

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO.: HC-MD-LAB-APP-AAA-2023/00020

In the matter between:

HELENA TOBIA KRUGER

APPELLANT

and

MIRIAM GOAGOSES

RESPONDENT

Neutral citation: *Kruger v Goagooses* (HC-MD-LAB-APP-AAA-2023/00020)
[2023] NALCMD 46 (18 September 2023)

Coram: Schimming-Chase J

Heard: 15 June 2023

Delivered: 18 September 2023

Flynote: Labour appeal — Labour Act 11 of 2007 — Appeal against arbitration award — Section 33 of the Labour Act — Dismissal — Whether dismissal was substantively and procedurally unfair — Appellant bears the onus to prove reasonable prospects of success on appeal.

Labour appeal – Dismissal – On appeal finding that dismissal was substantially and procedurally unfair – Appellant assumed that employee absconded and dismissed her.

Summary: The appellant lodged an appeal against an arbitration award that found that the appellant had unfairly dismissed the respondent. The respondent was employed by the appellant and her husband since 2006. On 19 August 2020, the respondent moved to the appellant's farm in Keetmanshoop. On 2 August 2021, the respondent went to town from the farm and did not return. After an exchange of SMS messages, and on 17 August 2021, the appellant sent an SMS to the respondent which was understood by the respondent as a termination of her employment. On the following day the respondent approached the Office of the Labour Commissioner and obtained a calculation of the monies due to her. The respondent lodged a complaint of unfair dismissal. The appellant maintained that she did not dismiss the respondent, she terminated her employment by absconding. The arbitrator heard the evidence of both the appellant and respondent and in conclusion found the dismissal of the respondent to be substantially and procedurally unfair. The arbitrator found on the facts that the respondent did not abscond and that in any event, no disciplinary proceedings were undertaken. The arbitrator ordered that the appellant pay the respondent one-month notice, leave accrued, severance and loss of income for two months, in the amount of N\$27,116.58.

Held that on interpretation of the appellant's SMS message, the appellant terminated the employment agreement with the respondent on 17 August 2021.

Held on the facts, the respondent did not abscond from work.

Held that there are two requirements of establishing unfair dismissal. Firstly, the employee must establish whether there was dismissal, and secondly, if it is established that such dismissal took place, then it is presumed to be unfair and the employer must prove that it was valid and fair and that a fair

procedure was followed. The test for fair dismissal is two-fold, i.e. substantive fairness and procedural fairness, and the two are cumulative and not separate.

Held further that the appellant has not discharged the onus of proving that there was no dismissal, and that there was a valid or fair reason for dismissing the respondent.

ORDER

1. The appeal is dismissed.
2. There shall be no order as to costs.
3. The matter is finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] This is an appeal noted against the arbitration award dated 25 January 2023 in case number SRKE 7-22 in terms of s 89 of the Labour Act 11 of 2007 (“the Labour Act”), in terms of which the appellant was found to have unfairly dismissed the respondent. Reinstatement was not ordered, and the appellant was ordered to pay compensation in the amount of N\$27,116,58.

[2] The appellant in this matter is Helena Tobia Kruger (“Mrs Kruger”) who was the employer of the respondent. The respondent is Miriam Goagosos (“Ms Goagosos”) who was employed as a general domestic worker.

[3] Mr van den Heever appears for Mrs Kruger and Mr Ikanga appears for Ms Goagoses.

Background

[4] Ms Goagoses was employed at Mrs Kruger and her husband's farm as an employee since 2006 and moved to the farm on 19 August 2020 where she resided. On 2 August 2021, Ms Goagoses left the farm, with leave, and should have returned the next day on 3 August 2021 with Mrs Kruger's daughter. Ms Goagoses did not return to the farm on the said date. Mrs Kruger made further arrangements for Ms Goagoses to return to the farm, however, she did not return.

[5] Mrs Kruger and Ms Goagoses remained in contact telephonically during the time that Ms Goagoses did not return to or report for work. This was evident from the call log and the messages that were handed up as evidence and marked as exhibits 'A' and 'B' during the arbitration proceedings.

[6] On 4 August 2021, Ms Goagoses contacted Mrs Kruger and asked for money. Between the period of 5 August 2021 and 17 August 2021, there were further back and forth SMS messages between the parties.

