
***REPORTALBE*** **CASE NO: LCA 71/2010**

**IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**RIVERSIDE SERVICE CENTRE** **APPELLANT**

and

**LEE-ANNE ADRIAANSE** **RESPONDENT**

**CORAM:** Geier, AJ

**HEARD ON:** 28.01.2011

**DELIVERED ON:** 08.02.2011

**JUDGMENT**

**GEIER, AJ.:** [1] The respondent in this matter had commenced employment with the appellant as an administrative assistant on 11 February 2008. A six month probationary period was still effective.

[2] By July 2008 the respondent had already utilised 21 days of her sick leave allowance due to certain medical problems.

[3] On respondent's version and on account of her employer's dissatisfaction with her work performance, the Respondent was apparently informed at a meeting on 10 July 2010 that 'her contract will not be extended due to the fact that she is no longer interested in her work'. She was allegedly told to come back the next day to sign her papers'. On account of these events the respondent considered herself dismissed.

[4] The appellant disputed that the respondent was so dismissed and the employers version of the events was to the effect that the respondent was indeed called into a meeting on 10 July 2008 at which she was informed that the purpose thereof was to conduct a 'poor performance counselling meeting' and that 'they were counselling her due to her poor performance at the workplace and that she was advised at that time that should her performance not improve her contract would not be extended'.

[5] It was further appellants case that the respondent indicated at such meeting that she rather preferred to resign, in response to which she was told to think this over and then come back on the next day.

[6] On the 11th of July 2008 the respondent did not return to her workplace. She did however send a *sms* to her employer indicating that she would not come to work on the 11th of July 'due to circumstances'.

[7] The respondent apparently thereafter enlisted the services of a certain Mr. Hewat Beukes of the Workers Advice Centre in Windhoek who apparently instructed her not to return to work.

[8] It was indeed common cause that the respondent never returned to work.

[9] Shortly thereafter and under cover of a letter dated 15 July 2008 Mr Beukes informed the

appellant as follows:

> ***" ... We are instructed that Mrs. Adriaanse's services had been terminated due to her illness which had been aggravated by smoking in her workplace. No hearing or assessment was held which constitutes unfair dismissal.***
>
> ***She instructs that she has not received her last payments and leave pay.***
>
> ***Further we are instructed that you have distributed her medical information to your labour consultants which constitutes an offence. Whence, we are instructed to demand immediate payment of her salary.***
>
> ***We are to demand payment of one year's salary as damages for unfair dismissal and the return of all documents and doctors letters pertaining to her health. We trust on your favourable response by Friday 18th July 2008."***

[10] Appellant was thereafter also informed that all communications by appellant to respondent should from now on be channelled through Mr. Beukes and that appellant should refrain from making any contact with the respondent.

[11] As appellant was of the view that no formal termination of the respondent's employment relationship had occurred, as the oral resignation was, inter alia, not effective as same was not in writing, as is required by Section 47 (2) of the Labour Act 1992, appellant instructed its labour consultants Messrs. Labour Dynamics cc to respond to the letter which had been so received from Mr Beukes and which was done on 17 July in the following terms:

> ***"Our instructions are that the employee has been on sick leave for a total period of twenty-one (21) days in her first five (5) months of employment. Her probation period is for a period of six (6) months. On 10 July 2008 she met with N Du Preez and A Schoombee. She was addressed on the performance of her work and she was in agreement that her work was not up to standard, that the line of work was not for her, that she was unhappy and that she was constantly ill (her illness was a "time bomb"). The employee asked if she could leave (resign) immediately and was informed that she should stay and end her***

***working day if she so chose to do so.***

***A verbal agreement was then reached between the employer that she would terminate her employment as she chose to do and that she would return on Friday 11 July 2008 for payment etc. On Friday morning she did not return to work and sent a sms via cellular telephone to say that she could no longer make the appointment because of circumstances. Since such time she has not returned to work and neither has she made contact with her employer.***

***We shall also hand deliver a copy of this document to her last known residential address. Kindly inform her unambiguously that:***

***1. Her employer has not only the right but the obligation to counsel her on poor performance.***

***2. Where sick leave is excessive or abused the employer also has a right and an obligation to address the employee accordingly.***

***3. Her employment has not been terminated in any manner whatsoever by her employer.***

***4. She chose to inform her employer that she wanted to leave immediately and that is her good right to do so.***

***5. That as far as her employer is concerned she remains an employee of Riverside Service Station with duties and obligations towards her employer.***

***6. That currently the employee is on AWOL and faces disciplinary charges in this regard.***

***7. That the employee is to return to work immediately and without further delay reporting to Riverside Service Station and in turn immediately reporting by telephone from Riverside Service Station to Mr. N Du Preez that she has returned to work.***

***8. That should the employee continue to absent herself from her place of work without official leave she will be held accountable in terms of the disciplinary code of conduct of her employer.***

***Yours sincerely ... "***

[12] Mrs Schoombee, on behalf of appellant testified that appellant now found itself in a situation where it was 'sitting with an employee that after a poor performance counselling

session simply absconds from work and were the employer was prevented from talking to this employee because the representative will not allow it to take place ... '. This is apparently how appellant viewed the situation as at 21 July 2008.

