



REPORTABLE

CASE NO: SA 55/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMDEB DIAMOND CORPORATION (PTY) LTD

Appellant

and

HENRY DENZIL COETZEE

Respondent

Coram: SHIVUTE CJ, SMUTS JA and HOFF JA

Heard: 23 June 2021

Delivered: 25 March 2022

Summary: In respect of the claim by the respondent that the proceeding in the disciplinary hearing was held *in absentia* and therefore procedurally unfair, the question arose, on the facts, whether or not the respondent had waived his right to a hearing. After rejecting an objection raised by the respondent, the respondent was given a choice either to participate in the disciplinary hearing or to be excluded therefrom. From the testimony of the respondent himself it was clear that he made certain demands and set conditions as to when and how he would be participating in the disciplinary hearing, and persisted therein. The view taken by the respondent that a disciplinary hearing could only proceed on his terms, is untenable. This stance by

the respondent amounted to an abandonment of his right to be heard. The chairperson was justified, in view of unreasonable demands, to proceed with the hearing in the absence of the respondent.

In respect of substantive fairness, the court *a quo* did not consider or evaluate the evidence presented in respect of the charge of gross misconduct, and on the charge of breach of trust, the court *a quo*'s only finding, and erroneously so, was that the chairperson of the disciplinary hearing had no authority to preside and everything which flowed from his assumption of power was invalid. On this charge, the court *a quo* also did not evaluate the evidence presented.

The undisputed evidence was that the respondent was employed as a senior diamond sorter in the geo-lab where diamonds are sorted from gravel and that he had discovered a rare or oversized diamond in the presence of a temporary worker. The standard procedure was to record the particulars, including the weight of the diamond, on a worksheet. The importance of recording the finding of any diamond is to determine which areas of the mine should be explored and this information impacts on the future prospects and lifespan of the mine. This rare diamond was never recorded by the respondent on a worksheet. On the day the diamond was found, the respondent left the diamond in the care of the temporary worker and never returned to secure the diamond in a safe, or checked whether the temporary worker had done so. The respondent was requested to forward photos of the diamond to his superior but delayed sending them for more than three hours under the ruse that the batteries of the camera were flat. During this period another employee, not employed at the geo-lab, was granted access to the area of geo-lab on a false job request. A computer provided by this outside employee was carried into the geo-lab by the respondent himself and the temporary worker. The computer later exited the geo-lab and was received by security officers who did not, as it was their duty to do, inspect the computer, and took the computer to the transport department where it was soon thereafter collected by this outside employee. The outside employee and the temporary worker subsequently left the mine and crossed the border into South

Africa. The computer provided by the outside employee and this rare diamond were never found.

The outside employee during the investigation into the disappearance of this rare diamond pointed out a different computer to the investigators.

The explanation by the respondent why he failed to record the finding of the rare diamond on the worksheet, was that he forgot to do so in the excitement of a looming strike two weeks hence, and that he was distracted by the upcoming strike.

Held on appeal – that the conduct of the respondent in respect of the safekeeping of this rare diamond revealed a very lackadaisical attitude.

Any employee has a fiduciary duty or duty of trust which involves an obligation not to work against his or her employer's interest, and to perform his or her duty faithfully and conscientiously. The respondent's conduct in the circumstances amounted to gross negligence.

Extraneous evidence was presented during the disciplinary and arbitration proceedings to support a finding that there was a breach of trust in the employer-employee relationship. The court *a quo* thus erred when it ordered the reinstatement of the respondent.

It was not disputed that the respondent never pleaded that he suffered any losses due to his dismissal, and never presented any evidence at all to prove losses or how he mitigated losses. The arbitrator thus erred in ordering the appellant to pay an amount of money in respect of loss of income and an amount in respect of compensation.

The court *a quo* misdirected itself on the facts by finding that the dismissal of the respondent was procedurally and substantively unfair.

The appeal is upheld.

APPEAL JUDGMENT

HOFF JA (SHIVUTE CJ and SMUTS JA concurring):

Introduction

[1] This is an appeal, with leave of this court, against the whole judgment of the Labour Court (the court *a quo*), confirming the finding by the arbitrator that the respondent had been unfairly dismissed by the appellant, and ordering reinstatement of the respondent. The arbitrator had declined to order reinstatement. Instead, he ordered appellant to compensate respondent for loss of income.

Background

[2] The respondent was employed by the appellant as a mineralogical technician whose duty it was to sort diamonds in the geological laboratory (the geo-lab).¹

[3] On 17 July 2014 the respondent found an oversized diamond of 77.324 carat (the diamond). At that stage the respondent worked together with a temporary worker Andreas Andreas (Andreas). The supervisor of the respondent, Monalisa van Rooi, a mineralogical technician, after the diamond had been weighed, reported the find to Marais Loubser (Loubser), the exploration manager at about 15h11 on 17 July 2014.

¹ The geo-lab is a facility where gravel samples are sorted for diamonds in order to determine which areas should be mined and impacts on the future prospects and lifespan of the mine.

Contrary to standard procedures the respondent did not immediately record this extraordinary discovery on his worksheet.

[4] Loubser requested that pictures be taken of this rare find and be forwarded to him. The next day he received five photos at about 13h40, which were sent by email from the respondent's email address. On 6 August 2014 the diamond was reported missing. After a thorough search the diamond was never found.

[5] Pursuant to an investigation by the security department, the respondent was charged with gross negligence in the loss of a diamond, breach of trust, providing false evidence, and non-compliance with policies and procedures. The negligence charge was subsequently amended to simply read 'gross negligence'.

[6] On 5 November 2014 the respondent appeared at a disciplinary hearing, and objected against certain procedures. The disciplinary hearing was subsequently moved to a different location due to the 'disruptive nature' of the respondent's representative. The respondent was convicted of all four counts *in absentia*. An internal appeal was unsuccessful, and on 1 December 2014 the respondent was dismissed.

[7] On 5 February 2015 the respondent filed a dispute for conciliation or arbitration with the Office of the Labour Commissioner stating the nature of the dispute as unfair dismissal, unfair labour practice and interpretation/application of a collective agreement.

[8] Arbitration proceedings started on 10 March 2015 and after hearing testimonies of witnesses, including that of the respondent, the arbitrator at the conclusion of the proceedings found that the respondent had been dismissed unfairly. The arbitrator also found that the 'trust relationship' had broken down and declined to order the reinstatement of the respondent. The arbitrator ordered the appellant to pay the respondent the amount of N\$242 111,67 for 'loss of income and for compensation'.

[9] On 20 May 2015, the appellant filed a notice of appeal against the whole arbitration award to the court *a quo*. The respondent filed a cross-appeal limited to the ground that the arbitrator erred in law by not granting respondent the 'primary remedy' of reinstatement. The respondent contended that the trust relationship between the parties had not broken down.

[10] The court *a quo* dismissed the appeal, upheld the cross-appeal, and ordered the appellant to reinstate the respondent and to pay him an amount equal to the monthly remuneration he would have received had he not been unfairly dismissed.

[11] The appellant appealed to this court against the whole judgment and/or order of the court *a quo*.

The disciplinary hearing

[12] The charges levelled against the respondent were the following:

'Charge 1: GROSS NEGLIGENCE

In that, you allow the loss of a large diamond (77.324 ct). You under false pretences intentionally left a temporary worker alone with the precious diamond.

Charge 2: BREACH OF TRUST

In that, you cause reasonable suspicion of dishonesty for which there exists extraneous evidence to prove a break down between you and the Company. You and your accomplices were involved in Organized Crime i.e. stealing and smuggling of diamonds. You deliberately and intentionally did not record the diamond in the worksheet.

Charge 3: FALSE EVIDENCE

In that, you provide false evidence during the investigation, where you were involved in IDT.

Charge 4: NON COMPLIANCE

In that, you fail to comply with standing instructions on 17 July 2014 (*sic*).'

[13] The minutes of the disciplinary hearing form part of the appeal record. The chairperson was Tony Bessinger.

[14] It appears from the minutes that after the charges had been read but before the respondent could plead thereto, the representative of the respondent, Polivester Hangula (Hangula), objected to the fact that the security department was the complainant in the case. It was contended that the line management should have been the complainant and not the security department. It was contended that this was not compliant with the terms of policy PO-SE-01.

