

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: LCA 56/2015

In the matter between:

**WILBARD JOSEF**

**APPELLANT**

versus

**STONE AFRICA (PTY) LTD  
IMMANUEL HELAO HEITA N.O  
THE LABOUR COMMISSIONER**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

***Neutral citation:*** *Josef v Stone Africa (Pty) Ltd (LCA 56/2015) [2017] NAHCMD 20 (09 June 2017)*

**Coram:** UEITELE, J  
**Heard:** 03 MARCH 2017  
**Delivered:** 09 JUNE 2017  
**Reasons:** 26 JUNE 2017

**Flynote:** *Labour law – Dismissal* - Substantive and valid reason must exist for dismissal. Dismissal-once a substantive and valid reason exist for a dismissal – court will not order reinstatement where an employee has clearly committed an act of misconduct.

*Labour law - Dismissal - Employees' right to fair hearing - Hearing of a complaint of unfair dismissal by an arbitrator not limited to the question whether the employer held a fair hearing - but whether in fact there was a fair reason for the dismissal.*

**Summary:** Mr. Wilbard Josef was employed by Stone Africa (Pty) Ltd as a load-operator since 1 March 2011 until he was dismissed from his employment on allegations that he committed acts of misconduct. He, in terms of s 85 of the Labour Act, 2007 referred a dispute of unfair dismissal, unilateral change of terms and conditions, unfair labour practice and non-payment of wages to the Labour Commissioner on 09 February 2015.

The Labour Commissioner appointed an arbitrator to conciliate and arbitrate the dispute. The arbitrator found that Mr Josef's dismissal was procedurally and substantively fair and he dismissed the complaint. This is an appeal by the appellant against the whole of the arbitration award made by the arbitrator, under s 86(15) of the Labour Act, 2007. The first respondent opposed the appellant's appeal. The second and third respondents did not oppose the appeal.

*Held that* the hearing of a complaint by an arbitrator is not limited to the question whether the employer held a fair hearing, but whether in fact there was a fair reason for the dismissal. The arbitrator hears all the evidence and arguments placed before him and decides the latter issue, irrespective of what the employer's domestic tribunal found.

*Held further that* a statement or entry contained in a book or document kept by an employer, or found upon or in any premises occupied by an employer, and any copy or reproduction of that statement or entry, may be used by the employer to prove facts stated in that statement or entry. The court found that the arbitrator did not act perversely when he accepted the evidence tendered by submitting the extract from the respondents Occurrence Book.

*Held further that* even if, in this matter, the appellant did not have the opportunity to respond to the factual allegations made by the respondent at the disciplinary hearing (i.e. the domestic tribunal), he had that opportunity to so respond at the arbitration hearing but he did not seize that opportunity and he did not contradict the factual averments made by the respondent.

*Held further* that one does not need a policy to know that one must not take property that does not belong to you without the owner's permission. The court further found that there is no doubt that in this case the appellant was given a fair and appropriate warning in the notice for the disciplinary hearing and also at the arbitration hearing that the question whether he had permission to remove the granite off-cuts was an issue in the disciplinary proceedings, and he chose not to answer it. The court was thus satisfied that the finding which the arbitrator arrived at, in respect of the first charge of misconduct is not perverse.

*Held further that* the appellant did not contradict the evidence presented on behalf of the respondent. His answer to Ms. Van der Westhuizen's evidence was simply that by the time that Ms. Van der Westhuizen made contact with him he was already in South Africa, assisting his sick wife. That portion of the statement can in the court's view not be correct because the reason why Ms. Van der Westhuizen contacted the appellant on 15 September 2014 was because she was informed that he would have returned from Cape Town around the 15 September 2014. Secondly, the appellant does not deny that on 15 September 2015 when Ms. Van der Westhuizen spoke to him, he was still in Namibia. The court did therefore find fault with the arbitrator's finding that the respondent proved the second charge of misconduct as well.

*Held furthermore that* the question whether a person has or has not waived his or her rights is a factual rather than a legal question and the answer will depend on the circumstances of the case. In this case while the disciplinary hearing is in progress the appellant decides to walk out of the hearing he is called back to the hearing, he comes back participate and again walks out of the hearing. When he walks out of the hearing for the second time he is warned that the hearing will proceed in his absence. He disregards the warning and the hearing proceeds in his absence. In the courts view, this is the clearest proof of a waiver of rights.