[7] On 17 August 2023, Mrs Kruger sent a SMS message to Ms Goagoses. It stated the following:

'Jy het nie meer nodig on vir my enige antwoorde te gee nie. Ek het genoeg gehad van leuns BV 'n foon wat op "silent" was. Ek het jou nie eens gebel nie. Jy het nie verlof ingesit nie. Jy het nie menslikheid verlof ingesit nie. Jy het nie bedank nie. Jy het gedros. Ek het jou water berad. Jy skuld my niks nie en as jy dink ek skuld jou, kan jy dit op skrif sit. Gee die sleutel af by Annamarie by Kaap Agri. Ek sal jou goed pak as ek weer ingaan. Dankie vir

alles en dat jy bereid was om op die plaas te bly. Jy het gekies om vir my te jok dat jy saam met Joamnie sou terug kom.’¹

[8] In response, Ms Goagoses said:

‘Is reg, ... nou is ek die slegste mens na al die jare se harde werk.’²

[9] It is apparent from the exchanges preceding above the SMS message of Mrs Kruger, that she experienced justifiable frustration with Ms Goagoses who did not return to the farm or respond to messages on 3 August 2021 whilst Mrs Kruger was waiting for her to arrive in order to return to the farm. Mrs Kruger returned without Ms Goagoses.

[10] On 5 August 2021, Ms Goagoses sent an SMS message to Mrs Kruger requesting money in order to purchase school shoes and socks. When queried about monies Mrs Kruger had previously advanced, Ms Goagoses explained that she had to buy food and pay off a debt. On 6 August Mrs Kruger informed Ms Goagoses that someone was coming into town, and that she could take a lift back to the farm with him. There was no response from Ms Goagoses, either to the aforementioned message or to a follow up message on the same day lamenting the lack of a response.

[11] Ms Goagoses only communicated with Mrs Kruger again on 12 August 2021 via SMS message, which informed, amongst others, that her phone was on silent and that she did not hear when Mrs Kruger called her. Mrs Kruger did not respond to this message. On 16 August 2021, Ms Goagoses informed that she was undergoing medical treatment which Mrs Kruger knew about,

¹ Loosely translated – ‘You don't need to give me any more answers. I had enough of lies, for example a phone that was on “silent”. I didn't even call you. You did not apply for leave. You have not taken compassionate leave. You have not resigned. You absconded. I paid your water bill. You don't owe me anything and if you think I owe you, you can put it in writing. Drop off the key at Annamarie at Kaap Agri. I'll pack your stuff when I go back in. Thank you for everything and for being willing to stay on the farm. You chose to lie to me that you would come back with Loammie.

² Loosely translated – ‘It's fine, ... now I'm the worst person after all these years of hard work.

that she had some days without it, and asked what she should now do. On 17 August 2021, Mrs Kruger responded and indicated to Ms Goagoses that her treatment was no longer her (Mrs Kruger's) responsibility, and that the responsibility lay with Ms Goagoses and her children. Ms Goagoses responded that she was at the hospital at the time. The response to this message is the one mentioned in paragraph [7] of this judgment, on which the appeal is based.

[12] On 18 August 2021, Ms Goagoses approached the Office of the Labour Commissioner and the Labour Inspector calculated an amount due to her. On the same date, Ms Goagoses sent an SMS to Mrs Kruger informing that she had attended the Office of the Labour Commissioner and that a certain amount had been calculated as due to her.

[13] Ms Goagoses instituted a labour complaint. The matter then proceeded for conciliation and then to arbitration at the Labour Commissioner.

[14] During the arbitration proceedings, Mrs Kruger testified that she never dismissed Ms Goagoses and that the intention of Mrs Kruger, set out in the SMS dated 17 August 2021, was not to dismiss Ms Goagoses. Instead it was Ms Goagoses that terminated her services as she absconded from work. Mrs Kruger testified that she did not know why Ms Goagoses did not return to the farm, and that she did not ask why, as Ms Goagoses did not answer her cellphone. Mrs Kruger then loaded Ms Goagoses' belongings because she was aware that Ms Goagoses had nothing when she left and that she knew Ms Goagoses needed her belongings.

