CASE NO.: LCA 6/2003

SUMMARY

EPSON TJIVIKUA versus THE MINISTER OF WORKS, TRANSPORT & COMMUNICATION

SILUNGWE, P
2005.07.07

LABOUR LAW – Public Service – Staff member – Misconduct – Staff member absenting himself from duty for period exceeding 30 days – Effect of section 24(5)(a) of Public Service Act 13 of 1995 – Such absence deeming staff member to have been dismissed – Permission for leave of absence can only be granted by Permanent Secretary of the office, Ministry or agency where staff member employed - Deeming provisions of section 24(5)(a) not only peremptory but also come into effect by operation of law – Hence, exercise of discretion by relevant authority by invoking provisions of section 26 of the Act does not arise – Attempt to introduce new ground to challenge Prime Minister's exercise of discretion in terms of section 24(5)(b) - Absence of notice to amend grounds of appeal – Notice serves to inform respondent of case to be met; crystallises issues; and informs Court of such issues – Such introduction of new ground impermissible.

CASE NO.: LCA 06/2003

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

EPSON TJIVIKUA **Appellant**

and

THE MINISTER OF WORKS, TRANSPORT AND COMMUNICATION
Respondent

CORAM: SILUNGWE, PRESIDENT

Heard on: 2004.06.18

Delivered on: 2005.07.07

JUDGMENT

SILUNGWE, P.: The appellant appeals against a judgment of the Windhoek District Labour Court dismissing his complaint of unfair dismissal, victimisation and unfair labour practices by the respondent.

At the outset, I would like to tender my apology to the parties and their legal representatives for the delay in the disposal of this matter. I was regrettably

taken seriously ill in September 2004 during Court recess and was thereafter placed on sick leave. I resumed duty in mid-January 2005 although I was then, and for a considerable time subsequently, far from operating at full strength. Since then, pressure of official work has militated against an earlier preparation and delivery of this judgment.

I now come to the merits of the case the facts of which are simple. At the beginning of October 1980, the appellant became an employee of the respondent. By the time that the cause of action arose in the matter, he was employed as a driver/messenger. The following facts are not in dispute. In a circular letter of July 19, 1999, addressed to all Permanent Secretaries concerning appointment and secondment of public servants to the Electoral Commission to assist with registration of voters and the electoral process and during the Presidential and National Assembly Elections, the Director of Elections wrote, *inter alia,*:

> "We acknowledge with gratitude the numerous positive responses received from various Government offices…to release public servants to assist in the forthcoming supplementary registration of voters.
>
> Kindly take note that public servants who accept the appointment and secondment to the Electoral Commission do need not to apply for any leave from work as they will be on official duty during the period in question. These officials only need to seek permission from their respective permanent secretaries for the period indicated on their appointment letter.

> Although the said officials must obtain permission from their respective Permanent Secretaries, they need not apply for leave as electoral work is considered as official duty.
>
> Secondly, we are hoping that all Government offices...are working on the compilation of their lists of staff to be seconded to the Electoral Commission for the forthcoming election.
> ..."

Consequently, the Secretary to Cabinet dispatched a circular letter addressed to, *inter alia*, all Permanent Secretaries which read:

> **"RE: SECONDMENT OF CIVIL SERVANTS TO THE DIRECTORATE OF ELECTIONS**
>
> 1. I hereby forward correspondence from Mr. J Rukambe, the Director of Elections, requesting all Accounting Officers to second staff members to the Directorate of Elections to assist with the Electoral process.
>
> 2. As discussed in the Management Committee meeting of Senior Civil Servants held on 09.09.99, Public Servants who are not nominated by their Accounting Officers may not be allowed to participate in this process.
>
> 3. For more information, please do not hesitate to contact the Directorate of Elections directly."

On September 20, 1999, the appellant applied to the respondent, through the Public Service Union of Namibia (PSUN), for secondment to the Electoral

Commission. When the respondent did not respond favourably, the appellant successfully sought leave for the period of November 29 to December 9, 1999. Although he was to resume duty on December 13, 1999, he failed to do so. On January 6, 2000, the Director of Elections surprisingly (but possibly because he had assumed that the appellant had been seconded to his Directorate when he initially worked there from November 29 to December 9, whereas in truth, the appellant had officially taken leave of absence during that period) addressed a letter to the respondent's Permanent Secretary in the following terms:

> **"RE: SECONDMENT OF MR EPSON T. TJIVIKUA**
>
> 1. Approval was granted by your Ministry for the secondment of Mr E. Tjivikua to assist the Electoral Commission during the Presidential and National Assembly Elections 1999.
>
> 2. His services are still urgently required at the Office of the Electoral Commission till 31 January 2000. It will be appreciated if approval can be granted to release Mr E. Tjiviakua for the above-mentioned period to the Electoral Commission.
>
> 3. Your assistance will be highly appreciated."

