

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: LCA 60/15

In the matter between:

STANDARD BANK NAMIBIA LIMITED

APPELLANT

And

MERVIN !GASEB

FIRST RESPONDENT

KYLLIKKI SIHLAHLA

SECOND RESPONDENT

Neutral citation: *Standard Bank Namibia Ltd v !Gaseb* (LCA 60/2015) [2017]
NALCMD 1 (27 January 2017)

CORAM: VAN WYK, ACTING

Heard: 22 July 2016

Delivered: 27 January 2017

Flynote: *Labour Law – the arbitrator is the final trier of fact - section 89 (1) of the Labour Act, 11 of 2007, hereinafter called the “Act” - unless the finding is so vitiated by lack of reason as to be tantamount to no finding at all – Parity principle – demands like misconduct to be disciplined alike – unless there is a justified reason to make a distinction between employees*

Summary: In this matter seven employees were working in a call centre under leadership of the first respondent. All of them completed timesheets indicating daily arrivals and departures from work, on a monthly basis. A number of incidences of absenteeism came to light after an incident which sparked an investigation into the comings and goings of call centre staff. The absenteeism shown on the video footage did not correlate with the timesheets in respect of all of them.

The first respondent being the team leader was charged with falsification of bank records and being absent without a valid reason; he was dismissed. Four of his fellow employees, following this same incident and investigation, were charged with negligence and only received warnings.

Held, the parity principle demands like disciplinary action for like cases of misconduct, unless there is a justifiable reason to distinguish between employees in terms of disciplinary action.

Held, the arbitrator made an unreasonable factual finding on the evidence of the appellant, in her finding that there was no justifiable reason to apply a different disciplinary measure to first respondent. The evidence is such that no reasonable arbitrator of fact could have reached this conclusion.

Held, there is a justifiable reason for the appellant to have taken harsher action against the first respondent.

ORDER

1. The appeal is upheld.
2. The arbitration award under Case number CRWK-107–15, delivered on 12 October 2015, is wholly set aside.
2. There is no order in respect of costs.

JUDGMENT

VAN WYK, AJ

[1] In this matter an appeal was filed against a decision by the second respondent in Case Number CRWK-107–15, delivered on 12 October 2015. The appeal is against a reward that the first respondent’s dismissal is substantially unfair. It was further ordered that the appellant must reinstate the first respondent in a similar or comparable position as the one he held prior to his dismissal, with effect 1st November 2015.

Facts

[2] Respondent was employed by the appellant at a call centre with seven other employees. The respondent commenced employment on 1 July 2007, in terms of a written employment agreement, and was at the time of his dismissal employed in a

position of senior customer consultant, a supervisory position in the call centre. He was commonly referred to as the team leader. Employees in the call centre were working shifts due to the operating hours of the centre, and remuneration was *inter alia* linked to the working hours calculated on the basis of the shifts each has worked for the month.

[3] The employees were required to complete daily timesheets, indicating the exact times worked at the centre. It is common cause that employees did not diligently do this on a daily basis and completed the timesheets once a month. In August 2014, an incident occurred during which an employee was locked out of the call centre, and could not access the centre; I will refer to this as “the lock-out incident”. Following the lock-out incident the appellant decided to investigate the actual attendance of all employees in the call centre. It became apparent, through the scrutiny of CCTV footage, that the first respondent was absent from work, coming late and or leaving early on dates in 2014, 26 July, 27 July, 3 August, 23 August and 24 August.

[4] Appellant charged the first respondent with falsification of bank records and absence from work without a valid and fair reason. He was found guilty of falsification of bank records and absence without authorization and valid reason and was dismissed. Two other call centre employees were also dismissed on similar charges¹ from the same investigation. It was common cause between the parties at the arbitration that all seven employees of the call centre falsified bank records, yet only three of them were dismissed, whilst the four other employees each received a written warning.² For ease

¹ Page 881 of the Record

² Page 882 of the Record

of reference I will refer to this group of four employees as the “comparable group”, going forward.

[5] The first respondent appealed the outcome of the disciplinary hearing, the appeal was dismissed and his employment was terminated in December 2014.³

[6] First respondent filed a complaint at the Office of the Labour Commissioner, under case number CRWK 107-15 and it was heard on 12 October 2015.

