



**CASE NO.: LCA 03/2009**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**MELVIN VAN WYK**

**APPELLANT**

**AND**

**ELIZABETH CORNELIA GOWASES  
RESPONDENT**

**CORAM: SHIVUTE, P**

Heard on: 22 January 2010

Delivered on: 29 September 2010

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**LABOUR APPEAL JUDGMENT**

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**SHIVUTE, J:** [1] This matter came on appeal against the judgment and order of the District Labour Court which made a finding that the Respondent was unfairly dismissed by the Appellant and awarded damages in favour of the Respondent. The Appellant was ordered to pay the Respondent severance allowance for 3 weeks in the sum of N\$375.00, a month's notice salary of N\$500.00, loss of income for 8 months of N\$4 000.00, N\$366.06 for 22 days which were presumed to be leave days, and N\$1500.00 for "wasted costs". The total amount which the Appellant was ordered to pay was N\$6741.66.

[2] Prior to proceeding with the appeal, the Appellant first brought an application on affidavit in terms of Rule 16 of the Rules of the this Court seeking condonation for the late filing of his Heads of Argument.

[3] The appeal was unopposed and the Respondent did not object to the late filling of heads of argument. Having considered the affidavit by the Applicant, the Court was satisfied that good cause was shown why the heads of argument were filed late and granted condonation for non-compliance with the Rules in terms of Rule 16 (a) of the Rules of this Court.

[4] The Appellant is a private individual who employed the Respondent as a domestic worker for three years. Her responsibilities were to look after the Appellant's sons, washing and ironing clothes and to do general domestic work.

[5] In her particulars of claim the Respondent alleged that she was sick and booked off by a medical doctor and that after she had been released from hospital she was fired from her job. The alleged dismissal took place on 02 October 2008. The relief sought was for full severance payment, leave credit payment, notice payment as well as payment of September 2008 salary. Respondent further claimed that her dismissal was procedurally and substantially unfair.

[6] In his plea the the Appellant denied having unfairly dismissed the Respondent and it was specifically denied that the Respondent was ever fired by the Appellant or his wife. It was further averred that Appellant ever spoke to the Respondent since 11 September 2008, the day she left for the extraction of her tooth until 09 October 2008 the day she gave Appellant the complaint she filed with the Ministry of Labour and Social Welfare against him. The Appellant stated further that he was informed by his wife that on 22 September 2008 the complainant arrived at the Appellant's residence at around 20h00 and informed his wife that she was in hospital. His wife stated that she only told the complainant that because the Respondent did not hear anything from the complainant since 11 September 2008 they had to get someone temporarily to work on complainant's behalf and they had to pay that person. The complainant stayed away from work previously on more than three occasions and as a result of that she was given three verbal

warnings. It was further the Appellant's plea that he was told by his wife that she never told the complainant that she was fired. The complainant instead went to the room she used to live during weekdays, and collected her belongings, left the keys on the table in the living room and left without saying anything to the Respondent's wife who was in the bedroom at that moment. The complainant never returned for work and as a result she absconded from work and in effect left employment without giving any notice.

As part of his plea the Appellant had initially also stated that the complainant worked as a temporary worker. As a result there was no agreement on leave, medical aid or any benefit. However, she was given annual leave which was normally more than 24 days. The Appellant abandoned the plea that Respondent was a temporary worker. Although the complainant was given money on 11 September 2008 to pay for her surgery, it was never an agreement between her and her employer that she was going to receive medical assistance. Mr Van Wyk further made a counter claim that the complainant owed them more than N\$700.00 which was accumulated over time. She used the money to pay for her municipal bills and used it for other purposes. The parties agreed that she could repay that money in small installments and that it would not be deducted from her salary. However, the complainant never paid the money back. He concluded by stating that the complainant dismissed herself on 22 September 2008.

