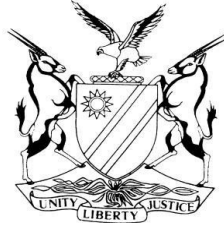


**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case No.: HC-MD-LAB-APP-AAA-2022/00067

In the matter between:

**YULANDA NATASHA MILDRED BEUKES**

**APPELLANT**

and

**FIRST RAND NAMIBIA**

**FIRST RESPONDENT**

**JULIA MUTENDA**

**SECOND RESPONDENT**

**THE LABOUR COMMISSIONER**

**THIRD RESPONDENT**

**Neutral citation:** *Beukes v First Rand Namibia* (HC-MD-LAB-APP-AAA-2022/00067)

[2023] NALCMD 37 (24 August 2023)

**Coram:** CLAASEN J

**Heard:** 5 May 2023

**Delivered:** 24 August 2023

**Flynote:** Labour law – Unfair dismissal – Arbitrator’s award – Appeal and cross appeal against an award by arbitrator which found dismissal was substantively unfair – Charge allegation that bank employee failed to ask a customer to remove his mask – COVID-19 period where customers wore masks – Court upholds arbitrator’s decision that the dismissal was substantively unfair – Factors for consideration when determining reinstatement as primary remedy – Court finds arbitrator’s decision not to reinstate employee was wrong and perverse and orders reinstatement.

**Summary:** The appellant was employed as a Branch Administrator at a commercial bank. An incident occurred at the branch wherein a male person posed as a customer and withdrew a substantial amount of money. The appellant approved the transaction, where after it was discovered that the person who withdrew the money was not the account holder. The bank instituted disciplinary proceedings for non-compliance with its rules/standing instructions, for failure to comply with a Newsflash notification that frontline staff are to request customers to remove their masks for identification purposes. The appellant was found guilty after a disciplinary hearing and was dismissed from the bank.

The appellant approached the Office of the Labour Commissioner. Having conducted a hearing the arbitrator found that the bank unfairly dismissed the appellant and ordered payment of 12 months’ salary to the appellant. The issues in the instant matter was whether the employee contravened a Golden Rule and or Newsflash instruction given by the bank and whether she was entitled to be reinstated.

*Held* that there are basic tenets about rules or standards in the workplace such as whether or not the employee has contravened a rule or instruction, whether the employee knew the rule that he/she allegedly broke, whether it is a fair rule and whether it was consistently applied-

*Held further* that the arbitrator has hit the nail on its head she said that the Newsflash notification does not specify whether the obligation referred to in the alert also applies to Branch Administrators. The term frontline staff leaves room for divergent interpretations.

It is necessary that rules in the workplace be clearly formulated for the employees to know, in no uncertain terms, the conduct that is expected and to whom the rule applies. That was not the case herein. Nor did the Newsflash notification indicates which Golden Rule it was aligned to or which Golden Rule it replaced.

*Held further* that the Labour Court is not at large to overturn an arbitral award simply on the basis that it holds a different view from the arbitrator. It may only do so where it is satisfied that the award is on all accounts, perverse. That cannot be said about the finding that the dismissal was substantively unfair. It is in those premises that this court uphold that part of the award. –

*Held further* that the finding of the existence of an intolerable working relationship between the parties was not properly supported by concrete evidence. Consequently, the arbitrator's decision not to reinstate the appellant was wrong and perverse and thus the court orders reinstatement.

*Held further* that the appeal succeeds and the cross appeal fails in its entirety.

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## ORDER

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1. The appeal succeeds and the cross appeal fails in its entirety.
2. The court upholds the finding by the arbitrator that the dismissal was substantively unfair.
3. The arbitrator's award as regards compensation is set aside and replaced by the following order: The first respondent (First Rand Namibia) is ordered to reinstate Ms Yulanda Natasha Mildred Beukes in a position comparably equal or better to the position she held before she was dismissed and to pay her an

amount equal to the monthly remuneration she would have received had she not been unfairly dismissed.