[15] Paragraph 4.4.7 of the Disciplinary Code of the appellant provides that offences relating to the possession and handling of rough or uncut diamonds are to be dealt with in terms of company policy PO-SE-01. In all such cases, the complaint will be laid by an official of the security department and the case shall be heard by an official at the head of department level or above.

[16] It was contended on behalf of the respondent that since the respondent was not charged with an offence relating to the possession and handling of a diamond, the provisions of para 4.4.7 were not applicable.

[17] The chairperson overruled this objection and was of the view that the security department should proceed as the complainant. The representative of the respondent refused to accept the ruling by the chairperson. It appears from the minutes that the 'discussions and arguments became counter-productive and reached [a] stalemate situation'. After a recess the chairperson pointed out two options to the respondent: – to either proceed with the hearing with Namdeb Security as complainant, and if this was not acceptable, the hearing would continue in the absence of the respondent.

[18] The record of the proceedings reflects that the chairperson 'necessarily' had to leave the room and proceeded with the hearing in an adjacent conference room. Six witnesses testified on behalf of the complainant.

The arbitration proceedings

[19] At the inception of the arbitration proceedings the representative of the appellant was sworn in as a witness. Her testimony in essence amounted to an

opening address usually given at the beginning of a trial. She was cross-examined not only by the representative of the respondent, but interchangeably by the respondent himself. This is a totally alien procedure – in fact the first time that I have ever come across such, in my view, an irregularity. No reason at all was provided by the arbitrator for such deviation. In view of the fact that the dispute concerns an allegation of an unfair dismissal and unfair labour practice and the fact that the appellant bore the onus of proving on a preponderance of probability that the dismissal was for a fair reason and in accordance with a fair procedure, the appellant should have been required to lead evidence first. Instead, after the representative of the appellant had been cross-examined, the respondent was called to give his testimony.

The evidence led by the respondent

[20] The respondent read out his summary of dispute into the record as his evidence-in-chief.

[21] The respondent testified that at the disciplinary hearing his union representative objected to the fact that the security department was the complainant, since he had not been charged in terms of PO-SE-01. According to the respondent, the fact that the security department was the complainant was not in line with a policy agreed between the union and the appellant. The chairperson of the disciplinary hearing overruled the objection and gave the respondent and his representative the option of continuing with the hearing with the security department as the complainant or should they persist with the objection, the hearing would continue in their absence.

They were granted a ten minutes recess to consult. At the resumption of proceedings, according to the respondent, his stance was that he would participate in the hearing provided that he was charged with the correct charges and that his line management was the complainant. The chairperson then decided to proceed with the disciplinary hearing in his absence. The respondent testified that although the chairperson of the disciplinary hearing was part of senior management, respondent was of the view that the chairperson was biased by proceeding with the hearing on his own volition.

[22] The respondent testified that the next day on 6 November 2014, he submitted a formal objection to the employee relations manager (ER Manager) highlighting his concerns as to the failure to comply with policy, and the behaviour of the hearing official. On 7 November 2014, the ER Manager responded and explained why his line management could not have been the complainant. The response of his union representative was to advise the appellant that they would lodge a dispute if the policy and procedures were not respected and because the hearing continued *in absentia*.

[23] The respondent testified that in the letter from the ER Manager he was urged to continue to attend the hearing and was led to believe that he would get another opportunity to be heard. He received no invitation to attend another hearing. The next correspondence from the appellant was a notice of termination of employment on 1 December 2014. This outcome, according to the respondent, had already been decided on 5 November 2014 and constitutes an unfair labour practice since it amounts to providing misleading information regarding disciplinary proceedings.

[24] Furthermore, the fact that he had been charged with a dismissible offence that is not defined, nor appearing in the disciplinary code namely, 'gross negligence: loss of a diamond or gross negligence' amounts to an unfair labour practice.

[25] In respect of the issue of unfair dismissal, the respondent testified that he was dismissed by the chairperson of the disciplinary hearing only on 'one sided testimony', and that the chairperson failed to request 'real physical evidence'.

[26] The respondent testified that the complainant used misleading evidence when the complainant stated that respondent only sent the photo by email of the diamond at 13h40 while he took the photo in the morning at 10h10, which according to the complainant and chairperson indicated the guilt of the respondent regarding the charge of false evidence. According to the respondent, he had taken the photo of the diamond immediately prior to sending the emails of the photos to the exploration manager at 13h40 on Friday, 18 July 2014.

[27] In respect of the charges of gross negligence and breach of trust, the respondent argued in his testimony that the appellant, in terms of the provisions of the Diamond Act 13 of 1999, was obliged to have performed a security check on the temporary worker, Andreas, whom he had left alone. The respondent testified that the temporary worker had passed the security check, adding that Andreas had prior experience since he had worked for De Beers Marine in a 'security sensitive environment' and respondent had no reason to doubt the integrity of the temporary

worker. The respondent argued that he was not aware of any policy which prohibits a temporary worker to be left alone to conduct his duties, neither did the complainant refer to any specific policy or procedure to substantiate his alleged failure in his responsibilities.

[28] In respect of the charge of breach of trust, the respondent testified that the agreement between the parties and Industrial Relations policies requires that extraneous evidence must exist in order to prove a breakdown in the relationship of trust, and that no such extraneous evidence was presented during the disciplinary hearing.

[29] The respondent testified that the appellant was unwilling to charge him with theft of a diamond in spite of clearly accusing him of such.

[30] The respondent testified that he was denied a fair hearing 'in accordance with the agreement between the company and the Union', and the fact that he was misled regarding his opportunity to have a second hearing by the ER Manager. In addition, the hearing *in absentia* and the chairperson's bias or incompetence in assessing the merits of complainant's statements all contributed towards his unfair dismissal.

[31] During cross-examination, the respondent reiterated that he did not choose any of the options given to him by the chairperson, but that he made the point that he was willing to participate in the disciplinary hearing provided that his line management was the complainant, in accordance with the agreement between the parties –

nothing more. In addition, the point was taken that the security department should have charged him with the charges that would have warranted it to be the complainant. The respondent testified that he did not accept the ruling of the chairperson in respect of the objection raised by him and his representative. The respondent confirmed that the chairperson had informed them that the issue of the correct complainant may be raised by them on appeal.

[32] The respondent testified that prior to the disciplinary hearing, he never questioned the fact that Bessinger would be the chairperson of the disciplinary hearing, but that the issue of bias was raised *after* the chairperson's decision rejecting their objection.

[33] It was put to the respondent by the representative of the appellant that the issue of bias was raised as a tactic to frustrate the process of the hearing to which the respondent replied that he 'detected bias' when he 'felt intimidated to continue with a procedure that was against company policy'.

[34] The respondent testified that prior to the disciplinary hearing he had no information that the chairperson had received an 'instruction from somewhere' to continue with the case on his own terms or on a 'predetermined outcome'. Respondent testified that prior to the hearing, he had no evidence that the chairperson was 'implicated' in the case.

[35] The respondent argued that the fact that the charge against him had been changed from gross negligence for the loss of a diamond to simply gross negligence had not prejudiced him in the preparation of the case – it just confused him.

[36] The respondent testified that a worksheet was required to be completed in respect of diamonds discovered during sorting on which worksheet the number of the diamonds, the weight, carats and dates were recorded, as well as by whom the diamond was discovered. These recordings were supposed to be done on the same date of the discovery but it had happened a 'few times' that it had been recorded at the 'end of a sample'.

[37] The respondent conceded that if accurate recording is not done it may compromise the integrity of the sample – ie that there was no correct information regarding the future of mining possibilities.

[38] In response to a question by the arbitrator, the respondent testified that he did not record the diamond in question because at that stage the sample 'was still running and it has become common for us to complete the sheet when the sample is completed'. According to the respondent, it was an oversight on his part by not recording the discovery of the diamond in question.

[39] In response to a question whether the respondent had not between 17 July 2014 and 2 August 2014 (the day the strike started) realised that the information regarding the discovery of the diamond should have been recorded on the worksheet,

he replied that in the excitement of the upcoming strike he forgot about it, as he was distracted by the strike.

