

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 68/2016

In the matter between:

ALDHARA NDC DATE PALM DEVELOPMENT (PTY) LTD

APPELLANT

and

LOISE EMELTA ELIASER

RESPONDENT

Neutral citation: *Aldhara NDC Date Palm Development (Pty) Ltd v Eliaser* (LCA 68/2016) [2017] NALCMD 22 (30 June 2017)

Coram: PARKER AJ

Heard: 21 April 2017

Delivered: 30 June 2017

Flynote: Labour Court – Appeals – Unfair Dismissal – Labour appeal against the award made at arbitration proceedings – Appellant alleging that dismissal was fair – The appellant failed to discharge the onus on it, on the balance of probabilities that the respondent was dismissed for a fair and valid reason – Appeal dismissed.

Summary: The respondent was charged with dishonesty – The charge alleged that she unlawfully and wrongfully misappropriated a box belonging to the appellant with intent to permanently remove from the appellant's premises – She pleaded guilty but

explained that there had been general permission given to the employees by the employer that the employees may take old card boxes home – She was however found guilty at the disciplinary hearing of having stolen an empty box belonging to the appellant and as a result, it was dismissed – The respondent then filed a complaint of unfair dismissal with the Office of the Labour Commissioner – Having found amongst others that the dismissal was procedurally unfair, the arbitrator made an order directing the appellant to reinstate the respondent in the position she held before her dismissal, to issue the respondent a final warning, and to pay the respondent three months' salary for loss of income for the respondent's six months of unemployment – The appellant lodged an appeal against this award.

Held that the arbitrator's failure to evaluate the witnesses' evidence and to consider the guilty or not guilty of the respondent amounts to a misdirection which entitled the court to consider the evidence to determine whether, on the evidence the respondent's dismissal was for a fair and valid reason.

Held, further that the appellant has failed to discharge the onus on it on the balance of probabilities that the respondent dismissed for a fair and valid reason.

Appeal dismissed.

ORDER

1. The plea of guilt is rejected and is substituted with a plea of not guilty.
2. The finding of guilty by the arbitrator, in so far it is implied by the imposition of a final written warning, is set aside.
3. The respondent is re-instated in the position she held before her dismissal.
4. The appellant is ordered to pay the respondent a salary as compensation for loss of income for a period of six months calculated as follows:

60 days for 12 weeks of 5 days per week x N\$84.50 per day equal to the sum of N\$5070.00 plus interest calculated at the rate prescribed in respect of a judgment debt in terms of the Prescribed Rates of Interest Act No. 55 of 1925, from the date of the arbitrator's award being 14 October 2016.

5. The payment ordered in point 4 is to be effected on or before 30 July 2017.
6. The payment is to be effected into the respondent's personal bank account alternatively at the Office of the Labour Commissioner for the benefit of the respondent.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an appeal against the arbitrator's award. At the end of the arbitration proceedings the arbitrator made an order directing the appellant to reinstate the respondent in the position she held before her dismissal, to issue the respondent a final warning, and to pay the respondent three months' salary for loss of income for the respondent's six months of unemployment.

Factual Background

[2] The respondent was employed by the appellant as a general worker. From the little information on the papers before court, it would appear that the appellant's business operation is involved in the cultivation of date palms and grapes at Naute dam situated near Keetmanshoop.

[3] On Saturday, 23 April 2016 she reported for work as usual. However, she did not feel well. Just before lunch time and while the employees were busy with work the respondent asked for permission from her supervisor to go to the toilet, which was situated near a store room. On the way to the toilet she picked up an old torn card box used to pack grapes which was behind the storeroom. She was running because she was in hurry. A security guard was nearby. On her way back she was confronted by the security guard who asked her what she was carrying. She responded that she was carrying an unwanted box. The security guard told her to take back the card box (It is referred in all the previous documents just as ('the box'), which she did. He asked her for her name, which she furnished it to him. The security guard filed a report with his supervisor who in turn made a report to the appellant's human resource manager ('the HR manager'). In the report, the security guard alleged that the respondent stole the card box. The HR manager then instituted her own investigation by questioning the respondent. According to the HR manager, at the end of her investigation she concluded that there was sufficient evidence to warrant the institution of disciplinary proceedings against the respondent.

