion of the food and drinks ordered for the year-end function? If the answer to that question is 'no', then first respondent's actions were untoward.

[31] As regards the amount of compensation ordered by the arbitrator, counsel points out that the first respondent's monthly salary was N$61 000, the arbitrator should have drawn an inference that he could not have been able to survive on nothing for the duration of his dismissal and that he must have had alternative employment during the period of his dismissal. Accordingly, the arbitrator should have adjusted the compensation amount.

Submissions on behalf of first respondent

[32] Mr Tjitemisa, who appeared on behalf of the first respondent in his written submission, supports in essence the arbitrator's findings and conclusions, namely

that the dismissal was substantively unfair. Counsel submits with regard to the compensation ordered by the arbitrator that it was not wrong merely because it includes benefits. In any event, the question of compensation is a question of facts and not law, and thus not appealable.

[33] Counsel further argues that, the first respondent did not order additional food and drinks but requested food and drinks that had already been ordered and budgeted for by appellant for the year-end function. Mr Tjitemisa submits further, that the arbitrator was correct in finding that the first respondent did not act in bad faith when he took his portion of the food and drinks. This is so, because it was common practice that employees sometimes took their portions of food and drinks and consumed same somewhere else, and no disciplinary steps had been taken against such employees.

[34] Finally, counsel submits that the arbitrator correctly found that the appellant's financial policy does not provide that an employee who takes food and drinks before the year-end function is guilty of an offence for which he or she could subjected to disciplinary steps and possible dismissal. Therefore no rule was breached.

Legal principles and analysis

[35] Section 33(1)*(a)* provides that: 'an employer must not, whether notice is given or not, dismiss an employee (a) without a valid and fair reason'. In *Rössing Uranium Limited v Goseb* (HC-MD-LAB-APP-AAA-2018/00034) [2019] NALCMD 4 (7 February 2019) at para 11, Parker AJ explained s 33 (1)*(a)* as follows:

'The "valid reason" requirement in s 33 (1)*(a)* (let's call it requirement "(a1)") demands establishment of justification, in the sense of proof of the guilt of the errant employee. The "fair reason"' requirement (let's call it requirement "(a2)") demands establishment of reasonableness in the sense that, on the facts and in the circumstances, the decision to dismiss is one that a reasonable employer acting fairly would take. The two sub-requirements, ie "(a1)" and "(a2)" are separate and should be kept apart when considering the requirements in s 33(1)(a) of the Labour Act because the fact that the employer has valid reason (ie requirement "(a1)") to dismiss the employee does not by that fact alone lead to the conclusion that it is fair (requirement "(a2)") for the employer to

dismiss. In sum, I make the point that the two disparate sub-requirements constitute the overall requirement of substantive fairness within the meaning of s 33(1)*(a)* of the Labour Act. It means for the employer to succeed, he or she must satisfy the two requirements of substantive fairness, apart from the procedurally fair requirement in s 33(1)*(b)(i)* of the Labour Act.'

[36] Applying the principle outlined in the immediately preceding paragraph, I am satisfied that in respect of the first test (establishment of justification), the finding by the arbitrator that the evidence before her did not show that there was a clear, known and consistently applied policy, rule, practice or directive in respect of the year-end function and in particular, the distribution of the food and drinks bought for that purpose, cannot be faulted. Secondly, regarding the second requirement of reasonableness, even if it were found that the first requirement had been met, dismissal would not have been a reasonable sanction having regard to the conduct for which the first respondent was found guilty.

[37] The facts of this matter are, in most areas, common cause: It is not in dispute that first respondent, who at the time was the acting CEO, approached the catering company to collect certain food and drinking items, mentioned earlier in this judgment. The first respondent did this, as he and Mr Noabeb for whom he also took food and drinking items could not attend the year-end function. It is further common cause that he signed a receipt form listing the items he had taken. He further contacted a member of the planning committee, Mr Nekwaya, and informed him about the items he had taken. This evidence was not disputed by the appellant. The appellant did also not dispute the evidence that a former CEO Mr Hafeni Mungungu never attended the year-end function and had employees deliver to his house his share of food and drinking items meant for the year-end function. The first respondent's evidence was corroborated on this point by Mr Gawaseb, who has been employed by the appellant for more than fifteen years. He testified that he only missed about three of such functions; and that over those years he had observed how food and drinks were handled at those functions. Mr Kruger's evidence was that appellant's financial policy does not allow for the use of company money for personal purposes, but that there was no general policy which specifically regulates or sets rules or guidelines for the year-end function. It is to be remembered that Mr Kruger was the substantive acting CEO prior to the first respondent being appointed in the

same position. It is therefore fair to assume that he was well conversant with the policies and practices of the appellant.