Evidence presented by the appellant

[40] The first witness called on behalf of the appellant was Henry Bruwer, the ER Manager employed by the appellant. His testimony related to the contents of three letters.

[41] In respect of the first letter, he testified that it was received by him on 6 November 2014. The letter in essence concerned the objection raised by the respondent and his representative during the disciplinary hearing and the ruling by the chairperson, which had been referred to *supra*, and an appeal to the witness that the Industrial Relations policy be complied with in order to facilitate a 'free and fair proceeding'.

[42] The second letter was drafted on 7 November 2014 by the witness in reply to the letter of the previous day. The witness testified that in this letter, he explained that the line management of the respondent could not act as the complainant or initiator since the investigation included the interrogation of personnel attached to line management. It was testified that in addition, the consideration that the investigation was 'diamond loss-related', caused the security department to provide an appropriate official to level the charges against the respondent as per paragraph 4.4.6 of the

agreement on Industrial Relations policies and procedures. The letter concluded by urging the respondent to continue to attend the hearing without prejudice to himself.

[43] The witness clarified the last sentence, in the preceding paragraph, by informing the arbitrator that he was at that stage under the impression that the disciplinary hearing was still in recess and ongoing and was not aware of the fact that the hearing had been concluded in the absence of the respondent. The witness testified that this letter was a response to the letter received by him on 6 November 2014, and nowhere in his reply did he state or create the impression that the respondent would be called for another hearing. This evidence was not challenged during cross-examination by the respondent's representative.

[44] The third letter which was received by the witness on 11 November 2014, was from Hangula a full time shop steward and representative of the respondent. This letter was written in response to the letter of 7 November 2014 by the witness. The witness testified that in this letter, it was stated that the Union totally rejected his explanation why the line management could not have been the official initiator of the four charges against the respondent. It emphasised once again non-compliance with Industrial Relations policies and procedures agreed between the parties and promised to declare a dispute on violation of the aforesaid agreement in the event of a failure to adhere to the aforesaid agreement.

[45] The second witness called by the appellant was Latiefa Uunona, the supervisor at the geo-lab. In her testimony, she confirmed the purpose of a worksheet

and that a sample may take a few days to complete. She confirmed the evidence of the respondent in respect of the information to be recorded on the worksheet, and added that the signature of the sorter must appear on the worksheet as well as the signature of the person who verifies the information. On 17 July 2014 when the diamond was discovered she was not at work.

[46] She testified that during the investigation of this case into the missing diamond, she together with other employees were requested by the Security Department to verify the number of the diamonds and their weights. In one sample bottle, on the label of the bottle, it indicated that it contained 22 diamonds. When the diamonds were counted there were 25 diamonds. The diamonds were then weighed. The carats were less than originally indicated. They subsequently discovered that one specific large diamond was not there, but four other new diamonds had been added to the sample bottle – these four diamonds had not been recorded on the worksheet.

[47] She testified that it remained a mystery where these four diamonds came from. Her testimony was at that stage all those employees who worked in the geo-lab had the codes to the safe.

[48] The third witness called was Monalisa van Rooi who was employed as a mineralogical technician. She testified that on 17 July 2014, the respondent and Andreas were sorting coarse material when Andreas called her and informed her that they had found a stone. She weighed the big diamond, a rare find, in the presence of the respondent and Andreas and reported the find by email to Loubser, her supervisor. She testified that she put the said diamond in the main 'glove box'. The

safe is situated inside the main 'glove box'. She did not know who put the diamond in the safe. The next day she was on leave and returned on 23 July 2014 when she saw an email from Loubser requesting Andreas to take a photo of the diamond.

[49] She testified that the diamond was recovered in the afternoon past 15h00 – near knock-off time. The witness explained that the procedure was that the employee who did the 'glove inspection' with the security personnel checked and must see everything was put away in the safe. She could not remember whether she did the checking with the security personnel that day.

[50] The fourth witness Marais Loubser, an exploration manager employed by the appellant, testified that on 17 July 2014 at 15h11 he received an email regarding an oversized diamond of 77 carat discovered by the respondent and Andreas. He requested pictures of the stone to be taken but was informed that the batteries of the camera had not been charged. He requested that the pictures be sent to him the next day.

[51] On 18 July 2014 at 07h55 by email he reminded the laboratory supervisor to send the pictures. At 07h58 Chris Tjiuana (Tjiuana) replied that the pictures would be sent later since the batteries were still flat. At that stage only Tjiuana, the respondent and Andreas were present at the geo-lab. At 08h15 by email Loubser requested Tjiuana to report on the rest of the sample – he wanted to know how many other diamonds were recovered with the big stone. At 09h03 he received by email the preliminary results namely one diamond of 77.324 carats and in addition 20 diamonds

weighing 17.006 carats. At 13h40 by email he received five pictures of the 77 carat stone which was sent from the email address of the respondent. He testified that as a 'low estimate', the diamond's value was calculated at U\$1300 per carat which translated into just more than N\$1 million in its rough and uncut state.

[52] During cross-examination, he testified that the procedure to lock or unlock the safe would require the codes of two persons, normally that of the supervisor and one of the four sorters. Where the supervisor was absent, as in this instance, normally, the other two permanent workers other than the temporary worker, would open and close the safe.

[53] The witness testified that there is a surveillance camera inside the geo-lab, but they could not view what had happened on 18 July 2014, since video footage is kept for only 14 days. On 6 August 2014, when it was discovered the diamond was missing, when they went to the geo-lab there was no footage since the 14 days period had lapsed.

[54] The fifth witness called was Gideon Shikongo (Shikongo) a senior security officer and the investigating officer. He testified that on 6 August 2014 at approximately 14h40, Loubser reported the mysterious disappearance of an unpolished diamond with the mass of 77.36 carats from the geo-lab. He testified that the evidence-in-chief (*supra*) of Loubser was conveyed to him during his investigation.

[55] In respect of the time when photos of the diamond were taken, he stated that the photos were taken at 10h10 on 18 July 2014, however on the camera itself the date shown was 17 July 2014. He explained that the camera set was to change the date at 12h00 instead of 24h00 and that is why an incorrect date appeared on the camera at the time the photos of the diamond were taken.

[56] The witness testified that during his investigation, the respondent explained that after he had taken the photos of the diamonds, he was not sure whether he put the diamond back into the canister (from which he removed it) or left it on the table of the sorting box with Andreas. At that stage only the respondent and Andreas were present in that particular area. The witness testified that the respondent in his statement averred that the photos had been taken past 13h00 – in the afternoon. According to the witness, the respondent also stated that after he had sent the photos by email, he could not recall if he had found Andreas in the laboratory. According to the witness, there was no obstruction which prevented the respondent from seeing Andreas in the laboratory.

[57] The respondent, according to this witness, explained that after he had sent the email he went to his colleague Tjiuana who was in the CCP area.² Tjiuana was with an IT official, Thomas Imene. There was a discussion. According to this witness the respondent himself explained when he was questioned about the incident, that he himself, Tjiuana and Imene had been 'chatting'. The respondent then went to call Andreas whom he found in the tearoom, to assist him to get a computer into the geo-

² The CCP area is an area where they used to operate plants and is a different area from the geo-lab.

lab through the geo-lab's airlock.³ The respondent and Andreas then took a computer provided by Imene in the geo-lab. Later two security personnel transported this computer from the airlock to the transport office where Imene collected it. This computer was never recovered. Andreas afterwards, without permission, left his workplace with Imene and left the mine. According to the witness, the investigation revealed that a false job request was created by Tjiuana which enabled Imene to enter the area of the geo-lab. Tjiuana arranged for Imene to come and fix a 'network problem', even though Imene did not work on 'network' problems – there was no job to be performed at the geo-lab.

[58] The witness testified that the procedure to inform the 'surveillance people' when an 'outsider' like Imene will enter the geo-lab area was not followed by Tjiuana.

That concluded the evidence led on behalf of the appellant.

[59] The respondent then called Marista Madison to testify on his behalf. She testified that she worked for the security department at the CSP surveillance section. On 18 July 2014 she was on duty observing the 'RAC⁴ sort house and the geo-lab' – these were however not the only areas she was tasked to observe. At 11h32 Tjiuana called her to ask for access for Imene. She does not remember the time Imene actually arrived there after access had been given. She was normally not informed by the geo-lab personnel the time when the safe would be opened. She could not recall

³ An airlock is a transit area through which goods are taken into or out of the facility – only two persons can enter or exit the airlock.