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## ORDER

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1. The appeal is reinstated.
2. The respondent's late noting of the notice to oppose the appeal and the late filing of the grounds to oppose the appeal is condoned.

3. The appeal is dismissed.
4. No order as to costs.

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## JUDGMENT

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**UEITELE, J**

The parties

[1] The appellant in this matter is a certain Wilbard Josef (I will, in this judgment, refer to him as ‘appellant’) who was, since 1 March 2011, employed by a company known as Stone Africa (Pty) Ltd as load-operator. Stone Africa (Pty) Ltd, is a private company registered in accordance with the Company Laws of the Republic of Namibia, which is the first respondent in this appeal. (I will in this judgment refer to this company as the respondent).

[2] Immanuel Hellao Heita who is cited as the second respondent in this appeal is a staff member of the Ministry of Labour and who is appointed under s 85(3) of the Labour Act, 2007 as an arbitrator and was designated by the Labour Commissioner to conciliate and arbitrate over the complaint lodged by the appellant. (I will in this judgment refer to the second respondent as ‘the arbitrator’).

[3] The third respondent is the Labour Commissioner appointed as such in terms of s120 of the Labour Act, 2007. (I will in this judgment refer to the third respondent as ‘the Labour Commissioner’). I fail to see why it is necessary to cite the arbitrator and the Labour Commissioner in this appeal proceedings.

The background to this appeal

[4] As I have indicated above the appellant was employed by the first respondent as a load-operator since 1 March 2011. On 16 August 2014 the appellant at approximately 20H56 arrived in a pickup vehicle at the respondent’s premises. When the appellant so arrived he was in the company of a person, by the name of Simon, who was not an

employee of the respondent. The appellant and his companion and without the consent of the management of the company (the respondent) loaded granite off-cuts on the pickup vehicle in question.

[5] The incident (of removing granite cut-offs from the premises of the company) was reported to the respondent's management, who decided to institute disciplinary action against the appellant. On 22 August 2014 the appellant was summoned to appear before his immediate supervisor, a certain Mr. Jan and the Site Manager a certain, Mr. Villa. When he appeared before Messrs Jan and Vila he was informed that he was suspended with full pay and that he was not allowed to enter the premises of the first respondent.

[6] On 10 September 2014 a '*Notice of Anticipated Disciplinary Action against A Shopsteward*' (I will in this judgment refer to this notice of anticipated disciplinary hearing as the 'hearing notice') was faxed to the Mineworkers Union of Namibia. In that notice the respondent through a certain Jacob Coetzer informed the Union that 'the Shopsteward Josef Wilbard committed serious misconduct and that the employer envisages taking disciplinary action against him, the disciplinary hearing will take place on the 12<sup>th</sup> of September 2014 at 15h00 at the premises of the employer.'

[7] The hearing notice furthermore stated that it is alleged that Josef Wilbard committed the following misconduct: I quote verbatim from the hearing notice.

**'Fails to comply with any provisions in the policy of the employer:** in that on the 16<sup>th</sup> of August 2014 you wrongfully and unlawfully removed or attempted to remove off-cut granite from the property of the employer and without proper documentation as per the company policy. Your actions detrimentally affected the trust relationship between yourself and the employer's need for continuous employment.'

[8] The reason why the notice was faxed to the Mineworkers Union of Namibia is the allegation by the respondent that it unsuccessfully made attempts to contact the appellant to inform him about the disciplinary hearing. The disciplinary hearing that was scheduled for 12 September 2014 did not take place, because the respondent could not get hold of the appellant. On that day, that is Friday 12 September 2014 the respondent through its consultant, Seena Labour Consultant, send an electronic mail to Mr. Ngwena of the Mineworkers Union of Namibia requesting the Union to inform the appellant that the disciplinary hearing that was scheduled for 12 September 2012 was formally postponed to

17 September 2014 at 09h30. In that electronic mail the respondent further indicated that *'Be reminded that the employee's suspension without pay has been uplifted.'* The first respondent attached a notice of formal postponement /rescheduling of the disciplinary hearing to the electronic mail that was sent to Mr. Ngwena.

[9] After several attempts, the respondent's Human Resources Manager a certain Ms. Zelda Van Der Westhuizen, on 16 September 2014 managed to telephonically get hold of the appellant, after she got hold of him the appellant related to her that he was in South Africa (Cape Town) where he was assisting his wife to get medical assistance. Ms. Van der Westhuizen testified at the arbitration proceedings that when she managed to make contact with the appellant on 16 September 2014 she conveyed to him the fact that his suspension was uplifted and that he had to return to work. She also conveyed to him the fact that if he had to leave the Country he had to go back to the office and apply for vacation leave.

