CASE NO.: LCA 13/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

OLD MUTUAL NAMIBIA **APPELLANT**

and

JOHANNA WALLENSTEIN **RESPONDENT**

CORAM: **MULLER J**

Heard on: 09 August 2010

Delivered on: 10 September 2010

JUDGMENT

MULLER, J.: [1] This Labour Court appeal concerns an event that occurred long ago. The Respondent in this appeal was charged with committing four fraudulent contraventions against her previous employer, the Appellant in this appeal. She was charged to appear before a Disciplinary Committee of the Appellant on 11 March 2005 and in terms of the judgment by the chairperson of the Disciplinary Committee, delivered on 30 March 2005, she was found

guilty on one charge, namely charge one, which is also the subject matter of this appeal. The Respondent appealed against that finding to the Appeal Committee of the Appellant, but the judgment of the Disciplinary Committee was confirmed on 06 July 2005. Thereafter the Respondent submitted a complaint to the District Labour Court, Windhoek. Her complaint was heard on 01 April 2008 **against her conviction on count 1 and her dismissal.** The Respondent succeeded at the District Labour Court and the guilty verdict on charge 1 and her dismissal was set aside. In addition the District Labour Court ordered that the Appellant, her employer, has to pay the equivalent of her salary for four years, as well as to reinstate her in the position that she had previously held at the Appellant. The judgment of the District Labour Court was given on 09 December 2009.

[2] The Appellant, Old Mutual Namibia, filed a notice of appeal on 15 December 2009 against the judgment of the District Labour Court for the district of Windhoek. That notice of appeal contained several grounds, alleging that the chairperson of the District Labour Court had misdirected herself in those respects. The Respondent also, although belatedly, filed a notice of opposition to the appeal, as well as a notice to cross-appeal the District Labour Court's decision. The Respondent also filed an application for condonation for the late filing of the notice to cross-appeal. The only ground of the cross-appeal is simply that the chairperson of the District Labour Court only ordered payment of the income that the Respondent allegedly lost for four years, while it should have been four years and nine months.

[3] On 09 August 2010 the Appellant's appeal, as well a cross-appeal of the Respondent was heard by this Court. Mr Philip Barnard represented the Appellant and Mr Tjitemisa the Respondent. Both legal representatives filed heads of argument which they amplified by oral argument when the appeal was heard.

[4] At the commencement of the hearing in the District Labour Court of Windhoek the following issues on which the parties had reached an agreement were formulated and recorded. This agreement entailed the following:

1) If it is found that there is an element of dishonesty present in the conduct of the complainant, that will be the end of the case;
2) In the event that it should be found that there was **no** dishonesty, the further issue that has to be determined is whether the sanction imposed by the Disciplinary Committee, namely the dismissal of the complainant, was too harsh under the circumstances.

Mr Ekandjo who represented the complainant in the Windhoek District Labour Court confirmed this agreement and also added that the procedure of fairness of the proceedings during the disciplinary hearing is not to be challenged.

The chairperson in the District Labour Court noted this agreement and stated: (unedited)

> *"So it is clear that issues are now specified and outlined before this court."*

(Record: Vol 1, p44, l19-20)

Thereafter the proceedings before the District Labour Court commenced and the first witness was called to testify.

[5] In her judgment delivered after the proceedings in the District Labour Court on 09 December 2009 it appears that the chairperson did not understand this agreement by the parties at all. She formulated the agreement as follows: (unedited).

> *"That on the 1st of April 2008 a Hearing commence. The Representative of both parties to the proceeding agree to limit issue to the dispute in that, if there was an element of dishonesty present in the conduct of the Complainant then that will be the end of the case of the Complainant.* ***Should it have been found that there was such dishonesty then the question is whether the sanction imposed was too harsh or not."***

(My emphasis) (Record: Vol. 4, p36, l32-p364l10)

It is evident that the chairperson did not understand the second leg of the agreement and her formulation thereof in the judgment is fact directly the opposite of what the parties agreed.

[6] I must confess that I find several other parts of the chairperson's judgment incomprehensible. As an example hereof the chairperson found that the Respondent was in fact dishonest, but nevertheless she continued to find in her favour and set the dismissal aside with an order that she be compensated for lost of income for a period of four years and be reinstated in that post which she had left four years before. According to the agreement her finding of dishonesty should have been the end of the complaint. The following also constitute examples of the findings of the chairperson which are not understood: (unedited)

> *"After considering the legal argument by both legal representatives and evidence presented to this Court,* ***it has been found that the Respondent has proved an element of dishonesty with interest on the part of the employee****. But the immediate supervisor acted in a negligent way to such a degree that a period of time pass by, yet he was the person in charge to authorise such claim and failed to bring it to the notice of the Complainant timeously. This amount affectively to a breach of the workplace and Rules and Policy yet that was there."*

(Record: Vol 4, p370, l1-13) (My emphasis)

Later she also stated:

> *"The Court has repeatedly held that as a general rule an employee cannot be expected to retain the service of dishonest employee. As dishonesty in general leads to a breakdown of the trust relationship, this is essential between an employer and an employee. However, this does not mean that an employer would under all circumstances be entitled to dismiss employee in a case of dishonesty. The real test was whether the trust relationship has become intolerable. This is a question of fact and not at law."*

(Record: Vol. 4, p371, l15-25)