[13] In such circumstances a further letter dated 21 July 2008 was faxed and delivered to respondent's representative under cover of which respondent via her representative was again informed as follows:

***"Our previous document dated 17 July 2008 in this matter refers.***

> ***We reiterate the contents of that document as attached hereto in the event that you did not receive such copy.***
>
> ***Having regard for your message to the employer that they are not to make any contact with their employee we state for the record that the above captioned is indeed an employee of the employer and as such, her employer has the right to communicate and issue instructions to her which to date they have done and through this letter they continue to do.***
>
> ***She has a duty towards her employer in that she is to provide her services in return for remuneration and that she remains subject to the disciplinary code of conduct of her employer. Her failure to comply with the policies of her employer especially in absconding from her place of work will result in the "no work pay - pay rule" being applied.***
>
> ***In any event she must stand and fall with the advice you have provided to her suffice to state that she is still employed by the employer and must return to her place of work immediately or face disciplinary action forthwith.***
> ***Kindly take notice that we place on record for the second and final time that she is to return to work immediately.***
>
> ***Yours sincerely, ... "***

[14] This letter also had the following hand written notes affixed to its page 2 to the effect that:

***"1. 21 July 2008 15H15 - 99 John Meinert Street, WDA spoke to Lee-Ann Adriaanse. She refuses to sign for any documentation.***

***2. She is told by Mr. R. C Raines to return to work immediately.***

***3. Affidavits to the above to be completed without delay.***

***Signed R. C. Raines*** ***Witness. Simon Raines"***

[15] Although respondent under cross examination denied that her representative had ever informed her of the contents of the above two quoted letters, respondent nevertheless admitted that the handwritten notes correctly reflected what had transpired on the occasion. This was also confirmed by Mr Simon Rains, who had come along to witness the events and who testified further that the respondent informed him and Mr RC Rains of Messrs. Labour Dynamics cc on that occasion that Mr Beukes had instructed respondent that *'she would not be allowed to return to work'.*

[16] It is against this background that the respondent, on the following day, lodged a complaint in the District Labour Court of Windhoek.

[17] On 1 August 2008 appellant instituted disciplinary steps against the respondent. The notice to appear at a disciplinary hearing indicated that the respondent was now charged with being 'absent without leave' and that such hearing was set for 8 August 2008. This notice was initially faxed to the fax number indicated on the letterhead of the Worker's Advice Centre, but all attempts to communicate via fax to this number were not successful. After an alternative fax number was provided the notice apparently 'went through'. On 8 August the hearing was postponed on the instruction of the chairman to 14 August 2008 of which postponement respondent's representative was given notice by facsimile, which read as follows:

***"H.BEUKES***

***WORKERS ADVICE CENTRE***

***WINDHOEK NAMIBIA 8***

***AUGUST 2008***

***Dear Sir,***

***RE: MS. LEE-ANN ADRIAANSE (EMPLOYEE)***

***Our Ms. Schoombe failed to get through to the fax number on your letter head (061 220 055). She contacted your offices and was given an alternative fax number of (061 210 226). We have proof that this facsimile went through.***

***The chairman instructed to do the disciplinary hearing postponed the matter until Monday the 14th of August 2008 at 14:00.***

***Take note that you and your client in spite of your persistent previous refusal to receive documents and to participate in any proceedings are again forewarned and invited to attend this disciplinary hearing as this is the fair and proper procedure to follow in this instance. Failure to attend the disciplinary hearing will result in the hearing being held in absentia.***

***Yours sincerely,***

***MANAGEMENT RIVER SIDE SERVICE STATION "***

**** TX REPORT *****

TRANSMISSION OK

TX/RX NO. CONNECTION 210226 ID

START TIME 12/o8 13:00
USAGE T 00'37

PGS. 1

RESULT OK

[18] It was in such circumstances that the respondent was then found guilty and dismissed in absentia, 'backdated to 8 July 2008'. On 19 August 2008 this ruling of the chairperson was also faxed to respondent's representative.

