



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: LCA 13/2013

In the matter between:

LYDIA KANDETU

APPELLANT

and

KARIBIB TOWN COUNCIL

RESPONDENT

Neutral citation: *Kandetu v Karibib Town Council* (LCA 13/2013) [2014] NALCMD 15 (16 April 2014)

Coram: UNENGU AJ

Heard: 7 February 2014

Delivered: 16 April 2014

Flynote: Labour Law – Absenteeism – Section 29(4)(a) of the Local Authorities Act 23 of 1992 – Section providing that absence from duties without permission for a period exceeding 30 days is deemed a discharge from service on account of misconduct – Appellant absented herself from duties for more than 30 days without permission – Discharged – Referred complaint of unfair dismissal to the Office of the Labour Commissioner – Unsuccessful – Appeal against Arbitrator award dismissed on appeal.

Summary: The appellant, Ms Lydia Kandetu who was appointed and worked as the Chief Executive Officer for the Town Council of Karibib was dismissed from her office on account of misconduct in terms of section 29(4) of the Local Authorities Act, 23 of 1992. Unsuccessful in the arbitration proceedings held before an arbitrator, she appealed the finding, but on appeal, the Labour Court dismissed her appeal and upheld the arbitrator's finding.

ORDER

- (1) The appeal is dismissed.
- (2) The finding of the arbitrator is upheld.

JUDGMENT

UNENGU, AJ:

[1] This is an appeal against an arbitral award in favour of the respondent by the arbitrator in terms of s 89(1)(a) of the Labour Act¹.

[2] Initially, the appellant appealed against her dismissal and issues relating to her leave days and the deductions made from her salary by the respondent. However, during the hearing of the appeal, the appellant has decided not to pursue the issues relating to the leave days and the deductions from her salary but to proceed with the dismissal alone. With the abandonment of the appeal pertaining to the leave days and the deductions from her salary as such, it was also the end of the cross appeal of the respondent on those issues.

¹ Act 11 of 2007

[3] The appellant was employed by the respondent as its Chief Executive Officer from 5 November 2006 for a five year period until 1 November 2011 when her contract was extended for another five year period.

[4] While attending a workshop in Mariental during February 2012, the appellant fell sick for which she was booked off by a doctor for a certain period to recuperate.

[5] On her return back to Karibib, Ms Kandetu submitted an application for vacation leave starting from 2 April 2012 to 21 May 2012 which she has indicated (in the form) as leave for 31 days, my own calculation brings me to a total of 33 days. The Management Committee, on 27 March 2012 resolved not to approve the leave application based on past absence of the appellant from office starting January 2012.

[6] Nevertheless, the disapproval of her leave did not deter the appellant from going on the intended leave. She proceeded and left for leave as from 2 April 2012 until 21 May 2012 without permission from the Management Committee. The appellant was aware that her application was not approved because on 27 March 2012 when the resolution not to grant the leave was taken, she was still in office.

[7] On 18 May 2012 the appellant was informed by letter signed by Mr Lipinge, the Chairperson of the Council of the Karibib Town Council that she was deemed to have been discharged from the establishment of the Town Council with effect from 2 April 2012 as a result of her being absent from office without approval by virtue of the provisions of s 29(4)(a)(i)(ii) of the Local Authorities' Act².

[8] In the same letter, she was referred to section 29 (4)(b) if she wished to be reinstated in her position. Section 29 (4)(a) and (b) of the Act provides as follows:

'4 (a) An officer or employee who absents himself or herself, without permission of the chief executive officer from his or her duties for any period exceeding 30 days, shall be

² Act 23 of 1992 (The Act)

deemed to have been discharged from the service of the local authority council on account of misconduct with effect from the date immediately after his or her last day of attendance at his or her place of duty.

(b) A local authority council may reinstate an officer or employee deemed to have been discharged in terms of paragraph (a), in the service of the local authority council in his or her former or any other post or position on such conditions as may be determined by the local authority council were-upon the period of his or her absence from duty shall be deemed to have been absence on vacation leave without pay or leave on such other conditions as may be determined by the local authority council.'

[9] The appellant opted not to make use of the option of applying for reinstatement in terms of section 29(4)(b) offered by the Council but instead decided to refer the dismissal to the Office of the Labour Commissioner as a dispute for unfair dismissal.

[10] The Labour Commissioner designated Mr Otto Angula as an arbitrator to arbitrate the dispute. On 14 January 2013 and in Swakopmund, Mr Angula, after hearing evidence presented on behalf of both the appellant and the respondent, dismissed the complaint and issued an award in favour of the respondent in which he found amongst others that the appellant was fairly dismissed and confirmed the finding of the disciplinary hearing.

[11] It is this finding of the arbitrator Ms Kandetu is not happy with and appealing against on the points of law and grounds hereunder:

'The Questions of law appealed against in the Arbitrator's award are as follows:

1. The Arbitrator erred in law by concluding that the Appellant was not entitled to a hearing before her dismissal.
2. The Arbitrator erred in law by concluding that there was no need for a disciplinary hearing before the termination of the services on the Appellant.
3. The Arbitrator erred in law by concluding that the Appellant was fairly dismissed.

4. The Arbitrator erred in law by incorrectly interpreting the Respondent's Personnel Rules with regard to the accumulation of leave days.

5. The Arbitrator erred in law by concluding that the Appellant is entitled to payment of only 60 (sixty) days leave credit amounting to N\$25,242.02 (Twenty-Five Thousand Two Hundred and Forty-Two Namibian Dollars and Two Cents).