[4] The respondent was charged with dishonesty. The charge alleged that she unlawfully and wrongfully misappropriated a box belonging to the appellant with intent to permanently remove it. The respondent pleaded guilty to the charge at the disciplinary hearing, but tendered an exculpatory explanation for her plea. At the end of the disciplinary proceedings the respondent was found guilty and dismissed. It was disputed whether at the arbitration hearing the respondent was advised of her right to appeal. The record nevertheless shows that she appealed. What does not appear from the record is what transpired at the appeal hearing and what outcome was reached? Given that the respondent filed a claim with the office of the Labour Commissioner, the only reasonable inference is that her appeal was dismissed.

[5] The respondent then lodged a complaint with the office of the Labour Commissioner for unfair dismissal. As indicated above, her claim was upheld by the arbitrator whereby the arbitrator made an award in her favour. It is that award which forms the subject matter of this appeal.

Arbitration proceedings

[6] At the arbitration hearing the respondent was represented by an official from her Union, the Namibia Food and Allied Workers. The appellant was represented by an official from the General Employers Association of Namibia. The record of the disciplinary hearing was admitted into evidence without proof. It consisted of: the notice of the disciplinary hearing as Exhibit A; the hand written notes of the chairperson of the disciplinary hearing as Exhibit B; the request for appeal as Exhibit C; the respondent's letter of appointment as an employee as Exhibit D; and a copy of the security guard report (referred to as "OB", which is an abbreviation for Occurrence Book).

[7] The arbitrator summarized and recorded the facts which were common cause namely: that the respondent was employed as a general worker with effect from 10 September 2013 until 28 April 2016; that the respondent earned a sum of N\$84,54 per day; and that she was found guilty at the disciplinary hearing and was subsequently dismissed.

[8] The arbitrator correctly identified the issue for determination: whether the dismissal of the respondent was procedurally and substantively fair.

The appellant's evidence

[9] The appellant called three witnesses. The first witness was Ms Gaenor Alberts, the HR manager. She testified that the incident which gave rise to the respondent's disciplinary hearing took place over the weekend while she was off duty, and that on Monday the security guard submitted a report to her that stated that the respondent had stolen a box on Saturday. She then conducted her own investigation which included questioning the respondent. At the end of the investigation she concluded that there was sufficient evidence to charge the respondent and thereafter charged the respondent with dishonesty. She drew up a notice of disciplinary hearing and explained the procedure associated with the disciplinary hearing to the respondent. Thereafter she acted as the initiator at the disciplinary hearing, which was chaired by an independent chairperson. Ms Alberts further testified that the charge was read and

explained by the chairperson to the respondent, whereupon the respondent pleaded guilty.

[10] Ms Alberts further testified that the respondent tendered an explanation for her plea, stating: that she found the box behind the store room and that it was torn on one side; that the box was old; and that she took it because she knew that the company would not use it.

[11] According to Ms Alberts an employee cannot take any of the appellant's boxes without authorization because they may be re-used, and if an employee wants to be on the safe side he or she should ask permission from the supervisor. She was of the view that the box which was brought to the disciplinary hearing by the respondent could not have been the box which she had been ordered by the security guard to put back.

[12] The second witness called to testify at the disciplinary hearing against the respondent was Mr Tanda Simata, the security guard. He testified that he was on duty when he saw the respondent running to the compound with the box cover under her jacket. When she returned he asked her what she was carrying. She responded that she was carrying an unwanted box. He then asked her to go and fetch the box so that he could look at it. When the respondent brought the box he looked at it and it looked nice to him. At that juncture his team leader arrived and he left the respondent with his team leader to go and open a gate for a vehicle. Under cross-examination he mentioned that he noted the incident in his occurrence book, and that later he informed his supervisor. Later Ms Alberts asked him for his occurrence book so that she could make a copy. Mr Simata further confirmed that sometimes workers are given boxes and that on such occasions his team leader would order him not to worry because the workers have been given the unwanted boxes.

