



CASE NO: LC 38/2008

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

NAMIBIA POWER CORPORATION (PTY) LTD

APPELLANT

and

GERALD NANTINDA

RESPONDENT

CORAM: SMUTS, J

Heard on: 8 March 2012

Delivered on: 22 March 2012

JUDGMENT

SMUTS, J [1] This is an appeal against an award of the Labour Commissioner, sitting as an arbitrator under s 86 of the Labour Act, 2007 (the Act). On 23 September 2009, he found that the dismissal of the respondent was unfair and made an order for his reinstatement with the appellant without any loss of income.

[2] The respondent joined the services of the appellant at its Brakwater motor vehicle workshop as a general worker on 23 June 2006. On 11 June 2008, the respondent and a fellow employee of the appellant were involved in removing three truck batteries from the appellant's workshop premises and sold these batteries to

Cymot for the sum of N\$75.00. The respondent and his fellow employee, Mr P. Mbeuserua, were charged with theft in a disciplinary hearing. Both were found guilty of theft of the batteries and dismissed by the appellant, given its policy of zero tolerance for that type of offence.

[3] The respondent and Mr Mbeuserua launched a dispute of unfair dismissal with the Labour Commissioner and the matter proceeded to arbitration. In his award, the Labour Commissioner, found that the dismissal of Mr Mbeuserua was procedurally and substantively fair but found that the dismissal of the respondent was “not substantively proven other than for him being probably an unsuspecting accomplice if not an innocent follower”. He proceeded to reinstate him without any loss of income. The Labour Commissioner however found that the respondent should receive “a verbal warning to refrain from unbecoming conduct or behavior” without specifying what conduct or behavior gave rise to this finding.

[4] In view of certain points raised by the respondent’s representative, I first refer to the nature of the arbitration proceedings in some detail. I then refer to the arbitrator’s award and finally deal with the attack made by the appellant upon that award.

Arbitration proceedings

[5] A full transcript of the oral proceedings together with exhibits and documentation handed to the arbitrator form part of the record. At those proceedings, the respondent and Mr Mbeuserua (the complainants) were represented by Mr S. Simon, a representative of the Mineworkers’ Union of Namibia. The appellant was represented by its legal advisor and the chairperson of the disciplinary proceedings at which the respondent and Mr Mbeuserua were found guilty.

[6] After they placed themselves on record, both the complainants’ as well as the respondent’s representatives sought guidance from the Labour Commissioner as to the form and nature of the proceedings. He stated at the outset in answer to the complainant’s representative’s question as to the procedure that the complainants could

testify if they wanted to but that their representative was also at liberty to state their case or present it without them giving evidence. The complainants' representative then stated that he would "present" their case.

[7] The complainants' representative then proceeded to outline their case, by way of an address, referring to certain factual matter as well as making submissions about the internal procedure and the merits of their case.

[8] It emerged as common cause but that the respondent and Mr Mbeuserua removed the batteries from the appellant's premises at brakwater and proceeded to Cymot where N\$75.00 was paid for them. They thereafter returned to their place of employ after first passing Mbeuserua's home.

[9] The complainants' representative asserted that the batteries belonged to Mr Mbeuserua and that he had instructed the respondent to load them on the vehicle. The complainants' representative criticized the disciplinary hearing and contended that the security guard who was called as a witness could not identify the batteries as belonging to the appellant. The complainants' representative also questioned the consistency of the sanction of dismissal with reference to other prior cases. When the complainants' representative completed his "presentation" of their case, the arbitrator invited the appellant's representative "to put some questions for clarification" to the complainant's representative or for it to provide its own version. Being placed before this range of possibilities, the appellant's representative enquired as to the procedure as to whether witnesses could be called, stating that the appellant wished to call witnesses, or whether the proceedings are confined to opening statements, as the complainants had done. In response, the arbitrator stated that it was up to the parties to decide whether they wanted to call witnesses or not, "otherwise statements which are made and the facts which you put before me will suffice if that is what the parties wish". But, he said, if either party wanted to call witnesses, it was open to them to do that.

[10] The appellant's representative indicated that he was unacquainted with the procedures and then sought clarity as to whether witnesses would be called after the

opening statements were made. The arbitrator again stated that it did not appear that the complainants wanted to call witnesses but that the appellant could make an opening statement and then call witnesses to support what was being said. The appellant's representative then called the chairperson of the disciplinary enquiry, Mr Johan Knoetze to give evidence and indicated that further witnesses may be called. But the arbitrator inexplicably indicated that Mr Knoetze should not be called as a witness as he had been sitting in the proceedings all along and stated that he should rather be called as a representative of the company (presumably to make its opening statement). Quiet why this ruling was made is not at all apparent. For this reason, Mr Knoetze was thus not permitted to give evidence but rather to "present the appellant's position or side of the story" as the arbitrator put it.