⁴ Red Area Complex, area of the mine.

that the respondent phoned her informing her that photos of the diamonds would be taken. She testified that if the respondent had informed her about a certain thing he wanted her to do, that would have put her attention on that specific action.

[60] She confirmed that Tjiuana requested to put a computer into the airlock and that the security officers would come and clear the computer to take it to the transport section.

[61] She testified that the procedure was for the security officers to make sure that an item is 'clean' before it is taken out of the area and the surveillance team had to watch them when they remove equipment from that area, but that day the security officers did not, according to her observation, open the computer to inspect what was inside it, as it was their duty to do. This concluded the evidence on behalf of the respondent.

Findings by the arbitrator

Procedural unfairness

[62] The arbitrator stated in his award that employers should ensure that they follow the correct procedure where there is an alleged misconduct. The arbitrator pointed out that where there are express contractual terms governing a disciplinary procedure, for example, contained in the disciplinary code; it is no defence for an employer to contend (as was done by the appellant) an alternative procedure followed was equally fair; that an employee is accordingly entitled to insist that the employer abide by his contractual obligation to follow the provisions of its own disciplinary code

meticulously, although an employer may depart from it, with good reason, eg to attain equitable results, but it may not do so to the detriment of an employee.

[63] It was stated that the first charge had been changed from 'gross negligence loss of a diamond' to 'gross negligence', two days before the hearing. This meant, according to the arbitrator, that inadequate time was given to the respondent for preparation. Also that the 'charges expect' that once the security department had completed its investigations, its findings must be submitted to the head of department 'to indicate the necessary disciplinary action'. This did not happen in this instance, as the appellant in contravention of company policy PO-SE-01 allowed the security department to investigate the matter and also to initiate disciplinary proceedings. The arbitrator found that the refusal or failure of the employer (appellant) to follow its 'own disciplinary code amounts to procedural unfairness'.

[64] The arbitrator found that 'the hearing official expressed an opinion⁵ (prejudiced the issue) that lead to a suspicion of bias and therefore his impartiality in the hearing is questionable, therefore the arbitrator declared the disciplinary hearing null and void as a result of biasness of the hearing official' (*sic*).

[65] The arbitrator erroneously found that since there were instances where findings or discoveries had not been recorded, that there was no rule which obliged staff members to immediately record a discovery on the worksheet. Furthermore it was found, based on the testimony of the exploration manager, that it was the

⁵ That the objection by the respondent and his representative did not hold water.

responsibility of the supervisor to see that the worksheet is completed on time, and that she was the one who had to be charged with misconduct.

Substantive unfairness

[66] The arbitrator stated that the discovery of the large diamond was well-known to the parties concerned and the respondent could not have been found guilty on negligence due to the fact that he left the temporary worker alone with the diamond who was on equal footing with the respondent and that they trusted each other. Furthermore, that the temporary worker was on a surveillance camera at that specific moment. It was stated that the security officer on the surveillance camera⁶ could not recall whether the respondent phoned her to keep an eye on the geo-lab the time he took photos.

[67] The arbitrator further stated that the hearing official appointed by the appellant 'pre-judged the issue and that indicates that he has been instructed by supervisors to dismiss the hapless applicant and acts accordingly. Such behaviour by a chairperson is totally unacceptable, and he is the one to be dismissed' (*sic*).

[68] The arbitrator stated that the 'matter that the applicant did not record the discovery on the worksheet cannot be declared as a serious offence and no one was ever disciplined for that and if disciplined a verbal warning should have been sufficient because the supervisor in the geo-lab testified that they were warned of not recording the discoveries on the worksheet'. The arbitrator found that the dismissal of the respondent was procedurally and substantially unfair.

⁶ The witness called by the respondent.

[69] The arbitrator found that he could not order reinstatement as a result of the trust relationship having broken down 'from the original complaint of the loss of the diamond till now'.

[70] The arbitrator ordered payment for loss of income from the date of dismissal until the date the award was issued, and compensation of 12 months' salary, because the respondent 'could possibly have worked . . . till retirement'.

Judgment of the court *a quo* and its findings

[71] The appellant appealed to the Labour Court against the whole arbitrator's award. The respondent opposed the appellant's appeal and filed a cross-appeal on the basis that the arbitrator erred by not ordering reinstatement.

[72] The background to the appeal appears from what is recorded (*supra*) in this judgment and need not be repeated.

[73] The court *a quo* summarised the grounds of appeal before it as follows:

Firstly, that the arbitrator on the evidence before him erred in law by making the findings he did;

Secondly, that the arbitrator on the evidence before him erred in law by failing to find that the respondent was properly found guilty of the charges of misconduct; and,

Lastly, that the arbitrator erred in law in finding bias and impartiality on the part of the hearing official and consequently declaring the disciplinary hearing null and void.

[74] The court *a quo* enumerated the grounds of opposing the appeal as follows:

Firstly, that in terms of the appellant's policy, the security department was not entitled to be the initiator at the disciplinary hearing, but only line management, thus the hearing official wrongly overruled the objection raised by the respondent; secondly, the disciplinary hearing was conducted in his absence; thirdly, the hearing official was biased; and fourthly, that three days before the disciplinary hearing the appellant changed the charges from gross negligence in the loss of a diamond to simply gross negligence.

The disciplinary hearing held in absentia

[75] The court *a quo* remarked that our courts have condoned the failure by employers to hold pre-dismissal hearings in two situations. The first, is where the circumstances were such that, objectively speaking, the employer could not reasonably be expected to hold a hearing. Such circumstances might arise when the employer is compelled to dismiss instantly in order to protect lives and property or to give effect to an ultimatum, and secondly, where employees have by their conduct abandoned or waived their right to a hearing, eg by refusing to attend the enquiry, or by abusing the employer at the disciplinary hearing.

[76] The court *a quo* referred to the submission made on behalf of the appellant namely, that the respondent waived his right to a hearing, in that the respondent and his representative set certain conditions, failing which they would not participate in the hearing. The court *a quo* found that this contention was not borne out by the evidence before it. The court *a quo* stated that the relevant portion of the record of the disciplinary hearing did not reflect that the respondent or his representative made any demand or set any conditions upon which the disciplinary hearing must proceed. The court *a quo* found that the minutes indicated that it was the hearing official who decided that the respondent and his representative would not participate in the disciplinary hearing.

[77] The court *a quo* stated further that the appellant (by failing to call the chairperson of the disciplinary hearing) did not place any evidence before the court to show that the respondent's representative acted unruly and disrespectfully.

[78] The court *a quo* found that the cases⁷ on which the appellant relied for its submission that the respondent had waived his right to a hearing were distinguishable on the facts from the present matter, and that the appellant had failed to discharge the onus on it to prove that the alleged waiver, either expressly or by necessary implication, took place. The court *a quo* found that the approach taken by the hearing official was inconsistent with an adjudicative process and a clear negation of the respondent's right to a fair hearing encapsulated in the *audi alteram partem* principle.

⁷ *Peace Trust v Beukes* 2010 (1) NR 134 (LC) paras 76-78; *Furniture Mart (Pty) Ltd v Kharuchab* (LCA 48/2012) [2014] NALCMD 21 (22 May 2014) (unreported judgment of the Labour Court).

[79] The court *a quo* stated that apart from the dispute as to whether the security department was the correct entity to initiate and lead the evidence, there was another aspect which pointed to a fatal irregularity, and this related to the provisions of subparagraph 4.4.6 of the appellant's disciplinary code dealing with breach of trust. This provision provides that where the conduct of an employee caused a reasonable suspicion of dishonesty or mistrust and for which there existed extraneous evidence to prove a breakdown in relationship between the employee and the company (appellant) the matter 'will be handled by officials at the HOD (Head of Department) level and above, including the Managing Director'.

[80] The court *a quo* found that no evidence was presented that the hearing official, Bessinger, was head of a department or above, and thus he had no authority to preside over the case. The court *a quo* found that he so assumed powers that he did not have and everything which flowed from such assumption was invalid. This point was never raised by the respondent.

