REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2020/00062

In the matter between:

LEWIS STORES NAMIBIA (PTY) LTD **APPELLANT**

and

ULRICHA J. ENGELBRECHT **RESPONDENT**

Neutral Citation: *Lewis Stores Namibia (Pty) Ltd v Engelbrecht* (HC-MD-LAB-APP-AAA-2020/00062) [2021] NALCMD 50 (11 November 2020).

CORAM: MASUKU J

Heard: 07 May 2021
Delivered: 11 November 2021

Flynote:- Labour Law – section 33 of the Labour Act No. 11 of 2007 – Unfair dismissal – whether the dismissal of the appellant was substantively fair – whether a fair and valid reason exists for the dismissal – Negligence on the part of the respondent caused stock loss.

Summary: The appellant had employed the respondent as a Branch Manageress in one of its shops in Windhoek. This employment relationship took a turn for the worst when the respondent was charged two counts, namely, dishonesty and breach of the appellant's stock procedure and negligence/ neglect to execute her duties as the branch manager. This neglect resulted in the appellant experience stock loss. The respondent was subsequently dismissed. Dissatisfied with the dismissal, the respondent approached the office of the Labour Commissioner and lodged a labour dispute. The arbitrator found in her favour and held that the dismissal did not comply with section 33(1) of the Labour Act 11 of 2007. The arbitrator held that there was no fair and valid reason for the dismissal and she accordingly ordered the payment of compensation to the respondent and her reinstatement. This arbitral award did not sit well with the appellant, hence this appeal. It appeared that the crux of the evidence led by the appellants' witnesses was that the applicant failed to take steps to comply with her duties and this resulted in the loss of stock. In her defence, the respondent, in part, blamed the loss of stock to her lack of training. This is so because she was to undergo training in South Africa but this never materialised. On appeal the court found as follows:

Held: that there must be a valid and fair reason for issuing a dismissal.

Held that: the respondent knew what her job description entailed and this included the responsibility for the security of the stock in the branch she headed. Had she religiously checked the stock as was required of her to do weekly, she would have been able to pick up the stock loss and prevented further loss.

Held further that: the respondent also did not take adequate steps to ensure that a door to the storeroom, where the stock was kept, was secure.

Held: that it was not sufficient for the respondent to say that the load of work at the branch was the reason she neglected her core function, which was designed to eliminate loss and theft of stock.

Held that: it made no sense for the arbitrator to find that there was no valid and fair reason to dismiss the respondent where it was established that the neglect of her

duties of which she admitted is what led to the loss of stock in the excess of N$ 300 000.

In the result the court found that the- appellant had made a good case of negligence against the respondent and that the appeal has a lot of merit. The appeal was thus upheld and the arbitral award set aside in its entirety.

ORDER

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1. The appeal noted by the Appellant herein, is upheld.
2. The arbitral award issued by the arbitrator Ms. Elizabeth Nkole, under Case No. CRWK 1077-19 and dated 30 September 2020, is hereby set aside in its entirety.
3. The dismissal of the Respondent, Ms. Ulrich J. Engelbrecht, is hereby confirmed.
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The *terminus ad quem* (the destination) of this judgment is to answer the following question – is the arbitral award issued by the arbitrator in this matter, in favour of the respondent, consonant with the labour laws of this country such as to survive the judicial scrutiny visited upon it at the instance of the appellant?

[2] The journey to the final arrival at the answer posited above, will require the court to traverse certain areas of the law, and to answer certain sub-questions. These will be evident as the judgment unfolds.

The parties

[3] The appellant in this matter is Lewis Stores Namibia (Pty) Ltd, a company, duly incorporated in accordance with the company laws of this Republic, with its place of business situate at Cnr. Guthenberg and Farraday Streets, in Windhoek. The respondent is Ms. Ulricha J. Engelbrecht, a major Namibian female, who also resides in Windhoek.

[4] The parties will be referred to in the judgment, as the appellant and respondent, respectively. It is common cause that another pertinent party in these proceedings, who is not cited, is the arbitrator, Ms. Elizabeth Nkole. She was assigned by the Labour Commissioner, to preside over the arbitration proceedings in this matter. She will be referred to as 'the arbitrator'.

Background

[5] The facts that give rise to this dispute, are fairly common cause and they acuminate to the following: the appellant was employed by the respondent firstly as a Sales Lady in 2010. She was later promoted to a trainee Branch Manageress in July 2015. She rose to higher ranks, and was eventually appointed as a Branch Manageress in Katutura, Branch 180, Windhoek.

