REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2019/00026

In the matter between:

HANGANA SEAFOOD (PTY) LTD	**APPELLANT**
and	
JUSTY MOSES	**1ST RESPONDENT**
MAXINE KRöHNE	**2nd RESPONDENT**

Neutral Citation: *Hangana Seafood (Pty) Ltd v Moses* (HC-MD-LAB-APP-AAA-2019/00026) [2021] NALCMD 15 (16 April 2021)

Coram:	Ndauendapo J
Heard:	**21 October 2020**
Delivered:	**16 April 2021**
Reasons:	**22 April 2021**

Flynote: **Labour Law** – Dismissal - Employer/employee relationship - Dishonest conduct - Employer should feel confident it can trust an employee not to be in any way dishonest - Employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of

such relationship intolerable - Trust is the core of employment relationship - Dishonest conduct is breach of such trust - Such breach will justify dismissal.

Summary: This is an appeal against the award of the arbitrator, Maxine Kröhne, who found in favour of the first respondent, (Justy Moses) and handed down her award on 19 February 2019. The arbitrator found that the first respondent's dismissal was procedurally and substantively unfair and ordered that the first respondent be reinstated and remunerated for the period which he remained unfairly dismissed (that is from March 2018 to February 2018). The amount equals to N$ 56 000 (Total Cost to company) x 12 months – N$672 000.

The first respondent was dismissed from the appellant's employment on allegations of misconduct involving conflict of interest. The appellant aggrieved by the arbitrator's award noted an appeal with this court on 23 May 2019. The first respondent opposes the appeal.

Held that the appellant had a fair and valid reason to dismiss the first respondent within the meaning of s 33(1) of the Labour Act, 2007.

Held further that the dismissal was based on reasonable grounds in that the first respondent committed a serious breach that goes to the root of the contract of employment and company policies.

Held that conflict of interest and failure by the first respondent to declare his outside interest/companies/close corporations is a dismissible offence as contemplated in the appellant's contract of employment.

Held that due to the breach of trust between the appellant and the first respondent, the relationship between the appellant and the first respondent has irretrievably broken down and as such reinstatement is not feasible.

Held that the first respondent's dismissal was procedurally unfair. However, the appellant had a valid reason to dismiss the first respondent.

Held that the appeal succeeds.

ORDER

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1. The appeal succeeds.
2. There is no order as to costs.

JUDGMENT

Ndauendapo J

Introduction

[1] This is an appeal against the award of the arbitrator, Maxine Kröhne, who found in favour of the respondent, (Justy Moses) and handed down her award on 19 February 2019. The arbitrator found that the first respondent's dismissal was procedurally and substantively unfair and made the following award:

> '[96] I therefore do not hesitate to make the following order:
>
> 1) The Respondent is ordered to reinstate the Applicant effective as of the 1st day of March 2019 and;
>
> 2) To compensate the Applicant the remuneration that he would have received over the period which he remained unfairly dismissed (that is from March 2018 to February 2018). The amount equals to N$ 56 000 (Total Cost to company) x 12 months – N$672 000.00 ON OR BEFORE THE 20th DAY OF MARCH 2019.'

[2] On 23 May 2019 the appellant, who is Hangana Seafood (Pty) Ltd a private company with limited liability noted an appeal against the award handed down by the arbitrator, on 19 February 2019. The grounds of appeal are listed in the notice of appeal as follows:

'The grounds of appeal (and further questions of law) on points of law only are the following:

1. The arbitrator erred in finding, based on the evidence, that the charges were vague and **lacked** sufficient information considering that the respondent must have known (and knew, and the appellant did not know):

1.1. which of his many external business interests he had neglected to report his involvement in to the appellant, and when exactly this had occurred;

1.2. in which year and on which date he did not declare or report his external business interests to the appellant;

when the arbitrator herself found that it was common knowledge that the respondent had more than one external business, being Aruab Fishing CC, Tses Fishing CC and Shamrock Investments CC (and the evidence showed that none of these were declared to the appellant).

2. The arbitrator erred in finding, in the face of the overwhelming evidence presented and policies and clauses of the employment contract referred to (and even quoted in the award) that the rule or policy that was contravened was not referred to.

3. The arbitrator further erred in finding that before the respondent could be found guilty of breach of trust, the charge must make reference to "what rule, cause, policy, employment condition was contravened or not adhered to which can result in a breach of trust". There is no such requirement in law.

4. The chairperson erred in finding that the chairperson did not consider or pronounce herself on the respondent's preliminary points, i.e. that he sought outside representation and a postponement, whereas the evidence clearly was that she considered the application for a postponement and refused same, and furthermore (as the arbitrator herself found) that the respondent had access to outside representation (just as the appellant had) from the appellant's holding company, but did not make use thereof.