[81] In respect of the first charge, the court *a quo* stated that the respondent was (during the disciplinary hearing) found guilty of 'gross negligence loss a diamond', an offence he had not been charged with and could not have been found guilty of such an act of misconduct.

[82] In respect of the charge of false evidence, the court *a quo* reasoned that evidence could only have been led at the disciplinary hearing and it was only at the disciplinary hearing that the respondent could have given false evidence, and since

the respondent did not participate in the disciplinary hearing and gave no evidence, the respondent could not have been guilty of something which he did not do.

[83] The court *a quo* further pointed out that statements made by the respondent during the investigation stage do not constitute evidence and the conclusion by the hearing official that the statement given by the respondent was false, was the say so of the security officer who took down the statement. It was found that no evidence at the disciplinary hearing or at the arbitration hearing was presented to contradict the statement made by the respondent.

[84] The court *a quo* found that in respect of the charge of not complying with policies and procedures, no evidence was led during the disciplinary hearing nor during the arbitration proceedings regarding what policy the respondent did not comply with. If the finding of guilt in the disciplinary hearing related to the fact that the respondent did not record the finding of the rare diamond on the worksheet, then there was evidence that sometimes diamonds were recorded on the worksheet later than the date of sorting.

[85] The court *a quo* found that in the present matter the reason for the finding of guilt was inextricably linked to the procedure followed by the appellant, and the inescapable conclusion was that the appellant, on a balance of probabilities, failed to prove that the respondent was actually guilty of misconduct.

[86] The court *a quo* also found that the dismissal was unfair in respect of the procedure followed.

The cross-appeal

[87] The court *a quo* pointed out that the arbitrator found that there was no extraneous evidence proving a breakdown in the relationship, contrary to the provisions of clause 4.4.6 of the appellant's disciplinary code; that the arbitrator found that the appellant did not follow a fair procedure neither did it have a valid reason to dismiss the respondent. It was thus, so the court *a quo* reasoned, a contradiction for the arbitrator to find that the relationship of trust between the employer and employee had irretrievably broken down. The court *a quo* found that the arbitrator's conclusion was not based on evidence. It follows therefore, according to the court *a quo*, that the general rule which gives primacy to reinstatement as the preferred remedy for unfair dismissal, must prevail.

Submissions on appeal

On behalf of the appellant

Disciplinary hearing in absentia

[88] The legal representative on behalf of the appellant submitted that the court *a quo* was wrong when it found that there was no evidence of disruptive behaviour by the representative of the respondent, since the evidence of the representative⁸ (sworn in as a witness) referred to the disruptive behaviour (as it appears in the minutes) and that this evidence was never disputed by either the respondent or his representative during cross-examination.

⁸ Of the appellant during the arbitration proceedings.

[89] It was submitted that the respondent and his representative demanded that certain conditions be met, failing which, they would not participate in the hearing. They were given an option either to participate or else the hearing would continue *in absentia*. Their refusal, it was submitted, amounted to a forfeiture of the right to be heard. It was pointed out that the respondent elected not to participate when his objection was overruled by the chairperson of the disciplinary hearing.

[90] It was submitted that the court *a quo* erred on a fundamental factual aspect in dismissing the appellant's appeal in that whilst the court *a quo* seemed to accept that if an employee sets unreasonable and unfounded conditions before he or she would participate in a hearing, an employer would be justified in concluding that the employer waived his or her right to a hearing, the court *a quo* found that nowhere in the portions of the minutes of the disciplinary hearing quoted by the court *a quo* was it reflected that the respondent or his representative made any demand or set any conditions upon which the disciplinary hearing must proceed – this in spite of the fact that those conditions can be objectively established from a letter written by the respondent himself.

[91] In respect of the objection regarding the initiator⁹, it was submitted that since the respondent relies on clause 4.4.7 of the policy which states that in offences relating to possession and handling of uncut diamonds 'the complaint will be laid by an official of the security department', and the question was asked how this could

⁹ The person who was going to lead the evidence during the disciplinary hearing.

have assisted the respondent as his whole case was that he did not unlawfully handle or possess the diamond. It was submitted, in any event, that the policy itself provides that nothing is cast in stone.

[92] In respect of the chairperson of the disciplinary hearing, it was submitted that the court *a quo* found – erroneously – that the presiding officer, Bessinger, was not above the level of head of department as provided by clause 4.4.6 of the appellant’s disciplinary code. It was submitted that it was common cause that Bessinger was part of senior management and that this was never in dispute and also never raised by the respondent. It was submitted that the appellant acted properly and fairly by appointing Bessinger as chairperson of the disciplinary hearing.

[93] In respect of the charge of gross negligence, it was submitted that the court *a quo* erroneously found that the respondent was charged with gross negligence but convicted of gross negligent loss of a diamond. The respondent stated the converse in his summary of dispute addressed to the Labour Commissioner.

[94] It was submitted that the arbitrator erred on a number of questions of law and accordingly the appeal should have succeeded in the Labour Court. The most important errors of law were, it was submitted:

- (a) the arbitrator summarised the evidence which confirmed that the respondent stated that ‘their position remained that they cannot participate in a hearing that does not respect the procedures set out in

the Agreement on Industrial Relations Policies and Procedures', yet the arbitrator simply ignored the evidence summarised by himself.

- (b) the chairperson was obliged to rule on the respondent's objection and conditions set as a pre-condition to participate in the hearing; the chairperson's ruling that the objections held no water, drove the arbitrator to conclude that the chairperson expressed an opinion and therefore prejudged the issue which the arbitrator held, led to a suspicion of bias, which is the wrong test; it was submitted that based on this erroneous finding of law the arbitrator declared the disciplinary hearing null and void.
- (c) the arbitrator, it was submitted, spurred on by aforementioned erroneous finding of bias, also erred in law by finding on a substantive level that the chairperson found the employee 'guilty on false evidence' because apparently the evidence was weighed up unequally as a result of his impartiality.
- (d) the arbitrator concluded that the chairperson 'has been instructed by superiors to dismiss the hapless applicant . . .', and found quite erroneously in law that 'such behaviour by a chairperson is an absolute disgrace, is totally unacceptable, and he is the one to be dismissed . . .'.

[95] In respect of the charge of false evidence it was submitted that the court *a quo* erroneously came to the conclusion that the false evidence referred to false evidence in the disciplinary hearing itself, whilst the wording of the charge itself referred to false evidence given during the investigation of the disappearance of the diamond.

[96] In respect of the requirement of extraneous evidence proving breach of trust or mistrust, it was submitted that the mistrust can be gleaned from the information at the disposal of the employer (the appellant). For example, where someone informs the employer that a trusted employee employed at the heart of the business where trust is at its highest level, was on duty when a diamond of 77 carats disappeared; the same employee did not record such a find and had been doing this all along; that he carried computer equipment into the area from which the diamond disappeared; that he left a junior employee in charge, and that he also lied during the investigation. All this information would constitute extraneous evidence.

[97] It was submitted that the record does not reveal one iota of evidence regarding respondent's alleged losses or how he mitigated them; that there was no basis upon which the arbitrator could have awarded the amounts in respect of losses, and of compensation. It was submitted that the burden of proof is on the respondent to prove his losses – this must be done by not only pleading how those amounts arose, but also leading evidence and proving those amounts.

[98] It was submitted that if the appeal succeeds the counter-appeal would fall away.

On behalf of the respondent

[99] It was submitted on behalf of the respondent that the appellant did not make out a case that the court *a quo* erred or misdirected itself and submitted that those findings are unassailable.

[100] It was submitted that none of the seven witnesses called during the disciplinary hearing presented any incriminating evidence against the respondent and that no effort was made to give notice to the respondent, after his conviction, to ask him whether or not he wished to say something before a penalty is meted out.

[101] It was argued that the policy of the appellant calls for a thorough investigation into the conduct of an employee and a conviction must be based on reasonable evidence. It was submitted that this standard set by the appellant itself was not met in respect of the conviction of the respondent.

[102] It was contended that the respondent was found guilty in respect of all the charges, but no evidence was tendered to prove and support the allegations in the body of the charges.

