**REPUBLIC OF NAMIBIA**

**LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: LCA 3/2016

In the matter between:

**NAMDEB DIAMOND CORPORATION (PTY) LTD** **APPELLANT**

and

**THOBIAS SHEYANENA** **RESPONDENT**

**Neutral Citation:** *Namdeb Diamond Corporation (Pty) Ltd v Sheyanena* (LCA 3/2016) [2022] NALCMD 8 (3 March 2022).

**CORAM:** MASUKU J
**Heard:** **3 September 2021**
**Delivered:** **3 March 2022**

**Flynote:** Labour Law – appeal in terms of s 89 of the Labour Act – whether dismissal was substantively fair – whether appellant proved by admissible evidence that the respondent had committed the disciplinary offences of which he had been charged with – reinstatement – circumstances in which reinstatement should be ordered.

**Summary:** The respondent was employed by the appellant as a driver. He was subsequently charged in an internal disciplinary hearing of having committed offences after working hours, which had implicated dishonesty. He was charged with illicit dealing in uncut diamonds and was also charged by the State under the Prevention of Organised Crime Act (POCA). He was subsequently dismissed and his appeal against the dismissal failed. He then lodged a claim for unfair dismissal and unfair labour practice. The arbitrator found for him but refused to order his reinstatement. Aggrieved by the favourable award to the respondent, the appellant noted an appeal, which was followed by a cross-appeal lodged by the respondent, who contended that the arbitrator was wrong in not reinstating the respondent.

*Held*: that on the evidence led, there was no basis in law for the dismissal of the respondent since the disciplinary charges had not been proved. Consequently, the arbitrator was correct in ordering compensation of the respondent in his award.

*Held that*: the arbitrator, although he did not provide good reasons, was correct in finding that the circumstances of the case did not admit of ordering the discretionary remedy of reinstatement.

*Held further that*: reinstatement calls upon the trier of fact to consider a multiplicity of relevant facts, which include the length of time between the dismissal and the date of reinstatement, the nature of the employment; the prejudice to the employer and an innocent employee who may have been employed after the dismissal of the employee.

*Held*: that arbitrators must be astute and not allow spectators in arbitration proceedings to interfere or intervene in proceedings as that may serve to poison the propriety of the proceedings.

The court accordingly upheld the award and made no order as to costs.

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**ORDER**

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1. The arbitral award issued by the Arbitrator and dated 24 December 2015, is upheld.
2. The Appellant's appeal is dismissed.
3. The Respondent's cross-appeal is dismissed.
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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**JUDGMENT**

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**MASUKU J,:**

Introduction

[1] Serving before court for determination is an appeal and cross appeal, both lodged against an arbitral award issued by an arbitrator Mr. Joseph Windstaan dated 24 December 2015. It appears plain that each party has some dissatisfaction with arbitral award.

The parties

[2] The appellant is Namdeb Diamond Corporation (Pty) Ltd, a company duly incorporated in accordance with the company laws of this Republic. Its place of business is situate at Oranjemund. Namdeb will, in this judgment, be referred to as 'the appellant'. This appellation will apply even in the instance where Namdeb is a respondent in the cross-appeal.

[3] The respondent is Mr. Thobias Sheyanena, a Namibian male adult who was in the employ of the appellant. He is now resident in Windhoek. Mr. Sheyanena will be referred to in the judgment as 'the respondent' and this appellation will, for purposes of clarity, apply in respect of the cross-appeal as well.

[4] The appellant was represented by Mr. Maasdorp before this court. The respondent, on the other hand, was represented by Ms. Shilongo-Alexander. The court records its appreciation to both counsel for their industry and assistance rendered to the court in this matter.

Background

[5] The facts that give rise to the present proceedings are fairly straightforward. They acuminate to this: the respondent was employed by the appellant as a bus driver on 31 April 2010. He was based in Oranjemund.