[11] Mr. Knoetze then referred to the investigation which was carried out and which resulted in the charges of theft against the complainants. He confirmed that he was the chairperson of the enquiry and explained what had happened at the disciplinary proceedings. He proceeded to hand in the record of those proceedings and summarized the evidence which was given by the different witnesses at those proceedings. He also handed in the statements which those witnesses had provided to those proceedings and in the course of the investigation.

[12] As to the investigation, Mr Knoetze stated that the security guard had stopped the complainants at the gate after seeing the respondent load the batteries. The security guard testified at the enquiry that he was informed by the respondent that the batteries were scrap and that he should not be concerned. Mr Knoetze also stated that the movements of the vehicle were traced by a tracking system to Cymot. The investigation had revealed that the batteries had been sold to Cymot for N\$75.00. The appellant's internal investigator interviewed the Cymot employees and also took photographs of the batteries which were provided to the enquiry.

[13] According to Mr Knoetze, the complainants' foreman, Mr Willemse also testified at the enquiry. He confirmed that the security guard had reported the removal of the batteries to him and Mr Willemse identified the batteries sold to Cymot as belonging to

the appellant. Mr Knoetze also pointed out that charges of theft were laid with the police but denied that the charges had been dismissed, as had been contended by the complainants' representative. He referred in some detail to the evidence of the appellant's investigator and to the statements which were taken by him, including from the two complainants. These statements were also handed in as exhibits in the arbitration proceedings. He referred to a statement made by Mr Mbeuserua which had been made to the police in which he stated that "I realized that the batteries that we sold at Cymot were stolen from work. I understand that the security officer saw Gerald Nantinda (the respondent) loading the batteries on that specific car I did not see him driving the said car from the point where it was parked to the point the batteries were kept. I cannot instruct Gerald Nantinda to drive the company car as he is not authorized to drive it by the company. The reason why I drove the said car without informing anyone is because there were no other senior staff members..."

[14] Mr Knoetze stated that in the course of the proceedings, Mr Mbeuserua said that he wanted to change his statement (to bring it in line with the respondent's version that the batteries were his own (Mbeuserua's) and which he brought on to the premises). Mr Knoetze also stated that the complainants were identified by the Cymot personnel and in view of the inconsistent statements made by both of the complainants, they were found guilty of theft at the enquiry by him and that dismissal was recommended. They appealed internally against the finding. But this appeal did not meet with any success.

[15] In the course of his presentation Mr Knoetze referred in some detail to the different statements made by the complainants prior to and in the course of disciplinary proceedings. Mr Knoetze also handed in a copy of the appellant's disciplinary code and stated that it had been introduced about 2003 and had replaced the code relied upon by the complainants' representative.

[16] The complainants' representative then proceeded to cross-examine Mr Knoetze – often at times concerning aspects upon which he would not have had personal knowledge such as contents of the documentation presented to him in the course of the disciplinary hearing. Mr Knoetze objected to that procedure and stated that, whilst he

appreciated the informal manner in which the arbitration was conducted, he could not give evidence on those aspects. He pointed out that the appellant had witnesses who would testify under oath and who could then be cross-examined. The arbitrator however ruled that cross examination would be permitted as long as somebody speaks on behalf of another and stated “that’s why (he) had given the respondent (appellant) the opportunity to question the complainants’ representative about what he was saying”.

[17] After the complainants’ representatives’ cross-examination of Mr Knoetze was completed, the arbitrator enquired as to whether any of the parties wanted to call witnesses having heard each other’s versions or whether they were “satisfied with what you have said”. The complainants’ representative again stated that they did not want to call any witnesses. The arbitrator did not expressly enquire from the appellant’s representative as to its position but instead turned the discussion to the production of the batteries themselves. He was informed that they were in the possession of police, given the criminal investigation. The appellant’s representative provided the police investigation number to the arbitrator who then proceeded to postpone the proceedings to a subsequent date for the purpose of the production of the batteries. The transcribed proceedings end there. It is however apparent from the award that the batteries were not produced on the postponed date and that the parties merely made closing statements then.

[15] There was thus no direct evidence on any of the issues except in respect of what transpired at the disciplinary hearing as Mr Knoetze was the chairperson. He was in a position to give evidence as to what occurred at those proceedings. But this was not given under oath. The complainants’ representative was further removed as he did even not represent the complainants at the hearing. They had other representatives at the internal disciplinary hearing.