[13] The third witness called to testify on behalf of the appellant was the supervisor for the respondent, Mr Ahmed Shafeeque. He testified that on the day in question the respondent came to him and asked for permission to go to the toilet. The toilet is situated about one hundred meters from the place where they are working. Shortly thereafter the security guards came to him and reported that the respondent stole a

box. Then the team leader, Brenda, instructed the respondent to go and fetch the box. She came back with one old box. He inspected and confirmed that it was an old box. Mr Shafeeque further testified that respondent explained to them that she was going to her room when she found an old box which she then took. He testified that no one is allowed to take old boxes without permission and that if an employee wants an old box he or she is required to ask for permission.

The respondent's evidence

[14] The respondent testified that on that day she reported for work although she did not feel well. At around 10 o'clock she did not feel well. She then went to the store room's toilet, but found it locked. She then asked for permission from her supervisor to go to the toilet situated at their living quarters. The supervisor gave her five minutes for her to be back at work. On her way she saw one box behind the store room. She picked it up. She was running because she was in hurry to get back to work. When she returned back she saw the security guard with the supervisor together with her team leader. The security guard asked her what she was carrying on her way to the toilet. She responded that it was an unwanted box. They then ordered her to go and fetch the box. She went and brought back the box to the security guard. The security guard asked for her name, which she gave him. The supervisor inspected the box after she put it back where she originally picked it up. The respondent further testified that they were given permission during February, March or April to take old boxes.

The arbitrator's findings

[15] After conducting a ticking-off exercise of whether the internal proceedings had been fair, the arbitrator concluded at paragraphs 46 to 49 of his award as follows:

[46] The applicant testify that they were given permission by the respondent in February, March and April to take old boxes of grapes and there was a lot. She further testified that the supervisor told the chairperson of the disciplinary hearing that the box was for last year and they are no more using them and they had already given permission to take those boxes, but if the box are new, you have to ask permission, but if for last year you don't need to ask, because it can be thrown away or burned and the supervisor was her witness in the first instance.

[47] The supervisor was present when the incident occurred, but did not report, because he testified that the box brought before him was old and the same box was also brought to the disciplinary hearing and that he only request her to put the box back. The security informed his supervisor of the incident who report it to the initiator, the Human Resources Manager at the respondent who investigate and prosecute the applicant.

[48] In my view, the action portrayed by the applicant does not warrant dismissal, hence the chairperson's decision was too harsh and the applicant's appeal (Why should the applicant appeal if chairperson's questions at guilty plea where positively answered?), on which the initiator testified that it was not explained to the applicant during disciplinary hearing, while under procedural requirements point 8 stipulates clearly that appeal procedures were explained to and understood by the employee and marked yes by the chairperson and where there are no documents revealing appeal procedure except request for an appeal makes the disciplinary hearing procedure unfair.

[49] As a result, the arbitrator found that the dismissal was procedurally unfair and the investigation officer did not execute proper investigation, therefore there is no investigation report.'

Proceedings in this court

Notice of appeal

[16] The amended notice of appeal lists the following questions as questions of law for consideration in this appeal.

2.1.1 Whether or not here is any evidence on record upon which the arbitrator could reasonably have come to the following conclusions:

2.1.1.1 That the dismissal was procedurally unfair;

2.1.1.2 That the appeal procedure was not explained to the respondent;

2.1.1.3 That the respondent did not plead guilty at the disciplinary hearing as reflected in the record of the disciplinary hearing, exhibit "B";

2.1.1.4 That "... where there are no documents revealing appeal procedure except request for an appeal makes the disciplinary hearing procedure unfair".

2.1.1.5 That the sanction of dismissal was not warranted and too harsh.

2.1.2 Whether on the factual finding the arbitrator could reasonably have come to the following conclusions:

2.1.2.1 That the dismissal was procedurally unfair;

2.1.2.2 That the appeal procedure was not explained to the respondent;

2.1.2.3 That the respondent did not plead guilty at the disciplinary hearing as reflected in the record of the disciplinary hearing, exhibit "B";

2.1.2.4 That "... where there are no documents revealing appeal procedure except request for an appeal makes the disciplinary hearing procedure unfair".