[38] Having regard to the foregoing undisputed facts, I am of the view that the arbitrator's finding that the appellant has no rule or policy which was transgressed by first respondent cannot be faulted.

[39] Before proceeding to evaluate first respondent's conduct, I think it is necessary to first consider the legal position of a chief executive officer of a company. Generally speaking, a CEO holds two positions and acts in two capacities: he is a director as well as an employee of the company. He acts as the principal executive of the company and therefore the *de facto* manager of the company. He is answerable only to the board. He is the direct and immediate representative of the board of directors. He is responsible for the day-to-day running of the company's affairs[1].

[40] The first respondent has been convicted of 'not acting in good faith and not preserving the interest of the employer'. In my view, standing on its own the charges consist of crispy phrases without any elaboration. They are simply labels. The chairperson of the internal disciplinary hearing who convicted the first respondent, testified that he convicted him because he went to buy food with the company's money without authorisation, which was not in the company's interest; that first respondent was supposed to get food at the party and not to go to the catering company and collect it himself. Accordingly, he found that he did not act in good faith. Furthermore, he found that he collected the food without authorisation from the board, which was wrong.

[41] The chairperson, Mr Ikanga, was the only witness for the appellant who testified that first respondent 'went to buy foodstuff without authorisation'. It would appear that he was clearly mistaken in this regard when his evidence is considered with the rest of other witnesses. Furthermore, he was the only witness for the appellant who was of the view that first respondent ought to have obtained the board's permission to collect the goods from the caterer. Mr Kruger, the substantive CEO, did not agree with him and pointed out that day-to-day running of the

[1] JL van Dorsten: *The Rights, Powers and Duties of Directors*, p 19.

company's affairs rested with the CEO, and not with the board. It follows therefore that the first respondent was convicted on incorrect evidence and a wrong understanding of his position *vis-a-vis* the board. I am of the view that the arbitrator was correct in rejecting Mr Ikanga's view in this regard, when she found that the first respondent 'only took his portion and the one for Mr Noabeb, which did not make the function's expenses to exceed the budget and he did not hide it'. I proceed to consider the concept of 'breach of good faith'.

Breach of good faith

[42] The term 'good faith', for instance, is not defined in the Act. What does it mean? Its meaning was considered by the Court in *Fashion Retailer (Pty) Ltd t/a American Swiss Jewellers*[2] the court held that good faith can be interpreted to mean with 'honesty or sincerity of intention or proceeding from – or characterized by qenuine feelings free from pretexts or deceit'. Furthermore, Black's Law Dictionary defines the phrase 'bona fide' as some thing or act 'made in good faith: without fraud or deceit; a standard of conduct expected of a reasonable person acting without fraudulent intent'.

[43] This court cannot fault the arbitrator's finding that the first respondent did not act in bad faith. He did not act surreptitiously. He conducted himself openly. He went to the catering company himself and did not send a subordinate. He signed for the receipt of the goods he took or received. He telephoned Mr Nekwaya and informed him what he had done. In my view, all those facts clearly demonstrate that he was *bona fide* or acted in good faith. In the absence of a policy or rule prohibiting him from doing what he did, he was entitled to act as he did guided only by his honesty and sincere intention.

[44] It is to be recalled that first respondent was responsible for the day-to-day running of the company's affairs. It would be unreasonable, as it was suggested Mr Ikanga, that he should have secured the permission of the board for such a mundane matter. In my view, the suggestion failed to appreciate the enormous power possessed by a CEO and the responsibility which rests on a CEO when

[2] *Fashion Retailer (Pty) Ltd t/a American Swiss Jewellers v Kurz* (LC 68/2011) [2012] NALCMD 15 (25 October 2012).

running a company. In my judgment, the decision the first respondent took was within the range of many decisions he was entitled to take in his day-to-day running of the affairs of the company. This, particularly taking into account that he had set up a planning committee for the year-end function which had held a meeting earlier that Friday prior to the Saturday on which the year-end function was due to be held. It is common cause that at that meeting he mentioned that he would not be attending the function because he was going to attend a family funeral out of town. I mention this fact just to demonstrate his forthrightness and transparency. It is fair to say that his conduct demonstrates his appreciation of his responsibilities, that in view of the fact that he would not be around the following day he would like to make sure everything was ready for the function. The undisputed evidence in this connection is that while he was at the catering company he phoned Mr Nekwaya and informed him that everything was in order. He also instructed Nekwaya what to do when collecting the goods the following day.

