REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2021/00033

In the matter between:

MARULA GAME RANGE (PTY) LTD **APPELLANT**

and

WILLA-KEMPEN LIEBENBERG **RESPONDENT**

Neutral Citation: *Marula Game Range Pty (Ltd) v Liebenberg* (HC-MD-LAB-APP-AAA-2021/00033) [2022] NALCMD 70 (10 November 2022)

CORAM: CHRISTIAAN AJ
Heard: **09 SEPTEMBER 2022**
Delivered: **10 NOVEMBER 2022**

Flynote: Labour Law – Unopposed Labour Appeal – Appellant appealed against the arbitrator's award which held that his dismissal was both procedurally and substantively fair – Appeal restricted to questions of law only in terms of Labour Act 11 of 2007, s 89(1)*(a)* – What constitutes – Whether decision of arbitrator was one which a reasonable arbitrator could make taking into account all the evidence,

leaving nothing out - Court found – Arbitrator came to a conclusion which no reasonable arbitrator could reach – Consequently, court upheld the appeal.

Summary: This is an appeal against the arbitrator's award, finding that the appellant's dismissal was both procedurally and substantively unfair. The appeal is opposed. The appellant was charged with eight charges of misconduct leaving nothing out. Principles in *Mashale Paulus Malapane v The State* Case No. CA 58/2001 (HC); and *Kamaya & Others v Kuiseb Fish Products* 1996 NR 123; and *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) restated - Consequently, court upheld the appeal.

Held that, in labour law at arbitration proceedings evidence which is relevant includes evidence of the findings of internal proceedings and appeal disciplinary hearings which appear on the records of those hearings and which form part of the record before the arbitrator.

Held further, that arbitrator is not entitled to disregard such findings of law and fact without justification and that the arbitrator was wrong when he disregarded findings of fact and law at the internal disciplinary hearing when there was no evidence justifying such conduct.

Held that, where the arbitrator rejects such findings and there is no other evidence adduced at the arbitration proceedings contradicting those findings the arbitrator has acted arbitrarily and his decision would not be a decision that a reasonable arbitrator could make – Such decision is arbitrary or perversed and stands to be upset by the court.

Appeal was upheld.

ORDER

1. The appeal is upheld.
2. The award by the arbitrator in case number CRSW 108-17 is set aside.
3. The dismissal of the respondent by appellant is accordingly confirmed.
4. There is no order as to costs.
5. The matter is removed from the roll and is considered as finalised.

JUDGMENT

CHRISTIAAN AJ:

Introduction

[1] This is an appeal against the arbitrator's finding that the dismissal of the respondent was both procedurally and substantively unfair.

Brief background

[2] The respondent was employed by the appellant as a farm manager. He was subjected to a disciplinary hearing, charged with eight charges *inter alia* gross insubordination, adopting an insolent attitude towards any superior/supervisor, giving false evidence or making a false statement, revealing of confidential information to unauthorized persons, unauthorized use and or abuse of telephones or internet facilities, fails or refuse to comply with any lawful instruction from employer, distribution of inappropriate, obscene or degrading publications, any conduct affecting the employer or employee relationship detrimentally.

[3] At the end of the disciplinary hearing, he was found guilty on two of the charges proffered and his dismissal was ordered. He appealed but did not receive any response.

[4] The respondent then filed a labour dispute with the Office of the Labour Commissioner. At the end of the arbitration hearing, the arbitrator made an award, adverse to the appellant, concluding that the respondent's dismissal was both procedurally and substantively unfair. This appeal is directed against the arbitrator's award.

Proceedings before the disciplinary hearing

[5] At the commencement of the disciplinary proceedings, the respondent's representative applied to have the hearing dismissed due to the alleged pending grievance filed by the respondent, however it was not successful. Furthermore, at the commencement of the disciplinary hearing the respondent applied that the first chairperson of the hearing Mr Horn recuse himself from presiding over the matter, which he did. The basis of this application was the fact that Mr Horn was the appellant's representative at the arbitration at the Office of the Labour Commissioner and was appointed to chair the disciplinary hearing. Mr Beuke was appointed as the second Chairperson of the disciplinary hearing, and the parties were informed that the hearing would commence the next day. Upon the appointment of the second Chairperson, the respondent brought an application for the disciplinary hearing to start *de novo,* as far as witness evidence was concerned. Mr. Beuke informed the parties that he could ascertain the evidence of the witnesses who testified before the erstwhile Chairperson who recused himself, and that the matter must proceed from where it ended.

