REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2021/00059

In the matter between:

JOHANNES K ANGOLO **APPELLANT**

and

ROSH PINAH ZINC CORPORATION (PTY) LTD **RESPONDENT**

Neutral citation: *Angolo v Rosh Pinah Zinc Corporation (Pty) Ltd* (HC-MD-LAB-APP-AAA-2021/00059) [2022] NALCMD 65 (26 October 2022)

Coram: PARKER AJ
Heard: **30 September 2022**
Delivered: **26 October 2022**

Flynote: Labour Law – Dismissal – Appeal from arbitrator's award that dismissal was air substantively and procedurally – Employee breaching of his fiduciary duty to his employer by publishing to a third party damaging false information about his employer.

Summary: Labour Law – Dismissal – Appeal from arbitrator's award – Appellant communicated to his union (the Mineworkers Union of Namibia (MUN)) certain damaging information about his employer, the respondent – There is uncontradicted

document proof that the information communicated to a third party in breach of the secrecy agreement he had signed upon commencement of his employment was false – Appellant was found guilty on the misconduct by the first-instance internal disciplinary hearing body which recommended his dismissal – That decision was upheld by the internal appeal body – Court finding that the internal hearings were fair – Arbitrator upheld the internal appeal body's decision on appellant's guilt and the imposition of the sanction of dismissal – Court finding that it was not established that the arbitrator misdirected herself on the fact or law – Consequently, court upheld arbitrator's finding and the imposition of the sanction of dismissal – Accordingly, the appeal was dismissed.

Held, a breach of the employer's fiduciary duty to his or her employer that has the potential to bring the employer's good name into disrepute or has the potential to cause labour disharmony is a dismissible misconduct.

ORDER

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1. The appeal is dismissed.

2. There is no order as to costs.

3. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] In this appeal, we should start from the first instance internal disciplinary hearing. The appellant who was employed by the respondent employer was charged

before the first-instance internal disciplinary hearing body ('the first-instance body') with the following forms of misconduct:

'(1) Ignoring standard orders or internal regulations ("charge 1");

(2) Assault, attempted assault or threatening to assault someone ("charge 2");

(3) Misusing one's position to promote personal interest at Rosh Pinah Zinc Corporation's expense ("charge 3"); and

(4) Unauthorized use and or possession of Rosh Pinah Zinc Corporation property ("charge 4").'

[2] The first-instance body found the appellant guilty on Charge 1, Charge 2, and Charge 3; and discharged appellant on Charge 4. The first instance body recommended the dismissal of the appellant. The appellant appealed from that decision to an internal appeal body. The internal appeal body upheld the decision of the first-instance body on the dismissal but overturned appellants guilty verdict on charge 1 and charge 4.

[3] Aggrieved by the decision of the internal appeal body, the appellant lodged a complaint with the Labour Commissioner. An arbitrator was appointed to arbitrate the dispute. In his award, the arbitrator in turn upheld the decision of the internal appeal body; whereupon he found the appellant's dismissal to be fair substantively and procedurally, within the meaning of s 33 (1) of the Labour Act 11 of 2007.

[4] The appellant, represented by Ms Kandjella, appeals against the arbitrator's decision. The respondent, represented by Mr Lochner, opposes the appeal. In that regard, it is important to note that it is trite that in such appeal the court should consider the grounds relied on by the appellant set out in Form 11 (under the Labour Court Rules) and Form LC 41 (under the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner) and the respondent's grounds for opposing the appeal in terms of rule 17 (16)*(b)* of the Labour Court Rules.

[5] The filing of Form 11 and Form LC 41 is peremptory and so, failure to file them is fatal, leading to the appeal being struck from the roll.[1] I have discussed the cruciality of Form 11 and Form LC 41 to make the following point. The determination of the appeal turns on the consideration of the grounds filed of record by the appellant, the respondents opposing grounds, and, of course, the record of the arbitral proceedings. I accept Mr Lochner's submission on the point. It is the appellant's grounds that are critical simply because the respondent bears no burden to prove that the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong.[2]

[6] In considering the grounds of appeal I shall apply the following trite principles and approaches relevant to appeals in general to the facts of the case:

'[4] The appellant relies on the grounds of appeal put forth in her further amended notice of appeal. Before considering those grounds one by one, I set out, hereunder; some principles that are relevant in these proceedings and that should inform the manner in which I approach consideration of the appeal:

(a) The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall…

> 'The notice also serves to inform the respondent of the case it is required to meet …. Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case (*S v Kakololo* 2004 NR 7 (HC), per Maritz J).'