[15] Ms Goagoses testified that she was to return to work on 3 August 2021. She was not supposed to go to Keetmanshoop, but Mrs Kruger requested that she accompany her for the purchase of certain goods. According to Ms Goagoses, Mrs Kruger requested her to stay the night and return to the farm the next day with Mrs Kruger's daughter. She testified that she called Mrs Kruger on her cellphone on the morning of 4 August 2021 but there was no reply. She also called Mrs Kruger's husband and her daughter

but there was no response from anyone. On that day her services were terminated via SMS message. She then went to the Labour Inspector's office for the calculation of her 'dues' by the Inspector which she later sent to Mrs Kruger.

[16] Before I proceed with the appeal, Mr Ikanga raised two points *in limine* which I will deal with in brief.

The points in limine

[17] The points *in limine* were:

- (a) non-citation, or misjoinder and/or non-joinder of the arbitrator and Labour Commissioner which apparently renders the entire purported notice of appeal defective, and void in law; and
- (b) the 'purported' notice of appeal was only filed to delay enforcement of the arbitration award.

[18] The first point *in limine* was correctly not persisted with. On the second point *in limine*, Mr Ikanga argued that Mrs Kruger failed to comply with the arbitration award. However, he conceded that the award was not registered as an order of court. This point is devoid of merit. If no award is registered with this court in terms of the applicable rules, it cannot be argued that Mrs Kruger has not complied with the arbitration award.

Arguments on the grounds of appeal

[19] The grounds of appeal raised by Mrs Kruger against the arbitrator's award are as follows:

- (a) the arbitrator erred in law in deciding that she was required to give evidence before Ms Goagoses, in a dispute for unfair dismissal,

such finding being a gross irregularity in terms of s 33(4)(a) of the Labour Act;

(b) the arbitrator erred in law in deciding that Mrs Kruger had to prove her case prior to the arbitrator making a finding whether Ms Goagoses proved her dismissal on a balance of probabilities;

(c) the arbitrator erred in law in failing to make a finding whether Ms Goagoses proved a dismissal and to provide reasons for such a finding;

(d) the arbitrator erred in law in finding that Mrs Kruger should have a disciplinary hearing for Ms Goagoses after she absconded;

(e) the arbitrator erred in law in finding that Mrs Kruger did not want to proceed with the employment relationship with Ms Goagoses;

(f) the arbitrator erred in law in finding that Ms Goagoses was unfairly dismissed.

[20] Mr van den Heever submitted that the arbitrator failed to indicate exactly how Ms Goagoses was dismissed and based the dismissal on the ground that Ms Goagoses approached the Office of the Labour Commissioner. On this basis an irregularity occurred because the arbitrator ruled that Mrs Kruger should testify first when in fact Ms Goagoses had the onus in terms of the Labour Act to prove that she had been dismissed.

[21] Mr van den Heever argued that the SMS message of 17 August 2021 was as a result of occurrences that happened before relating to Ms Goagoses not responding to messages and not attending work. He further argued that there was no dismissal, as there were further messages wherein Mrs Kruger made arrangements for the neighbours to collect Ms Goagoses and she did not manifest any intention to return to the farm. She further did not provide a

valid excuse as to why she was not returning to the farm, but she kept on requesting for money from Mrs Kruger.

[22] Mr van den Heever maintained the argument that Ms Goagoses absconded, and that is why the SMS was sent. He further argued that Ms Goagoses did not put in any leave, and that the SMS from Mrs Kruger was to make her aware that she is not dismissed. He further stressed that Mrs Goagoses did not make any attempt to return to the farm, but rather approached the Office of the Labour Commissioner. The Labour Inspector arranged a meeting between the parties, and Ms Goagoses only insisted on the money and was not interested in reinstatement.

[23] He further submitted that when the key was taken and Ms Goagoses' belongings were returned, this was apparently not an issue of dismissal. When Ms Goagoses left the farm she only had her handbag and her belongings which she returned to Ms Goagoses, because Mrs Kruger was aware that she had nothing apart from her handbag. He further argued that not everything was taken to Ms Goagoses on the first occasion, as her belongings were taken on two occasions.

[24] Mr Ikanga argued that the SMS of 17 August 2021 was clear in its terms that Ms Goagoses was dismissed, therefore, Mrs Kruger drew the onus to prove that the dismissal was fair, and the arbitrator could not be faulted for the ruling. Ms Goagoses approached the Labour Inspector because she understood that she was dismissed. The act of going to the Labour Inspector was not an express intention not to return to work, but a step taken subsequent to her dismissal via text message. He further argued that there was not a long period of absence, and that from the communications it was clear that Ms Goagoses was hospitalised during her absence.