4. There is no order as to costs.
5. The matter is removed from the roll and regarded as finalised.

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## JUDGMENT

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CLAASEN J:

### Introduction

[1] This constitutes an appeal and cross appeal against an award given by the second respondent ('the arbitrator') on 30 September 2022. The award found that the first respondent and appellant in the cross appeal (hereinafter referred to as 'the bank') unfairly dismissed Ms Yulanda Natasha Mildred Beukes (hereinafter referred to as 'the appellant') and ordered payment of an amount, equivalent to 12 months' salary, to her.

[2] The appellant appeals against the decision of the arbitrator not to have ordered reinstatement in the circumstances. The bank opposed the appeal and filed a cross appeal wherein it attacks the finding of substantive unfairness and the compensation that was awarded to the appellant, lamenting that the appellant has not mitigated her losses.

### Factual Background

[3] The appellant was employed as a Branch Administrator at the bank in Grootfontein. An incident occurred on 30 March 2021, at the branch wherein a male person posed as a FNB customer and withdrew N\$180 000. The appellant approved the

transaction. Thereafter it was discovered that the person who withdrew the money was not the account holder.

[4] The bank instituted disciplinary proceedings against the appellant. The misconduct charge alleged that whilst performing her duties on 30 March 2021 the appellant failed to vigilantly detect that the face of the customer in front of her differs from the photograph of the identity card handed to her during a withdrawal transaction and that she failed to request the client in front of her to remove his mask or hat. Based on the charge she contravened a Newsflash entitled 'COVID Account Take-over Fraud' dated 9 August 2020. The charge sheet also specified that the failure by the appellant to execute her duties with reasonable care and according to expected standards resulted in financial loss of N\$180 000, which the bank had to refund its client.

[5] The bank's Disciplinary Code in the Industrial Relations Policy and Procedures categorised the offense of non-compliance with rules, procedures, standing instructions and/or orders, which results in loss or major risk to the Group as a serious offense which warrants dismissal. Upon finalisation of the disciplinary hearing, the appellant was found guilty and she was dismissed.

[6] Aggrieved by the finding at the disciplinary hearing, the appellant referred her dismissal to the Office of the Labour Commissioner. The arbitrator convened a hearing for purposes of determining whether the dismissal was substantively and procedurally fair and further suitable relief.

#### The arbitration reasons and award

[7] The arbitrator in her reasons for the award referred to the evidence and motivated her stance on the issues before her in an extensive judgment. I do not intend to set out the expansive evidence but will summarise the salient parts thereof. The bank tendered evidence of the following witnesses:

[7.1] The Branch Manager, Ms Garosas to whom the appellant reported. She testified mainly about the bank's Golden Rules, and Newsflash notifications. She proceeded to set out the content of a Newsflash notification transmitted on 2 July 2020 about account takeovers and identity theft as well as one transmitted on 8 September 2020 about account takeovers during COVID-19. As for the contravention by the appellant she testified that the appellant should have asked the customer to remove the hat or mask and do a proper identification, in terms of looking at the facial features of the person. She also stated that she interprets 'frontline staff' as anyone that would go and assist a customer at the enquiries counter.

[7.2] A forensic investigator, Mr Van Schoor, who extracted CCTV footage as well as audit trails from the Hogan system and the Phoenix system. He provided information relating to the incident as well as other fraudulent occurrences perpetrated by the same fraudster at other FNB branches. He did this after receiving a call from the Manager at Eenhana. He explained that the perpetrators (an old and young man) cancelled the customer's sim card at MTC in Rehoboth and replaced the same number to obtain a new sim card and activate a cellphone. They attempted to withdraw money at Rehoboth branch. They were not successful as the staff referred them the branch where the account was held as they were not satisfied with the signature and some answers to the questions. However, subsequent thereto these perpetrators went to the Omararu branch and withdrew N\$ 45 000. From there they went to the Karibib branch where they obtained a debit card, registered on the FNB banking 'app,' transferred funds, did e-wallets and purchased items at a Built-it store in Okahandja, before proceeding to the Grootfontein branch. Based on the footage, the appellant did not ask the perpetrator to remove his mask or hat, which was a transgression of a certain Newsflash.