[103] It was pointed out that the chairperson of the disciplinary hearing was not called to testify during the arbitration proceedings and therefore it follows that there is

no evidence in respect of the disruptive conduct by the representative of the respondent complained of by the appellant. Likewise, there is no evidence to support the submission by the appellant that the respondent wilfully absented himself from the hearing or that he waived his right to be present at the hearing. It was submitted that the evidence of the witnesses who were called during the arbitration proceedings by the appellant mirrors more or less the unhelpful testimony led during the disciplinary hearing – it did not add anything new against the respondent.

[104] It was submitted that the arbitrator made five distinct important findings namely, that the appellant failed to follow its own disciplinary code by ruling that the security department may be the complainant; that the appellant to the detriment of the respondent changed the charges; that it was found that the hearing official prejudiced the issues and was biased, resulting in the disciplinary hearing being declared null and void; that it was the duty of the supervisor to see to it that worksheets are completed; and that the hearing official was instructed by his superiors to dismiss the respondent.

[105] It was submitted that most of these findings of law and fact by the arbitrator, referred to in paragraph 104, do not form part of the attack by the appellant on appeal and are sufficient by themselves to prove an invalid and unfair dismissal.

[106] It follows from the above, it was contended, that even assuming that the appellant succeeds to prove a misdirection by the court *a quo*, on one of the grounds

in the notice of appeal, such misdirection will be academic, as there remains grave and unaffected irregularities found by the arbitrator.

[107] It was submitted that the respondent never made an election not to attend the disciplinary hearing, but was excluded from the hearing by the decision of the chairperson as reflected in the minutes of the disciplinary hearing as well as the content of the letter of termination, which indicated that the hearing official had no other alternative but to continue the hearing *in absentia* due to the unruly and disrespectful behaviour of the respondent's representative.

[108] It was submitted that although it appears from the record that there was an option given to the respondent and his representative, this was contradicted by the letter of termination in respect of the reason for dismissal.

[109] The respondent's legal representative supported the findings made by the court *a quo*.¹⁰

[110] In respect of the cross-appeal, it was submitted that the court *a quo* found that there was no extraneous evidence proving the breakdown of trust and hence upheld the respondent's cross-appeal.

[111] It was submitted that the only thing which was proved both at the disciplinary hearing and the arbitration proceedings was the fact that the respondent admitted that

¹⁰ These findings were referred to *supra* paras [83] – [93].

through an oversight he omitted to complete his worksheet on 17 July 2014, but then there is evidence of the existence of an acceptable practice to complete one's worksheet only at the end of the whole sorting run.

[112] It was submitted that the arbitrator declared the disciplinary hearing null and void and that such declaration of nullity discards all the findings of guilt and a penalty imposed at the disciplinary hearing.

[113] It was submitted that on the appellant's own evidence, in particular the summary of investigation by security officer Shikongo, that Andreas and Tjiuana confirmed during the investigation that the diamond was on 18 July 2014 packed away into the safe by Andreas, in the absence of the respondent. There was no evidence of linking the respondent to the negligent or intentional disappearance of the diamond after that fact.

[114] It was submitted that the court *a quo* was correct that reinstatement is the primary remedy upon a finding of unfair dismissal. Reinstatement, it was contended, in the context of ordinary contractual principles is the ordinary and primary remedy available to an employee because it restores the contractual relationship and employment conditions and benefits.

[115] It was submitted that *Paulo v Shoprite Namibia (Pty) Ltd & others*¹¹ referred to by the appellant in which the Labour Court has in the past expressed the view that

¹¹ *Paulo v Shoprite Namibia (Pty) Ltd & others* 2013 (1) NR 78 (LC).

reinstatement is not an ordinary and primary remedy, were wrongly decided. The respondent supports the *dictum* in the matter of *Jurgens v Geixob & others*,¹² where it rejected the view that an arbitrator may refuse an order of reinstatement in a case where it found that no fair procedure was followed but that there was a fair reason for a dismissal.¹³

Discussion

Procedural unfairness

[116] It is common cause that during the disciplinary hearing evidence was led in the absence of the respondent and his representative. The court *a quo* found that no evidence was presented to show how the respondent's representative acted unruly and disrespectfully and found that hearing evidence in the absence of the respondent negated the respondent's right to a fair hearing and a violation of natural justice. The court *a quo* found no clear proof of an express or tacit waiver by the respondent of his right to a fair trial, as suggested by the appellant. The court *a quo* found that the respondent actually demanded an opportunity to be accorded a fair hearing.

[117] The court *a quo* relied solely on the minutes of the disciplinary hearing in its conclusion that the respondent and his representative did not make any demand neither set any condition themselves upon which the disciplinary hearing must proceed. I agree that from the minutes alone there is no indication that specific demands were made. The minutes reflect that 'arguments became counterproductive and reached a stalemate situation'. A recess followed and with the resumption of the

¹² *Jurgens v Geixob & others* 2017 (1) NR 160 (LC).

¹³ As decided in *Kamanya & others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC).

hearing the respondent and his representative were given two options. The minutes of the disciplinary hearing also do not reflect whether the respondent chose any option.

[118] In order to determine what the response was of the respondent and his representative faced with those options, one must look outside the minutes of the disciplinary hearing – ie to the evidence of the respondent himself and his stance taken on this issue.

[119] The testimony of the respondent to the options given, was not to choose any option. The stance of the respondent and his representative during the disciplinary hearing was as follows:

'Our position remained that we cannot participate in a hearing that does not respect the Procedures set out in the Agreement on Industrial Relations Policies and Procedures (AIRPP), whereupon the chairman decided to hear this case in absentia, later citing my representative's "unruly and disrespectful behaviour" as the reason he continued the hearing in absentia.'¹⁴

The respondent continued as follows:

'I stated my willingness to participate in a hearing where either I am charged with the correct charges to warrant Security to be the complainant or where my line management would be the complainant as per Agreement.'¹⁵

The respondent testified:

¹⁴ The summary of dispute addressed in a letter to the Labour Commissioner was read into the record by the respondent as part of his evidence-in-chief.

¹⁵ As it appears in the abovementioned summary of dispute.

'My Union representative issued a response indicating that we reject the session and we advise that we would lodge a dispute if the agreement and IR policy and procedures is (*sic*) not respected, . . .'¹⁶

[120] In my view, it should be apparent from the above quoted passages that the respondent's own testimony was that he made certain demands and set conditions as to when and how he would be participating in the hearing. His stance was that he could not participate in a hearing if he was not charged with the correct charges and where his line management was not the complainant.

[121] The court *a quo* erred in finding that it is not borne out by the evidence that the respondent and his representative had set conditions failing which they would not participate in the hearing.¹⁷

[122] The court *a quo*, in my view, erroneously held that the appellant 'has failed to discharge the onus' in proving that 'the respondent had full knowledge of the right which he decided to abandon, and that the respondent 'either expressly or by necessary implication abandoned the right to be heard . . .'.

[123] Although the facts of this matter are not on all fours with those in *Peace Trust v Beukes*, the pronouncement by the court in that matter, is applicable in the present matter where it was stated as follows at para 76 of the judgment:

¹⁶ This was read into the record as part of respondent's summary of dispute and formed part of his evidence-in-chief.

¹⁷ This was a ground of appeal.

'It is quite clear that the disciplinary hearing was going to get nowhere in view of the stance adopted by the complainant and her representative who seemed to have taken the view that a disciplinary hearing could only materialise on their terms. In my view, to argue that the absence of a disciplinary hearing was the fault of the Trust and that it had to take place at all costs is, against the backdrop of the acrimony which characterised this matter, untenable.'

[124] The testimony of the respondent was that the chairperson of the hearing gave them a ten minute recess to consult and reconsider their position and that after 'the recess the chairman asked us if we will proceed according to his interpretation, and we reiterated our position that we cannot participate in a hearing that does not respect the procedures set out in the agreement . . . '.

[125] The minutes of the disciplinary hearing reflect that hereafter the chairperson left the main conference room and proceeded with the case in the adjacent room.

[126] In my view, the court *a quo* erred by stating that since the minutes of the disciplinary hearing reflect that the chairperson stated that 'due to the disruptive nature of the representative, the accused and his representative will not be participating in this hearing. We will proceed *in absentia* . . . ' it thus follows that it is the Hearing Official who decided that the respondent and his representative will not participate in the disciplinary hearing'.