5. The arbitrator erred in ignoring completely the evidence that the respondent had not only failed to declare competing outside businesses, but involved a client of the

appellant in a fraudulent scheme, to the embarrassment and financial detriment of the appellant.

6. The arbitrator further erred in failing to consider that the respondent's only defence to the serious allegations against him was that he had declared all his outside businesses, which obviously was not the case and was disproved.

7. The arbitrator further erred in finding that the respondent's dismissal was substantively unfair because:

7.1 he was not charged with breach of his employment contract or failure to adhere to the declaration policy, or conflict of interest, but with dishonesty and/or gross negligence and breach of trust in that the respondent did not report his external business interests as required;

7.2 reporting and declaring "are two different actions" and "reporting one's business interest .... would not be sufficient".

8. The arbitrator erred in finding that the appellant had no valid reason for charging the respondent with dishonesty and/or gross negligence and breach of trust, when the respondent's conduct clearly justified all of these charges.

9. The arbitrator further erred in finding that the appellant failed to prove on the balance of probabilities that the respondent's failure to report his businesses was intentional or careless, when the evidence overwhelmingly showed the contrary, namely that it was intentionally concealed from the appellant because such businesses were in direct competition.

10. The arbitrator erred in making (contrary to all available evidence) the following astounding finding:

" .... for breach of trust to be proven on a balance of probabilities, one needs to prove a breakdown in the relationship of trust between the concerned employee and the company. This will include a situation where the conduct of the employee has created mistrust which is counterproductive to the company's commercial activities or the public interest thereby making the continued employment relationship intolerable. There is no

evidence before me that the Applicants conduct created a mistrust to such an extent that the Respondent was harmed in anyway."

11. The arbitrator erred in finding that reinstatement was an appropriate remedy under the circumstances of the case and considering the egregious conduct of the respondent.

12. The arbitrator further erred in law in finding that the respondent had proven losses of N$672,000.00.'

The Parties

[3] The appellant is Hangana Seafood (Pty) Ltd, (I will, for ease of reference refer to the appellant as "the appellant") a company with limited liability duly registered in terms of the Companies Act 28 of 2004 which operates a fishing fleet and a land-based fish processing factory. The appellant conducts business in Walvis Bay as a quota rights holder for the commercial harvesting of hake and by-catch, which includes crab and monk fish.

[4] The first respondent is Justy Moses, who was employed by the appellant as Assistant Fleet Manager as from 1 August 2014. (I will for ease of reference refer to Justy Moses as the "first respondent"). During 2017 the first respondent was promoted to the position of Operations Manager of the appellant's fleet. The first respondent opposes the appeal.

[5] The second respondent is Maxine Kröhne, an arbitrator who is in the employ of the Ministry of Labour at the Labour Commissioners office. The second respondent did not oppose the appeal.

[6] The appellant is represented by Adv. G Dicks whereas the first respondent is represented by Adv. R. Rukoro.

The first respondent's grounds of opposition

[7] The first respondent summarised his grounds of opposition as follows; I quote verbatim from the notice of opposition.

‘1 Respondent maintains that there is still no appeal before court; and

2. Regard being had to the evidence tendered and the nature of the operations of the Appellant, the Arbitrator was justified in finding that:

2.1 The charges were vague and that the Respondent was as a result prejudiced; and

2.2 The Appellants conducts in dismissing Respondent was inconsistent as other employees in similar position were not disciplined at all.

3. The Arbiter was justified on holding that the Appellant failed to refer to any policy provision of the Appellant Hangana Seafood (Pty) Ltd but instead referred to policies of other entities not party to the dispute.

4. The Arbitrator was justified in holding that the disciplinary hearing was not conducted in a fair manner because the Respondent was refused external representation while the Appellant made use of an external person.

5. Regard being had to the totality of the evidence tendered the Arbitrator was justified in holding that the dismissal was unfair.

6. The Arbitrator was justified in holding that the employment relationship had not been irretrievably broken down.

7. Regard being had to the position and duties of the Respondent as well as all the evidence tendered, the Arbitrator was justified in ordering reinstatement.

8. The Arbitrator was justified in awarding compensation for damages as the law in this respect is settled.

9. There was no breach of trust by the Respondent.

10. There was no conflict of interest.

11. In the event that the Court holds that there was a policy, it is submitted that there was inconsistent application of the policy as other senior employees in similar situations were treated differently.

