

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2023/00035

In the matter between:

SWAKOP URANIUM (PTY) LTD

APPELLANT

and

GEORGE CAMM

1st RESPONDENT

MARLEE CALPH N.O

1st RESPONDENT

Neutral citation: *Swakop Uranium (Pty) Ltd v Camm* (HC-MD-LAB-APP-AAA-2023/00035) [2024] NAHCLD 10 (5 April 2024)

Coram: USIKU J

Heard: 6 October 2023

Delivered: 5 April 2024

Flynote: Labour law – Unfair dismissal – Employer bearing onus to prove fairness of the dismissal – Court finding that arbitrator properly found that the dismissal was substantively unfair and properly awarded reinstatement and compensation.

Summary: The appellant appeals against the arbitrator's findings and award in favour of the respondent to the effect that the respondent's dismissal was substantively unfair. The court finds that the arbitrator's findings and award are

justified by the evidence which was placed before him. For that reason the court dismisses the appeal.

ORDER

1. The appellant's appeal is dismissed.
 2. I make no order as to costs.
 3. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU J:

Introduction

[1] This is an appeal against the entire judgment and arbitration award made by an arbitrator under s 86(15) of the Labour Act 11 of 2007 ('the Act'). On 25 April 2023, the arbitrator held that the first respondent ('the respondent') was unfairly dismissed by the appellant and ordered the appellant to reinstate him and to compensate him for 12 months' loss of income.

Background

[2] The respondent had been employed by the appellant as a Senior Operator since 3 August 2015.

[3] On 13 August 2021 to 3 September 2021, the respondent did not report for duty. On 3 September 2021, the appellant gave him a notice to appear before a disciplinary enquiry scheduled for 8 September 2021. Two charges were levelled against him, namely:

- (a) failure to follow company procedure, in that the respondent did not inform his supervisor of his whereabouts from 16 to 17 August 2021; and,
- (b) failure to comply with Covid-19 company measures.

[4] The chairperson of the disciplinary enquiry found the respondent guilty on the first charge and acquitted him on the second charge and recommended that he be dismissed from employment effective from 14 September 2021.

[5] On 16 September 2021, the respondent lodged an internal appeal against the decision of the chairperson of the disciplinary enquiry but his appeal was dismissed on 6 October 2021.

[6] On 8 October 2021, the respondent lodged a further internal appeal to a Disciplinary Review Committee. This appeal too was unsuccessful and was dismissed on 28 October 2021.

[7] On 7 January 2022, the respondent referred a dispute of unfair dismissal to the office of the Labour Commissioner in terms of the provision of the Act.

[8] On 25 April 2023, the arbitrator upheld the respondent's unfair dismissal complaint, concluding that the respondent's dismissal was substantively and procedurally unfair. The arbitrator ordered the appellant to reinstate the respondent with effect from 1 June 2023 and that the appellant pays the respondent compensation equal to 12 months remuneration that he would have received had he not been unfairly dismissed, totalling N\$425 069,16, and that such payment be made on or before 31 May 2023.

[9] Aggrieved by the foregoing decision, on 22 May 2023, the appellant noted the present appeal.

Grounds of appeal

[10] The appellant appeals against the arbitrator's decision on the following grounds:

- (a) the arbitrator erred in law, if regard is had to the facts and their application to the law, when he found that the respondent's dismissal was substantively unfair and not in accordance with the Act. On this

aspect, the appellant contends that the finding that the respondent's dismissal was substantively unfair is a finding that no reasonable arbitrator could have reached on the evidence before him;

- (b) the arbitrator erred in law in finding and concluding that the dismissal of the respondent was procedurally unfair and not in compliance with s 33 of the Act. The appellant submits that the finding and conclusion made by the arbitrator that the respondent's dismissal was procedurally unfair is a finding that no reasonable arbitrator could have reached on the evidence before him;
- (c) the arbitrator erred in law when he awarded compensation in favour of the respondent, in absence of any evidence that the respondent attempted to mitigate his losses and without considering and weighing the evidence that the respondent solely or significantly contributed towards his dismissal; and that;
- (d) the arbitrator erred in finding and concluding that the appellant could be expected to continue working with the respondent and ordering that the respondent be reinstated to his former position with all benefits, alternatively, the arbitrator erred in ordering that the respondent be reinstated despite the presence of evidence at arbitration that the respondent's position had been filled and that there were no available alternative positions to which the respondent could be placed within the appellant's employ. The appellant contends that the finding and order that the respondent be reinstated is one that no reasonable arbitrator could make on the evidence before him.