[10] The appellant did not go back to the office nor did he apply for vacation leave. From 16 September 2014 to 2 October 2014 the first respondent again had no contact with appellant. The lack of contact with the appellant prompted the respondent to, on 2 October 2014, add a second charge of misconduct to the charge which the appellant was facing. The second charge of misconduct which the respondent added reads as follows:

**'Desertion:** alternatively absence without leave or permission, after you failed to report for duty since 10 September 2014 to date.'

[11] On 2 October 2014 the appellant was then informed that the disciplinary hearing will take place on 8 October 2014. The appellant, however, requested that the disciplinary hearing rather be held on 6 October 2014. The disciplinary hearing proceeded as scheduled on 6 October 2014. At the commencement of the hearing the chairperson of the disciplinary hearing enquired from the appellant whether he required an interpreter or not, and whether he was given notice of the hearing, whether he understood the charges levelled against him and whether his rights and the protocol regarding the hearing was explained to him. He was also asked whether he was informed about his right to appeal.

[12] The appellant confirmed that he did not require the services of an interpreter, that he was given timeous notice of the charges against him, that he understood the charges proffered against him, that his rights and the protocol regarding the hearing was explained to him and that he was informed about his rights of appeal if the disciplinary findings were

not in his favour and he thereafter signed the disciplinary hearing form to confirm the answers he provided.

[13] During the proceedings of the disciplinary hearing some verbal exchanges between the chairperson of the disciplinary hearing and the representative of the appellant took place. The appellant accuses the chairperson of the disciplinary hearing of being rude to and insulting his representative, while Ms. Van der Westhuizen on the other hand levelled accusations of racism and aggression against the appellant. Because of the exchanges during the disciplinary hearing between the parties, the appellant and his representative decided to walk out of the disciplinary hearing.

[14] The chairperson of the disciplinary hearing summoned the appellant and his representative back to the hearing and after a while the exchanges resumed and the appellant and his representative again walked out of the disciplinary hearing. Ms. Van der Westhuizen states that the chairperson of the disciplinary hearing warned the appellant and his representative that if they continue to walk out of the disciplinary hearing, the hearing will proceed in their absence. The appellant on the other hand denies that he was warned or informed that if he and his representative walked out of the disciplinary hearing, the hearing will proceed in their absence.

[15] What is not in dispute is that the disciplinary hearing proceeded in the absence of the appellant and at the conclusion of the hearing the appellant was found guilty on the charge of failing to comply with any provisions in the policy of the employer and absence from work without leave or permission, from 10 September 2014 to 6 October 2014. The appellant was, as a consequence of the finding of guilt, dismissed from the first respondent's employment.

[16] Following his dismissal the appellant, on 09 February 2015, referred a dispute of unfair dismissal, unilateral change of terms and conditions, unfair labour practice and non-payment of wages to the Office of the Labour Commissioner. I find it appropriate to pause here and observe that at the arbitration hearing the appellant did not persist with his complaint of 'unilateral change of terms and conditions and non-payment of wages.' The Labour Commissioner, on 18 February 2015, designated a certain Mr. Immanuel Helao Heita as the arbitrator. The Labour Commissioner, on the same day (i.e. on 18 February 2015) also notified the parties that a conciliation meeting or arbitration hearing will take

place on 26 March 2015 at the Offices of the Labour Commissioner in Swakopmund.

[17] On 26 March 2015 the first respondent requested a postponement of the conciliation or arbitration hearing to 16 April 2015. The application for postponement was granted and the conciliation arbitration hearing was postponed to 13 and 14 May 2015 and again to the 30<sup>th</sup> of July 2015. At the arbitration hearing both the appellant (testifying on his own behalf) and the respondent (testifying through Ms. Zelda Van der Westhuizen) presented oral evidence to the arbitrator, they did not call witnesses to testify on either's behalf.

[18] On 15 September 2015 the arbitrator, delivered his award. In the award the arbitrator found that the respondent's dismissal was procedurally and substantively fair and he dismissed the complaint. The appellant is aggrieved by the dismissal of his complaint and now appeals against the dismissal of the complaint.