Arbitration Award

[8] The arbitrator made the following findings. In respect of the charges of falsification of bank records, she confirmed this factual finding by the appellant in the internal disciplinary hearing⁴. In the respect of the charge of absence without authorization and valid reason, she found:

‘In view of the above, I am inclined to believe that the applicant contravened the rules or standards of falsifying the bank records and that of absence without authorization, but I failed to find that his absence was without a valid and fair reason.’⁵

[9] The arbitrator also made a finding on the aspect of consistency in respect of sanctions against the employees⁶:

³ Page 877 of the record

⁴ Page 880 of the record

⁵ Page 880 of the record

[109] Taking into consideration the circumstances of the instant matter, it is not justified in law why the respondent deemed a dismissal to be appropriate in the case of the applicant, and not in the case of the other co-employees who committed similar act(s) (*sic*). For fairness to prevail, respondent must mete out similar punishment for similar misconduct to all offenders. Similar cases must be treated the same.

[110] In light of the above, I am inclined to believe that there was no consistency in the application of the rules of standard.'

[10] She made the following order:

1. That the first respondent's dismissal was substantially unfair.
2. That the appellant must reinstate the first respondent in a similar or comparable position as the one he had held prior to his dismissal. The reinstatement to take effect from 1st of November 2015.
3. That the appellant must pay the first respondent an amount of N\$ 165 000, (thus being his salary for 11 months), as compensation for loss of income.
4. No order was made as to costs.

Grounds of Appeal and Key submissions

[11] Ms. Angula acted on behalf of the appellant. The appeal was filed on the following grounds⁷:

⁶ Page 884 of the Record

⁷ The grounds of appeal 1-5 are quoted from the Notice of Appeal.

- 1.1 First question of law - The arbitrator erred in law when, on the evidence placed before her, she concluded that the respondent was unduly found guilty and dismissed on both charges of falsification of appellant's records and being absent from work, without a valid reason. She erred in law in failing to apply the appropriate test to the facts in determining this issue.
- 1.2 Second question of law – 'The arbitrator erred in law, in finding that the respondent's circumstances in contravention of the appellant's policies and rules were comparable to other employees. There is no evidence on record from which this finding could follow.
- 1.3 Third question of law – The arbitrator erred in law in finding that the respondent's recording of incorrect time entries , although amounting to falsification should not attract any disciplinary sanction from the appellant because of the respondent's perceived ignorance of the rule and because such practice had purportedly, become common practice amongst employees of the appellant.
- 1.4 Fourth question of law – The arbitrator erred in law in finding that the trust relationship between the respondent and the appellant has broken down merely because other employees were purportedly in a similar situation. As such the argument goes that the trust relationship between the appellant and the respondent could not have been broken. The arbitrator's finding on this aspect is one of which no arbitrator could reasonably have arrived.
- 1.5 Fifth question of law – the arbitrator erred in law in failing to take into account the respondent's seniority and position of supervision in the workplace in assessing the ramifications of his conduct '

[12] Ms. Angula did not deal with all the grounds of appeal in the above stated order in her heads of argument; her heads centered around two main lines of argument:

1. An argument was advanced that the arbitrator's factual determinations, with regard to the validity of the reasons offered by the respondent why he was absent, was without reason, it was tantamount to no finding at all and this court was requested to review the findings as a question of law.
2. A further argument against consistency of sanction between employees was raised. She advanced reasons why there was justification to apply a different measure of discipline to the first respondent, when compared to the comparable group. This argument will be referred to as the "consistency argument" going forth.

[13] I am going to consider her above stated key submissions as the basis for the appeal.

Grounds of Opposition and Key Submissions

[14] The grounds of opposition are:

- 2.1 The appellant principally relates to factual findings made by the arbitrator.
- 2.2 The appeal should further fail on what was the central issue of consideration at the arbitration proceedings, namely the issue of consistency.

[15] Mr. Kasper, counsel for the respondent, pointed out in his heads of argument that the appeal principally relates to factual findings made by the arbitrator, and in terms of her powers in the Act, she is the final arbitrator of fact. It is trite law that section 89 (1) of the Act, restricts the powers of the Labour Court to consideration of a question of law on appeal, and not to reconsider the factual findings of the arbitrator.

[16] I am inclined to uphold this argument made by Mr. Kasper. Ms. Angula is indeed asking this court to review a factual finding made by the second respondent. Mr Kasper correctly points out that an enquiry into a factual finding of an arbitrator would only 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 a conclusion that no reasonable court could have made. Authority for this contention is ample.⁸

[17] In my determination of the matter, I am not convinced that the factual finding made by the second respondent regarding⁹ validity of the reasons offered by the respondent why he was absent, is completely without a reasonable basis. The arbitrator, within the context of the evidence offered¹⁰, has made a determination that the explanations offered by the first respondent for the absences are valid. I am constrained to make a finding that no reasonable arbitrator of fact could have made

⁸ *Visagie v Namibia Development Corporation* 1999 NR 219 at 224. *Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd* 1998 (3) SA 349 (SCA); *House and Home v Majiedt and Others (LCA 46/2011) [2012] NALC 31 (22 August 2012) at para [7]*.