[6] On 15 December 2014, the respondent was dismissed following charges of contravention of PO-SE-01 related to possession and handling of rough or uncut diamonds; breach of trust; giving false evidence and committing an offence outside normal working hours, namely money laundering in disciplinary proceedings instituted against him by his employer.

[7] These charges emanated from an incident in which the respondent was found in possession of an amount of R17 000 at the Namibian and South African at the Swartkop border. He was driving a motor vehicle in which he left Namibia for South Africa. On his return from South Africa, he was found in possession of an amount of R17 000 which it is claimed he did not proffer a proper explanation for his possession of the said amount.

[8] Aggrieved by the dismissal, the respondent lodged a dispute of unfair dismissal and unfair labour practice with the Office of the Labour Commissioner. Conciliation did not bear the desired fruits. Consequently, the dispute proceeded to arbitration and served before Mr. Windstaan, who shall be referred to as ‘the arbitrator’.

[9] After listening to evidence adduced by both parties, the arbitrator, in his award, held that he could not order reinstatement of the respondent because the employment relationship between the parties had been irretrievably harmed. He

proceeded however, to order the appellant to pay the respondent compensation in an amount of N$60 000, which amounts to six months' salary.

[10] The appellant was further ordered to pay the respondent an amount equivalent to the respondent's monthly salary with effect from 16 December 2014 to 15 December 2015. The respondent was also to be paid leave for 12 months and severance for five years. The entire amount due to the respondent in terms of the arbitral award was N$ 200 770,83. Payment was due to be made on or before 15 January 2016.

[11] By notice dated 15 January 2016, the appellant noted an appeal against the award. This was done in terms of the provisions of s 89 of the Labour Act, No. 11 of 2007 ('the Act'). In essence, the appellant contended that the arbitrator erred in law in holding that the appellant did not prove that the action or conduct of the respondent caused a reasonable suspicion of dishonesty or mistrust.

[12] It was also the respondent's case that the arbitrator disregarded in its entirety, the compelling evidence which showed that the respondent had been found in possession of R3 000 in the morning of 24 October 2014 and another R17 000 in the afternoon and that these amounts were separate.

[13] It was the appellant's case that the arbitrator erred in law by concluding on the evidence before him that the respondent had not proffered a deliberate untrue, erroneous or misleading information or testimony regarding the money in question. There are further grounds listed in support of the appeal and which are unnecessary to traverse in full, save to point out, that the appellant submitted that the award was wrong in law and therefor liable to be set aside on appeal.

[14] As indicated earlier in the judgment, the respondent was also aggrieved by the award. In particular, he was aggrieved by the finding in the award that reinstatement could not be ordered 'because the relationship between the two parties has been irreparably harmed by the creation of that matter'.[1]

[1] Para 166 of the award, p 65 of the Volume 1 of the record of proceedings.

[15] It was contended on the respondent's behalf that the award of compensation was the correct one to issue in the circumstances. It was alleged that the arbitrator overlooked the fact that he had found that the appellant could not prove that the action or conduct of the respondent caused a reasonable suspicion of dishonesty or mistrust. It was also contended that there was no extraneous evidence that proved an irretrievable breakdown in the employment relationship.

[16] In view of the issues canvassed above, it would appear to me that there are two cardinal issues that the court is called upon to determine. First, is whether there was sufficient evidence to support the decision to dismiss the respondent? Put differently, the question is whether the decision to dismiss the respondent was substantively fair in all the circumstances. If the court finds in the appellant's favour in that regard, it would mean that the appeal must be upheld and the entire award set aside.

[17] If, on the other hand, the court is of the view that there was no substantive fairness in the dismissal of the respondent, the award would have to be upheld. That is not, the end of the matter though. What the court must also proceed to determine is whether the finding that the employment relationship had broken down irretrievably as the result of the respondent's actions which led to the disciplinary proceedings had been proved. If not, the court may have to consider the propriety of reinstating the respondent.

[18] In order to be able to come to a view on all the above issues, it is important to first consider the evidence that was led for and on behalf of both protagonists during the arbitration hearing. I do so below.