[7] The District Labour Court Chairperson's bases for finding in favour of the Complainant were that the Respondent and his wife should not have employed someone temporarily in the absence of the complainant; that instead they should have ascertained the complainant's whereabouts, and that they should have looked for the complainant's daughter for the later to come and work on complainant's behalf. These, the learned Chairperson found were of the determining factors as to whether or not there was a dismissal. The test this court does not agree with. The chairperson found that the dismissal took effect on the 22 September when the misunderstanding started the day when the complainant collected her personal belongings from Mr Van Wyk's residence and when she presented the sick leave which Ms Van Wyk said it was not clear. The court *a quo* found that the complainant was booked off on 15 September 2008 and from 24<sup>th</sup> to 30<sup>th</sup> September 2008. The fact that the sick leave certificate did not comply with the hospital requirements could not be blamed on the complainant. The District Labour Court further made a conclusion that an inference would be made that the cause of action or dismissal took place on 02 October 2008 because when the complainant left her employment to be placed under medical care in September 2008, she did not receive her salary for September. The fact that the employer appointed a person to work for them temporarily meant that the money which was supposed to be paid to the complainant was paid to that person instead. It was again the finding of the chairperson that the Appellant pretended to be the paymaster and the one

who was dealing with the family finances although the evidence allegedly revealed that Mrs Van Wyk interacted more with the complainant. When the complainant had health problems Mrs Van Wyk bought her pain killers. She had again granted her a day off so that she could start work on 16 September 2008. Finally it was the conclusion of the District Labour Court Chairperson that the dismissal was unfair. She made reference to an alleged authority in the matter of *International Union and Mutual Workers SP* "However, no citation therest was provided. The court *a quo* quoted that case as laying down a principle that "in expressing a moral value while you look at the conduct in order to drawn inference of the fairness of the procedure that leads to a dismissal." This court has difficulties in understanding the above mentioned quote because it appears to be incomplete and as stated already to citation of the case could be found. I now turn to the consideration of the grounds of appeal.

### **The grounds of appeal.**

The Appellant's grounds of appeal are as follows: The learned magistrate erred on the law and or facts in upholding the Respondent's claim as claimed and prayed for and more particularly on the following grounds:

- 1.1 That the Respondent on a balance of probabilities proved that she was unlawfully dismissed;

1.2 That the Respondent did not out of her own free will and action terminate unilaterally the employment relationship with the appellant;

1.3 That the Respondent did not act untruthfully towards the Appellant in stating that

1.3.1 she was due for dental surgery on 12 September 2008,

1.3.2 that the Respondent forgot a medical certificate in attempting to create the impression that she is booked off for 15 September 2008 for dental surgery.

### **The evidence**

[8] I propose to deal first with the evidence of Mrs Mara Belinda Van Wyk the wife of the Appellant in this matter. Her evidence is that she and her husband were married in community of property and they had employed the Respondent as a housekeeper to look after their two sons and to do the cleaning, washing and ironing. On 11 September 2008, Mrs Van Wyk was approached by the Respondent and was informed that the Respondent would be going to a hospital on 12 September for tooth examination. Since Mrs Van Wyk was aware that she had toothache she helped the Respondent by giving her painkiller tablets and any other medication she had. The Respondent left the Van Wyk's residence on 11 September 2008 at 17h00. Before she left, she had informed Mrs Van Wyk that she would phone her on

15 September 2008 to let her know what was going on. She promised Mrs Van Wyk that she would start work on 16 September 2008 which was a Tuesday. Mrs Van Wyk gave her one to two extra days extra off and expected her to return to work on 17 or 18 September 2008.

[9] After the Respondent left she did not communicate with the Van Wyk's until on 22 September 2008 when she came to their house around 20h00 in the evening. She informed Mrs Van Wyk that she was admitted in the Central Hospital and had come to collect her blanket and a dress. By then she was wearing a gown. Before the Respondent went to collect her dress and a blanket she showed Mrs Van Wyk a sick leave certificate. According to Mrs Van Wyk, the sick leave was not very clear to her because the Respondent did not hand it over to her. Instead, the Respondent was holding it and kept it under the table. Mrs Van Wyk had advised the Respondent to show the sick leave certificate, to her husband who was attending evening classes at Polytechnic.