#### The noting and prosecution of the appeal

[19] Section 89 of the Labour Act, 2007<sup>1</sup> and Rule 17(4) of the Labour Court Rules<sup>2</sup>, require of a person who intends to appeal against an arbitration award to do so, not later than 30 days of the award having been handed down by an arbitrator. A person who notes an appeal is required to, in the notice of appeal delivered in terms of Rule 17(4), call on the Labour Commissioner to dispatch, within 21 days after receipt of the notice of appeal, to the registrar the record of the proceedings appealed against duly certified by the Labour Commissioner and to notify the respondent that he or she has done so. The record must contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, and the copies lodged with the registrar must be certified as correct by the legal practitioner or party lodging the record or the person who prepared the record.<sup>3</sup>

[20] On receipt of the record the appellant must, not less than 14 days after receipt of the record, supply the registrar with two copies and each of the other parties with one copy of

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<sup>1</sup> Act, No. 11 of 2007.

<sup>2</sup> The Labour Court Rules, published under GN 279 in Government *Gazette* No. 4175 of 2 December 2008 as amended by Government Notice No. 92 published in in Government *Gazette* No 4743 of 22 June 2011.

<sup>3</sup> Rule 17(12) of the Labour Court Rules.

that record.<sup>4</sup> The appellant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice, amend, add to or vary the terms of the notice of appeal.<sup>5</sup> If a person to whom the notice of appeal is delivered wishes to oppose the appeal, that person must, within 10 days after receipt by him or her of the notice of appeal or any amendment of the notice to appeal, deliver notice to the appellant that he or she intends to oppose the appeal and within 21 days after receipt by him or her of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice to oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.<sup>6</sup>

[21] Rule 17(25) of the Labour Court Rules provides that an appeal which has been launched in terms of the Labour Court Rules must be prosecuted within a period of ninety days from the date it was noted. If the appeal has not been prosecuted within 90 days from the noting thereof as required that appeal lapses. An appeal is prosecuted when application is made to the registrar for the allocation of a hearing date.<sup>7</sup>

[22] In this matter the arbitration award was handed down on 15 September 2015 it follows that that the notice of appeal had to be launched on or before 15 October 2015. The appellant, however, only noted his appeal against the arbitration award on 23 October 2015, that was seven days out of time. In view of the fact that the appellant noted his appeal out of time he applied to this court for condonation of the late noting of the appeal. On 4 December 2015 this Court condoned the appellant's failure to note the appeal within the prescribed 30 days.

[23] The 90 day period within which the appellant had to prosecute the appeal, when calculated from the date when the Court condoned the late filing of the appeal on 4 December 2015 expired on 4 March 2016. The appellant however, only dispatched a copy of the record to the respondent on 8 April 2016. The appellant furthermore only served the notice (to obtain a hearing date) referred to in Rule 17(17) on 18 May 2016. The first respondent on the other hand also only filed his notice to oppose the appeal and the

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<sup>4</sup> Rule 17(13) of the Labour Court Rules.

<sup>5</sup> Rule 17(15) of the Labour Court Rules.

<sup>6</sup> Rule 17(12) of the Labour Court Rules.

<sup>7</sup> Rule 17(17) of the Labour Court Rules.

grounds on which he opposes the appeal on 1 October 2016. It follows that the appeal had lapsed and the respondent was barred from participating in the appeal.

[24] As a consequence of the failures by the appellant to timeously prosecute the appeal and the respondent to timeously oppose the appeal the appellant's legal practitioners applied for the reinstatement of the appeal and the first respondent's legal practitioner applied for condonation of the late filling of the notice to oppose the appeal. I pause here to point out that the scheme and object of the current Labour Act, 2007 is to resolve Labour disputes as expeditiously and as inexpensively as possible.

[25] From the explanations provided for the delays, the legal practitioners of both the appellant and the first respondent cannot entirely be exonerated for the delay in setting down and disposing of this appeal in the shortest possible time. I am of the view that the explanations proffered by the legal practitioners, although not entirely satisfactory, call for me to exercise my discretion in favour of condoning the failures to comply with the Rules of the Labour Court. I therefore reinstate the appeal and condone the late filling of the notice to oppose the appeal and the late filing of the grounds of opposing the appeal. I now proceed to consider the grounds on which the appellant basis his appeal.