2.1.2.5 That the sanction of dismissal was not warranted and too harsh.

2.1.2.6 That the appeal by the respondent was not considered by the appellant.

2.1.3 Whether the arbitrator was entitled to make a finding that the appeal procedure was not explained to the respondent and that the appeal procedure was unfair as it was not a dispute before the arbitrator for decision.'

[17] In addition to the questions law outlined above the notice of appeal as usual stipulates a number of grounds of appeal. I will refer to the grounds of appeal in the course of the judgment where necessary.

The respondents grounds of opposition filed pursuant to rule 17(16)(b)

[18] The respondent filed an extensive grounds of opposition pursuant to the provisions of rule 17(16)(b). The principal grounds of opposition, in sum, support the arbitrator's findings and decision.

Point in limine

[19] In addition to the principal grounds of opposition raised, the respondent raised a point *in limine*, namely that appeal is not based on a question of law within the meaning of section 89(1)(a) of the Act, 2007. Particularly the appellant's purported question of law under paragraph 2.1.2 – whether there is any evidence on record upon which the arbitrator could reasonably have come to the conclusions listed under that paragraph – is a question of fact.

[20] Counsel for the respondent submits that the appellant's grounds of appeal set out in paragraph 2.1.2 of its notice of appeal are not questions of law but rather of facts. It is contended that for that reason alone the appeal is defective and should be dismissed.

[21] In support of the above submission counsel for the respondent refers the court to the judgment of the Supreme Court in the matter of *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another*¹. Counsel for the appellant on the other hand submits that the objection by the respondent to the formulation of the notice of motion is without merit and should be rejected. In support of his stance, counsel refers the court to the Supreme Court's judgment in the matter of *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd*² in which the Supreme Court revisited the test to be applied in determining whether a finding by an arbitrator is an appealable question of law within the meaning of the provisions of section 89(1)(a). This is the same test which was adopted and applied by Supreme Court in the matter of *Swart v Tube-O-Flex Namibia (supra)*.

¹ (SA 70/2013) [2016] NASC 15 (25 July 2016).

² 2016 (2) NR 554 SC.

[22] It would appear therefore both counsel are *ad idem* on the applicable legal principles, but differ when it comes to the application of the legal principles to the facts of the current matter and the effect or results of such application.

[23] The test whether an issue is a question of law or a question of facts was laid down by the court in the *Janse van Rensburg* matter at para 43 – 44 but neatly summarized by the court in the *Swart v Tube-O-Flex Namibia* matter at 30 – 31 as follows:

[30] This court has recently revisited the test to be applied in determining whether or not a finding by an arbitrator is an appealable question of law under s 89(1)(a): *Van Rensburg v Wilderness Air Namibia (Pty) Ltd* Case No. SA 33/2013 delivered on 11 April 2016. O'Regan AJA held that s 89(1)(a) reserves determination of facts to the arbitration process and an appeal relating to decisions on fact will therefore only be entertained where the arbitrator has made a factual finding on the record that is arbitrary or perverse. An arbitrator's conclusion on disputed facts which a reasonable arbitrator could have reached on the record is not perverse and thus not subject to appeal to the Labour Court. The corollary is that an interpretation of facts by an arbitrator that is perverse in the sense that no reasonable arbitrator could have done so is appealable as a question of law. When a decision of an arbitrator is impugned on the ground that it is perverse, the Labour Court 'should be assiduous to avoid interfering with the decision for the reasons that on the facts it would have reached a different decision on the record'. It may only interfere if the decision reached by the arbitrator is 'one that no reasonable decision-maker could have reached.

[31] In so far as it is relevant to the present appeal, O'Regan AJA added (at para 48) that:

'Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.'

[24] The court further pointed out at (para 57) that in order to assess whether a particular ground of appeal raised a question of law alone within the meaning of 89(1)(a), it will require a consideration of each ground of appeal. Furthermore where grounds of appeal are raised that are not questions of law, the Labour Court should

simply dismiss them as improperly raised, and the true grounds of appeal which raise a question of law should be considered on the merits.