12. There was no fair and valid reason for dismissal.

13. Charges were impermissibly split.'

Brief background giving rise to this appeal

[8] The first respondent was employed by the appellant and he was dismissed for misconduct. An internal disciplinary hearing was conducted by the appellant which resulted in the first respondent being dismissed from his employment. The first respondent referred the dispute to the Labour Commissioner's office. On 19 February 2019, the arbitrator found in favour of the first respondent and ordered that:

1) First respondent be reinstated; and
2) First respondent be paid compensation in the amount of N$672,000.

[9] During 2020, the appellant brought an application for stay of execution of the arbitration award pending the finalization of the appeal. The first respondent, believing that the appellant was genuine with its intention to note and prosecute its appeal, agreed to a settlement in terms whereof he was only going to receive 50% of the monetary compensation for now and to await the finalization of the appeal.

[10] On 18 March 2019, the appellant filed a notice of appeal on the eJustice system along with its application to stay the award of the arbitrator. The appellant thereafter, on 19 March 2019, caused the notices of appeal to be served on the respondents. The application to stay the award was settled between the parties and the settlement was made an order of court on 20 March 2019.

[11] At that time, both the appellant and the first respondent believed the appellant's appeal had been properly noted and served. The first respondent filed his notice of intention to oppose the appeal, Form 12, on the appellant on 15 April 2019.

[12] It was only on 10 May 2019 that it came to the attention of appellant's legal representative, Mr. Kutzner, that the notices of appeal had only been uploaded on eJustice under case no HC-MD-LAB-MOT-GEN-2019/00080 (the stay application) and not also to a newly registered appeal with its own case number. This oversight occurred because of the inexperience, particularly in labour matters, of the candidate legal practitioner tasked with the eJustice filing. Therefore, although the notices of appeal had been uploaded and served timeously, they had only been uploaded to a related matter, and not also under an appeal case number.

[13] With the appellant realizing the error as depicted above, the first respondent took the stance that the appellant only annexed a notice of appeal to its application for stay to help strengthen its chances of success on the application for stay but never noted any appeal at all. To this, the first respondent formed the view that there is no appeal before court as the appellant only gave notice of appeal on 23 May 2019 which was about 64 days out of time and without obtaining condonation. The first respondent further formed the view that the appellant brought the condonation application nine (9) months after the award, which was prejudicial to the first respondent.

[14] The appellant, on the other hand, took the stance that the first respondent's opposition is without substance and in the circumstances, unnecessary.

[15] On 27 July 2020, this court handed down a judgment in which it granted condonation to the appellant for the irregular filing and or late noting of the appeal and the non-compliance with rule 17 (10) to (15) of the Labour Court rules, and reinstated the appeal. The court also ordered that the period for the prosecution of the appeal be extended to seven (7) days after the date of judgment.

Background facts pertaining to the merits of the appeal.

[16] During 2017, the appellant experienced difficulty in collecting N$120,000 from a client, a Jose Otero. The client informed the appellant that he was unable to pay the appellant because he was bankrupt as a result of a fraudulent scam that caused him financial losses, which involved the first respondent. The scam took place as follows as narrated by the appellant in the following paragraphs.

[17] It transpired that the first respondent approached Jose Otero with an offer to share in monk fish and crab fishing quotas in exchange for payment /investment in the sum of N$1,272 million and to make use of Jose Otero's fishing vessels. The sum of N$1,272 million was then transferred to the account of one Gustav Kaitjirokere by Jose Otero and his partner, Erna Loch, whereafter Jose Otero, the first respondent and one Zsa Zsa Paulsen (the daughter of Gustav Kaitjirokere) entered into a partnership agreement. In terms of the partnership, comprising of the aforementioned three persons, would trade under the name of Shamrock Investments Fifty-Two CC.

[18] According to Jose Otero, the first respondent was responsible for obtaining commercial fishing licenses for the partnership, Shamrock Investments Fifty-Two CC. Such licenses however, never materialized and Jose Otero, being the appellant's client, lost his investment of N$1,272 million and further incurred docking fees of N$4,5 million in respect of his vessels being laid up as from May 2019. With this information and by launching an investigation, the appellant uncovered that the first respondent was involved in two further close corporations, both of which have listed its business activities as "Fishing and Marine Consultancy". The appellant submitted that these were further not declared and disclosed by first respondent as required by the appellant's rules and regulations.

[19] Investigations further revealed that Shamrock Investments Fifty-Two CC had been incorporated in 2015 already and further that this was not declared by first respondent. To add on this, the appellant submitted that the investigations further revealed that the first respondent had been conducting Shamrock Investments Fifty-Two CC's business, during office hours of the appellant and further that the first respondent had been sending private company information and documentation from his work email address, to his personal yahoo address and from there to his partners.