[25] Mr Ikanga argued that a disciplinary hearing should have been held for the alleged abscondment and Mrs Kruger would have determined the reasons for Ms Goagoses' absence, as it did not appear from the record that this was a usual occurrence. Further, the fact that Mrs Kruger returned Ms Goagoses'

belongings was clear evidence of her dismissal, as opposed to the version presented by Mrs Kruger.

[26] In reply Mr van den Heever argued that Ms Goagoses failed to indicate to the Labour Inspector that she was absent because she was hospitalised and further that she did not provide proof at the arbitration proceedings that she was hospitalised.

Discussion

[27] Section 33 of the Labour Act 11 of 2007 provides that:

‘(1) An employer must not, whether notice is given or not, dismiss an employee –

(a) without a valid and fair reason; and

(b) without following –

(i) the procedures set out in section 34, if the dismissal arises from a reason set out in section 34 (1); or

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.’

[28] Section 33(4)(a) of the Labour Act provides that in any proceedings concerning a dismissal, if the employee establishes the existence of a dismissal, it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.

[29] Collins Parker, in his seminal work *Labour Law in Namibia*³ mentioned that there are two requirements of establishing unfair dismissal. Firstly, the employee must establish whether there was dismissal, and secondly, if it is established that such dismissal took place, then it is presumed to be unfair

³ Collins Parker, *Labour Law in Namibia* UNAM Press 2012.

and the employer must prove that it was valid and fair, and that a fair procedure was followed.⁴ The test for fair dismissal is two-fold i.e. substantive fairness and procedural fairness and the two are cumulative and not separate.⁵

[30] In *Tow in Specialist CC v Urinavi*⁶ Ueitele J discussed what dismissal means in terms of the Labour Act:

'[20] The Labour Act, 2007 does, however, not define the term 'dismissal'; it follows that I have to turn to the common law or other legal instruments defining dismissal to ascertain the meaning of the term 'dismissal'. At common law dismissal is equated with the termination of the contract of employment by the employer with or without notice. *Grogan*⁷ thus argues that at common law a 'dismissal' is deemed to have taken place if the employer gave the required notice; the employee would however have no legal remedy if the termination was by notice, because one of the implied terms of common-law contracts of service is that such a contract may be terminated by either party on agreed notice. In the matter *Meintjies v Joe Gross t/a Joe's Beerhouse*⁸ this court held that the word 'dismiss', where it is used in ss 45 and 46 of the Act, means the termination of a contract of employment by or at the behest of an employer. In *Benz Building Suppliers*⁹ (supra) Parker AJ stated that 'at somebody's behest' means because somebody has ordered or requested an act or a thing. Thus 'behest' as a noun means 'command' and so, a thing done at the behest of someone would mean that that someone commanded, requested or ordered the act.'

[31] A consideration of the SMS message from Mrs Kruger to Ms Goagoses dated 17 August 2021, as well as her response thereto, makes it apparent that the intention of Mrs Kruger was not to receive Ms Goagoses for work duties, and to terminate the employment, on the grounds of absconding. She

⁴ Ibid.

⁵ Ibid.

⁶ *Tow in Specialist CC v Urinavi* (LCA 55-2014) [2016] NALCMD 3 (20 January 2016).

⁷ John Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2nd Ed, 2007 Juta at 180.

⁸ *Meintjies v Joe Gross t/a Joe's Beerhouse* 2003 NR 221 (LC) (NLLP 2004 (4) 227 NLC).

⁹ *Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 (LC).

made it clear that Ms Goagoses was no longer her responsibility, that she was tired of her lies that she had absconded, and that she would arrange for her belongings to be brought to her. She even thanked Ms Goagoses for everything. The response by Ms Goagoses was: 'Its fine, after all the years of hard work'. Mrs Kruger did not respond to this message. I don't believe that Ms Goagoses could have interpreted this message as anything else than a termination of her employment, hence her attendance at the Labour Commissioner. I hold the view that the arbitrator was accordingly correct in requiring Mrs Kruger to commence with her evidence.

[32] I am satisfied that Mrs Kruger terminated the employment agreement with Ms Goagoses. The next question to be determined is whether the dismissal fell foul of the provisions of the Labour Act.