[6] It was for those reasons that the respondent's legal practitioner launched his an application with the Labour Court, seeking an order to interdict the Chairperson and the appellant from proceeding with the hearing which was set to proceed on 13 and 14 December 2017. This application was dismissed and the hearing proceeded on 13 and 14 December 2017.

[7] At the hearing of the matter, the respondent and his legal representative were not present, although numerous attempts were made for them to be present. Their absence was prompted by the fact that an urgent application was brought to the Office of the Labour Commissioner for the respondent's hearing to start *de novo*.

This application was still pending. The hearing proceeded in their absence, after the Chairperson found that the respondent could not hold the appellant hostage as far as the disciplinary process is concerned by refusing to participate in a disciplinary hearing.

[8] The respondent was dismissed on 27 December 2017, and the Labour Commissioner gave his ruling that the disciplinary hearing should start *de novo* on 5 January 2018.

Proceedings before the arbitrator

[9] Following his dismissal, the respondent filed a dispute with the Office of the Labour Commissioner. At the end of the proceedings, the arbitrator made an award concluding that the respondent's dismissal was both procedurally and substantively unfair.

[10] As regards the issue of procedural fairness, the arbitrator, made the following findings: The disciplinary hearing was held for the sole purpose of validating the dismissal of the respondent and not to provide him with the opportunity to be heard before a neutral chairperson.

[11] As regards the conduct of the proceedings by the chairperson of the disciplinary hearing, the arbitrator found that the chairperson had prior knowledge of the case against the respondent. The arbitrator found further that any reasonable chairperson who had no prior knowledge of the matter would have started the matter afresh to gain a better background and understanding of the matter. The respondent informed the chairperson that he intends to bring an urgent application against the refusal to start the matter *de novo*, but he proceeded with the hearing. The arbitrator concluded that the hearing was held for the sole purpose of validating the dismissal of the respondent.

[12] On the issue of substantive fairness, the arbitrator found 'on a balance of preponderance that the appellant did not call any witnesses to prove its case. There was one witness whose evidence could not be accepted as she was found to be an

unreliable witness, who was evasive throughout cross examination and in her evidence in chief. No probative value could be placed on her evidence. In the end, there was no fair and valid reason that could have justified the respondent's dismissal.

Grounds of appeal

[13] The appellant advanced the following grounds in support of his appeal:

'*Ad Ground 1 of the appeal and the first question of law*

1. 'Whether there was no substantive reasons for the dismissal of the Respondent.

1.1 Arbitrator concluded that Marula Game Ranch in the arbitration hearing did not call any witnesses to prove its case on a balance of probabilities with regard to the reasons for the dismissal. The arbitrator erred in her conclusion, in this respect as Mr. Cor Beuke and Ms. Rossouw testified concerning the misconduct committed by Mr. Liebenberg in great details.

1.2 The disciplinary hearing record further formed part of the arbitration proceedings and it reflected the evidence of Mr. Johan Kotze concerning the misconduct of Mr. Liebenberg.

1.3 Therefore sufficient evidence was presented to justify the dismissal of the Respondent.'[1]

Ad Ground 2 of the appeal and second question of law

2. 'The Arbitrator misdirected herself in the manner in which she assessed the evidence presented during arbitration. No reasonable arbitrator faced with the same set of facts and evidence would come to the same conclusion concerning the substantive reasons for the dismissal.

2.1 Sufficient and convincing evidence was presented both during the disciplinary hearing and arbitration hearing that proved that the Respondent committed the misconducts he was charged for and dismissal was the fair sanction.'

[1] Notice of Appeal para 1-3.

Ad Ground 3 of the appeal and third question of law

3. ‘Whether the disciplinary hearing was procedurally unfair.

1.1 The Arbitrator misdirected herself when she concluded that any reasonable chairperson who had no proper knowledge of the matter would have started the matter afresh to gain a better background and understanding of the matter, misdirected herself.