The arbitrator’s award

[16] In the arbitrator's award, he referred to the complainants' representative's "evidence in chief" as to the ownership of the batteries being that of Mr Mbeuserua. He referred to the security officer's "deposition" that the complainants had informed him that the batteries were scrap and to the respondent's version that he did not know whether the batteries were stolen or not. He referred in some detail to Mr Mbeuserua's original statement in which he said that he did not know where the respondent got the batteries from and in which he heavily implicated the respondent. In that statement Mr Mbeuserua said that he did not know that the respondent had stolen the batteries and that he (the respondent) was using him for this "odd deal" and later that he (Mr Mbeuserua) had realized that the batteries were stolen from work.

[17] The arbitrator proceeded to refer to this initial statement by Mr Mbeuserua, implicating the respondent, in the following terms:

"This is not only a powerful statement but equally a pack of lies cunningly arranged in such a way to mislead the (appellant) and to implicate the (respondent) by someone who later stubbornly claimed that the batteries were his" (presumably Mr Mbeuserua's)

[18] The arbitrator then proceeded to find that the appellant's version and that of "its witness number one" to be more plausible and that it was "probably true that the batteries belonged to it (the appellant) and were in fact stolen from the premises". The arbitrator then rejected Mr Mbeuserua's initial statement as "abhorrent, distasteful and totally misleading" and further stated:

"As a supervisor how can he get instruction from his subordinate, first to be taken to the Head Office, second half way stop at Cymot, third to let him sell unauthorized items, fourth to receive money and to hand it to his subordinate, fifth to go and get money from home for lunch while there was already money from the illicit sale. How the first applicant (Mr Mbeuserua) changed the statement at the hearing to adamantly put on record that the batteries were all of the sudden his is a mystery which spelt fatal to his claim and defence, if any" (sic).

[19] Turning the position of the respondent, the arbitrator then proceeded to accept his “version” that he was told to load the batteries and that they were Mr Mbeuserua’s who sold them to Cymot and who bought lunch for the respondent. A further reason the arbitrator advanced for accepting the respondent’s version “was that his representative at the arbitration had questioned the appellant’s representative as to why the respondent had indeed charged because to him he was carrying out instructions”. The arbitrator concluded in this regard:

“This confirms that the involvement of (the respondent) is probably incidental and innocent to the first applicant’s well planned and calculated action to illegally dispose of the respondent’s property”

This despite the fact that the respondent had not raised a defence of carrying out instructions and had stated at the disciplinary hearing that the batteries belonged to Mr Mbeuserua.

[19] The arbitrator also found that Mr Mbeuserua “dismally” failed to explain how and when he brought the big batteries onto the appellant’s premises and concluded that the batteries were the property of the appellant “on the strong balance of probabilities” (sic). He rejected Mr Mbeuserua’s claim of ownership as “diabolic” (sic). He then made the award and orders which I have already referred to.

The appellant’s attack upon the award

[20] In the appellant’s appeal, the attack upon the award is primarily directed at the arbitrator’s findings on the merits and his pivotal finding that the respondent was merely “an unsuspecting accomplice, if not innocent follower”.

[21] Mr Dicks, who appeared for the appellant, referred to the finding made by the arbitrator that the batteries loaded onto the vehicle and sold to Cymot belonged to the appellant. He then referred to the two versions which the respondent had offered as to the ownership of the batteries. He had firstly stated to the security guard, when batteries were discovered upon leaving the premises, that they were scrap. Subsequently, and at the hearing, the respondent stated that he knew that the batteries belonged to Mr

Mbeuserua and went as far stating that Mbeuserua brought the batteries to the appellant's premises to be charged at the end of 2007, more than six months beforehand. He also stated that it would take a maximum of two days to charge a battery.

[22] Mr Dicks contended that the respondent's two versions are mutually exclusive and that only one could be true but submitted that neither was the truth. He submitted that even if the respondent innocently believed that the batteries were scrap, then, upon the other evidence in the case as to what occurred with scrap, a finding of theft should follow. He also referred to what was stated at the disciplinary hearing (that the respondent knew that the batteries could not leave the premises without a permit and that scrap batteries would be sold at an auction and could not be removed by employees). Mr Dicks accordingly submitted that the arbitrator's finding that the respondent was an "unsuspecting accomplice if not an innocent follower" was so flawed that it amounted to a misinterpretation of the evidence and in reaching this finding, the arbitrator had erred in law. Mr Dicks submitted that the finding that the batteries belonged to the appellant was correct. He referred to the common cause facts which were established at the disciplinary hearing - that the appellant's older batteries would be auctioned from time to time pursuant to its procurement policy and that the batteries had been removed without permission. He further referred to the common cause fact that the batteries, when they were removed, were not taken to Mbeuserua's home but rather to Cymot to be sold for N\$75.00.