(b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal being an inferior tribunal. The Labour Court as an appeal court will not interfere with the arbitrator's findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).)

(c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on fact if convinced that it is wrong. If the appellate court is merely in doubt as to

[1] *Namibia Dairies (Pty) Ltd v Alfeus* 2014 (4) NR 1115 (LC).
[2] *Germanus v Dundee Precious Metals Tsumeb* 2019 (2) NR 453 (LC) para 4.

the correctness of the conclusion, it must uphold the trier of fact. (See *Nathinge v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014.)

(d) Principles justifying interference by an appellate court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-1).) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have gone the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555). See *Edgars Stores (Namibia) Ltd v Laurika Olivier and Others* (LCA 67/2009) [2010] NAHCMD 39 (18 June 2010) where the Labour Court applied *Paweni and Another* and *Powell*.

(e) Respondent bears no onus of proving that the decision of the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong. See *Powell v Stretham Manor Nursing Home*. If the appellant fails to discharge this critical burden, he or she must fail.'[3]

[7] I note that the appellant in the completed Form LC 41 'appeals against the entire arbitration award'; and so, I do not think Mr Lochner is entirely correct when he submits that the present appeal lies 'against the arbitrator's findings on the procedural fairness of the appellant's disciplinary hearings, and therefore this appeal is confined to the substantive fairness of the appellants dismissal'.

[8] The appellant has raised six grounds of appeal. I shall deal with those grounds now.

Ground 1, Ground 2, Ground 4, and Ground 5

[9] It is important to signalize this outstanding principle of our labour law. The process of resolution of a labour dispute involving employee misconduct goes along a statutory continuum. It starts with charging the employee by the employer with some misconduct, followed by the first-instance internal disciplinary hearing and the internal appeal hearing, followed by conciliation and arbitration in terms of Part C of

[3] *Germanus v Dundee Precious Metals Tsumeb* loc cit.

the Labour Act, if the employee or employer was aggrieved by the internal appeal body's decision. The record at every point on the continuum is relevant and they form part of the record of the arbitration. After all – and this is crucial – it at the first-instance hearing that the employer who wishes to dismiss the employee or employees must establish that he or she (1) had a valid and fair reason to dismiss; and (2) he or she followed the procedures prescribed by s 34, if the dismissal arises from collective termination or redundancy, or in any other case, the procedures prescribed in any code of good practice issued by the responsible Minister in terms of s 137 of the Act.

[10] In the instant proceeding, there is no cogent and satisfactory evidence led at the first-instant internal hearing that established that the appellant was not aware of the respondent's standard rules or regulations and grievance or complaint reporting procedures. Similarly, there is no cogent and satisfactory evidence placed before the internal appeal body to that effect.

[11] The allegations under charge 1 were these. The appellant ignored the standing orders by breaching the secrecy agreement and code of ethics of the respondent which he had signed at the commencement of his employment. He breached the code by writing a letter to a third party containing false information without prior written permission. By so doing, the appellant brought the company's good name into disrepute, it is alleged.

[12] In that regard, it is important to note that the respondent conducted a fair appeal hearing at which appellant, represented by a Robert Uvula, participated. It is not established that they were inhibited in any way from presenting appellant's case. I should say, no fair-minded reader of the record, who is minded acting reasonably, will agree with Ms Kandjella that the internal disciplinary hearings were 'one-sided and unfounded', whatever that means. I certainly do not see any good reason to fault the internal disciplinary hearings. And the arbitrator did not. I accept the arbitrator's finding that Charge 1 had been proved against the appellant.