The evidence

[19] It has become trite learning that in labour matters where an employee has been dismissed, he or she only has to prove the dismissal. Once that is done, the onus is on the employer to prove to the satisfaction of the arbitral tribunal that the dismissal was both procedurally and substantively fair. In the instant case, the

dismissal was admitted and as such, it was for the employer to prove that it was a dismissal that was both procedurally and substantively fair before the arbitrator.

[20] In this connection, the appellant called three witnesses namely, Messrs James Fisch, Simon Epafras and Gideon Shikongo to testify. These were all senior security officers in the employ of the appellant. They were all attached to the appellant's security department. I do not find it necessary though to recount in material detail the evidence adduced by each of the witnesses. What I will instead do, is to narrate in very broad strokes what can be regarded as the collective tenure of the evidence. I do so below.

[21] The evidence was to the following effect: In or around 23 October 2015, the appellant's security personnel obtained information to the effect that a person who was in possession of a piece of diamond and who had crossed with it to South Africa was returning to Namibia. This was on account of the fact that the said person had been unable to sell the diamond to the purchaser as the latter failed to raise enough money to take possession of the diamond.

[22] As a result of this information, the security personnel embarked on a security process that was geared, if at all possible, to lay their hands on the culprit and the diamond. In this connection, the company's security personnel was mounted at the Swartkop border post between Namibia and South Africa. This entailed the company's security personnel, with the assistance of the Namibian Police, (Nampol), conducting random searches of persons and vehicles crossing the border to and from South Africa.

[23] On 24 October 2014, the respondent, in the company of Mr. Amos Shikale proceeded to South Africa in a Toyota Corolla sedan vehicle bearing registration number N 64737 W. They reached the checkpoint at around 06h00. The respondent and his passenger were searched by Mr. Nangolo, who was in the company of an officer from Nampol known as Constable Iimbili. The body search on the respondent and his passenger yielded nothing of consequence.

[24] The evidence revealed that the respondent had in his possession a blue wallet, which contained an amount of R 3 000, which was in R200 notes. Mr. Epafras collected the wallet from the vehicle and handed it over to Constable Iimbili of Nampol, to count the money in the presence of the respondent and Mr. Epafras. The respondent is said to have stated that he appreciated that the money was counted so that he does not encounter problems on his return where he can be questioned about the money in his possession.

[25] It was the appellant's evidence, through its witnesses that the respondent then proceeded to South Africa in his vehicle together with his passenger. On return, around 16h10, on the same day, the respondent's vehicle was again searched by the security personnel. On this occasion, Mr. Fisch was on duty at the security point.

[26] During the search of the respondent's vehicle, the security officials found an amount of R17 000 hidden under the back seat of the vehicle and had, according to all the appellant's witnesses, been placed there by the respondent 'with a criminal mind'. The amount was in R100 denominations. They questioned the respondent about how he got possession of this amount and he informed them that he had this money with him in the morning when he left for South Africa but that the officers did not count the money.

[27] The respondent was then required, in view of his explanation, which was considered to be false, to place the amount discovered in the respondent's wallet and he did so. The wallet refused to close despite the respondent's best efforts. The officials' version was that the respondent only had an amount of R3 000 when he proceeded to South Africa that morning. In this connection, Constable Iimbili and Mr. Epafras were contacted and they confirmed that they had counted the money and it was not R17 000 but only R3 000.

[28] The security officials, then proceeded together with members of Nampol to the respondent's residence where they searched the place extensively and for a few hours. The search did not yield anything material. The respondent was later charged by the State. He was subsequently subjected to a disciplinary process for the charges mentioned above. He was found guilty of the latter and his appeal failed,

resulting in his dismissal being confirmed. He did not take the dismissal lying down, but filed a dispute with the office of the Labour Commissioner. That, in sum, is the evidence adduced by the appellant before the arbitrator.

