CASE NO. LCA 31/2005

REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

THOMAS ARNOLDUS GOUWS
APPELLANT

and

THE OFFICE OF THE PRIME MINISTER
RESPONDENT

CORAM: HOFF, J

Heard on: 18 July 2008

Delivered on: 29 April 2011

JUDGMENT

HOFF, J: [1] This is an appeal against the "entire judgment" of the district labour court dismissing the complaint of the appellant.

[2] The appellant was employed by the respondent as a chief efficiency analyst. The respondent dismissed the appellant by means of a letter dated 9 December 2003 which reads as follows:

> "Dear Mr Gouws
>
> Since you have absented yourself from your official duties for a period exceeding thirty (30) days (5 November 2003 until 9 December 2003) without permission or without informing your supervisor or any other senior member in this Office, you are deemed to have been discharged from the public service in terms of Section 24 (5)(a)(i) of the Public Service Act, 1995 (Act 13 of 1995) with effect from 5 November 2003.
>
> Yours sincerely
>
> George Simataa
> Acting Deputy Secretary to Cabinet."

[3] It is common cause that there was no disciplinary hearing.

The appellant lodged a complaint of unfair dismissal with the district labour court and claimed as relief "reinstatement retrospectively". This claim was unsuccessful in the district labour court.

[4] Section 24 (5) (a) (i) of the Public Service Act, Act 13 of 1995 reads as follows:

> "Any staff member who, without the 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;
>
> 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."

[5] If the provisions of section 24 (5)(a)(i) are compared with the letter (*supra*) addressed to the appellant, then it is apparent that the words "without permission or without informing your supervisor or other senior staff member in this office" are not reflected in the wording of section 24 (5) a)(i).

[6] In my view the words in the letter referred to (*supra*) are superfluous and do not form part of the jurisdictional facts which need to be established in order for the deeming provision to come into operation.

[7] The coming into operation of the deeming provision is not dependant on the taking of any discretionary decision but by operation of law.

[8] Section 24 (5)(b) reads as follows:

> "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 …"

[9] The Commission referred to in section 24 (5)(b) is the Public Service Commission established in terms of Article 112 (1) of the Namibian Constitution.

Ruling by Chairperson in district labour court

[10] The chairperson of the district labour court in his ruling stated that the respondent "ought to have excluded the Sundays of such a period of absence, in which event the days of such absence would have been plus minus 29 days".

[11] The chairperson further stated that the conduct of the complainant constituted a misconduct in terms of section 25 (1)(o) of the Public Service Act and that the complainant should have been charged with such misconduct in a disciplinary hearing. Section 25 (1)(o) provides that any staff member shall be guilty of misconduct if he or she absents himself or herself from his or her office or official duties without leave or valid cause.

[12] The district labour court found that since there was no prejudice to the appellant (i.e. the appellant in any event was guilty of misconduct in terms of section 25 (1)(o), the sanction of dismissal should be upheld.

[13] It is apparent from the aforementioned that though the chairperson in the district labour court found that the respondent had not proved the jurisdictional facts that the appellant had been absent from office for a period exceeding 30 days without permission, he nevertheless was guilty of misconduct in terms of section 25 (1)(o) and that the appropriate sanction for this misconduct was a dismissal.

The testimony in the district labour court

[14] Mr Jacobus Hermanus Brandt, deputy-director for Resource Management in the Directorate Management Services attached to the Office of the Prime Minister testified that he was the direct supervisor of the appellant who was employed as a chief efficiency analyst in that office. His evidence was that during the period 5 November 2003 until 9 December 2003 (both days included) the appellant was not at his office. He was instructed by senior management to keep a record of all activities regarding the appellant in the office. As a result of this he compiled a document where the occurrences of each day during afore-mentioned period was recorded by himself based on communications (as per short message service on

cellphones, hereinafter referred to as “sms”) from the appellant to himself and to a certain Mr Isaaks employed in the same office as a director of management.

He testified on which days messages were received from the appellant and the content of such messages as well as the days on which no such messages had been received from the respondent. He testified with reference to afore-mentioned period that he himself was in the office, that he looked at the attendance register and that he looked at the “comings and going”, i.e. whether the appellant was in his office or not and that he recorded those observations.

[15] On 11 November 2003 the appellant did not come to office but sent a sms to Mr Isaaks. In the internal memorandum drafted by himself (i.e. Mr Brandt) it appears that on 11 November 2003 that a reminder on uncompleted projects was still under the door of the appellant at 17h00.

It appears from the attendance register that someone in the space for 11 November 2003 wrote the words: “were here for the whole day”. The practice as testified by Mr Brandt and reflected in the attendance register is that a member of the personnel would enter the time and arrival and next to it would append his or her signature and in the afternoon would state the time of departure together with his or her signature.