[20] With that said, I will now proceed to briefly summarize the arguments advanced by both parties, commencing with those of the appellant.

Appellant's argument on appeal

[21] Counsel submitted that it is common cause that the first respondent was aware of the aforementioned policies, the terms of his contract of employment and the

appellant's stance towards conflicts of interest. Counsel further submitted that, it is also common cause that when first respondent joined the company in 2014 he declared his existing businesses to the appellant, namely a business dealing in scrap steel (EMS) and another in construction (Great Africa).

[22] Counsel went on to submit that, the appellant was entirely unaware that the respondent had registered Shamrock Investment CC and had applied for and had been granted fishing quotas for crab and monk fish. There were no declarations made in respect of this close corporation (Shamrock Investment CC) for the years 2015, 2016, 2017 or 2018. It is the practise that such declarations be made to the employee's line manager (in this case Eugene Louw), whereafter it goes to the Managing Director for approval, whereafter it is provided to Human Capital, which then sends it to the Company Secretary for record keeping purposes. The appellant was entirely unaware of the existence of this close corporation and the first respondent's outside business and conflict of interest. This was only discovered after first respondent's business dealings with the shareholder of Wynnic came to light. So the argument went.

[23] During the disciplinary hearing it transpired that the first respondent holds an interest in two further close corporations, namely Tses Fishing CC and Aruab Fishing CC. He holds a 20% members' interest in each of these close corporations. The description of their principal business is "Fishing and Marine Consultancy". Each of these close corporations were incorporated and registered on 1 June 2017. Tses Fishing CC and Aruab Fishing CC were also not declared to the appellant, so counsel further argued.

[24] In further bolstering his argument, counsel submitted that instead of 18 declarations of interest by the first respondent, the appellant only had the declarations in respect of EMS and Great Africa of 2014, when the first respondent commenced his employment. In respect of EMS and Great Africa he stated that he declared such interest in 2014 and thereafter annually in 2015, 2016 and 2017. However, the first respondent subsequently testified that both EMS and Great Africa were dissolved in 2015. His evidence in this regard is therefore highly questionable.

[25] Counsel further submitted that, the first respondent's undeclared and unapproved outside business interests were with the shareholder of a company which was a client of the appellant. This not only resulted in embarrassment for the appellant, but also that the mooring fees of N$120,000.00 were not paid, which constitutes a loss for the appellant.

[26] Considering the first respondent's conduct and the manner in which he (repeatedly) breached the trust relationship, counsel submitted that the arbitrator erred in reinstating him to his previous position. It cannot be expected of the appellant to ever trust the first respondent again.

[27] Regarding the aspect for prospects of success, the appellant submitted that by highlighting its policies and procedures relating to conflicts of interest, unlawful competition and breach of trust and further setting out serious misconduct of the first respondent, it is evident that the first respondent admits same, due to the position that he does not deny his misconduct at all. The appellant further submitted that the first respondent cannot deny that he conducted business in conflict of interest with a client of the appellant, which caused the client severe financial harm.

[28] The appellant further formed the view that, the first respondent cannot deny that he was unlawfully competing with the appellant and that, contrary to its policies and procedures, he did not declare his interest in at least three separate close corporations involved in the fishing industry.

<u>First respondent's argument on appeal</u>

[29] First respondent maintains that there is still no appeal before court. Counsel submitted that the internal procedures of the appellant were flawed as fully set out hereunder.

a) Ad the charges

The respondent was charged as follows:

i) Dishonest and or Gross Negligence – It is alleged that you have neglected to report your involvement in external business interest as required;

ii) Breach of Trust- It is alleged that you did not report your external business interest as you were required.

[30] Counsel argued that the charges were not detailed to enable the first respondent to know the case he was expected to meet and to thoroughly prepare himself. First respondent's request for more information was simply ignored. With respect to the issue of representation, counsel argued that, while the appellant made use of an external chairperson and external initiator, the first respondent was denied external representation. When the first respondent, given the circumstances, requested for a short postponement the request was turned down.

[31] Counsel submitted further that for the reasons set out in the preceding paragraphs, the procedures were fatally flawed and the arbitrator was justified in her finding that the procedures followed were unfair.

[32] Counsel went on to argue that the charges were impermissibly split because in both instances the basis or substratum is "It is alleged that you did not report your external business interest as you were required''. The splitting of charges resulted in the first respondent being found guilty of both charges on the same facts and basis. Counsel was of the view that in the premise, the finding of the arbitrator that the charges were vague cannot be faulted.

[33] Counsel argued that reliance was placed on a wrong policy. In that the first respondent was charged and dismissed in terms of the O & L Group of Companies policy and no reason was tendered as to how such policy found application.