[19] In the meantime respondent pressed ahead with her complaint in the District Labour Court. On account of the appellant's non-appearance there on 12 May 2009, default judgment was granted in respondent's favour, which judgement was subsequently rescinded on 6 July 2009.

[20] On 28 April 2010 the parties went to trial in the District Labour Court, which found that the appellant had terminated the respondent's employment without fair reasons ordering appellant to pay the respondent N$72 000-00 as loss of income as per her salary for one year.

[21] It is essentially this finding that now forms the central focus of this appeal.

[22] At the core of this issue is the question whether or not the respondent tendered her resignation on 10 July or not, or whether it was the appellant that had terminated her services unlawfully on that date as is alleged by respondent in her complaint.

[23] All the other grounds of appeal are ancillary to this issue.

**WAS THERE A RESIGNATION?**

[24] This question needs to be answered in the first instance in order to determine whether or not there could have been an unfair dismissal.

[25] If respondent's notice of resignation was freely given, and if such notice would be in accordance with section 47 of the Labour Act 1992, that would be the end of the matter.[1]

[26] In this regard it was submitted by Mr van Zyl, counsel for the appellant, at the hearing of this matter, that the so-called oral resignation of the respondent was invalid and not effective, and was treated as such by the appellant, as such oral notice did not comply with the requirements of section 47 of the Labour Act 1992, which provides that such notice had to be in writing.

[27] Section 47(2) states indeed that:

> " **... Subject to the provisions of subsection (3), a notice in terms of subsection (1) shall, except when given by an illiterate employee, be given in writing, and shall -**
>
> **(a) contain the date on which such notice is given; ...** "

[28] In *Joe Gross t/a Joe's Beerhouse v Meintjies*[2] the Supreme Court, when considering the validity of a notice of termination with reference to the requirements set by section 47(1), found that section 47(6) *'makes it clear that the notice in ss 47(1) is the prescribed*

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1 *Meintjies v Joe Gross t/a Joe's Beerhouse* 2003 NR 221 LC at p233 B-C

2 2005 NR 413 SC

*minimum'.*[3]

[29] It would appear that a similar conclusion cannot be drawn in regard to the peremptory requirements set by section 47(2), *(ie. that a notice of termination has to be in writing),* as the proviso, as contained in section 47(6), makes no cross-reference to the provisions of ss 47(2) and also as the exceptions to the general rule as provided for in 47(4)(b), (which again expressly cross-references to section

47(1) and not to section 47(2)) do not indicate that the legislature intended that the requirements of section 47(2) could be by-passed in any manner.

[30] But even if I am wrong in this conclusion and if the cross-references to section 47(1), as found in sections 47(4)(b) and 47(6), in turn are linked to Section 47(2) because of the cross-reference to section 47(1) as found in section 47(2), then, and if regard is had to what was found by the Supreme Court in the *Joe's Beerhouse* case, it must appear that also the requirements set by section 47(2) are at the very least to be considered as *'the prescribed minimum'.*

[31] It must be concluded therefore that the legislature intended that all notices of termination be effected in writing, save in the case of illiterate employees.

[32] For any effective resignation/termination to have occured therefore on the part of respondent on 10 July 2008, such notice had to be in writing.

[33] It is common cause that there was no such written notice, on respondent's version, because she considered herself to have been unlawfully terminated, and on appellant's version because she never returned on the 11th of July nor at any time thereafter to complete this formality.

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3 At p 417 E-G

[34] It is also of relevance in this regard, that on appellant's version, the respondent had also indicated that she would come back on the following day to formally resign, which she did not do. This intimation would signify only an intentionto formally resign on the following day. This fortifies the conclusion that no resignation occurred on the 10th of July 2008.

[35] Ultimately it must be concluded however that, even if any resignation did occur on 10 July, that such resignation was, in any event, not effective as it did not comply with the statutory requirement.

**WAS THERE A DISMISSAL**

[36] The point of departure to answering this question must be the realisation that dismissal by notice under s 47 terminates the contract of employment but: (a) if unfairly done, it will bring the provisions of ss 45 and 46 into play; and (b) if no or inadequate notice is given, the remedy provided for by s 53(a) will be available to an aggrieved employee.[4]

[37] I have already found that no statutory notice of termination/resignation was given by the respondent.

[38] It was also common cause between the parties that also the appellant had given no statutory notice of termination to the respondent.

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4 See also : *Rabe & Another v African Granite (Pty) Ltd* NLLP 2004 (4) 273 NLC at 278 -279

[39] In this regard it should be taken into account that it must be concluded from the wording of section 45(1)(a)[5] that, other than in the case of an employee ,the giving of the required written statutory notice of termination by an employer is not a pre-requisite for the provisions of section 45(1)(a) to come into play.