The grounds of appeal are as follows:

1. The Arbitrator erred in law in concluding that the Appellant deserted her employment considering the fact that the Respondent knew that the Appellant went on leave and that the respondent knew about her whereabouts as there was contact between the Appellant and Respondent during the period of absences.

2. The Arbitrator erred in having disregarded the fact that the witnesses of the Respondent contradicted one another and were evasive and are not credible witnesses.

3. The Arbitrator erred in law in that he failed to recognise the fact Mr Ya Otto, the main witness for the Respondent, lied with regard to the circumstances under which the Appellant was allegedly informed that her leave was not approved.

4. The Arbitrator erred in law in that he failed to recognise the fact the Mr Ya Otto, the main witness for the Respondent lied that the Employment Contract of the Appellant was drafted by the Appellant self, whilst there is uncontested evidence to the contrary.

5. The Arbitrator erred in law by having denied the Appellant the opportunity to be heard as provided for by the Constitution of the Republic of Namibia. The Respondent did not comply with the rules of natural justice.'

[12] Mr Tjitemisa who appeared for the appellant at the arbitration proceedings still appears for her in the appeal proceedings while Mr Wylie is representing the respondent.

[13] Factually, there is not much in dispute between the parties. It would seem that Ms Kandetu does not dispute that she was absent from her duties or office for more than 30 days without permission from her employer, the Town Council. Her

complaint lies in the fact that she was dismissed without affording her a hearing before dismissing her from office.

[14] Therefore, the failure of the respondent to conduct a disciplinary hearing into her absence from office, constituted an unfair dismissal, she claims. This is also the view of Mr Tjitemisa, her counsel, although he submitted in his main heads of argument and oral submissions that his client was under the impression that her application was approved.

[15] As the Chief Executive Officer of the Town Council, Ms Kandetu was a responsible person and as such, it was irresponsible on her part to go on leave without making sure that her leave application has been approved by her employer, and not to assume that her leave would be approved.

[16] The arbitrator, in his award considered the complaint he was seized with to adjudicate upon, the background information and the evidence presented before him by both parties. After assessing the evidence and relevant authorities like section 29(4) of the Local Authorities Act and the Council's Personnel Rules, the arbitrator concluded that the appellant was fairly dismissed as no evidence was presented before him indicating that the appellant's application for leave was approved. In my view, this finding was correctly made.

[17] In the *Njathi v Permanent Secretary, Ministry of Home Affairs*³ the same problem came before the Labour Court with Strydom, P presiding. In the *Njathi* matter the services of Njathi were terminated by his employer, the Ministry of Home Affairs following the provisions of section 24(5) of the Public Service Act⁴ which provides as follows:

(a) Any staff member who, without permission of the permanent secretary of the office, ministry or agency in which he or she is employed –

³ 1998 NR 167

⁴ Act 13 of 1995

(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 or official duties and assumes duty in any 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 employment.

(b) The Prime Minister may, on the recommendation of the Commission, any 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 shall be deemed to have been absence on vacation leave without pay or leave on such conditions as may be approved by the Prime Minister of the recommendation of the Commission'.

[18] As in this appeal, it was also not disputed in the *Njathi* matter that the appellant (Njathi) was absent from his duties for more than 30 days without permission. That being the case, the deeming clause provided in section 24(5)(a) was held to become operative once established that the employee absented himself from his or her office for a period exceeding 30 days and that such absence was without permission.

[19] Mr Heathcote, who represented the appellant in the *Njathi* matter submitted that in order to constitute a fair procedure and a fair and valid reasons for dismissal, in terms of the Labour Act it was incumbent upon the respondent (Ministry of Home Affairs) to hold a hearing also where section 24(5) applies.

[20] Strydom, P disagreed with Mr Heathcote and said⁵: 'Bearing in mind the circumstances which gave rise to the enactment of section 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'.

⁵ At 172 B-C

[21] Section 24(5) of the Public Service Act, was again the subject matter in an appeal matter of *Gouws v Office of the Prime Minister*⁶ before *Hoff, J* which appeal *Hoff, J* dismissed following the decision of Strydom, P in the *Njathi* matter.

[22] Section 29(4)(a) and (b) of the Local Authorities Act, is almost a copy of section 24(5)(i-ii) of the Public Service Act, therefore there is no reason, in my opinion, why the principles established and applied in the *Njathi* and *Gouws* matters cannot be applicable in the instant appeal.

[23] The deeming clause in section 29(4)(a) of the Labour Authorities Act is therefore for a valid purpose and would come into operation once it has been established that an officer or employee absented himself or herself without permission from his or her duties for any period exceeding 30 days, which is the position in this appeal. Ms Kandetu was absent from her duties without permission from her employer for a period exceeding 30 days, which resulted in her discharge in terms of the section.

[24] That being the case, the finding of the arbitrator that Ms Kandetu was fairly dismissed, is correct and should not be interfered with. In the result, I make the following order:

- (1) The appeal is dismissed.
- (2) The finding of the arbitrator is upheld.

⁶ 2011 (2) NR 427

9
9
9
9
9

E P Unengu
Acting Judge

APPEARANCES:

APPELLANT

Mr J N Tjitemisa
Of Tjitemisa & Associates, Windhoek

RESPONDENT:

Mr T Wylie
Instructed by Engling, Stritter & Partners, Windhoek