[7.3] The Chief Human Resources Officer, Mr Angula who spoke about the nature of the offense and the disciplinary proceedings at the bank in connection with the said matter.

[7.4] An Area Manager of the bank, Mr Kahono, who was appointed as the chairperson of the disciplinary hearing against the appellant. He attested that the appellant was expected to have been vigilant in identifying customers and asked the person to remove his mask and hat.

[8] The case for the appellant was presented by evidence of the following persons:

[8.1] Mr Aibeb who is a Branch Administrator of First National Bank at Outjo. He testified that the role of a Branch Administrator is not considered as frontline staff. He considered it to the tellers and consultants who are frontline staff members. As such there was no obligation on him, in his role, to identify customers and perform KYC functions. That underpinned his view that the Newsflash in terms of which the appellant was charged was meant for frontline staff. According to him Newsflash is an addition to the bank's Golden Rules.

[8.2] The Home Loans and Payment Administrator, Mr Waryie, who testified that some of the employees were not subjected to disciplinary measures and that it also resulted in different outcomes for the staff members. He also stated that even though there were transactions committed at the Omaruru branch, the staff member at that branch was not charged.

[8.3] The Teller, Ms Vatileni, at the Grootfontein branch. She was the first contact with the person on 30 March 2021, who fraudulently represented himself as an FNB customer. She referred the fraudster to the appellant, who came and verified aspects on her Phoenix system, asked the fraudster for his cellphone number and why he wanted to withdraw such a huge amount of money and that his signature did not look suspicious on that day.

[8.4] The appellant, who spoke about the charge of non-compliance with the rules and procedures of the bank, but that the rules have since been amended to specify that Branch Administrators or Managers have to identify the customer. She also testified that her working relationship with the initiator was not healthy and that she was informed that

the position of Branch Administrator has become redundant as the bank restructured positions. She was also asked whether it was possible to ask the customer to remove his mask in the cubicle where she had gone to interview the customer. She answered in the negative, saying that there was no social distancing and no shield which could have protected her or fellow colleagues and they were in direct contact with the customer.

[9] She also testified that it became apparent that the fraudster at the Grootfontein branch had been using the same *modus operandi* at the Rehoboth branch, the Omaruru branch and the Karibib branch. It appears that the fraudster managed to defraud a total amount of N\$557 943,49 from that customers' accounts, which included the N\$180 000 for which this appellant was charged. The appellant opined that, although similar offences occurred at the other branches, the disciplinary measures were not the same as she was the only one that was dismissed.

[10] The arbitrator disagreed with the bank that the appellant breached a rule and reasoned that 'Newsflash' cannot be regarded as a rule but that it is rather communication to sensitize staff members about suspicious customers. The arbitrator referred to the evidence about the Golden Rules which inter alia provide that withdrawals of N\$100 000 or more should be authorised by the Branch Administrator, Manager, or a Business Manager and that all customers must be positively identified and 'KYC' compliant. However, the arbitrator found that it does not specify whether positively identifying a customer refers to requesting the customer to remove the hat and mask and whether the duty to do so was that of the Branch Administrator.

[11] In line with that, the arbitrator construed the amendment to the Golden Rules to specify and include a point that a Branch Administrator must ensure that the face of a customer correspond with the photograph in the identity document, as indicative thereof that there was no such duty on the appellant at the time of the incident. The arbitrator also aligned with the view expressed by the Branch Manager of Outjo, that it is only tellers and consultants with the roles of first point of engagement with customers who are 'front line staff' and that Branch Administrators cannot be regarded as such.



[12] The arbitrator also referred to an inconsistent application of sanctions, as the fraudster did the same at other branches and the disciplinary hearings had divergent outcomes for staff across the branches.

[13] Having found that the bank unfairly dismissed the appellant, the arbitrator went on to find the employment relationship between the appellant and the initiator as an intolerable one and ordered compensation equivalent to the annual remuneration scale of the appellant.