[33] On the requirement of substantive fairness, Mr van den Heever submitted that Ms Goagoses terminated her employment by absconding, and that absenteeism is a form of misconduct. Reliance was placed on the decision of *B2Gold Namibia (Pty) Ltd v PF Hoaseb*¹⁰ where Angula DJP made the following remarks as follows:

[24] The learned author Grogan, J in his work has outlined the legal position with regard to desertion as follows:

'Desertion is deemed to take place when the employee has actually intimated expressly or by implication that he or she does not intend to return to work. Other things being equal, the longer the period of absence, more justified the employer will be in terminating the contract. Brief absence from work rarely warrants dismissal at first instance, unless the employee has by absencing him or herself committed some other act of misconduct, such as insubordination or participation in an unlawful strike, or where there is no pattern indicating that the employee is suffering from a chronic illness. Employees who fail to contact their employers during their absence, if

¹⁰ *B2Gold Namibia (Pty) Ltd v PF Hoaseb* (LCA 16/2016) [2017] NALCMD 10 (17 March 2017).

they can do so, may find it difficult to persuade their employers – or arbitrators – that they had good reason to be away. Employees who stay away from work in spite of an express instruction to report to duty, may find it even more difficult to justify their absence. [The] onus rests on an employee to provide an explanation for his or her absence and that generally an explanation will be adequate if an employee can prove that the reason was beyond his or her control.

[25] I am of the view that the above statement of law is applicable to the facts of this matter. It is not always a requirement that the intention not to return to work must be communicated unequivocally, but it can also be communicated by implication that the employee does not intend to return to work.' (emphasis supplied)

[34] To my mind, what is distinguishable between the *B2Gold* matter and the case before me, is that at no point did Ms Goagoses, although absent from work without leave, give an indication that she did not want to, or had no intention to return to work. It is true that Ms Goagoses did not reply to attempts to organise transport back to the farm, and I accept that this was frustrating, and *prima facie* misconduct. However, on 16 August 2021, Ms Goagoses sent an SMS message where she mentioned that she was undergoing medical treatment which Mrs Kruger was apparently aware of. In response Mrs Kruger, on 17 August 2021, informed that her treatment was now her and her children's responsibility.

[35] Furthermore, in the *B2Gold* matter, the employee did not return to work after he was warned in writing, that if he did not return to work, he would be dismissed. This was a clear indication that the employee had no intention of returning to work. The employee was charged with absenteeism and a disciplinary hearing was held. He was found guilty of desertion and dismissed.

[36] In this matter, although Ms Goagoses did not return to work where she was expected to carry out her duties, there appeared to be an explanation, and to my mind, there was no intention not to return to work. In

fact, Ms Goagoses' disappointment was evident from the response to Mrs Kruger. It is not in dispute that Ms Goagoses was employed since 2006.

[37] There was also no disciplinary proceeding or hearing for Ms Goagoses. In saying this, I bear in mind that one would not expect a full disciplinary procedure, as was undertaken in *B2Gold*. But some form of informal enquiry should have taken place, given Ms Goagoses' position and length of tenure.

[38] Mrs Kruger stated that she could not reach Ms Goagoses to enquire why she did not return to the farm. On the record there is a clear trail of text communication between the parties. Mrs Kruger had opportunity to inform Ms Goagoses that a disciplinary hearing would be held, and that she would be charged for misconduct. Moreover, Mrs Kruger knew where Ms Goagoses resided and could have made an attempt to approach her at her home and commence with or arrange some form of disciplinary hearing. No such attempt was made.

[39] Having considered the arbitrator's ruling and award, Mrs Kruger has not discharged the onus of proving that there was no dismissal and/or that there was a valid or fair reason for dismissing Ms Goagoses. She may or may not have committed some form of misconduct, but on a balance of probability, she did not abscond, and Mrs Kruger's messages made it clear that she should not return to work, therefore Ms Goagoses was effectively dismissed. Her dismissal was accordingly both procedurally and substantially unfair and the arbitrator's conduct, ruling and award cannot be faulted. This matter does not warrant the interference of the Labour Court and the appellant's appeal must fail.

[40] In the result I make the following order:

1. The appeal is dismissed.
2. There shall be no order as to costs.

3. The matter is finalised and removed from the roll.

EM SCHIMMING-CHASE

Judge

APPEARANCES

APPELLANT:

G van den Heever

Lentin, Botma & Van den Heever,

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RESPONDENT:

M Ikanga

M Ikanga & Associates Incorporated, Windhoek