¹⁰ Page 665 of the Record

such a finding. Hence, this court is not re-assessing such a factual question in relation to the second charge in the internal disciplinary hearing of the first respondent.

The Consistency Argument

[18] I am moving on to consider the consistency argument made by Ms. Angula. An argument was advanced that first respondent was in a supervisory position in the call centre *vis-a-vis* the other employees. He knew what his responsibilities were in respect of reporting his own absenteeism, he knew he had to make prior arrangements or at least inform his supervisor by email at his earliest opportunity. Secondly, the misconduct of the first respondent only came to the fore as a result of the lock-out incident which sparked the investigation. Ms. Angula advanced these reasons as the distinguishing factors, between the first respondent and the comparable employees and hence there is a rational basis for the different outcomes of the disciplinary process in respect of them. I will deal with this argument within the context of my reading of the record further down.

[19] In defense of the ruling made by the second respondent, Mr. Kasper advanced his arguments for consistency or parity. He argued that to treat employees who committed the same misconduct, differently, is as a general rule unfair. Consistency is simply an element of disciplinary fairness and every employee must be measured by the same standards. It is the perception of bias inherent in selective discipline which makes it unfair. In Labour Law, so his argument continued, a distinction is made between historical inconsistency and contemporaneous inconsistency. Historical inconsistency is where an employer, has a matter of practice used a certain punishment

for a certain type of offence. Contemporaneous inconsistency is where two or more employees engaged in the same or similar conduct at roughly the same time but only one of them are disciplined or different penalties are imposed.

The Law

[20] Mr Kasper cited the following three cases, which this court respectfully considered as part its decision in this matter. *Edgars Stores (Namibia) Limited v Laurika Oiliver and others*, Case No LCA 67/2009. *Rosh Pinah Corporation (Pty) Ltd v Dirkse* (LC 13/2012) [2015] NALCMD 4 (13 March 2015); *Namibia Wildlife Resorts Limited v Ilonga* NLLP 2013 (7) 251 LCN.

[21] I respectfully considered the decision in the unreported case of Parker AJ in *Edgars Stores*¹¹. The facts of the *Edgars Stores* case were that two fellow employees had a lover's quarrel at work. Things ended in a physical fight with both of them being charged with the same charge of assault or manhandling. Ms. Oliver was dismissed and her boyfriend, Mr. Rooi, received a warning. Parker AJ assessed the facts as follows¹²:

[5] On the record, I find that the following are not disputed or are, in my opinion, indisputable. The genesis of this matter lies in the 1st respondent and a co-employee (Mr. Willem Rooi) being charged as follows: 'Assault or Manhandling in that on 20/02/2009 you allegedly got into a fight on the sales floor which resulted in serious breach of the company

¹¹ *Edgars Stores (Namibia) Limited v Laurika Oiliver and others*, Case No LCA 67/2009.

¹² *Edgars Stores* supra, paragraphs 5-6

regulations and made the relationship between yourself and colleagues, customers and management intolerable.’

[6] It would seem the two employees pleaded guilty to the charge at the aforementioned disciplinary hearing conducted by the appellant. The 1st respondent was dismissed by the disciplinary committee and as respects Mr. Rooi, the committee recommended to Management to ‘seriously warn him against love affairs at the work place’.

[22] Parker AJ continued¹³:

‘[11] In Labour Law, fairness is at the root of its rules and practice. It cannot be seriously argued on any pan of scale that the sort of conduct of some employees of the appellant that abounds the present record and which the appellant’s disciplinary hearings dealt with on different occasions in the recent past is so different in nature from the 1st respondent’s conduct that the participants in such conduct in the past should be treated differently from the 1st respondent. In my opinion, no amount of theorizing about the parity principle and the inconsistency principle can put a different colour on this irrefragably unfair reality.

[12] In a matter like the present, one must always keep in one’s mental spectacle the facts and circumstances of the particular case. A closer look at the facts and circumstances of the instant case and the foregoing reasoning and conclusions propel me to the inexorable and reasonable conclusion that the appellant has not shown that the arbitrator did exercise her discretion for unsound reason or that she exercised her discretion with bias and caprice or that she applied a wrong principle when she held that the dismissal of the 1st respondent is substantively unfair on the basis that an inconsistent punitive measure was applied unfairly in the case of the 1st respondent.’