[25] Applying the foregoing principles to the point *in limine*, it is my considered view that the point *in limine* is liable to be rejected in so far it suggest that all the questions raised by the appellant amounts questions of facts and should thus be dismissed. This court is bound to consider each ground of appeal on merits. Those grounds found to be raising a question of law will be considered and those on consideration found not to raising a question of facts will be dismissed. The point *in limine* is thus dismissed.

Arbitrator's Failure to Consider Reasons for Dismissal

[26] Before proceeding to consider the questions of law raised by the appellant it is necessary to consider how the arbitrator in his award approached the arbitration proceedings. It has been held that the arbitration proceedings are not appellate in nature – that the validity and fairness of the reason for the dismissal of an employee are to be established at the arbitration proceedings; and furthermore, that the internal proceedings may be an important factor in the assessment by an arbitrator of facts when the determination of the fairness and validity of the reason for the dismissal could be a factor in weighing the credibility of witnesses who testified at the disciplinary hearing³.

[27] In this matter it would appear on reading the record that the arbitrator simply considered what happened at the disciplinary proceedings and ticked off whether those proceedings complied with the fairness and validity of the dismissal. The arbitrator failed to make an independent assessment of the evidence placed before him in determining the validity and fairness of the dismissal of the respondent. It would appear from the record that the arbitrator accepted without more that because of the mere fact that the respondent pleaded guilty at the disciplinary hearing that was the end of the matter as far as conviction was concerned, and that the arbitrator's duty was only to consider the fairness or otherwise of the procedure and sanction. This in my considered view is an incorrect approach and amounts to a misdirection. The plea of guilty at the internal disciplinary hearing was just part of the totality of the evidence

³ *Africa Personnel Services (Pty) Ltd v Shipunda & Others* NLLB 2013 (7) 261 LCN 31 July para 37

before the arbitrator. It is not conclusive of the guilt of the respondent. The arbitrator was under a legal duty to make a finding whether on the totality of the evidence placed before him the respondent was dismissed for a fair and valid reason.

[28] At para 4 of the award, the arbitrator correctly identified the issue to be decided as whether the dismissal of the respondent was procedurally and substantively fair or unfair. At para 49 of his award the arbitrator correctly *'found that the dismissal was procedurally unfair'*. However, nowhere in his award did the arbitrator make a finding that the dismissal was substantively fair in the sense that it was for a valid and fair reason. It follows therefore that the arbitrator committed a misdirection.

[29] The arbitrator reached the conclusion in paragraph 49 of his award without evaluating the evidence of the respective witnesses against each other. One is bound to ask questions: what was the purpose of the parties leading evidence? Was the purpose of the evidence only for the arbitrator to determine whether or not the sanction was fair without the need for the arbitrator to first determine whether the respondent was dismissed for a valid and fair reason? What is remarkable is that the evidence led by the parties was not only in respect of mitigation or aggravation of sentence but was in respect of whether the respondent was guilty or not.

[30] As pointed out earlier in this judgment the validity and fairness of the dismissal are to be determined afresh at the arbitration proceedings. The arbitrator ought to have evaluated the conflicting versions before him and based on the evidence determined whether the appellant had discharged the burden on the balance of probabilities that the respondent had been dismissed for a valid and fair reason. Failure to do so amounts to a misdirection. In the circumstances this court is obliged to evaluate the evidence on record in order to establish whether the appellant has proven that respondent was dismissed for a valid and fair reason.

Reasons for the respondent's dismissal considered

[31] It has been the respondent's case or defence right from the beginning that permission had been granted during the previous year to employees to take old boxes. Her plea of guilty was qualified by that explanation. Had it been a criminal proceeding,

a plea of not guilty would have been entered based on the respondent's exculpatory explanation.

[32] Ms Alberts, the HR manager was asked during the arbitration proceedings whether the respondent had admitted that she was wrong. She replied as follows: *She told me that 'yes, Ms Gaenor I took the box but I can bring it back or I can give it back, it is still there and I basically, I did not mean to steal it'.*

[33] The respondent's explanation for her guilty plea at the internal disciplinary hearing is recorded as follows:

'Plea explanation:

I just found one box behind the store-room. It was torn on one side. The reason why I took it, it was used for grapes and it was old. Each year we receive new boxes for the grapes... I took it because I knew the company will not use it.'