[6] She was ultimately transferred to the Branch Manageress at the appellant's shop known as Branch 192. It was at this Branch where the proceedings which give rise to this appeal took place. Due to certain events which occurred there, the appellant charged the respondent with two counts, namely dishonesty or breach of company's stock procedure and negligence/neglect to execute her duties as Branch Manageress, in terms of her profile.

[7] In relation to the first count, it was alleged that she breached the company's policy in that she allowed her private password to be used by another employee. She pleaded guilty to this charge and she was issued with a final written warning. No more needs be said about this count as it does not feature in the appeal. It is the second count that matters in this appeal.

[8] In the second count, as foreshadowed above, it was alleged that the respondent failed since December 2018 to execute her duties as Branch Manager in accordance with her Fifth and Eleventh core activities of her job profile. It was alleged further that her failure to adhere to her job profile resulted in the loss of stock valued at N$ 334 724 45, thus breaching the position of trust and confidence required of her in her position.

[9] The disciplinary proceedings took place on 4 July 2019. Despite her plea of not guilty, the respondent was found guilty of this count and she was dismissed on 10 July 2019. It would appear that the appellant's internal processes do not provide for an internal appeal. Dissatisfied with her dismissal, the respondent reported a labour dispute of unfair dismissal with the office of the Labour Commissioner.

[10] It is common cause that the matter did not settle at conciliation. It was then referred to arbitration before the arbitrator. After the proceedings, in which both parties were represented by legal practitioners, and led oral evidence, the arbitrator found for the respondent and held that the dismissal of the respondent was not justified in terms of s 33(1) of the Labour Act,[1] ('the Act').

[11] As a result of that finding, the arbitrator ordered that the respondent be reinstated to a position similar to the one she held before the dismissal, with the same salary and benefits. She also ordered the appellant to pay the respondent the amount of N$ 248, 248. 00, which amounted to 14 months' loss of income. She further ordered that the said amount was to be paid on or before 10 October 2020. There was no order as to costs.

[1] Act No. 11 of 2007.

[12] This award caused a sore lump in the appellant's throat. To record its dissatisfaction, the appellant noted an appeal against the said award in its entirety, claiming that the arbitrator erred in returning the award she did. In its notice of appeal, the appellant claimed that the arbitrator erred in finding that it had not complied with the provisions of s 33 of the Act and that the dismissal was substantively unfair; that the charges preferred against the respondent did not exist in the appellant's policy; that there was no risk in the continuation of the employment relationship with the respondent; that where the respondent's failure to adhere to her duties was not brought to her attention, she cannot be held accountable for the stock losses, to mention but a few.

[13] The appellant further took the point that the arbitrator erred in ordering the reinstatement of the respondent in the absence of evidence that reinstatement was appropriate in the circumstances. It was also contended by the appellant that the compensation awarded was in the absence of any evidence led by the respondent, especially her efforts to gain employment after her dismissal. Needless to say, the respondent stood firmly by the award and opposed the appeal, contending in the process that the award, in its entirety, was perfectly justified.

The proceedings

[14] The appellant, and on whom the onus to prove that the dismissal was not unfair, called four witnesses to testify on its behalf. These were Mr. Sammy Janser, the Human Resources Manager of the appellant; Ms. Sonja Bernado, a Divisional Manager; Mr. Netty Willmodt, the Regional Controller and Mr. Katjimuine, the appellant's Internal Auditor.

[15] I find it unnecessary, to chronicle the evidence given by the appellant's witnesses in any detail. The main features of the relevant evidence adduced by them, was that the appellant failed to take steps to comply with her duties and this resulted in the loss of stock in the amount stated in the charge sheet. They further testified that the respondent also failed to take steps to ensure that one of the doors to the place where the stock was kept, was properly secured.

[16] The respondent, for her part, blamed the loss of stock to lack of training. It was her case that she was not properly trained when she assumed the position of Branch Manager and that there was a time when she was to be sent to South Africa for training but this did not eventuate. She testified that she made efforts to speak to those in charge regarding the fixing of the door but they did not take steps to heed her protestations. It was also her case that she did the weekly stock counting and that the amount of stock alleged to have gone missing, cannot be attributed to her failure to perform in accordance with her job profile.