On 12 November 2003 he found a note in the attendance register (referred to *supra*) that the appellant was there on 11 November 2003 for the whole day. However nobody saw the appellant that day and he suspected that the appellant came in after hours. A note which was left by himself was still hanging from appellant’s door stating that the appellant did not came in for the day. He himself wrote in the attendance register that the appellant was not in his office on 11 November 2003.

On the 13th of November 2003 he received a sms from the appellant stating that someone broke his (i.e. appellant’s) office door lock and that he (i.e. the witness) should give him the name of such person since he was contemplating registering a

case. The appellant in the sms stated that he was still busy with work that involves an official process and that he was therefore on duty. Appellant did not come to office that day. Mr Brandt testified that he went each day to the secretary of the Directorate of Management (where the attendance register was kept) to see whether personnel checked in and out. He tried on several occasions to call the appellant but appellant never answered his telephone.

Mr Brandt testified that during the period 5 November 2003 until 9 December 2003 his office did not receive any application from the appellant regarding sick leave or for vacation leave. He testified that a message by the appellant in which he informed the office of the reason for his absence from office, is no authorisation to stay away and drew a distinction between information provided by the appellant regarding his whereabouts and authorisation granted to the appellant to stay away from his office.

It appears from the messages sent to Mr Brandt and Mr Isaaks that the appellant regarded himself to be on official duty when, as he informed them, he was busy drafting a formal letter of protest to the Prime Minister, or when he was "officially" in a conference with his "advisors".

[16] During cross-examination, by a Mr Gouws who appeared on behalf of the appellant, Mr Brandt was confronted with a letter addressed to the Deputy Secretary to Cabinet from the appellant dated 11 December 2003 which reads as follows:

> "I am placed on sick leave by my psychiatrist, for a three month period, from mid October 2003 to mid January 2004. A leave application in this regard is in the possession of the Personnel Office, of which Ms de Klerk is in charge."

[17] The only letter that I could trace in the bundle of documents (Ex A) handed in at the district labour court hearing was a referral letter from Dr H K Weimann to Dr K Truter dated 22 September 2003 in which it was stated *inter alia* that the appellant

suffers from “a major depression episode”. It does not state that the appellant had been booked-off for any period.

[18] During cross-examination in the district labour court it was never put as a defence, and understandably so if one has regard to the referral letter from Dr Weimann, that the appellant was on sick leave for the period mentioned in his letter addressed to the Deputy Secretary to Cabinet. The appellant also never denied that he had been absent from office from 5 November 2003 until 9 December 2003. The cross-examination concentrated mainly on the wording of the letter of dismissal regarding the fact that he had not informed his supervisors of his whereabouts, that being the reason for his dismissal, and the contention that there was no proper supervision of the appellant by his supervisors and that they had in terms of the provisions of the Public Service Act, been negligent themselves in this regard.

The appellant elected not to testify in the court *a quo*.

Submissions by counsel appearing on behalf of the appellant

[19] It was submitted by Mr Strydom, who appeared on behalf of the appellant, in this appeal, that the presiding officer in the court *a quo* on the version presented to the court by the respondent, found that the respondent did not prove the jurisdictional facts necessary to invoke the deeming provisions contained in section 24 (5)(a)(i) of Act 13 of 1995, since the court *a quo* found that the appellant was absent without leave for only 29 days.

[20] It was further submitted on behalf of the appellant that, on the version of the respondent, the appellant was at his office on 11 and 13 November 2003. If this is

accepted then it interrupted the period, 5 November 2003 until 9 December 2003, during which the appellant was allegedly away from his office.

[21] Furthermore it was submitted that in terms of the report made by Mr Brandt it was calculated that the appellant had been away for only 23 days.
Mr Strydom submitted that the Rules of the district labour court defines "number of days" as exclusive of the first, inclusive of the last, and exclusively of every Saturday and Sunday. Therefore by respondent's own the calculation the deeming provision contained in section 24 (5)(a)(i) could not come into operation on 9 December 2003 but only 7 working days later.

[22] Mr Strydom submitted that once the court *a quo* found that the provisions of section 24 (5)(a)(i) are not applicable then one falls back on substantive and procedural fairness and in this context sections 45 and 46 of the Labour Act, Act 6 of 1992 must be complied with.

Interpretation of 'days" in terms of section 24 (5)(a)(i) of Act 13 of 1995

[23] It is necessary to consider and interpret in the first instance what is meant by "days" in section 24 (5)(a)(i) of the Public Service Act 3 of 1995.
There is no definition of a day or days in the Public Service Act 13 of 1995. It was submitted that in terms of the district labour court rules "days" exclude Saturdays and Sundays. I do not agree. The aim of the Rules in the district labour court is to regulate the conduct of proceedings in the district labour court and the definition of a day in those Rules cannot as such be transplanted in determining '"days" in a totally different Act i.e. the Public Service Act.
Section 4 of the Interpretation of Laws Proclamation 37 of 1920 provides as follows:

> "When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day shall happen to fall on a Saturday or on any other day appointed by or under the authority of a law as a public holiday, in which case the time shall be reckoned exclusively also of every such Sunday or pubic holiday."