[29] The respondent testified and so did his passenger, Mr. Amos Shikale. The respondent's version was a horse of a different colour. He testified under oath that on the morning in question, he proceeded to South Africa and as recounted earlier, he was required to subject himself to a search, which yielded nothing. It was his evidence that the money in his vehicle was R17 000 and that the security officials at the border did not bother to count it but rather estimated it to be about R5 000, despite his best efforts to persuade them to count it. He expressed a wish that he would not be troubled when he returned later.

[30] The respondent testified further that whilst he was at the border, he received a call from the person whom he was to hand over the money to in South Africa. This, he testified, happened in the presence of the security personnel. The person at the end of the line informed him that since he was still at the border at that time, he would not be able to meet up with the respondent as previously planned.

[31] It was the respondent's evidence that he obtained this amount when he sold a vehicle and strongly denied that the amount was, as alleged, the proceeds of the sale of a diamond. It was his evidence that when he arrived in South Africa, he was afraid because it was a notorious fact that there are many criminals in South Africa and he accordingly decided to hide the money in the vehicle at the place where the search party found it. He completely denied the suggestion that the money had been placed there with a criminal mind as testified by the appellant's witnesses.

[32] It is perhaps important to point out that the evidence of the respondent's passenger did not have any bearing on the version testified to by the respondent. He did not know most of the things, including the money. It was Mr. Shikale's evidence that he did not listen to much of what the respondent said on the phone and did not know about the money in the vehicle either. That was the extent of the evidence adduced by both parties.

Analysis of the evidence

[33] It is fair to say that the level of examination and cross-examination on both sides was very poor. As a result, the respective versions of the parties were not adequately put, if at all, to the opposing side. As such, this renders it very difficult to properly assess the veracity of the evidence adduced and to make informed decisions on the probabilities of the case, especially regard had to the disputes of fact apparent in the matter.

[34] In my considered view, the one blight, if I may call it that, on the appellant, is that the evidence adduced by the appellant appears to have hinged on the amount of the money that was in the respondent's possession when he left Namibia for South Africa. The evidence adduced by the appellant was that it was Constable Iimbili who counted the money and found that it was R3 000. Constable Iimbili was, however, not called as a witness during the arbitration proceedings.

[35] In the circumstances, it is not possible to properly discount the version of the respondent, although it may have some imperfections, which were not properly dealt with in cross-examination. His version of how he came into possession of the money was not seriously discounted in cross-examination. In point of fact, no investigations were conducted in an attempt to establish the truthfulness or otherwise of his version regarding how he got the money. More importantly, there is no evidence at all that the respondent was involved in the sale of a diamond.

[36] There is a memorandum[2] on the record authored by Mr. Fisch regarding the investigations in the matter. He states the following on the third paragraph of the memorandum:

'According to Simon Epafras and Const. Iimbili the money that Sheyanena exits the country with was R200 notes and not R100 notes. Simon revealed that the R200 notes was in a closed wallet and was not more than R3000-00. It is therefore evident that the money is the proceeds of unlawful activities, i.e. illegal Diamond Trafficking'.

[2] Page 121 of the record of proceedings dated 10 November 2014.

[37] This is the very attitude that was displayed by Mr. Fisch during the arbitration. It is clear that his mind was made up and he did not even have any regard to the version put up by the respondent during the investigations. The respondent was alleged to be part of an illicit syndicate dealing in diamonds without any evidential matter supporting that far-reaching conclusion. In their eyes, he was guilty as hell if they had actual evidence regarding the illegal diamond trafficking alleged against him. There is no basis, it is very clear, why the money is said to be from illegal diamond trafficking. Ms. Shilongo's argument that the respondent was profiled by the appellant's security personnel cannot be discounted in view of the foregoing.

[38] It would appear that there was a very strong suspicion by the appellant's security officers about the respondent but such remain suspicions and nothing more. It is clear that the appellant's security officers believed that the respondent obtained the money from sale of diamonds but there was nothing concrete to back up that assertion.