1.2 Evidence was presented that the Labour Commissioner’s office ordered that the hearing start de novo before Mr. Cor Beuke and the hearing did start de novo.

1.3 The application brought before the Labour Commissioner’s office for Mr. Cor Beuke to recuse himself was refused by the arbitrator, therefore before the disciplinary hearing commenced after the issue of the impartiality of Mr. Beuke was determined and finalised in the Labour Commissioner’s offices. Therefore, conclusion of the Arbitrator is not supported by the evidence on the record.

1.4 The arbitration record and disciplinary record demonstrate that the Applicant appointed a new disciplinary chairperson when there was an objection to the first one.

1.5 The Disciplinary hearing was postponed allow the Respondent an opportunity to attend to the hearing to present his defence, despite the said opportunity he failed to attend.

1.6 A letter was written to the Respondent by the Applicant to attend to the proceedings, despite the said letter he refused.

1.7 The hearing was procedurally fair in all respects.’

Proceedings before this court

[14] The appeal is opposed by the respondents.

[15] Mr Namandje appeared for the appellant and Mr Coetzee on behalf of the respondent. Both parties filed comprehensive heads of arguments.

[16] The following are common cause facts:

(a) It is common cause that the respondent did not attended the disciplinary hearing
(b) That the appellant called two witnesses at the appellant's disciplinary hearing, Mr. Beuke the chairperson of the disciplinary hearing and Ms Rossow, the initiator at the disciplinary hearing.
(c) That the two witnesses that testified at the internal disciplinary hearing did not testify at the arbitration hearing.
(d) That the record of proceedings of the internal first instance disciplinary hearing was submitted at the arbitration hearing[2].

Substantive fairness – valid and fair reason

[17] On the question of substantive fairness it was argued on behalf of the appellant that it was agreed that the record of disciplinary proceedings would serve as evidence at the arbitration, a position that was further confirmed by the arbitrator's award. Notwithstanding this fact, the arbitrator found that the only evidence that was available in the appellants attempt to prove charges against the respondent was the two witnesses who testified at the arbitration hearing.

[18] This conclusion by the arbitrator was highly contested by the appellant, as the approach to simply limit the factual evaluation to the evidence of two witnesses called at the arbitration hearing to the exclusion of the witnesses who testified at the disciplinary hearing was unreasonable, unfair and an outright misdirection. The appellant holds the view that this is a serious misdirection as the disciplinary record proved that there was indeed a valid reason to dismiss the respondent.

[19] The appellant therefore maintained the view that sufficient and convincing evidence was presented both during the disciplinary hearing and arbitration hearing that proved that the respondent committed the misconducts he was charged for and dismissal was the fair sanction.

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[2] Record page 702, Exhibit M.

[20] The respondent on the other hand argued in support of the arbitrator's award and conclusions and said that there was no agreement between the parties at the arbitration hearing to the facts which served before the disciplinary hearing. The respondent contends that the remark by the arbitrator that all evidence led during the disciplinary hearing as reflected in the transcribed record be considered as part of these proceedings does not further the appellant's case.

[21] The respondent further maintained that the agreement is not apparent from the transcribed record and that an arbitrator should in any event consider evidence led at a disciplinary hearing as held in *the Nedbank Namibia Ltd vs Duncan*[3] matter. The conclusion therefore is that the arbitrator could not have accepted the evidence before Mr. Beuke as the truth without the witnesses that testified at the disciplinary hearing being called as a witnesses at the arbitration hearing. As Mr Beuke could only give evidence as to the nature of the proceedings before him but not as to the truth of the statements placed before him.

[22] The respondent maintained that the arbitrator was correct in stating that the respondent did not call any witnesses to prove its case on a balance of probabilities with regards to the reasons for the dismissal. Based on a proper assessment of the totality of the facts before the arbitrator, it is clear that the arbitrator reached a decision a reasonable decision maker would have reached.

Procedural fairness

[23] On the question of procedural fairness, the appellant takes the view that the respondent waived his right to a hearing when he and his legal representative frustrated the hearing with unnecessary objections that dealt with the recusal of the first chairperson and the second chairperson and lastly regarding the matter to start afresh before the new chairperson.