[24] Section 4 of the Interpretation Act, Act 33 of 1957 is similarly worded.

[25] In terms of section 4 of the Proclamation only in the case where the *last day* falls on a Sunday or public holiday such Sunday or public holiday is to be excluded in the computation of "days".

[26] In *S v Kashire 1978 (4) 166 (SWA) at 167 F* the following was said regarding the computation of "days" mentioned in section 316 of the Criminal Procedure Act 51 of 1977:

> "The days mentioned in this section must surely be computed with reference to section 4 of the Interpretation Act 33 of 1957, i.e. inclusive of Saturdays, Sundays and public holidays but exclusive of the first day and inclusive of the last day."

(See also *Rosslee v Rosslee 1971 (4) SA 48 (O) at 497 (F)*).

[27] The magistrate in the court *a quo* erred when he excluded Sundays in the computation of the number of days the appellant was absent from office.

[28] The correct computation of days for the period 5 November 2003 until 9 December 2003, in my view, would be as follows: the first day i.e. 5 November is excluded. When counting the days 6 November would be day one. The last day 9 December must be included. If I follow this method then the days in afore-mentioned period (i.e. 5 November – 9 December) are 34 days.

[29] Section 24 (5)(a)(i) of the Public Service Act does not stipulate a period exceeding 30 “consecutive” days but it is common cause that the days referred to in the section refers to “consecutive” days.

The interruption of the period 5 November 2003 until 9 December 2003

[30] Regarding the submission that on two days (i.e. 11 November 2003 and 13 November 2003) the appellant attended his office the following needs to be emphasised: there is simply no persuasive evidence to this effect on record. An unknown person (most probably the appellant himself) wrote in the attendance register “were here for the whole day”. Under “Remarks” in the attendance register Mr Brandt himself wrote “did not show up!” The unchallenged evidence by Mr Brandt was that the appellant did not come to the office but only sent a sms to Mr Isaaccs. A reminder regarding certain projects was still under door of the appellant at 17h00. If he had been at the office for the whole day one would have expected that the appellant would have seen and would have removed such a reminder.

[31] Mr Brandt testified that on 13 November 2003 the appellant did not come to office. This was also uncontested by the appellant (by his failure to testify). The submission by counsel that Mr Brandt received a sms from the appellant that someone had broken his (i.e appellant’s) office door lock, cannot in the absence of any testimony in support thereof, assist the appellant in any manner to cast doubt on the testimony of Mr Brandt that the appellant was not at his office. A sms simply conveys information and cannot as such be elevated to proof of the existence of a fact in dispute.

[32] I am satisfied on the evidence presented on behalf of the respondent that there was *prima facie* proof that the appellant was not at his office on the afore-mentioned days (i.e. 11 and 13 November 2003).
The submission (*supra*) that these two days interrupted the computation of the number of days can thus not be accepted.

The absence of the appellant on "official duties"

[33] It was also submitted on behalf of the appellant since various messages sent by the appellant stated that he was busy with official duties and there was no proof to the contrary, that it must be accepted that the appellant was indeed busy with "official duties".

[34] This submission was advanced on the basis that in terms of section 24 (5)(a)(i) of the Public Service Act a staff member who *inter alia* absents himself or herself from "official duties" for any period exceeding 30 days shall be deemed to have been discharged from the Public Service. Since there was no proof that the appellant had not been busy with official duties the deeming provision cannot be relied upon by the respondent, so it was submitted.
I have indicated (*supra*) that such a message cannot be elevated to proof of a disputed fact. It is common cause that the appellant was stationed in Windhoek.

[35] The evidence further was that Mr Brandt was aware of the fact that the appellant was in the process of instituting a grievance proceeding for the attention of the Office of the Prime Minister. Mr Brandt regarded this process not as official duties. The appellant was a senior civil servant with many years experience and to suggest that the appellant was busy with "official duties" in Windhoek *away from his office* for such an extended period is as unusual as it is unconvincing.

[36] I agree with the sentiment expressed in *Njathi (infra)* at p. 171 J – p. 172 A namely that *"even if some or other necessity brings about the absence of an employee from his or her duties, one can hardly envisage circumstances which would keep an employee absent for a period exceeding 30 days"*.

[37] Section 24 (5)(a)(i) *inter alia* reads: "from his or her office for official duties for any period exceeding 30 days". In my view, and for the reasons mentioned the appellant absented himself *from his office* for a period exceeding 30 days namely 34 days.