[17] In dealing with the above evidence, I will, in appropriate parts of the judgment, deal with the relevant evidence, and where called for, quote therefrom, to illustrate the point supporting the conclusion that the court will eventually reach on the sustainability or otherwise of the appeal.

Determination

[18] It is perhaps important to mention at this juncture that the issue relating to the first count in the disciplinary proceedings, does not feature anymore. The parties were agreed at the commencement of the arbitration hearing that the finding of guilty in that regard and the issuance of a sanction, would not be pursued. Secondly, the parties further agreed at arbitration that the only issue that remained outstanding, regarding the dismissal of the respondent, related to substantive fairness only. It was accepted by the respondent that the disciplinary proceedings undertaken by the appellant were procedurally fair.

[19] The first question to be determined in this matter, is whether the disciplinary proceedings were substantively unfair. This issue is governed by the provisions of s 33 of the Act, headed, ‘Unfair dismissal’. It reads as follows:

> ‘(1) An employer must not, whether notice is given or not, dismiss an employee –
>
> (a) without a valid and fair reason; and
> (b) without following –

(i) procedures set out in section 34, if the dismissal arises from a reason set out in section 34(1).

(ii) Subject to any code of good practice issued under section 137, a fair procedure in any other case.

(2) …..

(3) …..

(4) 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.'

[20] It would appear to me, when proper regard is had to the above provisions, that the issue of substantive fairness, is dealt with in s 34(1)(a), of the Act, namely, that there must be a valid and fair reason for issuing a dismissal. Substantive fairness has been dealt with in a long line of cases, and these include the case of *Dominikus v Namgem Diamonds Manufacturing*.[2]

[21] In dealing with the concept of substantive fairness, the court reasoned as follows:

'Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words, the reasons why the employer dismisses an employee must be good and well grounded; they must not be based on some spurious or indefensible ground. This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he or she contravened a rule. That rule, that the employee is dismissed for breaking, must be valid and reasonable. Generally, a workplace rule is regarded as valid if it falls within the employer's contractual powers and if the rule does not infringe the law or a collective agreement.'

[22] The above excerpt neatly sums up the enquiry upon which the court must embark in this matter. The question to answer is accordingly the following, was the respondent dismissed by the appellant for a fair and valid reason? One may further

[2] Dominikus v Namgem Manufacturing (LCA 4/2016) [2018] NALCMD 5 (23 March 2018).

ask, was the basis for the dismissal not one that may properly be termed as spurious or indefensible? Does the dismissal of the employee have a good, justifiable and appreciable basis in law?

[23] If the answer returned to these questions is in the affirmative, then it is safe to say in those circumstances, that the employer would have had a fair and valid reason to dismiss the employee in question. That is the question that I proceed to investigate henceforth, namely whether in the circumstances of this case, the appellant has shown, on admissible evidence that on a preponderance of probabilities, the employee was guilty of misconduct or contravened a valid employment rule.

[24] It must be borne in mind, when dealing with this matter, that the respondent admitted during the disciplinary enquiry that she neglected her duties. Although she attempted to distance herself from the position by claiming that she was not trained in the new position as branch manager, it is clear that she had been a trainee manageress and later promoted to Branch Manager in Katutura, before taking up the latest position.

[25] The respondent knew what her job description entailed. The evidence was that the respondent was responsible for the security of the stock in the branch she headed. There is no denying that there was loss of stock in the amount stated in the charge sheet and this happened under her watch so to speak. Mr. Janser testified that the respondent had received warnings previously regarding stock.[3]

[26] In this regard, Ms. Bernado testified that if the respondent had been doing her weekly stock checks, in terms of the company procedures prescribed, she would have been able to pick up the loss of stock and that same would have been prevented accordingly.[4]

[27] Furthermore, the respondent's allegation that the issue relating to stock did not form part of her terms and conditions of employment, holds no water. This was stated unequivocally by Mr. Janser, namely, that the terms and conditions of employees are

[3] Page 58 of the record of proceedings, lines 10 to 15, p83 line 4 to 9.
[4] Page 101 of the record of proceedings, line 15.

the same. It varies, where it comes to the job profiles for the relevant positions the employees occupy.[5]

[28] The evidence that the respondent did not receive training was not proved in evidence. The appellant's evidence was that she was trained and proved herself fit by being promoted eventually to the position of Branch Manageress from the position of trainee manageress.[6] In any event, the evidence of Mr. Willmodt, for instance, is that the respondent never complained to him that she needed training or did not understand any part of her job. It was his evidence that he would have assisted the respondent had she raised an SOS, so to speak.[7] Ms. Bernado, also testified to the same effect.[8]

[29] In cross-examination, the respondent was referred to part of her contract regarding training and it reads as follows:

> 'The company has comprehensive training programmes and manuals. If you do not understand anything in required training on any aspect of your job, you have to simply to (*sic*) the Manager or the Regional Controllers.'[9]

This puts paid to any credibility of the respondent's version that she did not perform her duties properly because she had not been trained. The onus was upon her, where she had shortcomings or difficulties, to alert those in charge in order for them to assist her.