[40] The fact that no written notice of termination was given by appellant on respondent's version is therefore not decisive herein.

[41] Respondent considered herself terminated due to the oral intimation that 'her contract will not be extended due to the fact that she is no longer interested in her work'. She was apparently also told that her work was not up to standard. She denied that she had been called in to receive counselling in this regard. She denied that she had indicated that she rather wished to resign. On her version she was allegedly told to come back the next day so that she can sign the papers and that she sent a sms to her employer to the effect that she cannot make the appointment as the doctor had called her.

[42] The appellant, on the other hand, all along denied vehemently that the respondent's services had been terminated, as appears from what has already been set out herein above. As the appellant continued to regard respondent as an employee she was repeatedly requested to return to work, (by two letters and orally), and only thereafter and on account of respondent's failure to return to her workplace were disciplinary steps instituted against her, which resulted in her ultimate dismissal.

[43] It does not take much to conclude in these circumstances that learned chairperson in the court *a quo* erred and misdirected himself when he reasoned against this backdrop of evidence that :

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5 45. (1) For purposes of the provisions of section 46, but subject to the provisions of subsection (2) -(a) any employee dismissed, whether or not notice has been given in accordance with any provision of this Act ..."

> ***"Having said that, there are few observations to be made. A, that the Respondent was duly notified by the Complainant about Complainant's illness on the 14th of May 2008 and 15th of May 2008 respectively. B. that with effect from those days above the Respondent was fully aware about the health conditions of the Complainant, C, that despite all that the Respondent took Complainant to task on the 10th of July 2008 at the management meeting about her work performance and that she was not interested in her work. D, irrespective of the aforegoing the Respondent continued to conduct a Disciplinary Hearing against the Complainant on the 14 of August 2008 knowingly that the Complainant was suffering from the ailment as aforementioned. Therefore, for the afore going reasons having analysed the totality of the evidence presented before this Court, I am of the view that the Complainant who was discharged from her employment by the Respondent on the 14th of August 2008 had been a victim of circumstances beyond her control. <u>The Complainant has shown something which justifies this Court in holding its discretion that sufficient cause for granting relief has been shown within the perimeters of Sections 45 and 46 of Act no. 6 of 1992 when such termination is considered as substantively unfair</u>. Having found that the Respondent has terminated the Complainant's employment without fair reasons thus causing the Complainant a loss of income of seventy two thousand Namibian Dollars (N$72 000-00) as per salary for one year... ".***

[44] With the greatest respect to the learned chairperson it was not his task to consider if one of the parties " ... ***has shown something which justifies this Court in holding its discretion that sufficient cause for granting relief has been shown within the perimeters of Sections 45 and 46 of Act no. 6 of 1992 ... ".*** Surely it was the court's task to consider the evidence before it and then, upon an analysis thereof, to decide, whether or not the complainant had discharged her burden of proof. No discretion was to be exercised at that stage.

[45] In the court a quo the parties were *ad idem* that the onus rested on the respondent to prove her dismissal. This issue therefore had to be proved by respondent on a balance of probabilities.[6]

[46] When considering where the balance of probabilities herein lies ie. in considering which

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6 See for instance : *Mineworkers Union of Namibia v CSO Valuations (Pty) Ltd* 2002 (2) 208 NLC at p 213

version is favoured by the probabilities, it emerges from the record that both parties essentially stuck to their guns, even under cross-examination. It cannot be said that the evidence of any witness was shaken in any meaningful way or should be regarded as untruthful. No credibility finding against any witness was made by the court *a quo.* It also appears from the record that both parties conducted themselves in accordance with their version of the events.

[47] Respondent considering herself dismissed on the 10th of July 2008, did not return to work on the 11th and seems to have promptly consulted her representative, Mr Beukes who immediately addressed her claims in the referred to letter of 15th of July. By the 22nd of July 2008 the complaint in the District Labour Court had been lodged.

[48] The only conduct in the respondent's case which is in contradiction with the respondent's version is the aspect of the sms, which was sent on the 11th of July. Why did respondent consider it necessary to explain to her employer that 'she could no longer make it due to circumstances' in circumstances were she considered herself already dismissed? This conduct is however and in all probability explained with reference to the advice the respondent received from Mr Beukes, to the effect that she should refrain from all contact with the appellant, that she s*hould not return to work* and that she should not accept any documentation from them.

