



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No.: HC-MD-LAB-APP-AAA-- 2020/00072

In the matter between:

**NAMIBIA BROADCASTING CORPORATION**

**APPELLANT**

and

**LYLIE NDEUYA HAUSHONA**

**RESPONDENT**

**Neutral citation:** *Namibia Broadcasting Corporation v Haushona* (HC-MD-LAB-APP-AAA—2020-00072 [2021] NALCMD 31 (29 June 2021))

**Coram:** PARKER AJ

**Heard:** 7 May 2021

**Delivered:** 29 June 2021

**Flynote:** Labour Law – Absent from work without permission – Clause 2.10.1 (vii) of NBC’s (appellant employer’s) Disciplinary Code and Procedure – Clause

providing that absence without permission for five or more days amounting to offence attracting automatic dismissal – Respondent absent for 24 days without permission – Respondent dismissed by NBC – Arbitrator upsetting dismissal – Appellant successful on appeal – Court held that the employee’s duty not to be absent from work without permission arises from the employee’s duty to render personal service to the employer, and so, absence from work without permission goes to the root of the employment contract and a punishable offence or misconduct – Court held, application for leave or to be absent from work not amounting to permission or approved leave to be absent – Court held, further that the dismissal of the respondent employee was for a fair and valid reason and in accordance with clause 2.10.1 (vii) of NBC’s Disciplinary Code and Procedure – Consequently, arbitrator’s award set aside.

**Summary:** Labour Law – Absent from work without permission – Clause 2.10.1 (vii) of NBC’s Disciplinary Code and Procedure providing that absence without permission for five or more days attracting automatic dismissal – Respondent might have applied for leave and did not wait for outcome but absented herself from work – Head of department of respondent circulated emails warning employees that having leave days is not automatic that you can take them without approval – Respondent disregarded such clear warning – Respondent absent for 24 days – Court finding that arbitrator confusing the offence with absenteeism and the guidelines in dealing with absenteeism – Court finding that arbitrator’s award was perverse of the kind entitling this court to intervene – Consequently, arbitrator’s award set aside.

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### ORDER

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1. The appeal is upheld.
2. The respondent’s dismissal is for a fair and valid reason.
3. The arbitrator’s award is set aside.
4. There is no order as to costs.
5. The Matter is considered finalized and is removed from the roll.

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## JUDGMENT

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PARKER AJ:

### Introduction

[1] This is an appeal against the arbitration award made under case no. CRWK 663-18, delivered on 14 September 2020. The appellant is the employer, that is, the Namibian Broadcasting Corporation (NBC), a parastatal (ie a State owned enterprise); and the respondent is Lylie Ndeuya Haushona, the employee.

[2] It is important that I discuss at the threshold two crucial matters. The first concerns relevant aspects of the public administration machinery based on the Namibian Constitution and some enabling Acts. The second crucial point is that no employee is entitled to be absent from work without due permission of the employer; and *a fortiori*, whether such permission was granted is a question of fact.

### Relevant aspects of Namibia's public administration machinery

[3] For the proper administration of the Public Service of Namibia, Offices, Ministries, and Agencies are established in terms of s 3 (1) of the Public Service Act 13 of 1995, as amended ('the PSA'), read with art 32 (7) of the Namibian Constitution. The list of Offices is set out in Schedule 1 to the PSA; Ministries in Schedule 2; and Agencies in Schedule 3. The NBC does not appear in any of the Schedules. It is, therefore, abundantly clear that NBC is not an Office, a Ministry, or an Agency in terms of the PSA.

[4] According to the long title of the PSA, the objects of the PSA are the establishment, management and efficiency of the Public Service and its purpose is for the regulation of the employment, conditions of service, discipline, retirement and discharge of the staff members in the Public Service. In the administration of the Public Service, the PSA provides in s 3 (1) the establishment of Offices, Ministries, and Agencies in accordance with the Namibian Constitution. The President of the

Republic of Namibia determines in terms of s 3 (2) (a) the functions of Offices, Ministries and Agencies. Each Office, Ministry and Agency is headed by an Executive Director who is also the Accounting Officer in terms of the State the Finance Act 31 of 1991. The Public Service is composed of posts on the establishment and posts additional to the establishment.