[23] I agree with Mr Dicks' submission that the arbitrator's finding as to the respondents involvement as being an unsuspecting accomplice or innocent follower is fundamentally flawed. Once he had correctly found upon the evidence before the disciplinary enquiry that the batteries belonged to the appellant, this meant that the respondent's later version given at the hearing that the batteries belonged to Mbeuserua and that the latter had dropped them off at the premises some six months before to be charged, should be rejected. Accepting the respondent's version, as the arbitrator did, could not reasonably be done upon the facts, particularly in view of his correct finding as the ownership of the batteries (which excluded accepting the

respondent's version). This is quite apart the respondents conflicting statement to the security guard at the time which further militated against accepting his version.

[24] The other facts which were common cause also militate strongly against the finding made by the arbitrator to accept the respondents' version given at the hearing. These include the fact that to charge a battery would last a mere two days. According to the respondent the batteries had been brought on to the premises some six months before. Furthermore, the batteries were not returned to Mbeuserua's home but had rather been taken to Cymot to be sold. Then there is the prior and contemporaneous version of the respondent as to the ownership of the batteries (which was closer to truth) when he stated to the security guard, that they were scrap. Furthermore, there is initial statement given by Mbeuserua very shortly after the incident, admitting that the batteries were stolen and taken to Cymot to be sold, and implicating his colleague, the respondent, in the theft. At the disciplinary hearing, Mr Mbeuserua sought to change this version entirely and come up with an exculpatory version to coincide with that of the respondent, namely that they were his batteries which he had brought to the premises sometime before. Had this innocent version been true, he would no doubt have provided it to the appellant's investigator and to the police when the matter was investigated rather than implicate his colleague and himself as an accomplice. Instead, he had immediately after the incident admitted that the batteries were stolen and taken to Cymot to be sold.

[25] After correctly accepting that the batteries were the appellant's, the arbitrator could not reasonably have accepted that respondent's belief that the batteries belonged to Mbeuserua and had been brought to the premises some six months before hand for the purpose of recharging, particularly given the respondent's contemporaneous version which was mutual exclusive to this and the fact that Mr Mbeuserua himself had immediately after the incident disavowed ownership of the batteries. His conclusion could in my view not have been reasonably reached and is a finding which could not reasonably have been made by an arbitrator. The faulty reasoning is further demonstrated by the arbitrator's award, stating that the respondent should receive a

verbal warning (to refrain from unbecoming conduct or behavior) on the material before him.

[26] It follows that the arbitrator's award concerning the dismissal of the respondent not being substantively proven and reinstating him to his position as a consequence is one which no reasonable arbitrator could have conceivably made. It falls to be set aside.

[27] The respondent, represented by Mr Boesak, however argued that the appellant's appeal could not succeed on the merits and submitted that it was reasonable to assume that the respondent was under the impression that the batteries belonged to his fellow employee, Mr Mbeuserua. I have already demonstrated that that assumption is entirely unreasonable and is at variance with the facts.

[28] In earlier written argument filed on behalf of the respondent (and not raised before me), the question was raised as to whether the appeal was one which relates to a question of law. In my view, it clearly constitutes a question of law if an appellant can show that the arbitrator's conclusion could not reasonably have been reached. In doing so I respectfully follow the approach of the full bench of this court in *Rumingo and Others v Van Wyk*¹. The full bench in that matter made it clear that a conclusion reached (by a lower court) upon evidence which the court of appeal cannot agree with would amount to a question of law. This approach is also consistent with that of a subsequent full bench decision in *Visagie v Namibia Development Corporation*² where the court, in my respectful view, correctly adopted the approach of Scott JA in *Betha and Others v BTR Sarmcor*³ that a question in law would amount to one where a finding of fact made by a lower court is one which no court could reasonably have made. Scott JA referred to the rationale underpinning this approach being that the finding in question was so vitiated by a lack of reason as to be tantamount as be no founding at all. That in my view aptly describes the finding of the arbitrator in this matter.