[39] The appellant's witnesses in their evidence even attempted to draw parallels with other cases where money well in the excess of R 200 000 was found hidden in lights of a vehicle driven by some other persons. I do not profess to be an expert in diamonds and may not be, even in the next lifetime. It however stands to reason that the amount of R17 000 found in the respondent's possession can hardly said to be the price for an uncut diamond.

[40] The respondent's version that he hid the money because he feared thugs in South Africa, cannot be discounted as utterly false. I say this again cognisant that there is no evidence at all that the respondent was involved in the sale of a diamond. Suspicions, regardless of how strongly they are held, do not because of the absolute belief in theories of what may have happened, ferment into evidence in the absence of proof.

[41] I say this cognisant that the version by the appellant's witnesses was that they were on the lookout for a diamond that was being returned to Namibia because it had not been sold. That was not found either on the respondent or his witness. The picture one gets from the evidence is that the appellant's officials believed that the

respondent was involved in smuggling diamonds but did not have any evidence. The possession of the money in question, considered with the explanation proffered by the respondent cannot result in one concluding that the respondent's version is without doubt false, imperfect as it may be considered to be.

[42] It may well be that the respondent, according to his version, did not declare the amount in question to custom's authorities. He states that he did not know that he had a duty to so declare the amount. One can quibble about that but there is nothing that is placed by the appellant that serves to gainsay the respondent's evidence that he did not know that he had to declare the amount of money in his possession.

[43] There is, as such, no basis laid, in my considered view for a conclusion that the respondent acted dishonestly. He who alleges must prove. In any event, the respondent was not charged for failure to declare the money in question by the relevant State authorities. His version regarding the non-declaration of the amount in question remains unchallenged.

[44] It is a matter of observation that there is no admissible evidence that shows, contrary to his evidence that he did in fact know that he was required to disclose the amount in his possession. Furthermore, there is no evidence that the amount in his possession, namely R17 000, was in terms of the law applicable at the time, liable for declaration. This is mentioned in view of the notorious fact that there is an amount normally stipulated by customs officials above, which declarations are required in ports of entry into Namibia.

[45] In view of the foregoing analysis, I am of the considered view that the conviction of the respondent by the internal disciplinary committee for breach of trust/ false evidence and offences outside normal working hours cannot be said to have been proven. In regard to the latter, it was found that the respondent had committed an offence outside normal working hours, namely organised crime or money laundering.

[46] The charge of breach of trust is interwoven with the alleged offence committed outside working hours such that it cannot, in my view survive. The court was informed

during the proceedings that up to the time of hearing the matter, the respondent had not been prosecuted for the alleged offence, some 6 years later. In this connection, it must in any event be recalled that there is a presumption of innocence operating in the respondent's favour in Art 12(1)(d) of the Constitution.

[47] It is mind-boggling that the respondent could be found guilty of committing an offence after working hours and dismissed therefor merely because he had been charged with an offence, even if under the Prevention of Organised Crime, (POCA). I say so because there is a possibility that at the end of the day, the respondent may be found not guilty of the offence but would have lost his employment merely because he had been charged. There was no evidence of the respondent having been in possession of a rough or any diamond at all. How he could be guilty possession or handling of a diamond is plainly inexplicable in the circumstances.

[48] In view of the foregoing, it appears to me that it cannot, on the evidence led, properly weighed and considered be concluded that the appellant had a valid and fair reason for dismissing the respondent. In this connection, I am of the considered view that on the whole, the decision reached by the arbitrator that there was no proof that the actions or conduct of the respondent caused a reasonable suspicion of dishonesty is eminently correct. His conclusion that there was no valid or fair reason for dismissing the respondent appears to me to be unassailable in the circumstances.

The cross appeal

[49] I now turn to consider the cross appeal raised by the respondent. It must be mentioned in this connection that the respondent had raised a point of law *in limine* to the effect that the cross appeal should be granted as it had not been properly opposed, if at all by the appellant. This issue served before Van Wyk AJ as she then was. She, in a ruling dated 17 June 2016, dismissed the point of law *in limine.*

[50] The learned acting judge held that strictly speaking, grounds of opposition to a cross-appeal be filed thus rendering a cross-appeal able to stand on its own, even if the main appeal is withdrawn. She however observed that the rules do not prescribe the format for the opposition to a cross-appeal. In that event, she held that it would be

unfair to penalise the appellant for not following a procedure that is not prescribed in the rules. That ruling was not appealed and as such, it must be accepted as settled that the cross-appeal is properly opposed. I will proceed on that basis.