[5] I have set out the foregoing basic aspects of the public administration machinery of Namibia to make these relevant and crucial points. The NBC is not an Office, a Ministry, or an Agency. The NBC was not established by the President. The President did not determine the functions of NBC as the President does with regard to the Public Service in terms of s 3 (2) (a) of PSA. The NBC is plainly not governed by the PSA.

[6] NBC, a parastatal, ie a public enterprise in terms of the Public Enterprises Governance Act 1 of 2019 ('PEGA'), was established by the Legislature in terms of the Namibia Broadcasting Act ('NBA'). The NBA provides for the establishment of a broadcasting corporation for Namibia and provides for its objectives, powers, duties and functions. The NBC, like all parastatals, was created with an independent Board of Directors, and administratively headed by a chief executive officer (see *Road Fund Administration v Government of the Republic of Namibia and Others* 2012 (1) NR 28 (HC)).

[7] It is the job of the Board of Directors to carry on and supervise the business of the NBC for the benefit of the NBC and for the promotion of NBC's prosperity. (See John A Franks *The Company Director and the Law* 3<sup>rd</sup> ed (1981) at 14.) In doing that, the Board does, among other things, make or approve rules and codes of conduct and give directives from time to time. The provisions of codes of discipline of parastatals may rehearse some of the provisions on discipline of staff members of the Public Service but that cannot by any stretch of legal imagination lead to the conclusion that the PSA governs the NBC and other parastatals in personnel matters, as respondent's counsel, Ms Williams, contented so boldly, when, as I have held, NBC is not in the Public Service. Ms Williams is, therefore, palpably wrong when she submitted that being 'a public enterprise, the internal policies and

procedure of the appellant (ie NBC) are regulated in terms of the Public Service Act 13 of 1995.’

[8] Ms Williams’s misreading of the PSA, PEGA, and the NBA has, with respect, clouded her appreciation of the matter at hand, in particular that only the NBC’s internal disciplinary code and other personnel code applied to the respondent (and other NBC employees), and it is such codes that should be considered by this court in the determination of the instant appeal.

#### Principles on employee’s absence from work without permission

[9] The employee has a duty not to be absent from work without permission duly granted by the employer, that is, with leave of the employer; hence, the term ‘leave’ used when an employee has permission to be absent from work. The duty not to be absent from work arises from the employee’s duty to render personal service to the employer; and so, absence from work goes to the root of the employment contract. (*Strachan v Prinsloo* 1925 TDP) and a punishable offence or misconduct. And it is based on the principle that an employee bears a fiduciary duty to act in good faith in the furtherance of the business interests of the employer.

[10] Burdened with that duty, an employee is obliged by law not to act against the employer’s interests. (*Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA)) Thus an employee must not place his or her self-interest over the business interests of his or her employer. An employee who absents himself or herself from work without due permission of the employer has, in the result, placed his or her self-interest over the business interests of his or her employer; and such conduct is a punishable offence or misconduct in the employment situation. The question that arises is whether the respondent was absent from work without permission; and if she was, what offence was committed.

Was respondent absent from work without permission; and if she was, what offence committed thereby

[11] The crucial point to make at the outset is that whether respondent was absent from work without permission is squarely a question of fact. And permission denotes permission duly granted by the authorized official. Therefore, an application for leave (or permission) to be absent from work (or notice, as the arbitrator called it) cannot as a matter of law and fact amount to permission or approved leave to be absent. The reason is simple. An application connotes a formal request to an authority for something. (*Oxford English Dictionary* 12<sup>th</sup> ed) And common sense and human experience tell me that being a request for something, the authority to whom the request was directed may grant that which was requested or he or she may refuse to grant that which was requested.