#### The appeal, the grounds of appeal and the grounds opposing the appeal

[26] The grounds of appeal contained in the notice of appeal are four in total. The first ground of appeal is divided into four sub- paragraphs. The first ground of appeal is inelegantly drafted and presents interpretation difficulties, but what I can make of it is that the complaint is directed at the procedural fairness of the disciplinary hearing. I quote verbatim that first ground.

1. The arbitrator erred in law in not finding that the disciplinary hearing held by the 1<sup>st</sup> respondent in respect of the appellant was fair in that:

1.1 The arbitrator erred in not taking into account the appellant's submission that the conduct of the said disciplinary hearing by the appointed chairperson was unfair to him and was not in keeping with his right to a fair hearing;

1.2 The arbitrator erred in finding that should the appellant have felt that the chairperson would not be fair to him he should have asked the chairperson to recuse himself in order for the

hearing to be chaired by someone else, when it was put before him during the arbitration proceedings that the appellant's representative at the disciplinary hearing had in fact contacted the company from which the disciplinary hearing chairperson came and demanded that they send an alternative chairperson, same which the said company failed to do;

1.3 The arbitrator erred in finding that it was fair for the disciplinary hearing to proceed in the absence of the appellant, as he came to this conclusion due to his failure to take due cognizance of the reasons why the appellant was no longer able to proceed with the hearing, which reasons were clearly put before him during the arbitration hearing;

1.4 The arbitrator erred in finding that the mere warning by the chairperson that if the appellant left the disciplinary hearing it would proceed in his absence to be sufficient justification for the hearing to have proceeded in the appellant's absence, considering the circumstances under which the appellant and his representative resolved to leave the disciplinary hearing, same which were clearly described to the arbitrator at the arbitration hearing.'

[27] The second ground of appeal relates to the finding by the arbitrator that the appellant was absent from work without official leave. The appellant argues that the arbitrator erred in law in finding that the appellant was away without official leave as he came to that finding despite the appellant's uncontested submission that his supervisor had informed him that he was not required to apply for leave as he was on suspension.

[28] The third ground of appeal relates to the arbitrator's alleged failure in not finding that the appellant was not afforded the chance to contest or disprove the charges which the respondent had brought against him and the fourth ground of appeal relates to the alleged failure by the arbitrator to consider the circumstances that occasioned the appellant's failure to adduce his testimony in relation to the first disciplinary charge. Before I turn to consider the grounds of appeal and the opposition to the grounds of appeal I will briefly set out the applicable legal principles.

#### The legal principles

[29] The termination of contracts of employment in Namibia is governed by the Labour Act, 2007. The Supreme Court and this court have stated that s 33 of the Labour Act, 2007 simply reinforces the well-established principle that dismissals of employees must

be both substantively and procedurally fair.<sup>8</sup> Unfair disciplinary action against an employee is regulated by s 48 of the Labour Act. That section provides that the provisions of s 33 of the Act, which apply to unfair dismissal, shall, 'read with the necessary changes, apply to all other forms of disciplinary action against an employee by an employer' and s 48(2) states that disciplinary action taken against an employee in contravention of s 33 constitutes an unfair labour practice.

[30] Accordingly, in assessing whether disciplinary action constitutes an unfair labour practice for the purposes of s 48(2), the key questions are whether the disciplinary action was imposed without a valid and fair reason or without following a fair procedure. An employee who considers that disciplinary action that has been imposed upon him in contravention of s 33 may refer the unfair labour practice to the Labour Commissioner in terms of s 51 of the Act. A copy of the notice must be served on the employer.

[31] An arbitrator who is tasked with a duty to determine a dispute concerning alleged unfair disciplinary action or unfair dismissal must accordingly make a finding of whether or not the employer had a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary action. If the arbitrator finds that there was no valid or fair reason for the disciplinary action, or that the process followed was unfair, the arbitrator must uphold the unfair labour practice or the unfair dismissal challenge. If on the other hand the arbitrator finds that there was a valid and fair reason for the disciplinary action and that a fair procedure was followed in imposing the disciplinary action the arbitrator must dismiss the complaint.

[32] A party dissatisfied with an arbitration award made in terms of s 86 of the Act (save in the case of disputes of interest relating to essential services) may appeal to the Labour Court on any 'question of law alone'.<sup>9</sup> In the *Van Rensburg* matter the Supreme Court said the following as to what constitute an appeal on a 'question of law alone':

[43] ...First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr. Jansen van Rensburg enter Runway 11

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<sup>8</sup> See: *Leon Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd*, an unreported judgment of the Supreme Court of Namibia delivered on 11 April 2016 under case number SA 33/2013 at para [28]. And also the unreported judgment of the Labour Court of Namibia of *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (LCA 11/2016) [2017] NAHCMD 18 (07 June 2017) at para [20].