[30] There was also the issue of the door that had remained unsecured at certain times. It was her evidence that she reported the door but it appears to have remained an issue of the spoken word. There is no evidence that she took proper steps, including placing the issue in writing as the likelihood that stock could have been spirited through that door was not excluded, even by the respondent herself. In this

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[5] Page 62 of the record of proceedings, lines 15 to 20.
[6] Page 65 of the record of proceedings, line 10 to 15 and p 73 line 20 to 25...
[7] Page 184 line 15 to 22 of the record of proceedings.
[8] Page 103 of the record of proceedings.
[9] Page 288 of the record of proceedings, line13 to 17.

regard, the respondent had a duty to 'ensure the functioning of alarms, locks, keys and shutter doors, to ensure security of strong rooms and storerooms.'[10]

[31] It is also well to consider the evidence of Mr. Katjimuine to the effect that there was loss of stock in the respondent's branch. This amounted to N$ 334,724.45 and it was discovered after he conducted some audit investigations. It was his evidence that this was through stock that was taken out of the branch for repair (N$ 194,693.57) and stock that was physically missing from the shop and unaccounted for, namely N$ 140,084.88.

[32] Questions to the effect that the stock may have gone missing when the respondent was not there was rejected out of hand by Mr. Katjimuine, who testified in cross-examination that when the stock was finalised, he was with the respondent and that the stock could not have been spirited away in her absence.

[33] In her evidence in chief, the respondent testified, when asked if she might have missed one or two of the stock counts, she stated, 'Ja, it can be possible that I missed some of the counts, although the branch I am working at is a very big branch and sometimes the workload is like that, that I have an assistant manager where I will say okay, you can go on and then I will just like maybe supervise. Because then I have to leave them alone and then I must assist to this and I must assist to that. Because of the workload, and that is why I had an assistant to assist me with those counts and things.'[11]

[34] This is an admission by the respondent that she did not always do the stock count and delegated this function to her assistant. In view of the requirements of her job profile, it is clear that she did not always perform this task and as such stock went missing and she was unaware of it. The load of work at the branch does not seem to be a sufficient reason for her to neglect her core function, which is designed to eliminate loss and theft of stock, which is pivotal to the sustainability of a business like that of the appellant.

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[10] Page 95 of the record of proceedings.
[11] Page 253 of the record of proceedings, line 17 to 25.

[35] Maybe in closing, it is necessary to quote, quite extensively from the cross-examination of the respondent when she adduced her evidence. The following exchange took place between the respondent and the appellant's legal representative regarding the loss of stock:[12]'

'FOR RESPONDENT: Okay, so you agree that stock losses, obviously it forms part of your duties as a branch manager:
MS. ENGELBRECHT: Yes Madam.
FOR RESPONDENT: So, its your duty to manage anything and everything that can possibly affect stock, that stock losses?
MS. ENGELBRECHT: Yes Madam.
FOR RESPONDENT: This would include but is not limited to movement of stock, counting of stock, inter-branch transfers, branch stock repairs, it's a very wide spectrum, correct?
MS. ENGELBRECHT: Yes Madam.
FOR RESPONDENT: Okay, we can go to page 49 please? Now on page 49 it talks about your 11th core activity which is part of your profile. It says there "Security and safety in terms of company policy and procedures" and at point 4 it just says there "Ensure security of strong room, storerooms", is that correct?
MS. ENGELBRECHT: Yes Madam.
FOR RESPONDENT: So, security of your stock goes hand in hand with preventing stock losses. These two core activities are intertwined or not?
MS. ENGELBRECHT: Yes Madam.
FOR RESPONDENT: Because if there is no security then there may very well be stock losses, do you agree? Security in the sense that your stock isn't secured, you stock isn't secured, there may very well be losses.
MS. ENGELBRECHT: Yes Madam.
FOR RESPONDENT: Because during the disciplinary hearing and as per your written statement that forms part of the record, it came to light that there was an issue with the back door, or the storeroom door. What was the issue again with that? You said that it was like a door that slides down, like a garage door?
MS. ENGELBRECHT: Yes.
FOR RESPONDENT: Ad (*sic*) it wasn't locked or what was the issue with the door? You were worried that it wasn't secure?
MS. ENGELBRECHT: Once its open, its open, Madam.'