[34] I think it is necessary to point out that even at the internal disciplinary hearing, in spite of her plea of guilty, evidence was led to prove her guilty or otherwise.

[35] The respondent persisted with her defence at the arbitration proceedings that there had been general prior permission by the appellant for the employees to take old boxes, and that such permission was given during the previous year during February, March or April. The appellant's case was that even in respect of old boxes the employer's permission was required before an employee could take an old box. The arbitrator failed to make a finding as to which of the two conflicting versions he accepted and for what reason.

[36] In my view, the question is whether the respondent's version is probably possibly true. It is common cause that on the day in question at around 10 o'clock the respondent did not feel well, that she asked for permission from her supervisor to go to the toilet at their living quarters which was closer to where they stay, and that she did not know that the supervisor had keys to the toilet situated in the premises where they were working. It is further not in dispute that on her way to the toilet she saw the security guard, and that on way she saw an old box and picked it up. It is further

common cause that she was running because she was in a hurry since she was given five minutes to return back to work. It is also common cause that the security guard stopped her and asked her what she was carrying and that she responded that she was carrying an old unwanted box. The security guard told her to put back the box.

[37] One of the grounds of appeal by the appellant is that the finding of guilty at the disciplinary hearing was not set aside by the arbitrator. This is correct. I have already found that failure to do so constituted a misdirection on the part of the arbitrator. The ground continues to say that the conduct of the respondent during the process shows premeditation and an attempt to hide the stolen box under her jacket.

[38] In my view the conduct of the respondent is inconsistent with a person acting with a guilty mind. It is improbable that the respondent would have picked up the box knowing that a security guard was nearby if she did not believe it was permissible to take an old box. Put differently, if the respondent knew that she was not allowed to take an old box without prior permission, she would not have picked up the box while the security guard was in the vicinity. Furthermore, in my view her explanation to the security guard that she was carrying an old unwanted box is consistent with a guilt-free mind.

[39] There is nothing on record to suggest that the respondent had known of the presence of the box at that particular place. On the evidence it would appear that the respondent came upon the box by sheer chance. Had the supervisor given her the key to the toilet in the workplace, she would not have left the location and would not have come upon the old box.

[40] It is suggested by the appellant's representative at the arbitration hearing that the fact that the respondent was running and was in a hurry showed that she had a guilty mind. In my view this suggestion is without merits. It is undisputed that the respondent was given a mere five minutes to go to a toilet which, according to Mr Ahmed Shafeeque, the supervisor, was situated about one hundred meters away from the working place. In my view, given the distance, the short time and whatever business the respondent had to transact in the toilet, it is understandable that she was running and in a hurry.

[41] Taking into account the foregoing facts, in my view, it cannot be said that the respondent's version is not reasonably possibly true.

[42] Moreover quite apart from the respondent's version the evidence tendered on behalf of the appellant supported the respondent's version. According to Ms Alberts, the HR Manager, when questioning the respondent about the box the respondent told her that it was an old box and that she did not mean to steal it. She persisted in her defense at the internal disciplinary hearing. The respondent even called her supervisor Mr Ahmed Shafeeque as a witness at the disciplinary hearing. The respondent put the following question to the Mr Shafeeque:

'Q: Now there are old boxes do I just take or ask?

A: They have to ask if new they must ask.'

My understanding of Mr Shafeeque's response is that in respect of new boxes the employees must ask for permission, but in respect of old boxes they did not need permission. This evidence in my view supports the respondent's version.

[43] It is significant to note that despite the fact that Mr Shafeeque testified as the respondent's witness at the disciplinary hearing he was called as witness for the appellant at the arbitration hearing. Not surprising, he corroborated the respondent's version that in respect of the old boxes the employees did not need permission. He further testified that the box in question was old. In my view the evidence by Ms Alberts that permission was needed even in respect of old boxes is unconvincing. It is based on mere say so. It is contradicted by Mr Shafeeques's evidence who according to her own evidence, as a supervisor had to give permission to the employees before they could take old boxes. There was no written record or document that such rule or policy was made known to the employees. She is the HR manageress, and should have been in position to testify when such rule or policy was made and communicated to the employees including the respondent. She failed to testify to that fact. Ms Alberts testified that if an employee needs permission he or she should request such permission from her supervisor. As a matter of fact under cross-examination she conceded that the respondent might have been given permission in respect old boxes.