[34] With respect to section 33 (4) of the Labour Act, counsel submitted that this section provides,

Section 33(4) of the Labour Act 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.’

[35] Counsel is of the view that there is a rebuttable presumption in favour of the employee (first respondent) and it is for the appellant to rebut same. It is further submitted that in determining whether or not the appellant has rebutted this presumption regard must only be had to the charges proffered against the first respondent and the evidence tendered in support as well as the procedures followed. Counsel emphasised that it is imperative that the charges should be repeated namely:

a) Dishonest and or Gross Negligence – It is alleged that you have neglected to report your involvement in external business interest as required;

b) Breach of Trust- It is alleged that you did not report your external business interest as you were required.

[36] Counsel argued that a close look at the charges reveal that the transaction with Wynnic Maritime Services and its inability to pay its debt to the appellant do not form part of the charges and are thus irrelevant. If the appellant believed the converse then they should have charged the first respondent with same. The same argument is equally valid in respect of Mr. Jose Luis Otero and the alleged 1.2 Million transaction.

[37] Counsel argued that it is common cause that as Shamrock Invest Number Fifty-Two CC never traded even for a day, first respondent could not have competed with the appellant. It is common cause that except for the quota no license was ever issued and it never traded.

[38] In amplification of his argument, counsel submitted that, the appellant only has a quota for the commercial harvesting of hake and not for monk or crab. Appellant by law can thus not harvest monk and crab. The quota granted to Shamrock Invest Number Fifty-Two CC was exclusively for monk and crab and there could thus not have been any competition between the appellant and Shamrock Invest Number Fifty-Two CC and

for that reason the first respondent never competed with the appellant. In the premise the allegations of dishonesty, gross negligence and breach of trust were never proven.

[39] Having considered the findings and the award by the arbitrator, the grounds of appeal, the issues raised in the heads of argument, I understand the following to be the questions that I am called upon to determine:

(a) Could the arbitrator, on the evidence that was before her, find that the appellant had a fair and valid reason to dismiss the first respondent?

(b) Was the first respondent's dismissal procedurally fair?

(c) If the first respondent's dismissal was procedurally unfair, did the arbitrator err in ordering the appellant to reinstate the first respondent?

[40] I find it appropriate to, before I consider the issues which I am called upon to decide in this appeal briefly set out the legal principles governing those issues.

The applicable legal principles

[41] The termination of contracts of employment in Namibia is governed by the Labour Act, 2007. The Supreme Court and this court have stated that s 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.[1] Unfair disciplinary action against an employee is regulated by s 48 of the Labour Act. That section provides that the provisions of s 33 of the Act, which apply to unfair dismissal, shall, 'read with the necessary changes, apply to all other forms of disciplinary action against an employee by an employer' and s 48(2) states that disciplinary action taken against an employee in contravention of s 33 constitutes an unfair labour practice.[2]

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[1] See*: Leon Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd,* an unreported judgment of the Supreme Court of Namibia delivered on 11 April 2016 under case number SA 33/2013 at para [28]. And also the unreported judgment of the Labour Court of Namibia of *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (LCA 11/2016) [2017] NAHCMD 18 (07 June 2017) at para [20].

[2] *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* (LCA 62/2013) [2017] NALCMD 27 (14 August 2017).

[42] An arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must accordingly make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary action. If the arbitrator finds that there was no valid or fair reason for the disciplinary action, or that the process followed was unfair, the arbitrator must uphold the unfair labour practice or the unfair dismissal challenge. If on the other hand the arbitrator finds that there was a valid and fair reason for the disciplinary action and that a fair procedure was followed in imposing the disciplinary action the arbitrator must dismiss the complaint.[3]

[43] The first point of departure in answering the issues this court is tasked to determine is to consider the provisions contained in the Contract of Employment also referred to as the Memorandum of Agreement of Employment as entered into between Hangana Seafood (Pty) Ltd, (the appellant) and Justy Moses (the first respondent). This agreement was signed by both parties on 6 August 2014.

[44] The appellant's contract of employment contains, amongst other, the following terms:

'**11. Protection of company interests**[4]

The Employee agrees not to divulge any of the secrets of the company, nor do anything likely to damage its business in any way.

.....

The Employee agrees to devote his/her whole time during the working hours to the business of the Company and shall do all in his/her power to promote, develop and extend the business of the Company. The Employee agrees to maintain trust and good faith and shall not enter into competition with the company in any capacity whilst in employment.

14. Restraint of Trade Agreement[5]

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[3] *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* (LCA 62/2013) [2017] NALCMD 27 (14 August 2017).

[4] See Record pages 107-108.

[5] See Record page 109.