[11] The appellant therefore submits that the appeal be upheld and that the award by the arbitrator be set aside and replaced with an order dismissing the referral filed by the respondent.

Opposition to the appeal

[12] The respondent opposes the appeal. In his grounds of opposition, the respondent contends that the arbitrator correctly concluded that the appellant had failed to demonstrate that it had valid reason to dismiss the respondent. The

respondent argues further that the appellant failed to prove at the arbitration the rules and procedures which the respondent violated.

Analysis

[13] Section 33(1) of the Act provides that an employer must not dismiss an employee without 'a valid and fair reason' and without following a fair procedure.

[14] The cardinal issues that stood for determination before the arbitrator were therefore, whether there was a valid and fair reason for the dismissal of the respondent and whether a fair procedure was followed in imposing the disciplinary action.

[15] The onus is on an employer to prove, on the balance of probabilities, that an employee was guilty of misconduct. This involves proving that a rule existed and that the employee contravened the rule. The test of fairness is two-fold and both requirements of substantive and procedural fairness must be met.¹ If the employer fails to satisfy one leg of the test, he fails the test of fairness and the dismissal is liable to be held as unfair dismissal.²

[16] The arbitrator, after evaluating and assessing the evidence placed before him, found that there was no valid or fair reason to find the respondent guilty on the first charge, since there was a 'sick note' (doctor's certificate) showing that the respondent was medically booked off as from the 13 August 2021 to 19 August 2021. The arbitrator also found that there is evidence that there was communication, via cellphone text messages, between the respondent and his supervisor during the period of 14 and 15 August 2021, which is indicative that the supervisor was aware that the respondent will not show up for work during the period of 16 and 17 August 2021. The arbitrator therefore came to the conclusion that there was no basis in law for the dismissal of the respondent since the charges at the disciplinary hearing were not proved.

¹ *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* LCA 11/2016 [2017] 18 (07 July 2017) at para 21.

² *Letshego Bank of Namibia v Bahm* (HC-MD-LAB-APP-AAA-2021/00011) [2022] NALCMD 2 (10 February 2022) para 39.

[17] From the evidence on record, the following facts are either common cause or facts proved, namely:

- (a) the respondent was away from work from 13 August 2021 to 2 September 2021;³
- (b) on 13 August 2021, the respondent informed Mr Isaacs (the supervisor) that he will not report for duty;
- (c) on 15 August 2021, Mr Isaacs made internal arrangements for someone to stand-in for the respondent at work for the 16 to 17 August 2021;⁴
- (d) the respondent submitted a medical certificate dated 13 August 2021, indicating that respondent was booked off from 13 to 19 August 2021.⁵ The respondent submitted the medical certificate to Mr Isaacs on 25 August 2021 via Whatsapp.⁶
- (e) on 3 September 2021, the respondent was served with a notice to appear before a disciplinary enquiry scheduled for 8 September 2021;⁷
- (f) the respondent was charged and found guilty on a count of failure to follow company procedures, in that he did not inform his supervisor of his whereabouts on 16 and 17 August 2021. He was dismissed from employment for that misconduct.⁸
- (g) the respondent used to earn a monthly salary of N\$35 422,43 per month.⁹

[18] The evidence given by Trevor Dube, (who was chairperson of the disciplinary enquiry) is to the effect that, after he went through the respondent's period of absence, he established that the period of 16 to 17 August 2021 was not covered by the medical certificate. In my view, that opinion is incorrect, because the medical certificate shows that the respondent was booked off as from 13 to 19 August 2021.

³ Statement by Mr Isaacs at the disciplinary enquiry; p 202 of the appeal record.