#### Grounds of appeal

[14] The appellant's ground of appeal was that the arbitrator erred in law, if regard is had to the facts and the application of the law, in finding that the appellant was not entitled to reinstatement, in particular that the employer-employee relationship has irrevocably broken down.

[15] The cross appeal was premised on two grounds. Firstly, that the arbitrator erred in law, if regard is had to the facts and application of the law, that the dismissal of the appellant was substantively unfair. Secondly, that the arbitrator erred in awarding compensation in favour of the appellant without considering that the appellant's conduct caused her dismissal, and that the appellant did not mitigate her losses.

#### Submissions by counsel

[16] Counsel for the appellant's view was that the decision not to reinstate the appellant was a decision that no reasonable arbitrator would have made and prayed for reinstatement. The nub of his argument was that the arbitrator read too much into the appellant's evidence that the working relationship between her and her supervisor was not healthy. Furthermore, the arbitrator also relied on submissions by the bank's representative that the working relationship has broken down.

[17] That was countered by counsel for the bank, who argued that it was not a mistake, because the arbitrator considered that the appellant conceded that she contributed to her dismissal in one way or another. Furthermore, that the appellant attested that her work relationship with Ms Garosas (to whom she reported) was tense and that she was told that her post will be rendered redundant in the restructuring exercise that the bank was undertaking.

[18] In respect of the cross appeal the argument was that the bank has Golden Rules, which inter alia required from the appellant to have positively identified the customer and also to be 'KYC' compliant, before she approved the transaction. It was explained that 'KYC' is an acronym that stems from the Financial Intelligence Act 13 of 2012, which means, 'know your customer' and it requires that businesses must conduct customer due diligence. In bank parlance it entails duties such as that a bank employee has to verify a customer's face with the photograph on his or her identity card and verify the signature with that on the bank's records etc.

[19] Furthermore counsel for the bank explained that the bank also utilised Newsflash electronic notifications which are sent to employees. One of these was transmitted during the COVID-19 period when customers were wearing masks. The instruction was that customers have to be requested to remove the mask or hat, for identification purposes. According to her the appellant's contention that she was not a frontline staff was a fallacy because any staff member who assists a customer is a frontline staff member.

[20] As regards the second ground, counsel for the bank stated that it is a trite principle in labour law that a dismissed employee cannot just sit back, but have to make an effort to seek employment, to mitigate her loss. She cited case law such as *Pupkewitz Motor Division (Pty)(Ltd) v Katjiruru*<sup>1</sup> in support of that argument and prayed

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<sup>1</sup> *Pupkewitz Motor Division (Pty)(Ltd) v Katjiruru* (HC-MD-LAB-APP-AAA-2021/00062) [2022] NAHCMD 78 (16 December 2022).

that the award be set aside or amended as the court sees fit, but that in the event that the substantive fairness is in their favour, no issue arises as to compensation.

[21] In arguing against these propositions, counsel for the appellant emphasised that the teller said that she asked the customer to remove the mask and reiterated that the appellant was a staff member at the back office and not a front line staff member. He argued that the appellant did more than what was required, not only did she ask the six KYC questions but the 'customer' was also asked to remove his mask. Thus, the conclusion of substantive unfair dismissal by the arbitrator was no error.

[22] In reply, the counsel for the bank recapitulated that the appellant's case in the arbitration hearing was simply that the Golden Rule or Newflash instruction did not apply to her, and not that she in fact complied with the rule(s). She submitted that the contention by counsel for the appellant was contrived, as it was the teller who asked the KYC questions and asked the customer to remove the mask and not the appellant. I will revert back to the evidence of the teller and the appellant as to who did what between the two of them further along in the judgment.

### Legal principles

[23] Section 33 of the Labour Act 11 of 2007 (the Act) fortifies the established principle that dismissals of employees must be both substantively and procedurally fair. One of the qualms raised by the cross appeal is that of substantive fairness. In *Dominikus v Namgem Diamonds Manufacturing*,<sup>2</sup> substantive fairness was explained at para 21 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. The rule, that the employee is

<sup>2</sup> *Dominikus v Namgem Diamonds Manufacturing* (LCA 4/2016) [2018] NALCMD 5 (23 March 2018).

dismissed for breaking, must be valid and reasonable. Generally speaking, 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.'