[127] In sequence, before this decision by the chairperson, the respondent's testimony (during the arbitration proceedings) was that they 'maintained [their] point

that the policy is not being followed and [they] would like [to have] a fair hearing where policies were followed’.

[128] It was in my view therefore wrong to have found that it was the decision of the chairperson to exclude the respondent and his representative from the hearing in light of the backdrop of what had transpired and specifically what he had been informed by the respondent and his representative. It must have been clear to the chairperson that the disciplinary hearing was going nowhere due to the stance taken by the respondent and his representative.

[129] The court *a quo* referred to a ‘fatal procedural irregularity’, namely that there was no evidence before the court *a quo* that the hearing official Bessinger was a head of department or above the level of head of department and thus had no authority to preside over the case where the respondent faced a charge of breach of trust.¹⁸ The court *a quo* found that when the hearing official so presided he assumed powers he did not have and everything that flowed from that, was illegal.

[130] This finding that the presiding officer was not at the level of head of department or above, was erroneous and not supported by the evidence. The evidence was that Bessinger was indeed from senior management. The respondent had at the inception of the hearing no issue with or objection to Bessinger presiding as the hearing official. It was only after Bessinger ruled against the respondent that respondent accused the

¹⁸ The appellant in its notice of appeal listed this finding as a ground of appeal.

chairperson of bias – not that he was not at the level of head of department or above. It is trite that an adverse ruling does not, without more, amount to bias.

[131] The arbitrator found that the refusal or failure of the employer to follow its own disciplinary code amounts to procedural unfairness, because once an employer has adopted a particular disciplinary code, the employer is obliged to stick to its provisions meticulously. This is a fallacy. Although a disciplinary code serves as a very useful and important guide during disciplinary procedures, it is wrong to elevate it to a level, as the arbitrator did, where whatever is contained in the disciplinary code, is immutable. The court *a quo* instead found that a guilty finding of a misconduct was inextricably linked to the procedure followed by the appellant, and had a proper procedure been followed the outcome might well have been different. The facts of this present matter are distinguishable from the facts in *Kahoro & another v Namibia Breweries Ltd*¹⁹ on which *dictum* the court *a quo* most probably relied where the following appears at para 44 of that judgment:

‘ . . . a valid and fair reason for a dismissal is one which justifies dismissal of the employee and is independent of the procedure followed before a dismissal is carried out. A valid and fair reason for a dismissal is founded on facts, conduct or circumstances which, independently, make the continuation of the employment relationship impossible. A valid and fair reason for dismissal cannot, in my view, exist in facts which, if a proper procedure were followed, might well have been different. *In casu*, not only is the reason for the dismissal inextricably linked to the procedure, but it is the very result of that procedure. Therein the court *a quo* erred. It should, on the facts, have come to the conclusion that there was no valid and fair reason for the dismissal.’

¹⁹ *Kahoro & another v Namibia Breweries Ltd* 2008 (1) NR 382 (SC).

[132] In the discussion, *infra*, it should be clear that on the facts of the present matter the court *a quo* should have found that the dismissal was not procedurally unfair – the reason for the dismissal in this matter, was on the facts, not so inextricably linked to the procedure, in the same context referred to in the *Kahoro* matter, and the court *a quo* erred, in my view, by concluding that the finding of guilty of misconduct by the respondent was inextricably linked to the procedure followed by the appellant. As stated hereinbefore, the hearing official was fully justified in the circumstances, in continuing with the disciplinary hearing in the absence of the respondent and his representative. Furthermore, the finding by the arbitrator that the hearing official pre-judged the issue and that this indicated that he had been instructed by supervisors to dismiss the respondent is not supported by one iota of evidence. Similarly, the finding by the arbitrator that the hearing official expressed an opinion and that this led to a suspicion of bias and therefore his impartiality is questionable, is illogical and the wrong test for the determination of bias. These procedural ‘irregularities’ identified by the arbitrator are unfounded. The court *a quo* erred in supporting the findings of the arbitrator as evidenced in paragraph 3 of the summary of the judgment of the court *a quo* where the following appears:

‘Where management prematurely decides that the employee is guilty and does not give that employee an opportunity to say anything in his defence, this would be entirely unfair.’

*Substantive unfairness*²⁰

[133] In respect of the charge of gross negligence, the court *a quo* found that the respondent was not charged with 'gross negligent loss of a diamond' and thus could not have been found guilty of such misconduct, as the hearing official did. This finding by the court *a quo* was the only reference in its discussion of the charge of gross negligence, but the implication is clear, namely that the charge of gross negligence had not been proved by the appellant.

[134] The respondent admitted that he suffered no prejudice as a result of the amendment of the charge of 'gross negligence in the loss of a diamond' to merely gross negligence.

[135] The minutes of the disciplinary hearing reflect that the chairperson of the hearing found the respondent guilty on the charge of gross negligence – the court *a quo* erred when it found that the respondent was convicted of 'gross negligent loss of a diamond'.

[136] In respect of who the initiator should have been, the appellant, in my view, gave a plausible reason why the line management could not have been the complainant. Paragraph 4.4.6 of the disciplinary code, dealing with breach of trust, does not prescribe who the complainant must be. Importantly, however, para 4.4.7 of the disciplinary code dealing with offences relating to the possession and handling of rough or uncut diamonds, on which the respondent relies for his insistence that the

²⁰ It was a ground of appeal that the court *a quo* erred or misdirected itself in finding that the dismissal was both procedurally and substantially unfair.

security department is not entitled to be the initiator in the present matter, is not applicable in this matter, as the respondent's case was that he did not unlawfully possess or handle the diamond.

[137] The court *a quo* did not discuss the question whether or not the evidence presented at the disciplinary hearing and during the arbitration proceedings constituted the misconduct of gross negligence, and it is in my view appropriate to do so at this stage.

[138] The chairperson of the disciplinary hearing found that the respondent's negligence is founded in the fact that the respondent left a temporary worker alone with the large stone which disappeared. In my view, in order to answer the issue of gross negligence one should look wider, ie at other common cause facts or undisputed evidence and consider the conduct of the respondent in that context.

[139] To start off, the respondent was employed as a senior diamond sorter who discovered a very rare or oversized diamond. The procedure expected from all diamond sorters was to immediately record the finding of any diamond on a worksheet, although according to the respondent the worksheet could also have been completed at the end of the sample run, which could take weeks to complete. The recording of findings of diamonds on the worksheet only at the end of the sample run according to the respondent was not the rule, but it happened a 'few times' or 'on occasion'. The respondent later elevated the exception to the rule on this point by

stating that it had become 'common' to complete the worksheet 'when the sample is completed'.

[140] The reason why it is important to keep an accurate record of such findings is common cause. If a diamond is not recorded it can be removed without trace and it cannot be checked against the final figures at the end of the sample run. Moreover, the purpose of accurately recording findings is to enable the appellant to pinpoint exactly in which area of the mine diamond bearing materials are situated, which will impact on appellant's future mining prospects.

[141] It is common cause that the respondent did not only fail to record the finding of such a rare diamond immediately, but failed to record it at all.

[142] The respondent left the diamond in the care of only Andreas. He never returned to secure the diamond in the safe himself or check whether Andreas had done so or not.

[143] The respondent, in respect of the safekeeping of the diamond, gave contradictory explanations. The respondent testified that he had asked Andreas to pack away the diamond while he was emailing the photos of the diamond to Loubser because Andreas was his colleague whom he trusted. However, the version he gave to Shikongo, the security officer, was that he could not recall whether or not he had placed the diamond back in the canister before leaving the room or whether he had left it on the sorting table.

[144] The respondent contends that his failure to record such an oversized diamond was a mere 'oversight'; that he never realised between 17 July and 2 August 2014 (when the strike started) that he should have recorded the finding; that he simply, in the excitement of the upcoming strike (two weeks hence) forgot to record such a finding; and that he was 'distracted'.