<sup>9</sup> Section 89(1) of the Act.

without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record<sup>10</sup> and may not be the subject of an appeal to the Labour Court.

[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperilled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed, and it echoes the approach adopted by appellate courts in many different jurisdictions.

[45] It should be emphasized, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.'

#### Applying the legal principles to the facts of the matter

[33] I now turn to consider the question whether or not on the evidence, that was placed before the arbitrator, his finding that the respondent had a valid and fair reason to terminate the appellants employment is a finding which 'no reasonable decision-maker could have reached.'

[34] The key issue raised by counsel for the appellant in relation to the disciplinary enquiry was whether the arbitrator was correct in law to hold that the respondent had a valid reason to dismiss the appellant. The first charge that the appellant faced was that

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<sup>10</sup> The supreme Court said: 'The word 'perversely' was used by Lord Brightman in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 (HL) 518 where he said: 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body, and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely'. See also *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 29, per Viscount Simmonds, a court will intervene where a decision maker 'has acted without any evidence or upon a view of the facts which could not reasonably have been entertained'. This approach is similar to the approach adopted in *Yeboah v Crofton* [2002] EWCA Civ 794.

he failed to follow company procedures by removing granite off-cuts from the company's premises without the permission of the respondent's management. The question for consideration on appeal is simply whether on the evidence placed before him the arbitrator misdirected himself when he concluded that appellant was correctly found guilty of misconduct. This is a legal question, not a factual question, and therefore one that falls within the scope of jurisdiction of the Labour Court as provided for in s 89(1)(a) of the Labour Act, 2007.

[35] Ms. Kandjella who appeared for the appellant argued that the arbitrator erred in law when he found that the appellant was correctly found guilty on the first charge of misconduct. She argued that the respondent did not prove any of the charges. No admissible evidence was led with regards to the allegations in respect of both counts 1 and 2. Instead the arbitrator and the witness of the respondent appear to be under the impression that the appellant should have substantiated and prove that he was dismissed unlawfully. This is bad in law as the *onus* at all times rested on the respondent to show that the appellant was dismissed for both valid reason and following a fair procedure, argued Ms. Kandjella. She continued and said:

'The findings of the chairperson in a final analysis will thus mean that the appellant was found guilty by removing granite off-cuts from the 1<sup>st</sup> respondent's premises without permission and that he deserted his employment with the 1<sup>st</sup> respondent. The basis of finding him guilty on the first charge was clearly based on hearsay evidence and on that basis alone the 1<sup>st</sup> respondent failed the procedural leg of the *onus* to establish fair dismissal as is required in terms of section 33 of the Labour Act. Sight should not be lost of the fact that the 1<sup>st</sup> respondent bears the *onus* to prove that the dismissal was both procedurally and substantially fair. It would appear that the arbitrator shifted this *onus* to the appellant when he opines that the appellant "failed to submit any proof to collaborate his arguments.

The charge is that of failure to comply with the policy of the 1<sup>st</sup> employer: nowhere was there evidence led on what the policy is that should have been followed if a person was to remove off-cut granite from the premises of the 1<sup>st</sup> respondent without prior arrangement with the employer and without proper documentation as per the company policy. What is the documentation? What is the policy to have been followed? There was simply no evidence proving a standing policy that could have been breached by the respondent.'

[36] Before I evaluate the submission of counsel for the appellant I want to highlight a remark by Justice O'Linn<sup>11</sup> where he said:

'It should further be kept in mind, that the hearing of the complaint by the District Labour Court, is not only whether the employer held a fair hearing, but whether in fact there was a fair reason for the dismissal. The District Labour Court hears all the evidence and arguments placed before it and decides the latter issue, irrespective of what the employer's domestic tribunal found.'

[37] In my view the same can be said of an arbitrator, the hearing of a complaint of unfair dismissal by an arbitrator is not limited to the question whether the employer held a fair hearing, but whether in fact there was a fair reason for the dismissal. The arbitrator hears all the evidence and arguments placed before him and decides the latter issue, irrespective of what the employer's domestic tribunal found.