In his reply of January 25, 2000, the respondent's Permanent Secretary indicated in no uncertain terms that no approval of the appellant's secondment to the Electoral Commission had ever been granted as alleged; and drew attention to the provisions of section 24(5)(a)(i) (but I will include

sub-paragraph (ii) as this is relevant) of the Public Service Act No 13 of 1995 (the Act) which read:

> "24(5)(a) Any staff member who, without permission of the Permanent Secretary of the office, ministry or agency, in which he or she is employed-
>
> (i) absents himself or herself from his or her office or official duties for any period exceeding 30 days; or
>
> (ii) absents himself or herself from his or her office duties and assumes duty in any other employment;
>
> shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of employment."

It is equally apposite to add paragraph (b) of section 24 (5) which provides that:

> "The Prime Minister may, on the recommendation of the Commission, and notwithstanding anything to the contrary contained in any law, reinstate any staff member so deemed to have been discharged in the Public Service in the post or employment previously held by him or her, or in any other post or employment on such conditions as may be approved by the Prime Minister on the recommendation of the Commission, but with a salary or scale of salary or grade not higher than the salary or scale of salary or grade previously applicable to him or her, and in such a case the period of his or her absence from his or

> her office or official duties shall be deemed to have been absence on vacation leave without pay or leave on such other conditions as may be approved by the Prime Minister on the recommendation of the Commission."

It is further not in dispute that the appellant was at all material times a staff member of the respondent; that he was neither seconded to the Directorate of Elections by the respondent's permanent secretary nor did his name appear on a list of staff members nominated by the respondent for secondment to the Directorate of Elections; that he kept away from his official duties (and/or his office) for a period in excess of 30 days; and that, during that period, he was working for the Directorate of Elections. Mr Ueitele, appearing for the appellant, concedes that the appellant had no permission from the respondent's Permanent Secretary and that, as such, the statutory requirements were (in strict terms) not met. In point of fact the following confirmation appears in paragraph 1.7.2 of the appellant's heads of argument:

> "The evidence also established that other employees were seconded by the Ministry to go and work at the Directorate of Elections. There is no plausable explanation on record why the Appellant's request to be seconded to the Directorate of Elections was treated differently from the other employees."

The primary bone of contention is whether the appellant had been granted permission by a Ms Britz, his then immediate supervisor, to carry on working

at the Directorate of the Elections. Mr Ueitele argues that his client did have such permission. This is indeed echoed in paragraph 1.7.3 of the appellant's written heads of argument which reads in part:

> "On the appellant's version, he then approached his immediate supervisor, one Britz, and informed her that he is at the Directorate of Elections and wished to continue there and was allowed to do so. That evidence was never displaced by the respondent. In fact, Ms Britz was never called as a witness by the respondent. The evidence of the appellant that he had authority to continue to work at the Directorate of Elections remains uncontraverted and must be accepted."

On the contrary, a reading of certain parts of the proceedings in the District Labour Court, referred to by Mr Ueitele (pp.140-141), reveals the following:

> Q. Now after the 09th December why didn't you come back to work at the Ministry?
> A. I came back three times (indistinct) and I came to see my supervisor to tell him.
>
> Q. To tell her what?
> A. So I told her that I was at the elections department of (indistinct).
>
> Q. Who is this supervisor?
> A. Britz.
>
> Q. What did she say?
> A. She (sic) said yes.

Q. She allowed you to be at the Elections Directorate is that what you're saying?

A. She never refused and never showed that she didn't want (indistinct), I even went to Mr Kauria (indistinct).

...

Q. And did Britz know during this time where you were?

A. Yes, she knew where (sic) I was.

Q. Did you know that you were not allowed to be at the Directorate of Elections?

A. So they did not come up with the truth to allow me. That's why (indistinct).

Q. Did anybody while you were at the Directorate of Elections call you and say Mr Tjivikua you are illegally at the Directorate, we want you to come back? Did you get any message of that kind?

A. No.

It is evident from the foregoing excerpt that, although Ms Britz was apparently aware of the appellant's whereabouts after the expiry of his official leave, she reportedly remained non-committal either way, on the critical allegation that she had given the appellant permission to work at the Directorate of Elections. Mr Marcus contends, on behalf of the respondent, that Ms Britz did not give permission as alleged. It is clear that, on the appellant's own version, one can not reasonably say that Ms Britz gave him permission as alleged. However, even if the allegation were true (but, as previously shown, it was not) this would merely have brought cold comfort to the appellant as the alleged permission could only have been validly given

by the respondent's permanent secretary, in terms of the law. In any event, not only is there unassailable evidence on record to show, but there is also no dispute, that the appellant never obtained permission from the respondent's Permanent Secretary. In reality, he merely took French leave.