[145] In my view, this explanation sounds hollow and unconvincing in the circumstances. One should keep in mind that respondent's duty as a senior diamond sorter implies that he should act with great responsibility, diligence and due care. A senior diamond sorter worth his salt would have realised that it would have been a priority for the appellant to know precisely from which diamondiferous sample such a diamond came from and would have had no plausible reason to deviate from the standard practice of immediately recording findings of diamonds. However, the conduct of the respondent in respect of this particular diamond revealed a very lackadaisical attitude. This court has pointed out in *Namdeb Diamond Corporation (Pty) Ltd v Gaseb*²¹ that an employee has a fiduciary duty or a duty of trust which involves an obligation not to work against his or her employer's interest. It implies that such an employee shall perform his or her duty faithfully and conscientiously. The respondent's conduct, in the circumstances, in my considered view, amounted to gross negligence.

[146] The court *a quo* did not pronounce itself on the charge of breach of trust, ie whether or not there was extraneous evidence presented at the disciplinary hearing

²¹ *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) para 65.

as well as the arbitration proceedings which support a conviction on such a misconduct.

[147] The issue of extraneous evidence, in addition to the common cause facts mentioned under the discussion of gross negligence, should be considered also with reference to the following facts: the respondent, as is apparent from the photo screen of the camera used by the respondent, took the photo of the diamond at 10h07 and 10h10 on 18 July 2014 and sent the email to Loubser at 13h40 – a delay of more than three hours. What transpired during this period of more than three hours is significant since it contains evidence which an employer would surely consider in deciding whether or not an employee can be trusted.

[148] Although there are conflicting versions of the time when the diamond was photographed by the respondent, the evidence, presented during the arbitration proceedings, on a preponderance of probability proved that the photographs had been taken in the morning, and not after 13h00 as contended by the respondent based on the followings reasons:

Firstly, the respondent during cross-examination of himself referred to a photograph²² depicting the screen of the camera on which the time of 10h10 appears, and criticised the chairperson of the disciplinary hearing for accepting the time as correct, without scrutinising the evidence presented. Subsequently during the cross-examination of the security officer (Shikongo) by the

²² Marked exhibit A2.

respondent, the question was posed how they knew that the time indicated on the camera screen was correct? This question elicited the answer that the colleagues of the respondent who were present at the time the photograph had been taken, 'all say a photo was taken in the morning . . .'. Secondly, although the respondent had questioned the correctness of the time which appeared on the camera screen (documentary evidence presented during the arbitration proceedings), he did not have an explanation why the times on the camera screen were reflected as 10h07 and 10h10 and not past 13h00.

[149] The following series of events manifested during this three hour period: It is common cause that Imene accessed the area of the geo-lab at 11h32 on a false job request to perform a network function; a computer provided by Imene was carried into the geo-lab by the respondent himself and Andreas and was later at 12h26 removed through the airlock (the exit); the security officials did not open the computer to determine whether or not it was 'clean'; at 12h40 Imene left the area; the computer was later collected by Imene at the transport department; shortly afterwards Andreas absconded and Imene left the mine without leave;²³ that Imene had pointed out an entirely different computer to the investigators; and the computer (brought by Imene to the geo-lab) and the diamond disappeared without a trace.

[150] The investigation into the disappearance of this diamond revealed another instance where diamonds had not been recorded which led to the theft of the biggest diamond (of nine carat) in the group of diamonds when it was switched with four

²³ The investigation revealed that both of them went to South Africa.

smaller diamonds which four diamonds had also not been recorded on any worksheet.

[151] In conjunction with those factors mentioned under paragraphs 146 to 149, and the fiduciary duty referred to *supra*, in my view, there was more than enough extraneous evidence on record for an employer to conclude that the respondent could not be trusted, ie that the relationship of trust had irretrievably broken down. The respondent failed to protect, as it was his duty to do, the interest of the appellant by all reasonable means at his disposal. The arbitrator was wrong to find that there was no extraneous evidence presented proving a breakdown in the relationship.

[152] The court *a quo* in my view also erroneously found that the charge of false evidence, refers to false evidence given during the disciplinary hearing and since the respondent did not testify during the disciplinary hearing he could not have been guilty of something he did not do. The testimony of the investigator clearly referred to explanations given by the respondent during the course of the investigation.

[153] Lastly, in respect of the charge of failure to comply with policies and procedures by not recording the discovery of the diamond on the worksheet, the court *a quo*, it appears erroneously condoned such non-compliance by stating that there was evidence that sometimes diamonds were recorded on the worksheet later than the date of sorting, whilst it is undisputed that the respondent did not only fail to record the finding later, but that he never recorded such finding.

[154] The court *a quo* in my view also erred in law by finding that the dismissal of the respondent was procedurally and substantively unfair.

Did respondent prove his losses?

[155] One of the grounds of appeal by the appellant was that the court *a quo* failed to find that the arbitrator had erred in awarding the respondent losses and compensation of N\$67 091,67 and N\$175 020 respectively.

[156] There was no evidence presented by the respondent during the arbitration proceedings what his losses were or how he mitigated them. The arbitrator simply ordered appellant to pay for loss of income from the date dismissed to the date the award was issued, and compensation of 12 months' salary. There was no basis upon which the arbitrator could have made such an award and clearly erred in law when he did so. There was no evidence at all that the respondent suffered any losses.

[157] It is trite that the burden of proof is on the employee to prove his or her losses and in order to do so must not only plead how those amounts arose but must also lead evidence to prove those amounts.²⁴

[158] The respondent pleaded no amount in his summary of dispute and unsurprisingly led no evidence at all to prove that he has suffered any loss. This is a fatal flaw in his dispute with the appellant. In such an instance, assuming that the

²⁴ *Pinks Family Outfitters (Pty) Ltd t/a Woolworths v Hendricks* 2010 (2) NR 616 (LC) para 8; *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Jacobs & others* (LCA 702/2012) [2013] NALCMD 17 (31 May 2013) para 12 (unreported judgment of the Labour Court).

dismissal of the employee had been procedurally and substantively unfair, the court *a quo* should have ordered absolution from the instance. In *Jo-Mari Interiors v Mouton*,²⁵ the Labour Court referred with approval to the matter of *ESSO Standard SA (Pty) Ltd v Katz*²⁶ in which Diemont JA refers to the matter of *Hersman v Shapiro & Co* 1926 TPD 367 at 379 where Strafford J said the following:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. *It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance.* (Emphasis provided)

The Labour Court in *Jo-Mari Interiors* continued to state at p 57 (*verbatim* quotation):

'The Respondent could easily have laid the factual basis of her claims in the court *a quo* but she failed to place that evidence before that court when she was in a position to do so. The chairperson in the court *a quo* should have found that the Respondent did not prove her claim against the respondent²⁷ and should have ordered a dismissal of the claim or the most appropriate order under the circumstance would have been absolution from the instance.'

The cross-appeal

[159] Where the arbitrator had found that there was a breakdown of trust in the employer/employee relationship he correctly refused to order reinstatement of the respondent.

²⁵ *Jo-Mari Interiors v Mouton* NLLP 2004 (4) 53 NLC at 57.

²⁶ *ESSO Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 AD at 970E-G.

²⁷ 'Respondent' should read 'appellant'.

[160] In *Pupkewitz Holdings (Pty) Ltd v Mutanuka & others*²⁸ the following principle was stated:

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

[161] In my view, the court *a quo* erred when it found that the arbitrator's conclusion that the relationship had irretrievably broken down was not based on evidence. I have referred to the factors and circumstances, which if considered in context, clearly underscore the arbitrator's conclusion on this issue, and the cross-appeal cannot succeed.

Order

[162] In the result the court makes the following orders:

- (a) The appeal is upheld with costs, including the costs of one instructing and two instructed legal practitioners.

- (b) The order of the Labour Court is set aside and substituted with the following:

²⁸ *Pupkewitz Holdings (Pty) Ltd v Mutanuka & others* (LCA 47/2007) [2008] NALC 1 (3 July 2008) para 17(unreported judgment of the Labour Court).

'The appeal against the arbitrator's award dated 16 April 2015 succeeds. The award is set aside and substituted with the following order:

"The applicant's dispute dated 3 February 2015 under case SROR 04-15 is dismissed.

There shall be no order as to costs.

The cross-appeal is dismissed."

HOFF JA

SHIVUTE CJ

SMUTS JA

APPEARANCES

APPELLANT:

R Heathcote (with him G Dicks)

Instructed by Köpplinger Boltman Legal
Practitioners

RESPONDENT:

S Namandje

Of Sisa Namandje & Co Inc.