[45] A further factor which should be taken into account in assessing whether the first respondent was *bona fide* when he collected the food and drinks is his knowledge that the former CEO, Mr Hafeni Mungungu, had in the past requested his portion of the function's food and drinks to be delivered to his house. This undisputed fact must have re-enforced first respondents' belief that he was acting correctly, as there was a precedent for doing so. In my judgment, the first respondent's conduct, viewed objectively, was reasonable and done in good faith. Accordingly, the finding by the arbitrator in this regard is unassailable.

[46] It is common cause that there is no policy clearly setting out the guidelines for the year-end function. It was left to the planning committee together with the office of the CEO to determine the rules and procedures for the year-end function. In his evidence the first respondent also indicated that on Friday preceding the event, he met with staff members concerning the event. Upon queries by employees, he informed them that they could get their portions of the food items if they were not going to attend the event. This, in my view further demonstrates his *bona fides* concerning how he understood how the food for function would be dealt with. He informed the meeting that employees who were on duty the following day, and could thus not be able to attend the function, would be permitted to collect their foodstuff, except liquor, and to take it with to their working station at sea. It is to be

remembered in this connection that in the absence of a policy or regulation it was upon first respondent, as acting CEO, to give orders and take decisions on an ad hoc basis.

[47] The appellant relies heavily on the testimony of Mr Kruger, to effect that their financial policy prohibits the subjecting of company funds or resources to personal use. There was no evidence that the first respondent applied or used the company resources for personal use. I have already earlier in this judgment pointed out this misconception under which Mr Ikanga was laboring. Ms Angula testified that she had selected those goods for a total costs of about N$13 000, which was below the budgeted amount of N$15 000. This evidence is in line with the arbitrator's finding, referred to earlier, that the taking of the food did not increase the expenses of the function nor exceed the budget for the function. Mr Kruger, however conceded that the policy does not specifically deal with the guidelines for the year-end function. The arbitrator found that in the absence of a clear rule that has been consistently applied, there was no rule which first respondent transgressed, particularly in light of the fact that there was evidence by Mr Gawaseb that employees used to take food and drinking items prior to and after the year-end function.

[48] The arbitrator considered all the evidence before her and concluded that the dismissal was substantively unfair. Her finding in that regard cannot be faulted. I turn to consider the next question.

Whether this court is at liberty to determine whether the arbitrator erred in facts and not law alone in the particular circumstances of this case?

[49] Section 89(1)*(a)* provides that: (1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78 – (a) on any question of law alone . . . .

[50] The appellant called upon this court in its written submissions to determine whether error in fact was committed by the arbitrator when she found that the first respondent did act in good faith. Mr Tjitemisa on behalf of the first respondent submits that, in terms of s 89(1)*(a)*, the appellant may not appeal against a question

of fact, but only on a question of law and that this court is not at liberty to decide an error of fact.

[51] In *Meatco Corporation of Namibia v Pragt* (LCA 43/2011) [2014] NALCMD 44 (27 October 2014), para 5, Van Niekerk, J quoted with approval Scott, JA in *Betha v BTR Sarmcol* (1998 (3) SA 349 (SCA) 405C-406E), where that court reasoned as follows:

'Accordingly, the extent to which it (the court of appeal) may interfere with such findings is far more limited than the test set out above (to findings of fact in criminal appeal). As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 et seq; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666B-D.) The inquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all.'

[52] The Supreme Court in *Leon Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* Case No. SA 33/2013 delivered on 11 April 2016, O'Regan, AJA, recognizing the challenge faced by courts in deciding appeals where a statute limits the court's jurisdiction to a question of law alone, made the following remarks at paras 43-45:

'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 and may not be the subject of an appeal to the Labour Court. . . . 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 should be emphasized, 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?'