[24] There is no doubt in this matter that the appellant was dismissed, thus the presumption in s 33(4)(b) of the Act comes into play. In the context of this matter, it is thus necessary to consider whether the arbitrator erred in concluding that the bank did not satisfy the requirements of substantive fairness, which concerns the question of a valid and fair reason to dismiss. The bank thus had to prove on a balance of probabilities that it had a right to dismiss the appellant in the light of the facts of the case and that is where I turn to. The specific charge allegation was that the appellant contravened a Newsflash notification as she did not ask the client in front of her to remove his mask or hat before she approved the withdrawal.

[25] Before dealing with the facts at hand, it is necessary to refer to basic tenets about rules or standards in the workplace and sanctions for that. In such a probe, there are several considerations such as whether or not the employee has contravened a rule or instruction, whether the employee knew the rule that he/she allegedly broke, whether it is a fair rule and whether it was consistently applied. When it comes to sanctions the questions will interrogate whether the breach of the rule was so serious as to merit dismissal as a disciplinary measure and whether dismissal was justified despite any mitigating circumstances that may have been relevant to the situation at hand.

[26] Having had regard to the reasons by the arbitrator, in simplified terms, the matter turns on ambiguity as regards to whether the Newsflash notification constituted a rule as part of the Golden Rules and whether it applied to the appellant. There was no dispute that the procedural steps that the bank expected its employees to follow was documented and known as the 'Golden Rules'. Ms Garosas described it as step by step procedures for the various functions in the bank. The Golden Rule for withdrawal of funds, inter alia, required that withdrawals of N\$100 000 or more should be authorised by the Branch Administrator, Manager, or the Business Manager and that all customers

must be positively identified and 'KYC' compliant. This has been referred to in the arbitration hearing as the old Golden Rule.

[27] The bank's witness, Ms Garosas, explained that the bank keeps records of customers' details such as identity documents and signature specimens for verification purposes. She stated that what was required was that the identity document has to be checked against the Phoenix system. In her understanding, it also meant physical face-to-face verification.

[28] I turn to the evidence by the teller, Ms Vatileni on this score. She stated that she, after having conducted her series of checks, referred the withdrawal slip to the appellant. Ms Vatileni stated that the 'customer' presented an identity document and that there was nothing suspicious about the signature on the withdrawal slip. Furthermore, the evidence by both the appellant and Ms Vatileni was that the appellant accessed the Phoenix system at Ms Vatileni's desk to check and that the appellant also asked questions. The appellant specifically mentioned that she asked the 'customer' the questions, known in banking terms as the 'six questions.' This included a question as to his cellphone number, she confirmed it on the Hogan system and it corresponded. The man answered the questions satisfactorily, she also compared the signatures and it raised no red flag. That accords with the evidence of the teller who said that the signatures looked alike. On that basis there was no suspicions raised as to fraudulent activity. That evidence was not refuted.

[29] The steps followed by the appellant point to steps taken to identify and verify the customer's information as on the bank's electronic record systems. The evidence by both witnesses who had direct contact with him corroborated the fact there was nothing unbecoming as they went through the Golden Rule steps for withdrawal of funds. It also has to be remembered that the existing Golden Rule was formulated in general tenor, namely that customers must be positively identified and 'KYC' compliant. As such it is difficult to comprehend the contention by the bank that the appellant did not comply with the procedures in place at the time.

[30] It is apparent that the bank expected the appellant to have done more than that, on the basis of a Newsflash notification. Ms Garosas described Newsflash as a quick guide that supplements a Golden Rule and that it is something that they need to implement with immediate effect. It then basically becomes a rule or a process which needs to be followed until it is assimilated into the Golden Rules.