It is acknowledged that whilst in the employ of the Company, the Employee will have access to information that sets apart the operating procedures from others operating in the same field. Without limiting the generality hereof, some of the information the Employee will have access to will be inter alia.

(a) Customer and Supply contracts;
(b) Pricing policies;
(c) Product lines;
(d) Financial structure;
(e) Contractual commitments.

The Employee admits and acknowledges that this information is not readily available to competitors of the Company and therefore a protectable interest for the Company.

. . .

The Employee further undertakes not to utilize or directly divulge any confidential information, trade secrets, date, know-how, which relates to the Company's business.

. . .

17. Disclosure[6]

The Employee agrees to disclose to his/her direct superior any potential conflict of interest or other interests that might be relevant to the employment relationship. Conflict of interest is defined as any circumstance that could cast doubt on the Employee's ability to act with total objectivity with regard to the Company's interest.

It is agreed that the Employee may not engage in private work either for a separate enterprise or a self-owned enterprise without the written permission of the Managing Director, if such work:

17.1 In nature is directly or indirectly related to the business of the Company and/or;

17.2 Is conducted during working hours and/or;

[6] See Record page 110.

17.3 Utilizes Company information which may be deemed of a confidential nature.

All private business interests, whether deemed a conflict of interest or not, must be disclosed in writing to the Managing Director.'

[45] The following is stated under the appellant's Declarations Procedure:[7]

'In order to protect the interest of the O & L Group of Companies in the best possible manner, Customers / Clients and Employees, the O & L Group will not entertain any situation that may lead to an actual, potential or perceived conflict of interest.

A conflict of interest in terms of this policy will be deemed as any circumstance that could cost doubt on an Employee's ability to act with total objectivity with regard to the Company's interest.'

[46] Furthermore, the following is stated in clause 6.5 of the appellant's Declarations Policy:

'6.3.2 Private Business

Employees who engage in private work may only do so upon successfully applying to the Office of the Chairman / CEO or Managing Director (if it is an Operating Company) to engage in such private work and if such an application has been approved. Upon approval the employee must complete the Declaration Form and forward this to his / her Human Capital Manager for filing on his / her personal file. A copy of the said Declaration should be sent to the Company Secretary for record purposes.

.....

6.5 Renewal of Declarations

All Employees who have applied for and declared private business interests, will be required to renew such declarations on an annual basis and submit it to their Human Capital Manager for record purposes at the beginning of a financial year. A copy of all declarations should be forwarded to the Company Secretary.'[8]

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[7] See Record page 117.

[8] Record 720-721. The Ohlthaver & List Group of Companies consist of numerous subsidiaries, including the appellant and companies such as Namibia Dairies (Pty) Ltd, *Namibia Breweries (Pty) Ltd, Kraatz*

[47] In the matter *E. Ebert & Co v Geo. H. Edy*[9] the headnote reads as follows:

'DISMISSAL – summary - Held, that an employer was justified in summarily dismissing a manager who had made use of his position to make arrangements for starting a business in opposition to, and to the detriment of, that which he was managing, and had neglected his duties to his employers, while acting as manager.'

[48] In the matter *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and another.*[10]

Hiemstra J, with reference to authority dating back to 1895, stated the following:

'There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in the contract of employment to that effect. It is stated thus in the leading case of Robb v Green, (1895) 2 Q.B.1, per HAWKINS, J., at pp. 10 - 11:

> "... I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service".'

Engineering (Pty) Ltd, Pick 'n Pay etc. These companies are all wholly owned subsidiaries of the O & L Group of Companies. Functions such as internal industrial relations, finance functions and IT are centralised and outsourced to the holding company. Such functions are standardized across the group for cost saving purposes and for purposes of efficiency. This was explained to the arbitrator by the witness Dawid Welmann as well as the witness Happy Amadila. See Record 622-623; Record 616-619.

[9] *E. Ebert & Co v Geo. H. Edy* (1893–1894) 8 EDC 32.

[10] *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and another* 1971 (3) SA 866 (W) at 867H-868A. This case was cited with approval by Prinsloo J in *Shoprite Namibia (Pty) Ltd v Petrus* 2019 (1) NR 175 (HC) at par [61].

[49] In the matter of *Foodcon (Pty) Ltd v Amoyre Schwartz*[11] the court held that:

'Employer should feel confident that it can trust its employee not to steal or in any way to be dishonest. An employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of such relationship intolerable. Theft is theft regardless of value of item stolen. Trust is the core of employment relationship and dishonest conduct is breach of such trust. It is immaterial that the employee has hitherto been a person of good character or that his/her breach of trust is a solitary act and such breach will justify dismissal.'