¹³ *Edgars Stores supra*, paragraphs 11-12

[23] The decision in the Edgars Stores case is firmly articulating the concept of consistence or parity as part case law in Namibian Labour Law. I also considered the decision of Hoff J in the regard, in *Namibia Wildlife Resorts Limited v Ilonga* NLLP 2013 (7) 251 LCN, “the *NWR* case” to see how this principle might have developed over time in our law.

[24] In the *NWR* case, the respondent was dismissed by the appellant after she was found guilty of theft of alcohol in a disciplinary hearing. The court a quo, found her dismissal was unfair, due to the appellant not being consistent in its punishment of similar previous offences by other employees. The insights on the subject matter of Hoff J follow below¹⁴:

[4] The only issue to be considered in this appeal is whether the arbitrator, erred in law, by finding on the evidence presented at the arbitration hearing, that the appellant had been inconsistent in the application of its disciplinary code as it treated the respondent differently from another of its employees, Limbo Engelbrecht, and thus acted inconsistent with Article 10(1) of the Namibian Constitution and section 33(1) of the Labour Act, 11 of 2007. Article 10(1) of the Constitution states that all persons shall be equal before the law. Section 33(1) of Act 11 of 2007 prohibits the dismissal of an employee without a valid and fair reason and without a fair procedure.

[5] In addition to the award of remuneration, the arbitrator ordered the reinstatement of the respondent solely on the basis of a perceived inconsistent application of disciplinary sanctions in respect of the same transgression.

[6] An employee seeking to rely on the inconsist application of discipline by the employer must mount a proper challenge. This in turn requires evidence of other similar cases which

¹⁴ *Namibia Wildlife Resorts Limited v Ilonga* NLLP 2013 (7) 251 LCN, paragraphs 4-8

attracted different and less severe disciplinary sanctions to warrant the inference that the employer had been inconsistent.

[7] John Grogan in his work *Dismissal, Discrimination & Unfair Labour Practices* August 2005 at 225 - 226 stated the following regarding a claim of inconsistency:

“Consistency challenges should be properly mounted. Little purpose is served by employees simply claiming at the beginning of an arbitration hearing that the employer has treated other employees more leniently in some earlier case or cases. Where this occurs, the employer’s representative can justifiably raise the objection that he or she is unaware of the details of the earlier case(s). The arbitrator must then disallow the objection or grant a postponement. Furthermore, a claim of inconsistency can be sustained only if the earlier cases relied on are sufficiently similar to the case at hand to warrant the inference that the employer has indeed been inconsistent. Comparison between cases for this purpose requires consideration not only to the respective employees’ conduct, but also of such factors as the employees’ remorse and disciplinary record, whether the workforce has been warned that such offences will be treated more severely in future, and the circumstances surrounding the respective cases”.

[8] In *Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) [at para 10] the following was said in relation to the issue of inconsistency by van Niekerk J.

“The legal principles applicable to consistency in the exercise of discipline are set out in item 7(b)(iii) of the *Code of Good Practice: Dismissal* establishes as a guideline for testing the fairness of a dismissal for misconduct whether ‘the rule or standard has been consistently applied by the employer’. This is often referred to as the “parity principle”, a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employee apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in

either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC) at paragraphs [37] – [38]). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to a different treatment, usually in the form of a disciplinary penalty less severe than that imposed to the claimant (see *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2001] 7 BLLR 840 (LC) at paragraph [3]). Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.”

[25] Finally, I am also considering the case of *Rosh Pinah Corporation (Pty) Ltd v Dirkse* (LC 13/2012 [2015] NALCMD (13 MARCH 2015) in this regard. In the headnote of his judgement, Hoff J articulated the principle of consistency in disciplinary fairness; he also formulated a qualification on the parity principle, in aid of an employer who wants to overcome a consistency challenge as follows:

‘Unfair labour practice – To treat employees, who have committed similar misconduct differently, is as a general rule, unfair. Consistency is simply an element of disciplinary fairness and every employee must be measured by the same standards. It is the perception of bias inherent in selective discipline which makes it unfair. Unfair disciplinary action short of dismissal amounts to an unfair labour practice. In order to overcome a consistency challenge the employer must be able to show that there was a valid reason for differentiating between groups of employees guilty of the same offence. Onus of proof in allegation of unfair labour practice rests on employee to prove not only the existence of the practice but also that it was unfair.’¹⁵

¹⁵ *Rosh Pinah Corporation (Pty) Ltd v Dirkse* (LC 13/2012 [2015] NALCMD (13 March 2015), [in the headnote]

[26] Having considered the above stated dicta, I respectfully conclude that the principle of consistency when imposing disciplinary sanctions on employees is part of our law. Further to that, Hoff J, in both his above stated judgements had it clear that the employer can only overcome a challenge of inconsistency if there is a valid reason for differentiating between employees guilty of the same offence. This principle was also confirmed by Van Niekerk J¹⁶ cited above.