[13] The appellant's allegation that the appellant's conduct was protected by s 6 and s 50 of the Labour Act must be rejected, as the arbitrator did, as baseless. Section 6 (1) of the Labour Act concerns individuals seeking employment. Appellant

was not seeking employment. And s 6 (2) concerns trade unions or employers' organisation. The appellant is neither a trade union nor an employer's organization. Section 50 stands in the same boat. Section 50 deals with unfair labour practices; and the appellant is neither an employer nor employers' organization. Section 50 does not concern the appellant by any stretch of legal imagination.

[14] Indeed, the appellant's defence has rather always been at all material times that the Secretary General of his union, the Mineworkers Union of Namibia (MUN), to whom he sent the letter is not a third party. Indeed, this defence was echoed with great verve and persistent voice by appellant's counsel in her submission to the court.

[15] To argue, as Ms Kandjella does, that the MUN is not a third party in this matter is, with respect, to misunderstand the fundamental legal basis of the employment relationship. The relationship between the appellant as employee and the respondent as employer is based on the employment contract that bound them. The MUN, whether it is the exclusive bargaining agent in terms of the Labour Act at the respondent's bargaining unit, is a third party to the employment contract through and through.

[16] What debunks the appellant's case is that there is found of record an uncontradicted documentary poof that the information that his letter carried was false in every material respect. There was, therefore, no good reason for the communication of such false information except to bring respondent's good name into disrepute and to engender labour disharmony.

[17] And what Ms Kandjella overlooks is this. The appellant, as the respondent's employee, bore a fiduciary duty to act in good faith in the furtherance of the business interests of the employer.[4] By communicating false information about his employer to a third party, the appellant plainly breached his fiduciary duty to the respondent. I have no good reason to fault the arbitrator's conclusion that the appellant did so 'with bad intentions and to spoil labour relations'. I hold that such breach of fiduciary duty that has the potential to bring the good name of the employer into disrepute and the potential to cause labour disharmony is a dismissible misconduct.

[4] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

[18] In all this, we should not lose sight of this trite and cardinal rule of practice. Where there is no misdirection on the fact by the arbitrator, the presumption is that his or her conclusion is correct and that the labour court will only reverse a conclusion on fact, if convinced that it is wrong. I have held that the arbitrator's conclusion as respects Charge 1 is not wrong; and so it cannot be overturned.

[19] As to the appellant's attack on the sanction of dismissal for the proved misconduct, the law is entrenched that what punishment an employer should mete out for a particular misconduct is entirely within the province of the employer. The court would interfere only if the sanction dished out to the errant employee is not fair or reasonable. Thus, generally, the ultimate sanction of dismissal ought to be applied only where, considering all the circumstances of the case, it is reasonable to do so.[5]

[20] In my view, considering the seriousness of the misconduct and its potential to wreak great harm to the respondent's reputation and disturb labour harmony or 'spoil labour relations', as the arbitrator correctly put it, the sanction of dismissal is fair and reasonable. The appellant has not satisfied the court that the decision of the arbitrator to uphold the sanction of dismissal is wrong.[6] That being so, I have no good reason to interfere with the arbitrator's decision to uphold the sanction of dismissal.

Ground 3 and Ground 6

[21] Upon the authority of *S v Gey van Pittius and Another*,[7] I find that these cannot in our rule of practice be grounds of appeal. A ground of appeal must be reasons why the court should hold that the decision of the arbitrator is wrong, that is, reasons for the conclusion drawn by the drafter of the notice of appeal; not just conclusions *simpliciter*.[8]

Conclusion

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[5] *Pupkewitz & Sons (Pty) Ltd v Kankara* 1997 NR 70 (LC).
[6] *Reuter and Another v Namibia Breweries* NALCMD 20 (8 August 2015).
[7] *S v Gey van Pittius and Another* 1990 NR 35 (HC).
[8] *Germanus v Dundee Precious Metals Tsumeb* footnote 2 para 14 where the principle in *S v Gey van Pittius and Another* is applied.

[22] Based on these reasons, it is ordered that:

1. The appeal is dismissed.

2. There is no order as to costs.

3. The matter is finalized and removed from the roll.

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C PARKER

Acting Judge

APPEARANCES:

APPELLANT:	R Kandjella Of AngulaCo Inc, Windhoek
RESPONDENT:	L Lochner Instructed by Engling, Stritter & Partners, Windhoek