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[3] *Nedbank Namibia Limited v Arendorf* and Others (LCA 1 of 2015) [2017] NALCMD 9 (16 March 2017).

[24] It was argued further that the Appellant was not bound to stay the disciplinary proceedings in the absence of an interdict restraining it to do so. The Chairperson proceeded with the hearing as he found that there was a refusal by the Respondent to participate in the hearing. It is concluded that the arbitrator did not question this finding and that the appeal must be determined on the basis that the Respondent had refused to participate in the hearing.

[25] The Appellant therefore submits that the disciplinary hearing was procedurally fair on the basis that there was no interdict restraining them from proceeding with the hearing as scheduled and the respondents' conscious decision not to participate in the hearing amounted to a clear and express waiver.

[26] The respondent argued in opposition that the hearing ought to have started afresh before the newly appointed chairperson. The newly appointed chairperson considered evidence that was not presented to him but which was presented before the chairperson that recused himself.

[27] The respondent further argued that he did not refuse to attend the disciplinary hearing, but was awaiting the outcome of the urgent application for the recusal of Mr. Beuke as chairperson of his disciplinary hearing. Mr. Beuke did not wait for the outcome of the urgent application and unfairly dismissed the respondent. The appellant has furthermore refused to attend to the respondent's disciplinary appeal.

Applicable legal principles

Substantive fairness – fair and valid reason

[28] Section 33 of the Labour Act provides for the law on unfair dismissal. The section simply reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair.[4]

[29] In terms of section 89(1)*(a)* of the Labour Act a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 on any question of law alone. The general principle to be applied to determine whether an

[4] *Dominikus v Namgem Diamonds Manufacturing* (LCA 4/2016) [2018] NALCMD 5 (23 March 2018) para 20.

appeal is on a question of law is whether on the material placed before the arbitrator during the proceedings, there was no evidence which could have reasonably supported the findings made. Thus, the test is whether, on a proper evaluation of the evidence placed before the arbitrator that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings. Simply, the appellant must show that the arbitrator's conclusion could not reasonably have been reached.[5].

[30] Relying on the decision that was made in the matter of *Rumingo and Others v Van Wyk* [6], Parker AJ, in the matter of *Nedbank Namibia Limited v Arendorf* [7]made the following remarks, which I consider relevant in the current circumstances:

> '[6] As a general rule questions of law are those questions determined by authoritative legal principles: the court seeks to ascertain the rule of law applicable. (*President of Republic of Namibia and Others v Vlasiu* 1996 NR 36 at 44F-45A) And when it is said that a party may appeal on a question of law, for the purposes of appeal, *Rumingo and Others v Van Wyk* 1997 NR 102 (HC) at 105E tells us that the appellant must show that the impugned decision 'could not reasonably have been reached'. In *Janse van Rensburg* the Supreme Court developed the *Rumingo* principle in this way in paras 43-47:
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> '[43] I now turn to the language of s 89(1)*(a)*. First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr Janse van Rensburg enter Runway 11 without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record 21 and may not be the subject of an appeal to the Labour Court.
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> '[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be

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[5] *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC), para 43.
[6] *Rumingo and Others v Van Wyk* 1997 NR 102 (HC) at 105E.
[7] *Nedbank Namibia Limited v Arendorf* and Others (LCA 1 of 2015) [2017] NALCMD 9 (16 March 2017).

imperiled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed, and it echoes the approach adopted by appellate courts in many different jurisdictions.

'[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.

'[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)*(a)* and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1) *(a)* as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

'[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has

erred in that respect, an appeal will lie against that decision, as it raises a question of law.'(Underlining my emphasis)

[31] And further to the above, Parker J had to answer the question: 'what constitutes whether decision of arbitrator was one which a reasonable arbitrator could make taking into account all the evidence, leaving nothing out', and what follows was the conclusion made:

> '[10] In *Kamanya & Others v Kuiseb Fish Products* 1996 NR 123 at 13, the Labour Court held that it is a requirement of procedural fairness under our law that an employer who conducts an internal disciplinary hearing should keep a proper record of the proceedings. If such record is otiose and plays no role in subsequent arbitration proceedings that may follow when the dispute remains unresolved after conciliation in terms of the Labour Act, why would it matter whether chairpersons of internal disciplinary hearings keep proper records of the proceedings they chair, or they keep no records at all.
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> [11] It is important to state this crucial point: The process of resolution of an industrial dispute of right under the Labour Act involving a complaint of unfair dismissal, as is in the instant case, goes along a statutory continuum, starting with charging an employee with misconduct, through first-instance disciplinary hearing (if the employee denies the charge), followed by an internal appeal hearing to which the employee is entitled, a referral to arbitration if a party is unhappy with the outcome, where the arbitrator must attempt to resolve the dispute through conciliation before beginning arbitration, up to proceedings in the Labour Court where review of, and appeals from, an arbitration award are determined. Every point on the statutory continuum is important; and so, the record of the proceedings of the internal first-instance disciplinary hearing and the internal appeal hearing are relevant for the purposes of conciliation and arbitration. They are disciplinary proceedings at the workplace and they are necessary: they are required by law; and their records of proceedings are relevant at arbitration: they are also required by law.
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> [12] As I have shown, an arbitrator cannot, as a matter of law and common sense, ignore the findings recorded in the records of proceedings of the internal disciplinary hearings (ie the first-instance and appeal hearings) when especially the law demands that proper record of proceedings be kept there; and, *a fortiori*, it is at the internal hearings – not at the conciliation or arbitration proceedings – that an employer gets

> the opportunity to establish that he or she had a valid and fair reason to dismiss the errant employee and that he or she followed a fair procedure in doing so in satisfaction of the requirements of s 33(1) of the Labour Act. I do not think the employer can go to the arbitration with new, sanitized grounds to explain the dismissal. If it is accepted that he or she cannot do that, I fail to see on what basis can anyone argue that an arbitrator can, without justification and without more, disregard the findings of fact and law by the chairpersons of the internal first-instance and appeal hearings, just because, as Mr Soni submitted, the arbitral hearing is a hearing *de novo*. In my view the law required of the arbitrator not to disregard the findings of the internal hearings: after all, they formed part of the record before the arbitrator, as I have said more than once, and they contained evidence as to whether the employer complied with the requirements of s 33(1) of the Labour Act.'(Underlining my emphasis)

[32] Considering the above, it is clear that in our labour law an appeal court 'would be reluctant to upset the factual findings of the arbitrator' so long as the totality of the evidence accounts for such findings; and in that event, every piece of evidence must be considered, leaving nothing out. It is also a clear principle of our law that at arbitration proceedings evidence which is relevant includes evidence of the findings of any internal first-instance and appeal disciplinary hearings which appear on the record of those hearings and which form part of the record before the arbitrator. An arbitrator is therefore not entitled to disregard such findings of law and fact without justification.

[33] The aforementioned leads me to the discussion of the key ground put forth by the appellant; and I consider it first for obvious reasons which will become apparent in due course.

Determination

[34] In the matter before me it is clear that the Respondent lodged a complaint of unfair dismissal with the Labour Commissioner and that the conciliation meeting failed to resolve the dispute and dispute was accordingly referred to arbitration. The respondent was absent from the arbitration hearing and that two witnesses testified

during the arbitration. The record of disciplinary proceedings formed part of the arbitration.

[35] It is further important to point out that no evidence was led during the arbitration proceedings to contradict findings of the internal hearings and testimony of the two witnesses called by the Appellant. The Arbitrator makes the following finding after considering the facts placed before it:

> 'Without wasting my time and energy, the respondent did not call any witness to prove its case on [a] balance of probabilities with regards to the reasons for the dismissal'

[36] It is the above finding that attracted the first and second ground of appeal and questions of law to be determined by the court. The Appellant submits that the arbitrator erred in her conclusion in this respect as Mr. Cor Beuke and Ms. Rossouw testified concerning the misconduct committed by Mr. Liebenberg in great detail. The disciplinary hearing record formed part of the arbitration proceedings and it reflected the evidence of Mr. Johan Kotze concerning the misconduct of Mr. Liebenberg.

