*REPORTABLE*

**CASE NO. LCA 34/2008**

**IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**lLD DIAMONDS NAMIBIA (PTY) LIMITED** **APPELLANT**

and

**PILATUS THOBIAS** **RESPONDENT**

**CORAM:** HOFF, J

**Heard on:** 2008.11.07

**Delivered on:** 2009.02.27

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**JUDGMENT:**

**HOFF, J:** [1] This is an appeal against a judgment by the district labour court granted on 31 January 2008. The district labour court made the following order:

*"(a) the termination of the complainant's services by the respondents was unlawful and not in compliance with section 45 or 47 of the Labour Act and is accordingly set aside;*

*(b) the complainant is not to be reinstated, but the respondent is ordered to compensate him for his loss of income and benefits for a period of six months. This payment should be made to the representative of the complainant on or before 29 February 2008. Interest at a rate of 20% per annum shall be added to any outstanding amount not paid before 28 February 2008."*

[2] The respondent was employed by the respondent as an occupational health and safety officer on 1 September 2005. He was on probation for a period of three months and earned a salary of N$7 800.00 per month. In terms of an employment agreement either party may from the second month terminate the agreement on one week's notice in writing. The respondent's services were terminated on 10 October 2005. It is common cause that appellant did not give respondent any notice.

[3] Mr Nesongano, the general manager, of the appellant testified that, after his appointment,the respondent was urgently required to come up with an action plan in including evacuation procedures. He enquired about the action plan on a weekly basis and each time respondent told him that he would provide the action plan. When the respondent did not provide the action plan a meeting was called, attended by respondent as well as employees attached to the Human Resources section, where the urgency of having an action plan was emphasized. A deadline of one month was set for such an action plan. The deadline was not met since the respondent called on the date of the deadline informing appellant that he was sick. Mr

Nesongano testified that the respondent informed him that too much pressure was being exerting on him by demanding the action plan. When respondent again reported for work (after sick leave) he asked for an extension of the deadline. This request was granted without specifying a specific date when the action plan should be provided. Mr Nesongano testified that at that stage he had informed respondent that the action plan should be provided when respondent was ready to submit it. The respondent provided the action plan a few days later. Mr Nesongano testified that the action plan was *"well-written"* to such an extent that he was of the view that only a *"genius"* could have produced such an action plan. He testified that having regard to the fact that respondent had the previous week felt sick because of the demand for an action plan, that the present action plan could not have emanated from the respondent. Mr Nesongano stated that when he shared his suspicion with the respondent, the respondent felt that he was being victimized. He then realized that the respondent was incapable to perform the work of occupational health and safety officer and the services of the respondent were terminated without a disciplinary hearing. It was appellant's policy that the services of an employee on probation may be terminated without a disciplinary hearing.

It appears to me that the respondent's services were terminated because he did not meet the required standard. It must be stated at this stage that poor work performance does not constitute misconduct.

*Rossouw and Conradie in A Practical Guide to Unfair Dismissal Law in South Africa* explain this distinction as follows on p. 48 par. 4.3.4:

> *"As has already been mentioned, incapacity dismissals are regarded as "no-fault" dismissals because there is generally no intention on the part of an employee to*

*contravene a behavioural standard in the workplace. Where an employee is perfectly able to perform in accordance with the required performance standard, but fails to do so for a reason unrelated to capacity, it may be more appropriate to treat the incident as one of misconduct".*

[4] Probationary employees may be dismissed for poor work performance but they are entitled to be treated fairly by an employer and may not be dismissed at the whim of their employer and for no valid reason.

(See *NUMSA v Tek Corporation Ltd. & Others (1991) 12 ILJ 577 (LAC); Jonker v Amalgamated Beverage Industries (1993) 14 ILJ 199 (IC).*

[5] An employee on probation, in terms of the common law, may be dismissed for poor work performance at any stage during the probationary period and an employer need not to wait until the end of the probationary period of dismiss such an employee proved that reasonable notice has been given to such employee.

(See *Ndamase v Fyfe – King NO 1939 EDL 259* ).

[6] Although there are conflicting decisions for the need to hold a formal inquiry prior to dismissal (See *Delport v Gro-Homes Marketing CC (1992) 1 LCD 157 (IC) contra BAWU & Others v One Rander Steak House (1988) 9 ILJ 326 I C* ) courts will investigate the substantive fairness of a dismissal for incapacity in respect of employees on probation.

[7] The question which needed to be answered *in casu* was whether the respondent was dismissed for a valid reason. This in turn leads to the question namely, on what basis did the general manager of the appellant conclude that the action plan did not emanate from the respondent ?

The answer to this question, in my view, was that the conclusion reached was based on an unsubstantiated suspicion that someone other than the respondent had drafted the action plan.

It was the testimony of Mr Nesongano that the only basis for him to determine whether or not the respondent was performing would be based on an action plan since he would then be able to *"monitor"* what the respondent was doing *vis-à-vis* the action plan.