[38] I am satisfied on the evidence presented in the court *a quo* that the magistrate erred on the facts and on the law by finding that respondent failed to prove the jurisdictional facts namely (a) that the respondent absented himself from his office or official duties for a period exceeding 30 days; and (b) that such absence was without permission.

[39] The appellant in his notice of appeal (paragraph 2) contended that section 24 (5)(a)(i) of the Public Service Act is intended to be used in cases where the employee absconds, disappears, and where the employer has no idea of his or her whereabouts and that no communication lines by whatever means can be established with such an employee, and not in those instances (like his case) where a communication link was established.

[40] I disagree that the provisions of section 24 (5)(a)(i) cover only those instances where an employee absconds, disappears or where the employer has no idea of such employee's whereabouts.

I am of the view that the provisions of section 24 (5)(a)(i) are also applicable in the circumstances of the present case.

In *Njathi v The Permanent Secretary, Minister of Home Affairs 1998 NR at 170* Strydom JP (as he then was) stated that the *"deeming clause terminating the employment comes to the rescue of the employer who was placed in the 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 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".*

[41] Even though the appellant informed the respondent of his whereabouts respondent never knew for how long such absence would continue. It is clear from the record that this period (5 November until 9 December) was not the first period which the appellant had absented himself from office without the necessary permission. Indeed I gained the impression that the appellant was an habitual absentee.

It is further significant that the appellant, in spite of various previous letters addressed to the Office of the Prime Minister or to the Deputy Secretary to Cabinet regarding his grievances, failed to invoke the provisions of section 24 (5)(b) of the Public Service Act after her had been informed of his dismissal.

[42] On the question whether a dismissal in terms of section 24 (5) can be said to be for a valid reason and a fair procedure as required by the Labour Act 6 of 1992 Strydom JP (as he then was) stated on p. 173 in *Njathi (supra)* as follows:

> "Bearing in mind the circumstances which gave rise to the enactment of s. 24(5) and the purpose thereof, I have come to the conclusion that the termination of employment in terms of the section is for a fair and valid reason and in accordance with a fair procedure".

The contention that appellant's absence was accepted and/or condoned

[43] It was submitted that since the respondent had informed his superiors the reason for his absence namely that he was busy with an official protest letter and since they did not query him or did they do any investigation to rebut appellant's version, they accepted and/or condoned his absence.

[44] It is not disputed that the protest letter was being drawn up by the respondent in his private capacity. This much is clear from a letter (dated 5.12.2003) addressed to the Deputy Secretary to the Cabinet by the appellant.

[45] In this letter he stated that he regarded himself as a professional career civil servant with nearly 25 years of experience, that his career was taken away from him in 1996 by "illegitimate means" and that he was claiming his career back. It is also apparent from his latter that the proverbial thorn in the flesh of the appellant was that he qualified in late 1995 for a promotion "in-turn". He was not so promoted but instead someone else who according to appellant did not satisfy the required minimum prescribed years of experience, was promoted. Appellant stated that legal action was contemplated at that stage but he eventually opted to reach a negotiated settlement with the Office of the Prime Minister.

[46] It is apparent from the internal memorandum and from the *viva voce* evidence of Mr Brandt in the district labour court that the absence of the respondent was never accepted and/or condoned by senior management.

[47] Mr Brandt testified that the respondent had previously been warned regarding his absenteeism and had been told that his "stay aways" were not official and that it was unauthorized. Mr Brandt further testified that the accepted view in the Office of the Prime Minister was that a sms from an employee did not constitute authorisation to stay away from office.

[48] In any event it was never put to Mr Brandt during cross-examination that the respondent accepted and/or condoned the absence of the appellant.

Conclusion

[49] I agree with Mr Strydom that the magistrate in the district labour court erred by finding that the respondent was guilty of misconduct in contravention of the provisions of section 25 (1)(o). The appellant was never charged with such misconduct, did not appear at a disciplinary hearing on such a charge and it would have been procedurally unfair, having regard to the provisions of section 45 of the Labour Act 6 of 1992, to have confirmed his dismissal on this basis.

[50] I am of the view for the afore-mentioned reasons, that the appeal against the dismissal of the claim of the appellant by the presiding officer in the district labour court should be dismissed.

[51] In the result the following orders are made:

1. The appeal is dismissed.

2. The appellant is deemed to have been discharged from the Public Service on account of misconduct in contravention of the provisions of section 24 (5)(a)(i) of the Public Service Act, Act 13 of 1995.

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HOFF, J

ON BEHALF OF THE APPELLANT: **ADV. STRYDOM**

Instructed by: **METCALFE LEGAL PRACTITIONERS**

ON BEHALF OF THE RESPONDENT: **MS KATJIUONGUA**

Instructed by: **GOVERNMENT ATTORNEY**