[44] It is important to point out that the respondent was specific in her defence that permission was granted in the previous year during February, March, or April. The appellant did not lead evidence to contradict that evidence. In my judgment, that evidence in favour of the respondent stands unchallenged.

[45] The appellant bears the onus to prove on the balance of probabilities that the respondent did not have a reasonable belief that she did not require permission to take an old box. In my considered view, the appellant has failed on the evidence to discharge that burden.

[46] Accordingly the plea of guilty by the respondent is rejected and is substituted with a plea of not guilty.

[47] In the light of the foregoing conclusion, it follows that the appellant has failed to discharge the onus on it on the balance of probabilities that the respondent's dismissal was substantively fair.

Questions of law considered

[48] I now proceed to consider the questions of law posed by the appellant. In the light of my finding in the preceding paragraph, I will only consider the questions which relate to the issue of procedural fairness and not substantive fairness.

Whether there is evidence on record upon which the arbitrator could reasonably have come to the conclusion that the disciplinary hearing was procedurally unfair.

[49] The arbitrator found that the dismissal was procedurally unfair in that the investigating officer did not execute proper investigation resulting in there being no investigation report.

[50] In this respect the appellant raised a question of law whether or not there is evidence on record upon which the arbitrator could reasonably have come to the conclusion that the dismissal was procedurally unfair. It is then submitted on behalf of

the appellant that it is not a legal requirement to execute or investigate before the respondent is charged, and that prior investigation is irrelevant. Counsel for the respondent on the other hand submits that prior proper investigation is part and parcel of fair procedure.

[51] As noted earlier in this judgment, Ms Alberts had testified that the employees are not allowed to take anything belonging to the company without permission and it was for the supervisor to decide whether the box was old or not before it was taken. Ms Alberts further testified that the respondent told her that she could bring back the box as she did not mean to steal.

[52] In my view, it cannot be said that the conclusion reached by the arbitrator is a conclusion which no reasonable arbitrator could have reached. The respondent is entitled to know in advance what case she was to meet and to prepare for the hearing accordingly. She could only have known of the case she was to meet and have prepared if she had been provided with the information implicating her such as the security guard's report. Such information would usually form part of the investigation report or the docket. Compiling an investigation report and the requirement to make a discovery thereof to the person charged or opposite side is part of fair procedure and indeed fair trial.

[53] In this matter despite there being the security guard's report upon which the charge of misconduct against the respondent was based, there is no evidence why such a crucial report was not made available to the respondent. The security guard's report according to the record featured for the first time at the arbitration hearing while the guard was being cross-examined by the representative for the respondent. Furthermore, in my view, the lackadaisical manner in which the appellant's HR manageress failed to properly investigate the matter had a prejudicial effect on the respondent's right to fair hearing. Importantly, the HR manageress failed to secure the box as an important exhibit. It was left to the respondent to secure the box in dispute and for the respondent to produce it at the disciplinary hearings to prove her innocence. To add insult to injury, the HR manageress questioned the authenticity of the box by disputing that the box produced by the respondent may not be the box in question.

[54] As for the summary of the dispute in the referral document prescribed Form LC 21, counsel for the appellant in his heads of argument complains of the lack of particularity contained. Counsel points out that if the summary is not detailed enough the respondent (the appellant in this case) would not be informed of the case he has to meet and therefore in such circumstances the respondent will be put to a great inconvenience and prejudice in an attempt to try to answer the applicant's case. I found earlier in this judgment that the appellant had failed at the disciplinary hearing to provide the respondent with the security guard's report and that failure amounted to unfair proceedings. Suffice it to say that what is good for the goose is good for the gander.

[55] In my view, the lack of proper investigation and failure by the appellant to make the security guard's report available to the respondent had a negative effect on the procedural fairness of the disciplinary hearing against the respondent.

[56] I have arrived at the conclusion that the arbitrator's finding on this point, that the arbitration proceedings were procedurally unfair, was correct. In my view, a reasonable arbitrator would have come to a similar conclusion.