[10] Mrs Van Wyk instructed her son to accompany the Respondent to the room in order for her to go and pick up her blanket and a dress. Meanwhile, she went to her room to go and get some clothes which her sister gave to her to pass on to the Respondent. However, when Mrs Van Wyk came out of the room, she inquired from her son where the Respondent was. Her son informed her that the Respondent had left with all her belongings and she



placed the key to the room on a desk. When the Respondent left, she did not inform Mrs Van Wyk that she was no longer returning to work.

[11] On 28 September 2008 the Respondent visited Ms Van Wyk at her work place and informed her that she had just been discharged from the hospital and that she wanted money for a taxi. Mrs Van Wyk informed the Respondent that she had no taxi money. She had asked for a lift to go to Academia. The Respondent then inquired about her salary to which Ms Van Wyk said she could not paid the Respondent and referred her to the Appellant because he is the one who normally pays the Respondent's salary and he is the one who was responsible for administering their finances.

[12] Mrs Van Wyk further testified that she did not employ anybody to occupy the Respondent's position. However, she had temporarily called in a lady who came on three occasions on Friday's to help her with domestic work from 13h00 until 17h00. She categorically stated that she did not dismiss the Respondent. The Respondent dismissed herself on 22 September 2002 when she took all her belongings from their house and she never reported for duty.

[13] The second witness called by the Appellant was Doctor Reinhardt Collin Gariseb. Dr Gariseb testified that he is the Superintendent of Katutura State Hospital. He testified that he is the overall Supervisor of the hospital administration. According to him, the procedure to be followed when a patient is being admitted is that, the patient's, particulars and diagnoses are

entered in the admission register on the day of admission and discharge. Patients who are admitted to undergo dental surgery are admitted in Ward 7 B. If Ward 7 B is full, then patients are admitted in Ward 3 B which is a normal surgical ward. The doctors normally make entries in the admission booklet or write in a health passport. The nurses who work at the wards when receiving the patient make admission entries in their records. If the doctor intends to take the patient for surgery, the patient's name would be put on the theatre's list. Before a patient goes to the theatre, she has to sign a consent form.

[14] After the operation if the patient is well she will be discharged, depending on the circumstances of the procedure, the patient may be told to come for a follow up. The doctor may also give sick leave to the patient. All the basic things will be recorded in the patient's health passport namely the date of admission and discharge the nature of the procedure conducted and the follow up plan. With regard to sick leaves, doctor Gariseb explained that at the bottom of the sick leave form, there are provisions for the doctor's name, her qualifications and her signature. A doctor who books off the patient must be the one to sign the sick leave certificate. The sick leave certificate must also bear the official date stamp and doctor's signature otherwise it would be rendered invalid. Apart from the above mentioned the sick leave should also be completed fully.

[15] The doctor was shown two leave certificates in respect of the Respondent. He made an observation on the two sick leave certificates dated 04 September 2008 and 15 September 2008. According to the sick leave certificates it is indicated that if the sick leave certificate does not have an official or doctor's stamp or not completed fully than it is invalid. Doctor Gariseb, explained that the two sick leave certificates were invalid because they were not signed by the doctor. He testified that in the two sick leave certificates qualification were indicated as dentist. According to him dentist is not a qualification. The form required that it should be signed by the doctor who booked off the patient and the doctor should state her/his qualification. It is not allowed for someone to sign a sick leave certificate on behalf of the doctor who booked the patient off.

[16] Apart from the sick leave certificates doctor Gariseb was given a health passport of the Respondent by Mr Tjiroze with the assistance of Mr Beukes the representative of the Respondent. According to the medical report Ms Gowases was admitted on 24 September 2008 and discharged on 25 September 2008. She was admitted because of epileptic fit and upon admission she was under the influence of intoxicating liquor.