[50] In *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa*[12] Ueitele J held that:

'That an arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary sanction. If the arbitrator finds that there was no valid or fair reason for the disciplinary sanction, or that the process followed was unfair, the arbitrator must uphold the unfair labour practice or the unfair dismissal challenge. But if on the other hand the arbitrator finds that there was a valid and fair reason for the disciplinary sanction and that a fair procedure was followed in imposing the disciplinary action the arbitrator must dismiss the complaint.'

Was the dismissal of the respondent procedurally unfair?

[51] It is not in dispute in this matter that after concluding the internal disciplinary hearing the appellant dismissed the respondent. Apart from complying with the guide-lines for substantive fairness, an employee must be dismissed after a fair pre-dismissal enquiry or hearing was conducted. In the South African case of *Mahlangu v CIM Deltak*[13]

the requirements of a fair pre-dismissal hearing were identified as follows: the right to be told of the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the enquiry; the right to some form of representation; the right to call witnesses;

[11] *Foodcon (Pty) Ltd v Amoyre Schwartz* LCA 23/98.

[12] *Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa* LCA 62/2013 [2017] NALCMD 27 (14 August 2017).

[13] *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC).

the right to an interpreter; the right to a finding (if found guilty, he or she should be told the full reasons why); the right to have previous service considered; the right to be told of the penalty imposed (for instance, termination of employment); and the right of appeal (usually to a higher level of management).

[52] In the matter of *Management Science for Health v Kandungure*[14] [Parker JA opined that in order for an employer to find that a valid and fair reason exists for the dismissal of his or her employee, the employer must conduct a proper domestic enquiry – popularly known as disciplinary hearing in Labour Law. And in that regard, the procedure followed need not be in accordance with standards applied by a court of law, but certain minimum standards must be satisfied. The minimum standards that must be satisfied: (a) The employer must give to the employee in advance of the hearing a concise charge or charges to able him or her to prepare adequately to challenge and answer it or them. (b) The employee must be advised of his or her right of representation by a member of his or her trade union or a co-employee. (c) The chairperson of the hearing must be impartial. (d) At the hearing, the employee must be given an opportunity to present his or her case in answer to the charge brought against him or her and to challenge the assertions of his or her accusers and their witnesses. (e) There should be a right of appeal and the employee must be informed about it.

[53] Parker has argued that in view of the clear and unambiguous words of s 33(1)(a) and (b) of the Labour Act, 2007 even where an employer succeeds in proving that he had a valid and fair reason to dismiss an employee, the dismissal is unfair if the employer fails to prove that it followed a fair procedure.[15] Also see the case of *Rossam v Kraatz Welding Engineering (Pty) Ltd*[16] where Karuaihe J said:

> 'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair.'

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[14] *Management Science for Health v Kandungure* An unreported judgment of the Labour Court Case No. (LCA 8/2012) [2012] NALCMD 6 (delivered on 15 November 2012) at para [5] and [6].

[15] Collins Parker: Labour Law in Namibia, University of Namibia Press, at p 156.

[16] *Rossam v Kraatz Welding Engineering (Pty) Ltd* 1998 NR 90 (LC).

[54] In my view the respondent's dismissal was procedurally unfair in that the charge sheet was lacking in details about the charges proffered against the first respondent and prejudicially affected his preparation for the hearing. There was a duplication of charges because in both charges the basis was that "you did not report your external business interests as you were required." The refusal by the appellant to allow the first respondent to be represented by an external representative was in my respectful view procedurally unfair given the fact that the initiator and the chairperson were external persons, first respondent should've been allowed to be represented by an external person. However, in my view the appellant had a fair and valid reason to dismiss the first respondent. In the matter of *Kahoro and Another v Namibian Breweries Ltd*[17] the Supreme Court held that:

'41. This principle that an arbitrator may refuse to order reinstatement, re-employment or compensation where it finds that no fair procedure was followed but is satisfied that the employer proved before it a fair reason for this dismissal, has been followed in the Supreme Court and numerous subsequent cases in the Labour Court.'

Discussion

[55] From the record it is evident that the first respondent has several undeclared registered companies/close corporations in which he has/had shares/interests, namely:

55.1 EMS: 2014, 2015, 2016, 2017 and 2018;

55.2 Great Africa: 2014, 2015, 2016, 2017 and 2018;

55.3 Shamrock Investments Number Fifty Two CC: 2015, 2016, 2017 and 2018;

55.4 Tses Fishing CC: 2017 and 2018;

55.5 Aruab Fishing CC: 2017 and 2018.

[17] *Kahoro and Another v Namibian Breweries Ltd* 2008 (1) NR 382 (SC) at 390; *HS Limbo v Ministry of Labour*, unreported judgment by Swanepoel J in LCA 01/2008 delivered on 10 February 2010 at para [28].