[51] The main question for determination is whether the arbitrator was correct in finding, as he did, that there was a breakdown in the relationship between the parties as a result of the events leading to the disciplinary charges so as to render reinstatement inappropriate. The respondent contends that he should have been reinstated as the delay in this matter is not attributable to him.

[52] I am the first at admit that the delay in this matter on the part of the court was egregious. The matter served before an acting judge. It was heard on 16 November 2016. Judgment was not delivered for a period in the excess of three years from the date of hearing. On 4 December 2019, before the judgment was delivered, the appellant filed an application for the recusal of the judge. The recusal was based on the fact that the acting judge's law firm was acting for the union that represented the respondent.

[53] The application for recusal was heard on 21 January 2020. The application for recusation was successful. The ruling thereon was delivered on 11 May 2021. To mark disapproval of the lateness of the application for recusal, the learned acting judge ordered the appellant to pay the costs of the application for recusal, subject to rule 32(11). As a result, it will be plain that the respondent was dismissed in 2015 and his matter is now ready for judgment some 7 years later. I may mention that the length of the delay, is not attributable him to any degree.

[54] It should be mentioned that the respondent's complaint is that there is no evidence that was led, to show that there was a breakdown in the relationship between the appellant and the respondent. A reading of the award and the record, does not reflect the genesis for the finding in the circumstances. This would ordinarily point to the propriety of upholding the cross-appeal.

[55] The respondent contends in this connection that there was no evidence led which could properly cause the arbitrator to come to a finding that the relationship

between the parties had been irreparably damaged. In this connection, it was submitted that the arbitrator fell into error that is so serious as to warrant the intervention of this court because the appellant failed to prove the charges of dishonesty or mistrust against the respondent.

[56] What does the law say regarding the issue of reinstatement? In *Dominikus v Namgem Diamonds*[3] Ueitele J had to deal with a situation in which there was a delay between the lodging of the appeal and the judgment of four years and three months. The learned judge considered the propriety of reinstatement in the light of that period of delay.

[57] The learned judge referred to a few cases in this connection. One of these is *Parcel Force Namibia (Pty) Ltd v Tsaeb*[4] where the following was stated:

> 'The long delay of four years was not the fault of the respondent. He was wrongly dismissed. In fact Swartbooi was reinstated. In respect of the argument of destroyed confidence, the respondent was a lorry driver, and, though he had to act responsibly by delivering parcels entrusted to him, he was not in a position of, for example, a financial manager in the employ of the appellant. Reinstatement follows the decision by the chairperson of the district labour court to the effect that the respondent should have received a warning and should not have been dismissed by the appellant on the recommendation of the disciplinary committee. That means in fact that he would have continued with his work with the appellant. Reinstatement would not change it and in fact Swartbooi, who was apparently dismissed for the same reason, was reinstated.'

[58] In *Swartbooi and Another v Mbengela NO and Others*,[5] the Supreme Court held that the award must not only be fair to the employees but also to the employers. In this connection, the court had refused to grant reinstatement in those cases where there has been a delay considering the prejudice that would result to innocent parties who have held the position since the dismissal of the employee. The court considered that reinstatement in that case, which was over a period of 5 years from the dismissal, was impractical, inappropriate and unfair to the employer.

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[3] *Dominikus v Namgem Diamonds* (LCA 4/2016) [2018] NALCMD 5 (28 March 2018).
[4] *Parcel Force Namibia (Pty) Ltd v Tsaeb* 2008 (1) NR 248 (LC).
[5] *Swartbooi and Another v Mbengela NO and Others* 2016 (1) NR 158 (SC).