[17] Apart from the sick leave certificates and extract from the health passport the doctor read into record a letter he indicated to have been written under his authority. There is no evidence that the doctor dictated the letter to the author. The author of the letter was not called to testify. It is

the findings of this court that the content of the letter annexure C and the card annexure F is hearsay because neither the matron the author of the letter nor the doctor who examined the Respondent was called to testify. The sick leave certificates dated 04 September 2008 and 15 September 2008 are found to be invalid because they do not meet the requirements of the sick leave certificates to be issued by Katutura hospital. Apart from the above mentioned sick leave certificate there is another sick leave certificate dated 25 September 2008 indicating that the Respondent was booked off from 24 September 2008 to 30 September 2008. This sick leave certificate was not fully completed because, it was left blank where the complaint of the patient and the diagnosis of the patient is indicated therefore, the sick leave certificate did not meet the requirements, and does not help the court in any way.

[18] Johannes Matheus Van Wyk testified that he is known as Melvin Van Wyk. He was married to the first witness in community of property. He testified further that he was responsible for paying the Respondent's salary since she started to work for them, because he was responsible for handling the family financial affairs. It was further his testimony that he did not dismiss the Respondent unlawfully, because the Respondent dismissed herself. He never spoke to the Respondent from 11 September 2008 until 09 October 2008 when the Respondent served her with a labour complaint for unlawful dismissal. Respondent never availed herself to him for purposes of payment. She never spoke to her concerning her sick leave. She never

showed him any sick leave before she laid a complaint. He only came to see the sick leave certificate indicating that she was booked off from 12 September 2008 to 30 September 2008. She was also booked of from 24 – 25 September 2008.

[19] He continued to testify that he went to Katutura Hospital and requested to be shown whether the Respondent was admitted at the hospital in Ward 7 B. He and Ms Shaanika looked in the admission register from 11 September 2008 to 30 October 2008. They did not find Ms Gowases' name. At the Labour Commissioner's office Mr Van Wyk confronted Ms Gowases that her name did not appear in the register of people who were admitted at Ward 7 B. Ms Gowases then informed him that she was admitted at Ward 5 B. Mr Van Wyk went back to the hospital and checked the register of the patients admitted at Ward 5 B. He did not see Ms Gowases' name. He was referred back to ward 3 B because if ward 5 B or 7 B is full patients could be referred to ward 3 B. Ms Gowases' name did not appear in War 3 B. Mr Van Wyk went back to Ms Shaanika and they went back to Ward 5 B. They searched for Ms Gowases' name and they did not trace it. The secretary, at Ward 5 B took them to Ward 5 A. They checked the register at Ward 5 A and they found Ms Gowases' name. According to that register Ms Gowases was admitted on 24 September 2008 and discharged on 25 September 2008. Ward 5 A is not a dental ward.

[20] After the discovery, they asked Doctor Gariseb who was on leave to give them something in writing. Doctor Gariseb instructed the matron of the hospital to give them a letter, exhibit C. before this court. It was put to Mr Van Wyk through cross-examination that he by checking the register he intruded upon Ms Gowases medical confidentiality. Mr Van Wyk responded that he had reasons to believe that the claim she was making was fraudulent, he was the employer paying for her salary and the Respondent stayed away from work and the sick leave certificates were used as the basis of the claim, he had the right to confirm whether the Respondent was really indeed admitted especially given the fact that those sick leave certificates were not submitted to him before the respondent laid the claim. After Mr Van Wyk was re-examined by his legal representative, he was questioned at length by the chairperson. After he finished questioning him the legal representative for Mr Van Wyk in the district court wanted to question Mr Van Wyk to clarify certain issues however he was denied that opportunity by the chairperson. I must point out that the chairperson adopted an irregular procedure by questioning the witness and not allowing the parties to question the witness concerning issues which arose from the court's questioning.

[21] On the other hand Ms Gowases the complainant now the Respondent testified in favour of her claim. Her evidence was that she started working for the Van Wyk's family since 2 September 2005 until the date she went on sick leave. Respondent worked from Mondays to Fridays 7h30 to about

18h00. She further testified that she went to stay at the employer's work since the beginning of 2008. It was her testimony that she had a good relationship with Ms Van Wyk. However, she had few problems with Mr Van Wyk because she sometimes used to oversleep and reported late for duties.

