REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 31/2005

In the matter between:

THOMAS ARNOLDUS GOUWS **APPLICANT**

and

THE OFFICE OF THE PRIME MINISTER **RESPONDENT**

Neutral citation: *Gouws v The Office of the Prime Minister* (LCA 31/2005) [2013] NALCMD 23 (05 July 2013)

Coram: HOFF J

Heard: **14 June 2013**

Delivered: **05 July 2013**

ORDER

The application for leave is granted in respect of grounds 3 and 4 only of the application for leave to appeal.

JUDGMENT

HOFF J:

[1] This is an application for leave to appeal against the appeal judgment of this court in which this court confirmed the dismissal of the appellant.

[2] It is common cause that the dismissal was done in terms of the provisions of s 24(5)*(a)*(i) of the Public Service Act 13 of 1995 which reads as follows:

> 'Any staff member who, without the permission of the permanent secretary of the office, ministry or agency in which he or she is employed –
> (i) absents himself or herself from his or her office or official duties for any period exceeding 30 days;
>
> shall be deemed to have been discharged from the Public Service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of employment.'

[3] This court found in a judgment delivered on 29 April 2011 that the applicant had been absent for 34 days. In its judgment this court explained the computation of days and I am not convinced that this court erred in any way in the computation of the days the applicant had been absent of office without the permission of the permanent secretary.

[4] This court also referred with approval to the case of *Njathi v The Permanent Secretary, Minister of Home Affairs* 1998 NR 167 where the court per Strydom JP stated that the 'deeming clause terminating the employment comes to the rescue of the employer who was placed in the invidious position of not knowing why and for how long such absence would continue, to again fill the position so that the work can be done'.

[5] This court found that even though the applicant informed the respondent of his whereabouts respondent never knew for how long such absence would continue. This court also found due to the applicant's history of absenteeism, that the applicant was a habitual absentee.

[6] The applicant in his application for leave to appeal referred to five grounds of appeal and Mr Strydom who appeared on behalf of the applicant, though not abandoning the other grounds of appeal, concentrated on grounds 3 and 4 which he submitted is in fact a challenge to the constitutionality of the provisions of s 24(5)*(a)*(i) of the Public Service Act (as amended).

[7] I have indicated (supra) that I am not persuaded that this court erred in coming to certain conclusions, but I shall instead consider the submissions in respect of the constitutionality or otherwise of the said s 24(5)*(a)*(i).

[8] Grounds 3 and 4 deal with the substantive and procedural unfairness of the dismissal of the applicant in terms of s 24(5)*(a)*(i).

[9] Mr Strydom submitted that s 24(5)*(a)*(i) fails the test of constitutionality if one has regard to the provisions of Article 10(1) (which requires that all persons shall be equal before the law); Article 12(1)*(a)* (which provides that all persons shall be entitled to a fair trial); and Article 18 (which provides that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirement imposed upon such bodies and officials by common law and relevant

legislation). It was further submitted that any limitation upon these fundamental rights, as provided for in Article 22, must be sanctioned by the Constitution itself.

[10] This court was referred to an unreported case of the Labour Court in South Africa in the matter between *Hospersa* (first applicant) *Moultire* (second applicant) and *MEC for Health* (respondents) case no. D 218/03 delivered on 18 August 2003 as per Pillay J which dealt with the constitutionality of s 24(5)*(a)*(i) of the Public Service Act, Proclamation 103 of 1994, similarly worded as s 24(5)*(a)*(i), in which the court dealt with the jurisdictional prerequisites for invoking the provisions of s 17(5)(a). The court remarked that s 17(5)*(a)* calls for a purposive interpretation to give effect to the constitutional objective of the right to fair labour practices.

[11] The court found that in view of the deeming provision, when the employees are discharged, they are deprived of all the rights and protections afforded by the unfair dismissal laws. The court at paragraphs 36 and 37 expressed itself as follows:

> '36 . . . Section 17(5)*(a)* not merely restricts, but excludes the employees' right to a fair hearing before being found guilty and dismissed. It deprives the employees of challenging the termination of their services through conciliation and arbitration. It automatically deprives employees of their employment.
>
> 37. All in all, section 17(5) is a draconian procedure. It must be used sparingly and only when the code cannot be invoked when the employer has no other alternative. That would be so, for example, when the respondents are unaware of the whereabouts of the employees and cannot contact them. Or, if the employees make it quite clear that they have no intention of returning to work.'

[12] Mr Ncube who appears on behalf of the respondent submitted that the deeming provision in s 24(5)*(a)*(i) passes the test of constitutionality. He submitted that where a civil servant has absented himself for such a long period without leave or valid reason, such employee has breached the duty to render personal service to his employer, such breach going to the root of the contract of employment entitling the employer to summarily dismiss the employee.

[13] This court was referred inter alia to the case of *SABC v CCMA and Other* (2001) 22 ILJ 18 where the South African Labour Court held that it would be silly to require an employer to hold a hearing for an employee who had deserted and indicated an unequivocal intention not to return to work. Mr Strydom's submission is that there is no evidence of an unequivocal intention not to return to work by the applicant.

[14] Mr Ncube also referred to the matter of *Director-General: Office of the Premier of Western Cape and Another v SA Medical Association on behalf of Broens and Others* (2011) 32 ICJ 1077 (CC) where the following appears:

'In *Phenithi v Minister of Education and Other*, the Supreme Court of Appeal explained the purpose of a deeming provision in the Employment of Education Act similar to that in section 17(5) (a) of the Public Service Act as follows -

Clearly in my view, the provision creates an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory requisites are fulfilled. In such a case there can be no unfairness for the educator's absence is taken by the statute to amount to a "desertion". Only the very clearest cases are covered. Where there is in fact not the case, the Act provides ample means to rectify or reverse the outcome.'

[15] Mr Strydom in reply stated that on the facts of this case and in particular the constant communication between the applicant and his employer the inference of desertion cannot be drawn neither that the applicant no longer regarded himself to be bound to his terms of employment (contractual obligations). Mr Strydom submitted that s 24(5)*(a)*(i) does not include a fair and reasonable procedure as envisaged by the Labour Act 6 of 1992 and the Articles referred to in the Constitution of Namibia and cannot exclude an employee's right to a fair hearing before being dismissed. It was submitted by Mr Strydom that the constitutional challenge to the provisions of s 24(5)*(a)*(i) is an appeal on a point of law.

[16] In my judgment of 29 April 2011, I expressed the view that the provisions of s 24(5)*(a)*(i) were also applicable in the circumstances of the present case and not only in those circumstances where an employee disappears or absconds. Upon reflection, and with due regard to the particular circumstances of this case, I now hold the view that another court may come to a different conclusion.

[17] In the result the application for leave is granted in respect of grounds 3 and 4 only of the application for leave to appeal.

E P B HOFF

Judge

APPEARANCES

APPLICANT: J A N Strydom
Instructed by Du Pisani Legal Practitioners, Windhoek

RESPONDENT: J Ncube
Of Government Attorney, Windhoek

8
8
8
8
8