[49] Mrs Schoombee on behalf of appellant on the other hand insisted that the meeting of the 10th was convened for purposes of counselling. (Counselling during the probationary period is indeed provided for by the respondent's contract of employment). Respondent admitted that her work was not up to standard, that it was not her line of work, that she was unhappy, that her 'illness was a time bomb' and that she rather resign. (this version is also reflected in the abovementioned letter of 17 July 2010). In such circumstances it was agreed that the respondent should return on the 11th. As she never presented her employer with a resignation letter the appellant considered respondent to remain in their employ.

[50] This position was maintained throughout as the letters of 17 and 21 July addressed by Labour Dynamics cc on behalf of appellant show. Also the warning contained in the letter of the 17th of July, to the effect, 'that should the respondent continue to absent herself from her place of work without official leave she will be held accountable in terms of the disciplinary code of conduct of her employer', was carried into effect, as the disciplinary proceedings promptly launched on 1 August 2008, on the charge of being absent without leave, indicate and, as a result of which, respondent was dismissed on 14 August 2008.

[51] The high- watermark during Mr Beukes' cross-examination of Mrs Schoombee ran as follows:

> ***"... Is it correct that she started her employment at 11 February 2008? -That is correct, Mr Chairman.***
>
> ***And she was dismissed on 10 July 2008 or rather 8 July 2008? - That is correct Mr Chairman,***
>
> ***Let the record show that I finally got the admission that she was dismissed on the 8th of July - (intervention) --- She resigned on the 10th of July.***
>
> ***2009, the salary before deduction incomplete you know. Madam, let me share a little wisdom with you. The truth has an uncanny ability to slip out so often here - (intervention) --- She resigned, that was my answer previously,***
>
> ***Yes, but the truth has that unsavoury characteristic to slip out in an unguarded moment. Her salary was five thousand six hundred and seventy Namibian Dollars (N$5 670-00) per month? - That is correct, Mr Chair...."***

[52] This was really *'much ado about nothing'* and this passage at best demonstrates that Mr Beukes overstepped the 'fair lines of cross-examination'. The so-called admission that according to Mr Beukes slipped out, was in any event common cause. It related clearly to the

backdated dismissal of the respondent as effected by the chairperson on 14 August 2008. This was also clearly understood by Mr Beukes, as this line of questioning shows, and which elicited a factually correct answer from Mrs Schoombee.

[53] In any event it appeared that the versions of the respondent and of the appellant in the court a quo were mutually destructive in the sense that acceptance of the one version necessarily would have involved the total rejection of the other version.

[54] Taking into account however the various factors and circumstances listed in paragraph [46] above it appears that the probabilities herein are evenly balanced in the sense that they do not favour the respondent's case any more than they do the appellant's. In such circumstances the respondent could only have succeeded in the court *a quo* if the court had nevertheless believed her and would have been satisfied that her evidence was true and that the appellant's version was false. [7]

[55] As it is impossible to make such a finding on the record it must be concluded that the respondent has failed to discharge her onus to prove that she was unlawfully dismissed on the 10th of July 2008. The appeal must therefore succeedas the magistrate should not have granted judgement in favour of respondent as the proper judgement in such circumstances would have been absolution.

[56] In view of this finding it becomes unnecessary to deal with all the other grounds of appeal as raised in the relevant notice of appeal.

[57] In so far as is necessary I also find that nothing turns on the issue of the respondent's subsequent dismissal on 14 August 2008, *in absentia*[8] as due and sufficient notice of such

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7 See for instance : *Sakusheka & Another v Minister of Home Affairs* 2009 (2) NR 524 HC at 540 I -541C - see also *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 H-I ; *Stellenbosch Farmers Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 SCA at [14] -[15] ; *Dreyer NO v AXZS Industries (Pty) Ltd* [2006] 3 All SA 219 (SCA) at 228 c-h.

8 The dismissal of 14 August 2008 was also not specified in the 'Complaint' as being the 'date on which the cause of action' arose

disciplinary hearing[9] was given to her representative in this regard. The respondent chose to *'nail her colours to the mast'* of her representative, and when she acted on Mr Beukes' advice by ignoring such proceedings, she did do so at her peril.

[58] In the premises the appeal is upheld and the order of the District Labour Court, made on 28 May 2010, is hereby set aside and substituted for an order for absolution from the instance.

**GEIER, AJ**

**ON BEHALF OF THE APPELLANT:** **Mr. C. van Zyl**

INSTRUCTED BY: **GF Kopplinger Legal Practitioners**

**ON BEHALF OF RESPONDENT:** **IN PERSON**

INSTRUCTED BY:

9 *Oa-Eib v Swakomund Hotel and Entertainment Centre* NLLP 2002 (2) 88 NLC at p 91