[7] In this Court Mr Tjitemisa agreed with Mr Barnard that the chairperson misunderstood and misformulated the agreement reached by the parties and presented to the District Labour Court at the commencement of that hearing. Mr Tjitemisa agreed that in respect of the second leg the chairperson formulated it in fact in direct opposite terms to what the agreement was. However, Mr

Tjitemisa valiantly attempted to argue around this obvious problem in order to persuade this Court that on the evidence before the District Labour Court the issue of dishonesty was not proved. On the other hand, Mr Barnard's argument is that in the first instance the formulation and finding of the chairperson of the District Labour Court put an end to any further argument in respect of dishonesty. He argued that as soon as there was finding of dishonesty, that was the end of the matter and that the chairperson had in fact found that the Respondent acted dishonest. Despite this argument, Mr Barnard proceeded to make submissions in order to show that on the evidence before the District Labour Court the finding should have been that the Respondent was indeed dishonest and that would be the end of her complaint. Mr Tjitemisa also supported the Respondent's cross-appeal to the effect that the order of the Magistrate was correct save for the period that the Respondent should be compensated, namely for the period of four years and nine months instead of four years. Mr Barnard submitted that the parties are bound by their agreement, unless there exists a satisfactory explanation why such agreement should not be binding on the parties to that agreement. He also pointed out that the agreement was confirmed by both parties at the commencement of the hearing in the District Labour Court. The agreement was never denied, nor was any attempt ever made to resile from it. Consequently, the District Labour Court was bound by the agreement. In this regard Mr Barnard referred to case of *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC). At 335F-G, Damaseb AJA, with Chomba AJA and Strydom AJA concurring, stated this principle in the following words:

> *"It is equally trite that a party is bound by its counsel's conduct of*

pleadings and agreements entered into in the conduct of a case, unless there is a satisfactory explanation for the inference not to be drawn. (Compare SOS Kinderdorf International v Effie Lentin Architects 1992 NR 390 (HC) at 398F-H (1993 (2) SA 481 (Nm) at 490C-E); Brummund v Brummund's Estate 1992 NR 306 (HC) at 310C-E (1993 (2) SA 494 (Nm) at 498C-F).)"

[8] There is merit in Mr Barnard's submission that it is not necessary to go beyond the decision of the chairperson of the District Labour Court when she found that the conduct of the Respondent was dishonest. In terms of the agreement the Magistrate had to stop there. The agreement could not have been formulated more clearly than what was recorded in the record of the District Labour Court. Once it was found that the Respondent was dishonest, the buck had to stop there and it was not necessary to make any finding in respect of the second leg of the agreement. That only comes into play if there was a finding that there was **not** any dishonesty on the Respondent's part. The finding of the chairperson of the District Labour Court was that there was dishonesty after she heard and considered the evidence put before her. Although Mr Barnard in the alternative also argued why a finding of dishonesty on the Respondent's part should be made for several reasons advanced in his submissions. It is not necessary for this Court in an appeal against the decision of the District Labour Court to consider those submissions on the merits. I am in agreement with those submissions advanced by Mr Barnard, but apparently so was the chairperson of the District Labour Court. I have already indicated that I have great difficulty in following the Chairperson's reasons for her findings in her

judgment. On the one hand it appears that, after considering all the evidence, she held that there was no proof that the complainant acted in a bad faith (which is not an issue that she had to consider), but on the other hand she clearly stated that the Appellant (Respondent before the District Labour Court) *"has proved an element of dishonest intent on the part of the employee",* but that her supervisor, which could only be Mr Nowaseb, acted negligently. Negligence by Nowaseb never an issue to excuse the conduct of the Respondent, neither was it argued by the Respondent's representative in the District Labour Court. From that finding of the Magistrate it seems clear that she has found that the first leg of the agreement between the parties should be answered in the positive. However, she then went on to consider to the evidence in regard to the second leg of the agreement, which she, as indicated above, clearly misunderstood.

[9] The Appellant's first ground appeal reads as follows:

> *"That the Learned Chairperson erred in the law and/or on the facts in failing to find that as the Appellant has proven dishonesty on the part of the Respondent (Complainant a quo) and pursuant to the agreement reached between the Parties at the commencement of the proceedings the complaint should be dismissed."*

The other grounds dealt with issues relating to the second leg of the agreement and are irrelevant in the light of my decision.

[10] The first ground of appeal, quoted above, is in my submission spot on. Having found that the Respondent was dishonest, the chairperson of the

District Labour Court should have dismissed the complaint according to the agreement reached between the parties. She was not entitled to go further and consider the issues relating to the second leg of the agreement.

[11] In the light of my finding, the appeal should succeed on this ground, which means that the District Labour Court should have dismissed the Respondent's complaint. It is not necessary to go any further. On this finding the cross-appeal becomes irrelevant and consequently falls to be dismissed.

[12] In the result, the appeal of the Appellant succeeds and the decision of the District Labour Court is set aside. The cross-appeal is dismissed.

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MULLER, J.

ON BEHALF OF THE APPELLANT:	**MR. BARNARD**
INSTRUCTED BY:	**LORENTZ ANGULA INC.**
ON BEHALF OF THE RESPONDENT:	**MR. TJITEMISA**
INSTRUCTED BY:	**TJITEMISA & ASSOCIATES**