[12] Page 325 line 10 to 25 to 326 line 1 to 25 of the record of proceedings.

[36] It is plain from the foregoing exchange, in cross-examination, that the respondent accepted that it was her duty to ensure that there were no stock losses by doing the stock count. This was also related to the security of the places where the stock was kept and this was also part of her duties. She admitted that she never put the complaint about the security door to Mr. Willmodt in writing, confining herself, it would seem, to only making verbal complaints.

[37] She admitted that when the matter was not attended to by Mr. Willmodt and his predecessor, Mr. Alan Strauss, she did not escalate the issue to higher authorities. The implication of this is very plain as she was the one ultimately responsible for the stock at the branch she superintended. The case of negligence, was, in my considered view, well made out by the appellant during the arbitral hearing.

[38] The argument advanced by Mr. Coetzee, for the respondent that there was no evidence that the stock loss resulted from the respondent's failure to do weekly stock checks seems to lose sight of the picture. It is clear from the respondent's job profile that it was her core responsibility to avoid the incidence of stock loss and it would appear to me, this was regardless of whatever shape or form it took.

[39] It becomes something of a bother when the arbitrator, in the face of the neglect of duties, so serious and so consequential, found that, 'Having taken all the evidence and testimonies and arguments presented to me into consideration; the Respondent did not have a valid and fair reason to dismiss the Applicant. This I am of the learned opinion that the Applicant succeeded in making out a *pre ma facie* (*sic*) case of unfair dismissal.'[13]

[40] It would appear to me that the findings and conclusion by the arbitrator, were perverse in the circumstances. It was clear on the evidence that the appellant lost stock in the excess of N$ 300 000 under the respondent's watch and this was linked to her failure to perform her duties, namely religious stock-counting and having the premises secured.

[13] Page 798 of the record of proceedings, para [99] of the award.

[41] It would accordingly follow, in my considered view that the decision to reinstate the respondent in the circumstances, is also perverse and this is so regardless of what Mr. Willmodt, one of the appellant's witnesses may have said. Ms. Bernado, whose evidence the arbitrator did not take into account, contradicted Mr. Willmodt and stated that in view of the events that unfolded, it was not appropriate to reinstate the respondent.

[42] It must be mentioned in this connection that the evidence did not disclose any basis for charges of dishonesty as there was no evidence that she partook in the disappearance of the stock. The charges were limited to her neglect of her duties, which resulted in the loss of stock.

[43] I am of the considered view, whatever the views of the parties may have been that in view of the nature of the neglect of her duties by the respondent, considered *in tandem* with the serious consequences thereof on the employer, it would not be appropriate to reinstate the respondent. It is in any event plain that the issue of compensation was itself a wrong conclusion, regard had to the previous discussion and consideration of the evidence.

Conclusion

[44] In view of the findings and conclusions above, I am of the considered opinion that the appeal has a lot of merit and its must accordingly be upheld. The findings and conclusion of the arbitrator were, in the circumstances, perverse. Properly considered and evaluated, the evidence in this matter proves on a balance of probabilities that here was a fair and valid reason to terminate the respondent's employment.

Costs

[45] This is a labour matter. Section 117 of the Act does not readily permit the issuance of an order for costs, unless there is evidence that the institution, defending or the further pursuance of the proceedings, amount to frivolous or vexatious

litigation. There is no such case made out in this matter. Accordingly, it would be appropriate to make no order as to costs.

Order

[46] Paying due regard for the discussion and conclusions reached above, it would appear to me that the proper order to issue in the circumstances, is the following:

1. The appeal noted by the Appellant herein, is upheld.
2. The arbitral award issued by the arbitrator Ms. Elizabeth Nkole, under Case No. CRWK 1077-19 and dated 30 September 2020, is hereby set aside in its entirety.
3. The dismissal of the Respondent, Ms. Ulrich J. Engelbrecht, is hereby confirmed.
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

Appearances:

APPLICANT	L. Ihalwa
Instructed by:	ENSAfrica
RESPONDENT	E. Coetzee
	Of Tjitemisa and Associates