[56] Instead of having submitted 18 declarations of interests, the first respondent only submitted the declarations in respect of EMS and Great Africa of 2014, to the appellant when the first respondent commenced his employment and subsequent to that according to the appeal record and the evidence before this court. The first respondent did not deny his involvement with Shamrock, and also with Tses Fishing CC and Aruab Fishing CC when these close corporations were discovered by the appellant. The entire dispute between the parties during the disciplinary hearing as well as the arbitration hearing before the Labour Commissioner was therefore whether or not the first respondent had declared his outside business interests to the appellant.

[57] In line with the terms of the contract of employment as well as with the procedures and declarations of the appellant, the first respondent had an obligation to be transparent and must have complied with his terms of employment and company policies. As postulated above, the first respondent ought to have made no less than 18 declarations of interests to the appellant by 31 January 2018. The first respondent failed to do so and thus was in breach of the terms of the contract of employment and company policies relating to disclosure and declarations.

[58] Approximately six months after his employment with the appellant, the first respondent caused Shamrock Investments Number Fifty Two CC ("Shamrock") to be incorporated and registered. This occurred on 28 January 2015. Included in the description of its principal business is "MARITIME". The first respondent held 100% of the members' interest in the close corporation. Shamrock was registered for tax purposes and with the Social Security Commission. It had a Certificate of Good Standing for "Tender Purposes" from the Receiver of Revenue. The close corporation was registered with the Walvis Bay Municipality and the Employment Equity Commissioner. It also held a Certificate of Registration as an SME with the Ministry of Industrialisation, Trade and SME development.[18]

[59] On 21 May 2017 the respondent had entered into a partnership agreement with José Luis Otero and one Zsa-Zsa Paulsen. The partnership would operate under the name Lochmar Fishing CC.[19] It appears from the agenda for the board meeting of the

[18] See Record pages 128-134.

[19] See Record pages 135-145.

Ministry of Fisheries and Marine Resources held on 29 May 2017 that Shamrock was awarded a crab fishing quota of 800 metric tons and a monk fish quota of 800 metric tons. Lochmar Fishing CC which is the name under which the partnership traded, also received a crab fishing and monk fish quota of 800 metric tons each.[20]

[60] During January 2017 the first respondent had been in contact with Wynnic regarding a joint venture to exploit a crab fishing quota. Further emails were addressed to Arina Paulsen and Wynnic in this regard. It is pointed out that these emails were written during working hours.[21]

[61] To illustrate that the first respondent was in breach of the appellants' company policies, during the disciplinary hearings in his closing arguments, the first respondent stated the following:

> 'I am not experience (sic) in this area. But to me, my private business interest are not a secret. …it is true that I own Shamrock Investment. However, it is not in any way in direct competition with Hangana…why is it a harm to send an email here and there?'

[62] It is crystal clear from the aforegoing that the appellant regards conflicts of interest and competition by employees in its business in a very serious light. It is common cause that the first respondent was aware of the aforementioned policies, the terms of his contract of employment and the appellant's stance towards conflicts of interest. Nowhere in the record is it reflected that the first respondent was unaware or had no knowledge of the appellant's aforementioned policies. In fact, it is also common cause that when he joined the company in 2014 he declared his existing businesses to the appellant, namely a business dealing in scrap steel (EMS) and another in construction (Great Africa).

[63] In the words of Silungwe J, in the *Foodcon* judgment referred to above. 'The confidence that the appellant had in the respondent was destroyed or substantially diminished on a realization that the respondent was a dishonest person and, as such,

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[20] See Record pages 136 par 2; Record 325; Record 146.

[21] See Record 363 l 508; 366 l 13-15; Record 146; Record 372 l 14-25.

the respondent's relationship with the appellant became intolerable in the eyes of the appellant.'

[64] The evidence presented by the appellant during the hearing was on a balance of probabilities true and correct and the first respondent's denials were false. The court is therefore satisfied that the first respondent's conduct was dishonest and in conflict with the interest of the appellant and that the appellant had a fair and valid reason to dismiss the first respondent.

[65] For the reasons set out in this judgement, I hand down the following order:

1. The appeal succeeds.
2. There is no order as to costs.

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G N NDAUENDAPO

Judge

APPEARANCES:

APPLICANT:	Adv. G Dicks Instructed by Engling, Stritter & Partners Windhoek
1st RESPONDENT:	Adv. R Rukoro Instructed by Pack Law Chambers Windhoek
2nd RESPONDENT:	No Appearance