[53] Keeping in mind the principles referred to above, this court is thus called upon to determine whether the arbitrator's findings – that the first respondent did not act in bad faith, failed to preserve the interests of the appellant or that he breached trust – are findings which are so perverse that no reasonable arbitrator, faced with the same facts would have made such findings.

[54] I think it is necessary to first undertake an inquiry into the finding by the chairperson of internal disciplinary hearing that the first respondent failed to preserve the interest of the appellant and that he committed a breach of trust before considering the arbitrator's finding in this regard.

Failure to preserve the interest of the employer

[55] The count of failure to preserve the interest of the appellant envisages a passive act; an omission. In other words an act under which first respondent was under obligation to perform but he failed or neglected to do so. He was found guilty for not having done something so as 'to preserve the interest of the employer'. There is nothing on record indicating in what respect the first respondent had failed to perform a positive act and thereby has failed to preserve the interests of the appellant. On the contrary the only act the first respondent performed and for which he was found guilty relates to a positive act; which he openly performed when he collected his and his colleague's food and drinks.

[56] The obvious question with regard to this finding is: what are the interests of the company which first respondent had failed to preserve?

[57] The test in this regard has been formulated in the following words: In other words, 'the test is whether an intelligent and honest man in the director's position could, in the existing circumstances, have reasonably believed that the transaction in question was for the company's benefit[3]. This test has been formulated in relation to

[3] *Van Dorsten* (supra) at 195.

the conflict of interest between the director and the company. But in my view, it is of equal application to the facts of the present matter.

[58] It is common cause that the food and drinks that the first respondent took were budgeted for and indeed had been bought for the function with the company's money. It was meant for consumption by the employees at the year-end function. It was not meant to be preserved. Furthermore, in respect of the food and drinks the first respondent took for his own consumption, in the first place, he is an employee and for that reason he was entitled to the consumption of the food and drinks designated for the year-end function. The funds and resources had already been budgeted and approved, and such funds had been expended in accordance with the budget and prior approval.

[59] In my view, the already budgeted and purchased food and drinks did not injure or cause harm or prejudice to the interests of the company for the mere reason that it was not consumed at the venue of the function. It is to be noted in this regard that it was not the appellant's case that the first respondent took more food or drinks than what he was entitled to and that as a result other employees did not receive enough or no food or drinks. The arbitrator, correctly in my view, found that there was no policy as to whether or not food and drinks for the year-end function might be taken for consumption away from the venue where the function is held. Having regard to the foregoing, I am of the firm view that the arbitrator's finding that the first respondent did not fail to preserve the interest of the company is unassailable, and is correct.

Did the first respondent commit a breach of trust

[60] It is a general principle of our company law that a director stands in a fiduciary position towards the company of which he or she is a director. Failure to comply with such fiduciary duty, constitutes a breach of trust and gives rise to a liability, whether out of delict or out of contract In *Cohen NO v Segal*[4] the court said the following: 'an application of a company's money *ultra vires* the company is in fact a breach of trust on the person of the director'. In the case of such misappropriation the directors are not only liable for what they put in their pockets but also for what they, in breach of

[4] *Cohen NO v Segal* 1970 SA (3) SA 702 (W) at 706.

trust, pay to others. They have to account to the company for such monies and their liabilities need not necessarily be based on fraud or delict. If it is sought to base their liability on fraud or delict, it is necessary to prove the fault or blameworthiness which is essential for an action of that kind. In our law, an action based on breach of trust is *sui generis*.

[61] In the present matter the first respondent did not misappropriate the company's resources unlawfully. He consumed the food and drinks which had been bought with the money already approved for the year-end function. He did not misappropriate the goods; it was already designated for that purpose. In my judgment the first respondent did not breach any trust between him and the company, for the following reasons: firstly, he was in charge of the company and was entitled to take all lawful decisions relating to the staging of the year-end function which were in the interests of the company; the food and drinks he took had already been budgeted and paid for by the company and were therefore not unlawfully misappropriated; and finally there is no policy which regulates the consumption of food and drinks for the year-end function, either on or off premises of the function venue. The conclusion I have reached is therefore that the arbitrator was correct in her finding that the first respondent did not in any way commit a breach of the trust he owes the appellant.

[62] In light of all the matters considered, this court is satisfied that the findings by the arbitrator cannot be said to be perverse. Instead this court is of the considered view that the arbitrator's findings are findings which a reasonable arbitrator would have made on the same facts. Accordingly, this court cannot interfere with the arbitrator's said findings. I turn to consider the issue of compensation for the first respondent as ordered by the arbitrator.