[22] She continued to testify that during September 2008 she fell ill. During her illness Ms Van Wyk would go to the pharmacy and buy her some tablets. The tooth became seriously sick and Ms Van Wyk advised the Respondent to go to the hospital. She gave her N\$28.00 to go to the doctor. On 11 September 2008 Ms Gowases visited the hospital. She was told to go back on 15 September 2008. On 15 September 2008 her tooth was extracted successfully. Unfortunately one got broken and it had to be drilled. After the Respondent was seen by the doctor, she was given sick leave certificate by the doctor's secretary. The Respondent did not recover fully after her tooth was extracted. She went back to the hospital because she was in pain. She could not remember the exact date she went there, it could be 21 or 22 of September 2008. The Respondent was admitted.

[23] When it was pointed out to her that her health passport was written 23 September 2008 she indicated that, that was the date she was taken by her neighbors to the hospital. She was admitted on 24 September 2008 and released on 01 October 2008. When she was asked whether she was not released on 25 September 2008 she testified that she went back on 25 September 2008 and had a follow up on 01 September 2008. Respondent

testified that whilst she was in the hospital she visited her employer and showed Ms Van Wyk "the doctor's papers" Ms Van Wyk told her that her husband was unhappy because of her absence at work. She explained to Ms Van Wyk that she could not phone her.

[24] Respondent further testified that Ms van Wyk was not interested in what the Respondent was saying. She was just looking at her son. She put the "paper" I presume the sick leave certificate on the table but Ms Van Wyk did not look at it. Since her main purpose to go to Mr Van Wyk's place was to collect her blanket and a dress, she walked to her room, it was at the stage Ms Van Wyk told her that she was no longer needed. She already got someone to come on Saturday to do the ironing. Since the Respondent did not know what to do she went to the room and collected her belongings and left because she understood Ms Van Wyk to mean that she was dismissed. Respondent further testified that she was paid N\$500.00 per month, and the accommodation which she was given by the Appellant was quite neat. It consisted of a double bed, blanket and a shower and a table. She further testified that the rent in Katutura area where she lives varied from one place to another. It ranged between N\$500.00 - N\$1000.00. The evidence concerning her income and accommodation facilities was led in order to establish the Respondent's loss. The Respondent was asked through cross-examination why she laid a complaint against Mr Van Wyk. Some of her answers were that Ms Van Wyk, referred her to Mr Van Wyk, it was obvious he was in charge. She also had a problem because she was told by Ms Van



Wyk that Mr Van Wyk was upset. She gave several answers which did not answer the question. As to the question regarding when she was dismissed she indicated that she was dismissed on the date she took the sick leave to Ms Van Wyk which could be the 22 September 2008.

[25] When the Respondent was asked whether it was impossible for Doctor Zenga to sign the sick leave certificate, she responded that she in fact requested the sick leave from the Secretary in order to show it to her employer. Respondent was further asked why she did not leave her sick leave certificate with Ms Van Wyk and she responded that Ms Van Wyk was not interested in looking at the papers and she had no reason to leave the papers with her because she told her that she was no longer needed.

[26] Ms Gowases was again asked whether when she saw Ms Van Wyk later at her work why she did not give her sick leave certificates for the 15<sup>th</sup> , 24<sup>th</sup> and 25<sup>th</sup> September she answered that she brought the leave certificates to Ms Van Wyk as well as the laboratory result but Ms Van Wyk refused.

Furthermore, Respondent was asked whether if she understood to be fired on 22 September already when she went to Ms Van Wyk's house why would she present medical reports to Ms Van Wyk again at her work place? She did choose not to answer the question.

[27] It was submitted on behalf of the Appellant that the Respondent came with a premeditated intention to leave the Appellant's employment on 22 September 2008 as she arranged for a motorvehicle to transport her

belongings even before she was allegedly told by the Appellant's wife that someone was employed in her position. It was further submitted that the Respondent dismissed herself by failing to offer her services to the Appellant since 12, 13, 21 and 23 September 2008 and from 26 - 30 September 2008. Should one accept the Respondent's version that she received dental surgery on 15 September 2008 she was only booked off for a day. It was again submitted that at no stage did Ms Van Wyk or the Appellant dismiss the Respondent. The fact that Mr Van Wyk went to collect clothes from her sister in order to give them to the Respondent did not conform with the act of an employer who had the intention to fire the employee.