[38] The critical question in this matter is 'what is the evidence that was placed before the arbitrator, for him to arrive at the conclusion that the employer had a valid reason to dismiss the appellant. As I have indicated above the appellant faced a charge of removing granite off cuts from the respondent's premises without following company procedures. The charge which the appellant faced was based on a write up in the Occurrence Book (OB) of the respondent by a Security Officer who was in the employment of the respondent and who was on duty on the evening of 14 August 2014. That officer made the following recording I quote verbatim the recording:

'Josef and Simon on Saturday around 8:56 –they came inside with a Toyota Hilux 4x4 Reg No. N 25484 SH and load up lot of small pieces of broken slabs they say that they buy the slabs the time in the office there was Mr. Jaap and he told me that Jacu he also know about this.'

This piece of evidence was placed before the arbitrator and the arbitrator accepted the evidence.

[39] The appellant at the arbitration hearing did not contest or contradict this evidence he was silent and simply contended that this was hearsay evidence because the security officer who made the entry or recording was not called to testify and no evidence of a standing policy was led. This in my view is where the appellant and his counsel missed

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<sup>11</sup> In the matter of *Kamanya and Others v Kuiseb Fish Products Ltd* 1996 NR 123 (LC).

the point. I say the appellant and his legal representative missed the point for the following reasons. First s 133(3) of the Labour Act, 2007 reads as follows:

**‘133 Evidence**

(1) ...

(3) In any legal proceedings in terms of this Act, a statement or entry contained in a book or document kept by an employer, or found upon or in any premises occupied by an employer, and any copy or reproduction (whether obtained by microfilming or any other process or by the use of a computer) of that statement or entry, is admissible in evidence against that employer as an admission of the facts stated in that statement or entry, unless it is proved that that statement or entry was not made by that employer, or any manager, agent or employee of that employer in the course and scope of their work.’

[40] I am of the view that a statement or entry contained in a book or document kept by an employer, or found upon or in any premises occupied by an employer, and any copy or reproduction of that statement or entry, may be used by the employer to prove facts stated in that statement or entry. In my view the arbitrator did not act perversely when he accepted the evidence tendered by submitting the extract from the respondents Occurrence Book.

[41] Second, in the Van Rensburg matter the Supreme Court said:

[72] .... it is important to note that disciplinary proceedings are not criminal proceedings, and are accordingly not governed by the rules of criminal procedure. The guiding principle for disciplinary proceedings is that they must be conducted fairly. The South African Labour Court has described the obligation of fairness as follows:

“When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process ... requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the

employer's allegations with the assistance of a trade union representative or fellow employee."<sup>12</sup>

[73] Fairness thus requires that an employee be given proper notice of and an opportunity to respond to the factual issues relevant to the disciplinary proceedings....'

[42] The Supreme Court has thus stated fairness requires that an employee be given proper notice of an opportunity to respond to the factual issues relevant to the disciplinary proceedings. Even if, in this matter, the appellant did not have the opportunity to respond to the factual allegations made by the respondent at the disciplinary hearing (i.e. the domestic tribunal), he had that opportunity to so respond at the arbitration hearing but he did not seize that opportunity and he did not contradict the factual averments made by the respondent.

[43] The argument that there was 'no evidence led on what the policy is that should have been followed if a person was to remove off-cut granite from the premises of the first respondent without prior arrangement with the employer and without proper documentation as per the company policy' is misplaced. One does not need a policy to know that one must not take property that does not belong to you without the owner's permission. I therefore have no doubt that in this case the appellant was given a fair and appropriate warning in the notice for the disciplinary hearing and also at the arbitration hearing that the question whether he had permission to remove the granite off-cuts was an issue in the disciplinary proceedings, and he chose not to answer it. I am thus satisfied that the finding which the arbitrator arrived at, in respect of the first charge of misconduct is not perverse.

[44] With respect to the second charge Ms. Van der Westhuizen testified that during the period over which the appellant was on suspension the respondent wanted to set the disciplinary hearing down for 12 September 2014, but the respondent could not get hold of the appellant to notify him of the date, and as last resort the respondent contacted the trade union, and informed the Union that the appellant's suspension had been uplifted and that he thus had to return to work. Ms. Van der Westhuizen further testified that on 15 September 2014 she telephonically spoke to the appellant who informed her that his wife was sick and he was travelling back to Cape Town. She continued and testified that she instructed the

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<sup>12</sup> See *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* 2006 ZALC 44.

appellant to come to the office and apply for vacation leave or he should submit a proof that his wife was in hospital so that he can apply for sick leave, but the applicant did not do it.