Whether there is evidence on record upon which the arbitrator could have come to the conclusion that the appeal procedure was not explained to the respondent.

[57] It appears from the record that there is sufficient evidence to show that the appeal procedure was explained to the respondent. Ms Alberts testified that she explained the appeal procedure to the respondent. The respondent in fact lodged the appeal. Furthermore, the record of the disciplinary hearing shows at para 8 of Exhibit B that the appeal procedure was explained and understood by the respondent. The record reads: '8. Appeal procedures were explained to and understood by the employee, Yes- No'. There is a tick in the 'Yes' box. At the bottom of the Form there is a signature by the respondent. Part of the record of the disciplinary hearing is Exhibit C, a document with a heading '*Request for an appeal*'. It is in a Form style and is filled in with information. It is dated 3 May 2016. It is signed by the respondent and co-signed by her representative, presumably a Union representative. The Form bears the

respondent's name and ID Number. The reasons or grounds for appeal are stated as *'unfair dismissal and the chairperson was not fair'*.

[58] In the summary of dispute attached to the referral document filed by the respondent it is stated that: *'I fail to understand why the company said I am dishonest; I have appeal. The case to get other chairperson because I am not in agreement with the chairperson's minute he has write'*.

[59] In the light of the evidence on record referred to, it would appear to me that the factual finding made by the arbitrator, namely that the appeal procedure was not explained to the respondent, was incorrect. In the circumstances, no reasonable arbitrator could have come to such a conclusion.

Whether there is evidence on record upon which the arbitrator could reasonably have come to the conclusion that respondent did not plead guilty at the disciplinary hearing as reflected on the record of the disciplinary hearing, exhibit B.

[60] My reading of the arbitrator's award does not show that the arbitrator arrived at the conclusion that the respondent did not plead guilty at the disciplinary hearing. To the contrary the award states as follows: *'Applicant given the opportunity to plead to the charges? Yes, plead guilty as marked by the chairperson'*. Elsewhere in the award the arbitrator noted that the appellant did not have to lead evidence against the respondent because the respondent pleaded guilty.

[61] I was unable to find a place on record or in the arbitrator's award where the arbitrator made a finding that the respondent did not plead guilty. Not only would such a finding not have been supported by evidence on record, but it would in addition have amounted to a finding which, on the facts of this case, no reasonable arbitrator could have made.

Whether or not there is evidence on record upon which the arbitrator could reasonably have come to the conclusion that the sanction of dismissal was not warranted and too harsh.

[62] In view of my finding that the appellant has failed to discharge the onus on it on the balance of probabilities that the respondent was dismissed for a fair and valid reason, it is not necessary for me to consider the above question which in essence relates to the fairness or otherwise of the sanction imposed by the arbitrator. My finding is further that it cannot be said that the respondent's explanation is not reasonably, possibly true. It follows therefore that the question whether the sanction imposed on the respondent was appropriate or not does not call for consideration in this appeal.

[63] In the result I make the following order:

1. The plea of guilt is rejected and is substituted with a plea of not guilty.
2. The finding of guilty by the arbitrator, in so far it is implied by the imposition of a final written warning, is set aside.
3. The respondent is re-instated in the position she held before her dismissal.
4. The appellant is ordered to pay the respondent a salary as compensation for loss of income for a period of six months calculated as follows:

60 days for 12 weeks of 5 days per week x N\$84.50 per day equal to the sum of N\$5070.00 plus interest calculated at the rate prescribed in respect of a judgment debt in terms of the Prescribed Rates of Interest Act No. 55 of 1925, from the date of the arbitrator's award being 14 October 2016.
5. The payment ordered in point 4 is to be effected on or before 30 July 2017.
6. The payment is to be effected into the respondent's personal bank account alternatively at the Office of the Labour Commissioner for the benefit of the respondent.

H Angula
Deputy-Judge President

APPEARANCES

APPELLANT: P C I BARNARD
Instructed by Neves Legal Practitioners, Windhoek

RESPONDENT: N N SHILONGO
Of Sisa Namandje & Co. Inc., Windhoek