[28] Section 46 (3) of the repealed Labour Act, Act 6 of 1992, stipulate:

“When in any proceedings in terms of this section it is proved that an employee was dismissed from his or her employment or that any disciplinary action has been taken against such employee, it shall be presumed that, unless the contrary is proved by the employer concerned, such employee has been dismissed unfairly or that such disciplinary action has been taken unfairly against such employee”.

The above section can be interpreted to mean that where an unfair dismissal is alleged against an employer, but such dismissal is in dispute as in this case, the employee has the onus of proof to show that the alleged dismissal occurred. Once the employee discharged the burden of proof, the employer shall be deemed to have dismissed the employee unfairly unless the contrary is proved.

[29] This court is called upon to determine whether Respondent was dismissed by the Appellant or his wife. The Respondent approached the Appellant's wife on 11 September 2008 and informed her that she will be going to the hospital on 12 September 2008 for tooth extraction. The Respondent agreed with the Appellant's wife that she would communicate to her on 15 September to let her know what was going on. Respondent undertook to start work on 16 September 2002. However the Respondent failed to communicate to the Appellant about her whereabouts. It is the Respondent's testimony that she was admitted in the hospital between the period 12 to 30 September 2008. However, there are no entries registered in wards 7B, 5B or 3B in respect of the Respondent. The only entry which refers to the epilepsy attack the Respondent suffered was found in the register of ward 5A for the periods 24 to 25 September 2008. However, if this court has to accept the Respondent's version that her tooth was extracted, this would mean that the Respondent was only booked on 15 September 2008 and she was due to report for work on 16 September 2008.

[30] The Respondent could not account for the days from 16 to 21 September 2008 and 23 to 30 September 2008. The Respondent only approached the Appellant's wife on 22 September and informed her that she was admitted in the hospital. On that date the Respondent alleged that she was dismissed by the Appellant's wife by telling her that her services were no longer needed, which was disputed by the Appellant's wife. On the same evening the Appellant's wife went to collect the clothes in order to give them

to the Respondent however, she found the Respondent already gone with all her belongings. This fact that the Appellant's wife wanted to give clothes to the Respondent is inconsistent with the action of an employer who wants to dismiss an employee.

[31] Because the Respondent was unable to explain for her absenteeism at work, she connived with certain individuals and obtained unauthorized leave certificates. This is an indication that the Respondent was not honest to her employer. Although the Respondent stated that she was told that her services were not needed, the Court *aquo* did not make a credibility finding why she accepted the Respondent's version and rejected the Appellant's. Respondent exhibited an element of dishonesty by presenting a false sick leave certificate to her employer. This is an indication that she is a reliable witness.

[32] The Respondent failed to render her services to the Appellant in exchange for remuneration; therefore she was in breach of contract. She absented herself from duty without permission and there were no justifiable grounds for her absence. She stayed away from work under the erroneous assumption that she was dismissed. See *Cross Country Carriers v Farmer NLLP (1) 226 NLC and Swartbooi v Hennis NLLP 2002 (2) 367 NLC..*

[33] Having read the record of appeal and the arguments from the Appellant's counsel, it is my finding that the Respondent was not dismissed by the Appellant. She dismissed herself. It follows that the chairperson of

the District Labour Court misdirected herself by finding that the Respondent discharged the onus that she was unfairly dismissed.

[34] In the result the following order is made:

- (1) The appeal is upheld.
- (2) The order of the District Labour Court given in favour of the Respondent is set aside.
- (3) As for costs, this court is enjoined by section 20 of the Repealed Labour Act, Act 6 of 1992 not to make any order as to costs unless it is of the opinion that a party to proceedings before it has acted frivolously or vexatiously. I am not of such opinion and there shall be no order as to costs.

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**SHIVUTE PRESIDENT**

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