[31] I accept that rules or procedures in the workplace can flow from various sources. In this matter the rationale for the Newsflash was to instantaneously attend to instances of account fraud during the COVID-19 period when the wearing of masks were mandatory. In looking at the Newsflash alert, which is dated 8 September 2020 and not 09 August 2023 as indicated in the charge, the relevant sentence is set out below:

‘While the wearing of masks is mandatory, it goes without say that it still remains a must and as per set procedures/guidelines, for the frontline staff to humbly request customers wearing masks to remove same for identification purposes whilst ensuring that proper social distancing is maintained at all times.’ *sic*

[32] The arbitrator hit the nail on its head in her criticism that the Newsflash does not specify whether the obligation referred to in the alert also applies to Branch Administrators. My view is that the term frontline staff leaves room for divergent interpretations, as it became evident in this case. It is necessary that rules in the workplace be clearly formulated for the employees to know, in no uncertain terms, the conduct that is expected and to whom the rule applies. The meaning of ‘front line’ in the Concise English Oxford Dictionary <sup>3</sup> is defined as ‘the military line or part of an army that is closest to the enemy’ or ‘the most important position in a debate or movement.’ If that is contextualized to the employment set up in the situation at hand, it implies that tellers will be categorized as the front line staff as they represent the first direct contact with a client. The bottom line is that the term is capable of different interpretations as the various staff who testified herein explained. In view of that, it was not clear which staff members are included in that category. In my view it is unfair to charge an employee for

<sup>3</sup> A Slevenson and M Waite *Concise English Oxford Dictionary* 12 ed (2011).

contravention of a rule of which the formulation of its scope is ambiguous. It has a bearing on whether it can be said, with certainty, that the employee know of the rule and that it applies to him or her. Had the bank formulated the rule clearer there would have been no confusion about it.

[33] In addition, the Newsflash notification was also silent as to which of the bank's existing Golden Rules it replaced or which Golden Rule it was aligned to. As such the arbitrator also found that the appellant was essentially charged for a purported rule that was not yet in place, because the bank only inserted that as a Golden Rule through an amended afterwards. That is where I turn to next.

[34] It was common cause that on 21 August 2021 the bank amended its existing Golden Rules relating to withdrawal of funds. The amendment<sup>4</sup> introduced the duty in exact detail, so as to leave no uncertainty that the staff member has to 'ensure that the face of the customer agrees with the photograph in the identity document.' That is as opposed to the old Golden Rule that merely placed an obligation on the employee to 'positively identify the customer.' Even more appropriately, the bank also specifically named the categories to which it applies namely 'Branch Administrator or Manager Resources or Business Manager or Branch Manager' who deals with withdrawals where the amount exceeds N\$100 000.

[35] As to what informed the amendment, the appellant gave a telling explanation:

'There was a lot of cases that came out identity theft cases to be specific, that came out and that came to light. And with that in mind the bank realised that there is a loophole in the sense of the Golden Rule does not, it is not specific. It is not saying specifically. I mean you want to hold the staff members accountable is it not? But then it should not be a guessing game for them. Something must be precise and direct. You must say it whenever, if you want them to comply with this rule the rule must be very specific. And they saw that the rule does not

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<sup>4</sup> Amended Golden Rule point 3.4.2.

speak to what the expectation of the bank is that they want us to go and identify a customer but the rule did not make provision for that.<sup>5</sup>

[36] The amendment is, in my view, tantamount to a concession that there was a loophole in the existing applicable Golden Rule. The old Golden Rule was not sufficiently descriptive in terms of what the bank expected from its employees as to the facial comparison requirement. All things considered, I am in agreement with the findings of the arbitrator that the bank did not discharge its onus to show that the dismissal was substantively fair. The Labour Court is not at large to overturn an arbitral award simply on the basis that it holds a different view from the arbitrator. It may only do so where it is satisfied that the award is on all accounts, perverse.<sup>6</sup> That cannot be said about the award on the finding in relation to the dismissal being substantively unfair. It is in those premises that I uphold the arbitrator's award.