[37] The Appellant is of the view that the Arbitrator misdirected herself in the manner in which she assessed the evidence presented during arbitration. No reasonable arbitrator faced with the same set of facts and evidence would come to the same conclusion concerning the substantive reasons for the dismissal. The Appellant therefore maintained the view that sufficient and convincing evidence was presented both during the disciplinary hearing and arbitration hearing that proved that the Respondent committed the misconducts he was charged for and dismissal was the fair sanction.

[38] The respondent argued that there was no evidence to support the agreement between the parties that the disciplinary proceedings should form part of the record of arbitration and that the arbitrator could not have accepted the evidence before Mr Beuke as the truth without the witnesses that testified at the disciplinary hearing being called as witnesses at the arbitration hearing. Mr. Beuke could only testify regarding the proceedings before him

[39] I see no reason why the above principles laid down in the *Nedbank* matter do not find application in the current circumstances. I therefore align myself with the decision and the principles laid down in the matters of *Rumingo*, *Jansen Van Rensburg, Malapane*[8] *and Kamaya*, as far as it finds application in the current circumstances.

[40] It is my considered view that an arbitration award that concludes that an internal disciplinary process was substantively and procedurally unfair, by disregarding the findings of fact and law of the internal hearing, when there was no evidence to justify such conclusion, and when the law required of the arbitrator not to disregard the findings of the internal hearing, will be subject to appeal to the Labour Court under s 89(1) *(a)* and liable to be overturned on the basis that it is wrong in law. The question will then be susceptible to appeal under s 89(1) *(a)* as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[41] In my view the law required of the arbitrator not to disregard the findings of the internal hearings: after all, they formed part of the record before the arbitrator, and they contained evidence as to whether the employer complied with the requirements of s 33(1) of the Labour Act.

[42] It is my view that the arguments advanced by the counsel for the respondent that there was no evidence to support the agreement between the parties that the disciplinary proceedings should form part of the record of arbitration and that the arbitrator could not have accepted the evidence before Mr Beuke as the truth without the witnesses that testified at the disciplinary hearing being called as witnesses at the arbitration hearing, does not hold water if it is tested against the legal principles laid down in the *Nedbank* matter.

[43] This court is entitled to decide whether the conclusion which the arbitrator reached is one that a reasonable arbitrator could have reached on the record; that it is not perverse on the record.[9].

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[8] *Mashale Paulus Malapane v The State* Case No. CA 58/2001 (HC).
[9] See *Janse van Rensburg*, para 43.

[44] The facts of the current proceeding make the case that an arbitrator should not disregard the findings of the internal hearings even stronger, because the respondent did not attended the arbitration proceedings; and so, what was before the arbitrator was only the evidence of the appellant's two witnesses and the record of proceedings of the internal disciplinary hearing. There was no evidence placed before the arbitrator to confute those internal hearings which would entitle the arbitrator to upset the findings and conclusions and recommendations of the internal hearings; not forgetting that those records of proceedings formed part of the record before the arbitrator.

[45] I have looked into the record of proceedings of the first internal hearing and I cannot fault the findings made by the chairperson in terms of the weighing of the evidence, the application of the law, and in terms of the findings on the facts and the law.

[46] By disregarding the findings of fact and law of the internal hearings, when there was no evidence to justify her conclusion, the arbitrator did not properly apply her mind to the reference before her. She came to a conclusion which the evidence could not sustain, a conclusion which could not have been reached on the record by a reasonable arbitrator.

Conclusion

[47] For the foregoing considerations and conclusions, I hold that the conclusion which the arbitrator reached is one which no reasonable arbitrator could reach on the record; it is perverse. This holding is dispositive of the appeal; it is a futile exercise to deal with the rest of the grounds. There is no rule of law prescribing the number of successful grounds which would entitle the court to find for an appellant.

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

1. The appeal is upheld.
2. The award by the arbitrator in case number CRSW 108-17 is set aside.
3. The dismissal of the respondent by appellant is accordingly confirmed.
4. There is no order as to costs.

5. The matter is removed from the roll and is considered as finalised.

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P CHRISTIAAN

Acting Judge

APPEARANCES

APPELLANT:	S Namandje (assisted by N Alexander) Of Sisa Namandje & Co. Inc, Windhoek

RESPONDENT: E Coetzee
Of Tjitemisa & Associates, Windhoek