⁴ Page 97 of the appeal record.

⁵ Written Agreement submitted by the appellant and the respondent to the arbitrator, in terms of rule 20(2) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, p 23 of the appeal record.

⁶ Statement by Mr Isaacs at the disciplinary enquiry, p 202 of the appeal record.

⁷ Page 195 of the appeal record.

⁸ Written agreement by the parties submitted in terms of rule 20(2) referred to above.

⁹ Written agreement by the parties submitted in terms of rule 20(2) referred to above.

[19] In any event, the fact that the respondent was booked off from 13 to 19 August 2021 explains the reason for the respondent's absence at work during that period. Even if it were found that Mr Isaacs (the supervisor) was unaware of the respondent's whereabouts during the period of 16 and 17 August 2021, he must have become aware of his whereabouts on 25 August 2021 when he received the medical certificate via WhatsApp indicating that the respondent was booked off for the period of 13 to 19 August 2021.

[20] It is worth noting that one of the 'facts in dispute' raised by the parties in their rule 20(2) agreement was whether the respondent breached any existing rule of the company. The respondent was charged for failure to inform his supervisor of his whereabouts on 16 and 17 August 2021. There was no evidence presented before the arbitrator on whether such a rule exists and if so, whether it was oral or written. If it was written, a copy thereof or of the part relied on, ought to have been tendered in evidence at arbitration.

[21] The evidence on record shows that the respondent did not report for work on the 16 and 17 August 2021, because he was medically booked off. The respondent informed his supervisor about being booked off on 25 August 2021 when he send a copy of the medial certificate to the supervisor via WhatsApp. For the foregoing reason, I cannot fault the finding of the arbitrator that the respondent's dismissal was substantively unfair.

[22] In view of my finding that the appellant did not have a valid and fair reason to dismiss the respondent, I find it unnecessary to consider whether the respondent was dismissed in accordance with a fair procedure. I will therefore proceed to consider the grounds of appeal concerning the relief granted by the arbitrator.

[23] The appellant contends that there is no evidence on record that the respondent attempted to mitigate his losses, and therefore the arbitrator erred in granting compensation in favour of the respondent. This contention has no merit. In his evidence before the arbitrator, the respondent testified that after his dismissal, he tried to find alternative employment at various places such as Namdeb, SAB Miller, Rossing, B2Gold, Namibia Breweries and Namib Mills. His attempts were

unsuccessful.¹⁰ The respondent's evidence on that aspect was not challenged. That ground of appeal therefore stands to be dismissed.

[24] The other ground of appeal is to the effect that the arbitrator erred in reinstating the respondent with all his benefits alternatively erred in ordering reinstatement despite the evidence at arbitration that respondent's position had been filled. There is also no merit in this contention. Where an employee has been unfairly dismissed, an arbitrator is allowed by the Act to make any appropriate award including an order of reinstatement of the employee and an award of compensation.¹¹ The appellant does not advance argument why reinstatement was not appropriate in the circumstances. In addition to that, there was no evidence placed before the arbitrator that respondent's position had been filled or that there is no alternative positions available to which the appellant could place the respondent in its employ. The appellant's contention on this aspect has no merit. Furthermore, the appellant did not lead evidence before the arbitrator to the effect that the trust relationship has broken down between the applicant and the respondent.

[25] On the evidence presented before the arbitrator, I am of the opinion that the arbitrator's findings and the award cannot be faulted. The award is justified by the evidence that was placed before the arbitrator. For the foregoing reasons I am of the opinion that the appeal stands to be dismissed.

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

1. The appellant's appeal is dismissed.
2. I make no order as to costs.
3. The matter is removed from the roll and is regarded finalised.

B USIKU

¹⁰ Page 158 of the appeal record.

¹¹ See section 86(15)(d) and (e) of the Act.

APPEARANCES

APPELLANT: N Bassingthwaighte (with her L Van Der Smit)
Instructed by Koep & Partners, Windhoek

1st

RESPONDENT: E Coetzee
Of Tjitemisa & Associates, Windhoek