### Reinstatement

[37] The second pivotal question before this court is whether the arbitrator was correct in the remedy that she ordered, compensation instead of reinstatement. The finding was that the appellant was not entitled to reinstatement in view of the appellant's evidence that the relationship between the appellant and the supervisor was tense. The arbitrator supported that stance with reference to the bank's representative's submissions before her that the employer-employee relationship between the parties broke down. Consequently the arbitrator regarded reinstatement as impracticable and in lieu of that granted compensation in the amount of N\$593 130,60, which was the annual remuneration as indicated by the appellant.

[38] In considering the feasibility of reinstatement, Masuku J had this to say in *Namdeb Diamond Corporation (Pty) Ltd v Sheyanena*<sup>7</sup> at para 60:

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<sup>5</sup> Appeal record at p 936 lines 16 to 23 and at p 937 lines 1 to 7.

<sup>6</sup> *Namibia Foods and Allied Workers' Union v Novanam Limited* (HC-MD-LAB-APP-AAA-2017/00015) NAHCMD 24 (5 October 2018).

<sup>7</sup> *Namdeb Diamond Corporation (Pty) Ltd v Sheyanena* (LCA 3/2016) [2022] NALCMD 8 (3 March 2022).



'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.'

[39] Whether there is a breach of the trust relationship of employer and employee is also of relevance. In this regard it was stated in *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others*<sup>8</sup> that:

'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.'

[40] In considering the issue, the appellant testified that it was her first disciplinary encounter in her service of 19 years at the bank. The period which elapsed between the dismissal at the bank and the appeal at this court is less than two years.

[41] Although it was not a prominent issue before the arbitrator, it appears that the bank engaged in a restructuring exercise. It is a factor in consideration at this juncture, even though it was not mentioned in the arbitrator's reasons for not granting reinstatement. The appellant testified that she was verbally informed that her position as Branch Administrator will become redundant. Furthermore, she realised on the day of her dismissal that Ms Gorases, the Branch Manager, will take over her duties. In the matter at hand the appellant was not dismissed for operational reasons, on account of the needs of the bank, which makes it difficult for this court to comment on the merits thereof vis a vis the purported redundancy of the appellant's position. What can be

<sup>8</sup> *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & Others* LCA 47/2007 delivered on 8 July 2008.

deduced is thus that no new staff member was appointed in that position and it was amalgamated with another position.

[42] The appellant had been employed as a Branch Administrator for close to two decades at the bank, which is indicative thereof that she could be versatile in multiple functions in the bank. Furthermore, the nature of the charge does not stem from any dishonesty or lack of integrity on the appellant's part. The incident came about as a result of opportunistic criminal behavior by the man who masqueraded as a legitimate customer, whilst he was not.

[43] It appears to me that the finding of the existence of an intolerable working relationship between the parties was not properly supported by concrete evidence at all. The evidence was merely that the work relationship between the appellant and her supervisor was tense and not healthy. That is it, nothing more, nothing less. That, in my view, does not equate to a conclusion of an intolerable work relationship, which would have justified the arbitrator's decision not to reinstate. The general rule which gives primacy to reinstatement, as the preferred remedy for unfair dismissal, must prevail. Therefore, the decision to award compensation rather than to award the primary remedy of reinstatement is one that no reasonable arbitrator could have come to. Consequently the court orders reinstatement.

[44] It follows that the appeal succeeds and the cross appeal fails in its entirety.

[45] In the result, the order is as follows:

1. The appeal succeeds and the cross appeal fails in its entirety.
2. The court upholds the finding by the arbitrator that the dismissal was substantively unfair.
3. The arbitrator's award as regards compensation is set aside and replaced by the following order: The first respondent (First Rand Namibia) is ordered to

reinstate Ms Yulanda Natasha Mildred Beukes in a position comparably equal or better to the position she held before she was dismissed and to pay her an amount equal to the monthly remuneration she would have received had she not been unfairly dismissed.

4. There is no order as to costs.
5. The matter is removed from the roll and regarded as finalised.

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C CLAASEN

Judge

APPEARANCES

APPELLANT:

M Ikanga  
Of Ikanga Legal Practitioners, Windhoek

RESPONDENT:

L Van der Smit  
Of Koep & Partners, Windhoek