¹ 1997 NR 102 (HC) at 105 D-E

² 1999 NR 219 (HC) at 224 C-H

³ 1998 (3) SA 349 (SCA)

As was further stated by Scott JA, it would amount to a question of law where there was no evidence which could reasonably support a finding of fact or “where the evidence is such that a proper evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made that finding...”⁴

[29] Applying this approach, I reiterate that the finding by the arbitrator concerning the second respondent’s involvement in the removal of the batteries was one which no court or arbitrator could reasonably have made and that it is entirely unsupported by the evidence before him and is furthermore emphatically excluded by a proper evaluation of that evidence.

[30] In the respondent’s heads, criticism has justifiably been leveled about the manner in which the proceedings were conducted. I have referred in some detail to the conduct of the proceedings. It is correctly pointed out that Mr Knoetze’s statement was not under oath and thus was not properly admitted as evidence and for that reason should have been disregarded as an irregularity which may cause the proceedings to be set aside. I found this approach rather surprising in view of the fact that the respondent on appeal supports the arbitrator’s award. Mr Boesak did not pursue this line of argument. What makes this approach even more surprising is that the respondent’s representative at the hearing was not present at the disciplinary enquiry. His opening statement to the arbitrator constituted an even a further degree of hearsay. Mr Knoetze was at least able to give evidence as to the nature of the proceedings before him but not of course as to the truth of the statements placed before him.

[31] The procedure followed by the arbitrator was also clearly flawed. But this is not the basis of the appeal and, despite criticism in the prior written argument, Mr Boesak on behalf of the respondent, did not move to have those proceedings set aside on that basis. Had the proceedings been challenged on the basis of the manner in which they were conducted by merely making use of opening statements and the refusal to permit Mr Knoetze from giving evidence because he was present during the complainants’

⁴ Supra at p 405J – 406B

opening statements, I would have had no hesitation in setting those proceedings aside. The statement that Mr Knoetze could not give evidence because he has been present during complainants' exposition of their case through their representative is of course entirely unsustainable and grossly irregular. Even if the complainants themselves had given evidence, there was of course nothing wrong with Mr Knoetze and the respondent's other witnesses from being present when they did so.

[32] I accept that in some circumstances, particularly where the facts are common cause and the dispute concerns the interpretation of a term or agreement or turns upon an interpretation of common cause facts, there would be nothing wrong with the arbitrator relying upon opening statements of representatives. Nor would it also be wrong for an arbitrator to determine an issue with reference to documentation placed before him by agreement which could include the parties agreeing to the facts which served before a disciplinary enquiry and then making their submissions upon those facts for the arbitrator to determine whether a dismissal was procedurally and substantively unfair on those facts.

[33] An arbitrator after all has much latitude with regard to the conduct of the proceedings before him or her. The Act provides that an arbitration should be conducted in a manner considered by the arbitrator appropriate in order to determine the facts fairly and quickly and with the minimum of legal formality⁵. Rule 18 relating to the conduct of conciliations and arbitrations permit an arbitrator to determine dispute without applying strictly the rules of evidence.

[34] It may be conducive to clarity to request the parties at the outset to make brief opening statements in order to determine what is in issue between them and thus curtail the proceedings to the issues in dispute. But it is an entirely another matter then to permit the cross-examination of those representatives on their opening addresses and dispense with evidence and real cross-examination upon the factual issues in a dispute, like in this matter where credibility was a crucial factor. There can be very little value in

⁵ See S86(7) of the Act

permitting cross-examination of the parties' representatives who cannot give any direct or factual evidence on the facts in question – except in the present instance where Mr Knoetze could have been cross-examined in respect of the confined issue of the nature of the disciplinary proceedings conducted by him. But those proceedings were hardly in issue.

[35] Once the issues have been determined and unless the parties agree otherwise, an arbitrator should then proceed to hear the evidence under oath and to permit cross-examination of those witnesses by the other party or representative and in his or her discretion to relax the rules of evidence where the circumstances of a case require that, especially concerning the receipt of documentary matter.

[36] Despite the considerable latitude accorded to arbitrators concerning the conduct of the proceedings, the proceedings in this matter in my view fall far short of the standard which should be followed by an arbitrator. I do not propose to set aside the proceedings by reason of the shortcomings and irregularities which occurred because the parties did not seek this. I am prepared to accept that the parties would appear to have indirectly agreed or consented to the proceedings been conducted in that manner by not insisting upon leading evidence.

[37] It follows that the order I make in this matter is that the appeal against the arbitrator's award succeeds and the award in favour of the respondent is set aside. No order is made as to costs.

SMUTS,

ON BEHALF OF THE APPELLANTS

Instructed by:

**ADV DICKS
FISHER, QUARMBY & PFEIFFER**

ON BEHALF OF RESPONDENTS

Instructed by:

**ADV BOESAK
TJITEMISA & ASSOCIATES**