Computation of remuneration ordered by arbitrator

[63] It is argued on behalf of the appellant that the evidence in respect of compensation was hearsay, in that there was no evidence placed before the arbitrator, in respect of the benefits lost and subsequently included in the amount for compensation. On the other hand, it was argued on behalf of the first respondent

that this is a question of fact and not law alone; save to mention that this ground was not captured in the notice of appeal or the grounds of appeal.

[64] In *Pep Stores (Pty) Ltd v Iyambo*, Gibson J said, 'it is common cause that the respondents had all been in the appellant's employment'. The question of what the appellant paid the respondents was not in issue. It was a circumstance which could easily be ascertained without the need for formal evidence from the respondents as it lay exclusively within the purview of the appellant's domain. The failure to lead the formal details is more of a technicality. There cannot be prejudice to the appellant in mere failure to depose to the salaries paid to the workers[5].

[65] It is trite law that if the amount determined as compensation includes loss of certain benefits, such as, medical benefits, then the employee must establish by evidence what the losses entail[6]. In 'ordering compensation to an employee who has been unfairly dismissed, regard to the loss suffered or the amount the dismissed employee would have been paid had he not been dismissed[7]'. Further, in determining the compensation amount, the court should have regard to all the circumstances of the case, such as, but not confined to (a) the employee's contribution to his or her dismissal or (b) alternative employment for the duration of his or her dismissal[8]. The amount so determined is compensatory and should not place the employee in a position better off then he would have been in had he not been dismissed[9]. It is for this reason that an employee is required to prove that he had suffered financial loss as a result of the dismissal and that he or she had taken reasonable steps to mitigate his or her losses[10].

[66] Upon my consideration of the record, I could not find that first respondent at any point during the arbitration proceedings adduced evidence that he had suffered losses as a result of his dismissal. Judging from his claim form for re-instatement and compensation, he indicated some losses he has suffered as a result of the loss of his remuneration. However, there is no evidence on record regarding the loss he had suffered as a result of the loss of benefits subsequent upon his dismissal. There

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[5] *Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others* 2005 NR 372 (SC).
[6] C Parker *Labour Law in Namibia* (2012) at 194.
[7] Ibid.
[8] Ibid at 195.
[9] Ibid.
[10] Ibid.

is also no evidence that he mitigated, if at all he did, his losses, nor was there any evidence led on whether or not he had found alternative employment during the duration of his dismissal.

[67] According to Parker AJ, 'compensation consists of: (a) an amount equal to the remuneration that the employer ought to have paid the employee, had he not been dismissed or suffered other unfair disciplinary measure or some other labour injustice, and (b) an amount equal to any losses suffered by the employee because of the dismissal or other disciplinary action or other labour injustice[11]'.

[68] Therefore, in the absence of evidence to support an order for benefits included in the compensation amount, no reasonable arbitrator would have made a determination on compensation inclusive of an amount for loss of benefits. Under these circumstances, non-interference by this court with regard to the compensation order would be a grave injustice to the employer and would amount to punishing the employer, which is not the purpose of compensation in labour matters. That finding of the arbitrator was perverse and cannot be allowed to stand.

[69] The above principles hold true in this matter. The first respondent was in the employment of the appellant; therefore first respondent's monthly remuneration amount is known to the appellant. However, where loss of benefits are included in the amount for remuneration, particularly where no evidence was adduced, it would be inappropriate for this court to allow the compensation order to stand as it is in its present form. Taking into account the foregoing principles, I therefore propose to amend part of that order as it appears below.

Conclusion

[70] In the result, I hereby make the following order:

1. The appeal is dismissed.

2. The arbitrator's order insofar as compensation is concerned is varied to read:

[11] Ibid at 193.

‘The appellant is ordered to pay the first respondent his monthly salary that he would have earned from the date of his dismissal to the date of this Court Order.’

3. There is no order as to costs.

4. The matter is removed from the roll and considered finalized.

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H Angula

Deputy-Judge President

APPEARANCES:

APPELLANT:	E NEKWAYA Instructed by Koep & Partners, Windhoek
FIRST RESPONDENT:	J TJITEMISA Of Tjitemisa & Associates, Windhoek