‘Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.’

Application of the law in this matter

[27] I respectfully associate myself with the above stated dicta. However, in the matter currently under my consideration, I have to distinguish the following. In this matter the employees were not disciplined on the same charges, as was the case in the matter of Edgars Stores. Three of them were disciplined on falsification of bank records and absence without a fair and valid reason and were dismissed. The comparable group was charged with negligence and received a warning. It was common cause in the investigation and arbitration that all of them falsified the bank records. That cleared and despite its slightly distinguishable factual matrix, I still find it an applicable case to apply the reasoning in the case law above.

¹⁶ *Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) [at para 10]

[28] In doing so, going forward, I consider the finding of the second respondent that there was no justification for inconsistency in the disciplinary measures between the respondent and the comparable group¹⁷. I respectfully disagree with this finding.

[29] My view is that the factual finding that there is no justification of the differentiation between first respondent and the warned employees, 'is so vitiated by lack of reason as to be tantamount to no finding at all.'¹⁸ The evidence is such that on proper evaluation, it inexorably leads to the conclusion that no reasonable arbitrator of fact could have made such a finding.

[30] The evidence I am referring to, is the testimony of Mrs. Swartz¹⁹ that the first respondent was in a leadership position vis-as-vis the other employees. He was leading a team in the call centre of the bank. The call centre is a critical function in the bank. It was described as the 'voice of the bank'²⁰ in evidence. In execution of his function as team leader in this important department of the bank, the first respondent had five instances of absenteeism, which he was concealing²¹ from management. His absenteeism only came to light when management reviewed the CCTV footage, following the lock-out incident. The essence of her testimony is that it was his leadership role, combined with him concealing his offences, which formed a critical factor to distinguish him from the others. It is so, that all seven employees gave explanations for

¹⁷ Page 884 of the Record

¹⁸ *Betha and Others v BTR Sarmcor* 1998 (3) SA 349. Confirmed in *Namibia Power Corporation (Pty) Ltd v Gerald* 38/2008 [22 March 2014]

¹⁹ Pages 125, 130, 182, 197, 229, 272,273 of the Record

²⁰ Page 273 of the Record

²¹ Page 229 of the Record

their absenteeism only after they were requested to do so by the investigation team²². However, the first respondent's role as team leader makes his hiding of the information a worse kind of misconduct. He knew what his responsibilities were and he failed in that was her contention.

[31] In my assessment, the reasoning of Ms. Swartz in the above stated evidence perfectly acceptable. She explained the role of the call centre, she emphasized the need for a constant and reliable presence of the staff in the centre, given that the reputation of the appellant as a bank at stake. If the call centre team leader is concealing five counts of unauthorized absenteeism until such time that his fortune runs out, there is certainly a reason for concern and a basis to single him out. After all, the other employees were not hiding their absenteeism from their supervisor. He was their supervisor. He was with them in call centre and instead of reporting the absenteeism; he was joining his team in such conduct.

[32] With the above stated evidence adduced, my finding is the arbitrator made an incorrect legal finding. Her factual finding²³ that there is no basis to distinguish between first respondent and the comparable group is simply unreasonable in the bigger scheme of the employment context sketched in this matter, and is tantamount to an incorrect finding in law. It is abundantly clear to me that the employer was justified in taking a firmer approach to discipline in respect of the first respondent, vis-a vis the comparable group of employees.

²² Page 199 of the record

²³ Page 884 of the Record, paragraphs 109 and 110

[33] In the premises, it was common cause that the first respondent and the comparable group all falsified bank records. Only the first respondent was charged with falsification of bank records and dismissed. The parity principle demands like discipline for like misconduct, unless there is a justified reason to distinguish between employees. In this matter I find that there was a justified reason to distinguish the first respondent for the reasons above stated.

[34] The appeal is upheld. In respect to the aspect of costs, I see no reason to depart from the normal rule in Labour cases that each party pays its own cost.

[35] Based on the above, I make the following order:

3. The appeal is upheld.
4. The arbitration award under Case number CRWK-107–15, delivered on 12 October 2015, is wholly set aside.
2. There is no order in respect of costs.

L VAN WYK
Acting Judge