The action plan would provide the appellant with an opportunity to objectively assess respondent's performance, and to see how the respondent would implement such plan. Instead appellant argued that if respondent initially had difficulty in providing an action plan, implementing such plan would have been more demanding and therefore, respondent was incapable of performing the work of occupational health and safety officer.

[8] The conclusion is inescapable that the appellant anticipated what it perceived to be an incapacity of the respondent to perform.

[9] It was submitted on behalf of respondent on the authority of *Rossam v Kraatz Welding Engineering (Pty) Ltd 1998NR 90* that no fair procedure was followed prior to the dismissal of the respondent since it was common cause that no disciplinary hearing was held.

In Kraatz *(supra)* the court referred to the *"authoritative work of Le Roux and Van Niekerk, The South African Law of Unfair Dismissal where the following is stated at 222 (it should read 223):*

> *"To the extend that there was ever doubt that a fair hearing was required in cases of poor work performance, this is now a well – established proposition." "*

(Emphasis provided).

[10] In my view this quotation is applicable to those employees who are not on probation. The same authors on p. 71 – 75 deal specifically with the position of probationary employees and at p. 72 raises the following questions:

> *"What has been the subject of some debate and some conflicting decisions, however, is the extent of the protection to be granted to probationary employees. Are they entitled to the same standards of fair conduct as permanent employers, or does their probationary status mean that some lesser standard applies ? "*

[11] The authors refer (at p. 74) to the case *Amalgated Beverage Industries (Pty) Ltd v Jonker (1993) 14 ILJ 1232 (LAC)* where the Labour Appeal Court (per Stafford J) agreed with the contention that the position of a probationary employee should not be equated with an ordinary tenured employee and that an employer is entitled to terminate a probationary employee's employment provided that he does not behave grossly unfairly and arbitrarily in doing so. The court emphasised the element of fairness and stated (at 1250 A) that *"fairness requires that an employer act reasonably and bona fide …"*

[12] The magistrate in his reasons stated that the appellant who bore the onus, failed to provide any minutes, assessment reports reminders, or any document to support its contention that the respondent was subjected to an objective performance evaluation.

[13] One of the grounds of appeal was that the magistrate erred in this finding and erred in finding by implication that the oral testimony delivered on behalf of the appellant was not sufficient.

It was testified in the district labour court that minutes had been taken during meetings but the whereabouts of those minutes were unknown.

As indicated *(supra)* an employer has a duty to act fairly and may only terminate the employment of a probationary employee for a valid reason. Thus where there is documentary proof in existence in support of an averment that such a valid reason existed at the time of the termination of service such must be handed up in support of such a contention.

[14] Mr Francis Eiseb (employed by the appellant) was called to testify on behalf of the appellant in the district labour court. He testified *inter alia* that he was initially required to be part of a panel who interviewed applicants for the position of health and safety officer. This was so because of his expertise in that field. He testified that the period within which the respondent was required to provide the action plan was very short and that having regard to his experience he himself would have required a month to come up with an action plan. He testified that he was present in a meeting where respondent was instructed by the general manager to come up with an action plan although he was not sure of the date of such a meeting. He also testified that in that

meeting respondent was not accused of poor work performance and that he was not aware of any other meeting in which the respondent had been accused of poor work performance. This is in conflict with the evidence of Mr Nesongano.

[15] I agree with the finding of the presiding magistrate in the labour district court that if the appellant had doubted the authenticity of the action plan it should have held a proper enquiry. I further agree with the magistrate that on the basis of the evidence presented on behalf of the appellant that the determined period was insufficient to produce the required action plan.

[16] I am of the view that the dismissal of the respondent was substantially unfair primarily because the general manager dismissed the respondent on suspicion he was unable to perform and for this reason alone the appeal should be dismissed.

[17] The appellant (in paragraphs 7 of its notice of appeal) stated that the magistrate erred in ordering payment of loss of income equal to a period of 6 months taking into consideration that complainant was still under probation when his services were terminated. Furthermore that the magistrate erred in ordering such payment by not making exactly clear what such amount would entail.

[18] In terms of the employment agreement the salary of the respondent was N$7 800.00 per month.

It further provided that *"after deductions the net amount will be deposited into a bank account of the employee's choice"*.

[19] The deductions the company would be entitled to deduct were:

(a) any amount the company is legally obliged to deduct;

(b) any amount in respect of which the employee's written authority has been obtained;

(c) any amount that the parties have agreed pay be deducted; and

(d) should the employee at any time owe any amount to the company.

[20] The appellant in my view should compensate the respondent the monthly salary minus the deductions referred to *(supra),* multiplied by six (months).

[21] In the result the following order is made:

The appeal against the order made in the district labour court is dismissed.

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**HOFF, J**

**ON BEHALF OF THE APPELLANT:** **ADV. DICKS**

**Instructed by:** **KOEP & PARTNERS**

**ON BEHALF OF THE RESPONDENT:** **MS JANTJIES-SHAKWA**

**Instructed by:** **SISA NAMANDJE & CO.**