[45] The appellant again did not contradict this evidence presented on behalf of the respondent. His answer to Ms. Van der Westhuizen's evidence was simply that by the time that Ms. Van der Westhuizen made contact with him he was already in South Africa, assisting his sick wife. That portion of statement can in my view not be correct because the reason why Ms. Van der Westhuizen contacted the appellant on 15 September 2014 was because she was informed that he would have returned from Cape Town around the 15 September 2014. Secondly the appellant does not deny that on 15 September 2015 when Ms. Van der Westhuizen spoke to him, he was still in Namibia. I therefore cannot find fault with the arbitrator's finding that the respondent proved the second charge of misconduct as well.

[46] Counsel for the appellant also took issues with the fact that the chairperson of the disciplinary hearing proceeded with the hearing in the absence of the appellant. She argued that the arbitrator erred in law when he found that the appellant waived his right to be heard and challenge the charges brought against him. She proceeded and argued that, because the arbitrator did not consider the circumstances under which the appellant had to leave the hearing and instead relied on the respondent's hearsay evidence, the arbitrator erred when he found that, because the appellant was warned by the chairperson of the disciplinary hearing that the hearing will proceed in his absence if he leaves the hearing, the appellant waived his right to be heard.

[47] Relying on the case of *Kiggundu and Others v Roads Authority and Others*<sup>13</sup> where Damaseb P said that the '*law requires 'clear proof' of tacit waiver*' of a right Ms. Kandjella proceeded and argued that a person can only be found to have waived his or her right if there was an express waiver or by necessary and firm implications the existence of waiver is proven.

[48] I agree that in our jurisdiction the law requires a clear proof that a person has waived his or her rights. The question whether a person has or has not waived his or her rights is a factual rather than a legal question and the answer will depend on the circumstances of the case. In the present matter the circumstances are as follows. On 16

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<sup>13</sup> 2007 (1) NR 175 LC.

August 2014 the appellant removed granite off-cuts from the respondent's premises. He was charged with misconduct, he was given sufficient notice of the charges levelled against him, he understood the charges and the procedures of the hearing were explained to him. While the disciplinary hearing was in progress the appellant decided to walk out of the hearing, he was called back to the hearing, he came back participated and again walked out of the hearing. When he walked out of the hearing for the second time he was warned that the hearing will proceed in his absence. He disregarded the warning and the hearing proceeded in his absence. In my view this is the clearest proof of a waiver of rights.

[49] Ms. Kandjella argued that one must have regard to the circumstances under which the appellant walked out of the hearing. She argued that the appellant, at the commencement of the hearing indicated that he has a reasonable apprehension that the chairperson of the hearing will be biased. I am of the view that even if the appellant had a reasonable apprehension that the chairperson of the disciplinary hearing will be biased he could not just walk out of the disciplinary hearing because, if his apprehension was found to be reasonable there would in terms of s 48 be remedies available to him.

[50] Ms. Kandjella further attacked the procedural fairness of the disciplinary hearing on the basis that the appellant was not informed of the sanction that was imposed on him. She said 'the appellant was further prejudiced when not informed of the fate of his sanction and as such he could not exercise his right to appeal.' I agree that the failure to inform the appellant of the sanction imposed on him amounts to procedural unfairness. In view of the fact that I have come to the conclusion that the respondent had a fair and valid reason to dismiss the appellant it will be a travesty of justice if this Court were to order reinstatement of an employee who has clearly committed an act of misconduct. I am of the further view that this is an appropriate case where the Court can refuse a reinstatement even if it found that the dismissal of the appellant was procedurally unfair.

[51] As to the question of costs I am not convinced that the appellant acted vexatiously and I will therefore not make any order as to costs. In the result I make the following orders.

1. The appeal is reinstated.

2. The respondent's late noting of the notice to oppose the appeal and the late filing of the grounds to oppose the appeal is condoned.
3. The appeal is dismissed.
4. No order as to costs.

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SFI Ueitele  
Judge

**APPEARANCES****APPLICANT:**

Rochelle Kandjella  
Köpplinger-Boltman Legal Practitioners.  
Windhoek.

**1<sup>st</sup> RESPONDENT:**

Salomon J Jacobs  
Instructed by Du Pisani Legal Practitioners.  
Windhoek.