[59] In *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others,*[6] the following was held:

'It is important to note that to force an employer to reinstate an employee is already a tremendous inroad into the common law principle that contracts of employment cannot be specifically enforced. Indeed, if one party has no faith in the honesty and integrity of the other, to force that party to serve or employ the other one is a recipe for disaster. Therefore the discretionary power must be exercised judicially.'

[60] It would seem to me therefor that there are a few considerations that the court has to take into account in deciding on the discretionary remedy of reinstatement. These would include the nature and complexity of the work the employee performed; the nature of the breakdown in the relationship and its seriousness; the egregious nature of the dismissal; the effect of the reinstatement to the employer, especially employees that would have been employed in the interregnum and while the dispute was being determined and of course the period between the dismissal and the reinstatement.

[61] In the instant case, while I have no qualms finding that the respondent was badly treated and dismissed for serious offences in the absence of cogent and admissible evidence, one factor that cannot be overlooked or underplayed, is that the respondent was charged with a criminal offence by the State, which was an issue beyond the appellant's powers, even if was at its report and instigation. The respondent may be convicted or acquitted eventually. What must be borne in mind is that the respondent at this time, enjoys the presumption of innocence as guaranteed under the Constitution.

[62] I am acutely aware that the respondent had no role in the length the proceedings took to be finalised. The same may be said regarding the appellant, save the unreasonable delay it took to lodge the recusal application. I take into account the fact that the work that the respondent performed was that of a driver, which is a position that can be filled readily.

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[6] *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others* LCA 47/2007 delivered on 8 July 2008.

[63] If reinstatement were to be ordered, it may prejudice the appellant and an innocent employee who would have taken over the respondent's job, considering the period it took for the matter to be finalised. There is no indication of what steps the respondent took in the interregnum to secure alternative employment. I am of the considered view that considered carefully, this is a proper case in which reinstatement would not be appropriate. To that extent, the arbitrator's order reinstating the respondent must be upheld.

[64] I do so because on the conspectus of facts attendant to the matter, which the arbitrator did not carefully and clearly deal with, it would be unconscionable, regard to what has been stated in the immediately preceding paragraphs to reinstate the appellant.

Admonition

[65] I find it necessary, before drawing the curtain on this matter, to address one issue that appears to rear its ugly head once in a while. During the proceedings before the arbitrator and on several occasions, there was a person who intervened in the proceedings to cross-examine the respondent. This person was not the appellant's official representative in the proceedings. In the record of proceedings, the individual was described as 'Unknown female voice'.[7]

[66] The procedure allowed by the arbitrator, where persons who were not representatives of either party participated and intervened to pose questions or cross-examine a witness is highly irregular. It may, in appropriate cases even result in the proceedings being set aside therefor. Arbitrators must accordingly be studious and follow the rules of conduct of arbitrations to the letter.

[67] It is odious for spectators to immerse themselves in the pools of litigation. They must remain true to their role as spectators and not interfere or intervene in the proceedings, especially as happened in this case, in favour of the employer, who ordinarily has stronger bargaining power and resources.

[7] Page 233, line 13; 241 line 4; page 85 line 4 and page 123 line 15.

Conclusion

[68] Having regard to what has been stated above, it would appear to me that the arbitrator was correct in his finding that the dismissal of the respondent was substantively unfair. Furthermore, his decision to refuse the respondent's reinstatement was equally justified in the circumstances, although he did not adequately deal with the reasons behind his decision in that regard.

Order

[69] In the circumstances, I am of the considered view that the following order would be condign:

1. The arbitral award issued by the Arbitrator and dated 24 December 2015, is upheld.
2. The Appellant's appeal is dismissed.
3. The Respondent's cross-appeal is dismissed.
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:

| | |
|---|---|
| APPELLANT: | N. Shilongo-Alexander<br>Of Sisa Namandje & Co. Inc. |
| RESPONDENT: | R. Maasdorp<br>Instructed by Kopplinger-Boltman Legal Practitioners |