Mr Ueitele further argues that, in the event of the Court finding that the appellant had no authority to be at the Directorate of Elections then, it was an improper exercise of the respondent's power under section 24(5)(a) of the Act to wait until the expiry of the period of 30 days in order to dismiss him for absconding, when it was possible and reasonable to charge him with misconduct under section 26 of the Act. The authorities, he continues, had a discretion to apply either section 24(5)(a) or section 26. My understanding of the point made here is that the respondent's application of section 24(5)(a) was an improper exercise of its discretion as it could have charged the appellant with misconduct prior to the expiry of the 30 day period stipulated in section 24(5)(a). This, it appears to me, smacks of a bold attempt to get the appellant off the hook that he had consciously swallowed, obviously because of an alluring monetary bait that he had spotted at the Directorate of Elections. The deeming provisions of section 24(5)(a) of the Act are not only peremptory but also come into effect by operation of law; and, in point of fact, the respondent's Permanent Secretary had drawn these provisions to the attention of the Director of Elections in reply to the latter's request to sanction the appellant's stint at the Director of Elections. As both the

Director of Elections and the appellant were apparently anxious to regularise the appellant's position at the Directorate of Elections, it is at best likely, and at least possible, that the appellant was informed, or that he became aware, of the contents of that reply. In any case, the appellant can not legitimately point an accusing finger at the respondent's Permanent Secretary for having allowed the law to take its course. And so, there was no wrong-doing whatsoever on the part of the respondent. For ease of reference, section 26 provides (in so far as it is relevant) that:

> "26 (1) If a permanent secretary has reason to believe that any staff member in his or her office, ministry or agency is guilty of misconduct, he or she may charge the staff member in writing under his or her hand with misconduct.
>
> (2)(a) The permanent secretary concerned may, on the recommendation of the Commission, suspend any staff member at any time before or after he or she is charged under this section if the permanent secretary has reason to believe that the member is guilty of misconduct: Provided that the staff member shall be suspended only where the nature of the misconduct dictates that the staff member be removed from his of her duty or if the possibility exists that the staff member may interfere or tamper with witnesses or evidence.
>
> …."

A close scrutiny of section 24(5)(a) of the Act demonstrates, as previously shown, that the deeming provisions of that section come into effect by

operation of law. See: *Mwellie v Ministry of Works, Transport & Communication and Another* 1995 (a) BCCR 1118 (NmH) at 1142E-F. Hence, the exercise of discretion by any relevant authority to invoke the provisions of section 26 of the Act does not arise. Moreover, it is apparent in this regard that no hearing was either necessary or contemplated by the legislature. See: *Njathi v Permanent Secretary, Ministry of Home Affairs* NLLP 2002 (2) 34 at 39 (2nd paragraph from the top); 1998 NR 167 at 171G. Accordingly, the principle of *audi alterem partem* is of no application to the present case. In *Njathi's* case, *supra*, Strydom, P (as he then was) aptly made the following observations at 38; 1998 NR at 170I-171A:

> "As was pointed out by Hugo, J. in *Mkhwanazi v Minister Agriculture and Forestry. Kwazulu*, 1990 (4) SA 763 at 768 (D&C) the words "absents himself" clearly imports an element of volition on the part of the absentee. The deeming clause terminating the employment comes to the rescue of the employer who was placed in an invidious position of not knowing why and how long such absence would continue, to again fill the position so that the work can be done. In my opinion the termination is final unless and until the provisions of sub-section (b) are invoked and a discretion is exercised by the Prime Minister on the recommendation of the Commission."

Finally, an attempt has been made by Mr Ueitele during oral argument to introduce a new ground of appeal, in the absence of an application to amend the notice of appeal. It is alleged that there was an improper exercise of discretion by the Prime Minister in terms of section 24(5)(b) of the Act. But

Mr Marcus's resistance to that attempt is both prompt and spirited. He points out that it is a trite principle of procedural fairness that a party who intends to amend his or her notice of appeal is required to give due notice thereof to the other party.

Indeed, Mr Ueitele's concession does not come to me as a surprise. This is so because the fundamental reasons underlying the requirement to file an amended notice of appeal that introduces a new ground (or new grounds) of appeal are salutary. Evidently, such a notice serves to inform the respondent of the case it is required to meet; to crystallize the issues; and to inform the Court of Appeal of such issues. See: *S v Ngonga* 2004 (10) NCLP 80 at 89-90. *In casu*, no notice of amendment of the grounds of appeal has either been filed or applied for. In other words, no foundation whatsoever has been laid for the introduction of the new ground. In the circumstances, any such introduction would be impermissible.

In the final analysis, this appeal fails. Accordingly, it is dismissed.

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SILUNGWE, P.

ON BEHALF OF THE APPELLANT: **Mr S. F. I. Ueitele**

Instructed By: **Conradie & Damaseb**

ON BEHALF OF THE RESPONDENT: **Mr N. Marcus**

Instructed By: **Government Attorneys**