[12] It follows as matter of course that any request that respondent might have made to the relevant authority by application or on notice remained a request. Indeed, respondent had knowledge of emails sent out in November 2017 by Ms Maria Nepaya, Head of Content Hub at the NBC (appellant witness at the arbitration) to personnel of the Content Hub, including respondent, and copied to Content Hub Managers. Respondent does not say she had no knowledge of those emails. For obvious reasons, I append hereunder material parts of those emails:

'Sent: Wednesday, November 29, 2017 11:51AM

...

Dear Colleagues,

The indication of your leave does not mean you are granted leave, there is still a lot of stuff to be done for instance see whether indeed you have the leave days as indicated. Secondly having leave days is not automatic that you can take them without approval, thirdly the programmes need to be in order, (tapes to be signed in and tape nr. And dates to be given to Glendyrr and be signed off by manager) before any approval is (granted).

Clarity, from my office approval will only be done if you print out your leave days that you (are) allowed to take and what the balance is, programmes is (are) in order and I get a thumb of approval by your manager in conjunction with the production manager. **THUS IF YOU GO ON LEAVE WITHOUT YOU SEEING MY APPROVAL YOU ARE ON AWOL** and please familiarize yourself with the policy regarding that.

I'm writing this for us to be on the same page and not come back that I did not know. Let's do our work early and get approval early as our programmes are not on holiday(s) but your slot still exist(s) and need to be filled'

'Sent: Thursday, November 30, 2017 12:40 PM

Dear

Colleagues, let us familiarize ourselves with these procedures in place. And carry them out accordingly. We have people who go on leave without formalizing it (by first discussing with supervisors, and then fill in leave).

Those who indicate they are not going on leave, but never report to the desks they are attached must be monitored carefully, and remedial action must be taken.'

[13] The emails did that which any efficient, conscientious and dedicated head of department would do in any public broadcaster. It is commendable by any personnel administration standards. The emails sounded warnings; and they drew the attention of the concerned staff members to what was expected of them in the face of the impending festive season. I find that respondent had sufficient knowledge of the contents of the aforementioned emails, particularly regarding the warning that an application for leave (or notice, as the arbitrator characterized it) to go on leave was not approved leave. Ms Nepaya put the warning in capitalities thus:

'THUS IF YOU GO ON LEAVE WITHOUT YOU SEEING MY APPROVAL YOU ARE ON AWOL and please familiarize yourself with the policy regarding that.'

[14] On the facts, I find that respondent did not have an approved leave that could permit her to be absent from work from 22 December 2017 to 15 January 2018, that is, a period of some 24 days. No sufficient and satisfactory evidence was placed before the arbitrator to prove that respondent had the appropriate and due permission, that is, permission duly granted by an authorized official. The conclusion is, therefore, inescapable that respondent was clearly on AWOL; to use the language of Ms Nepaya in the above-quoted emails. The next determination to make is this: Was dismissal an appropriate punishment.

Was the dismissal of respondent an appropriate punishment

[15] NBC's Disciplinary Code and Procedure ('DCP') provides:

'2.10.1 (vii) Desertion: (5 and more consecutive working days absence without permission will result in automatic dismissal)'

[16] Thus, in terms of the DCP, clause 2.10.1 (vii), respondent was absent without leave (AWOL) for 24 consecutive days; and if an employee was absent without leave for five or more consecutive days, the errant employee commits the offence of desertion which results unequivocally in automatic dismissal. The arbitrator relied on clause 6.2 of the DCP, which is part of the provisions entitled 'Guidelines on absenteeism' to come to the conclusion that 'desertion is only applicable if a staff member fails to provide notice or authorisation from the supervisor'. On the basis of such unsustainable conclusion, the arbitrator surmised without evidence that 'respondent should in the circumstance (circumstances) have charge (charged) the applicant (ie respondent) with absence without permission, as opposed to desertion.' With the greatest deference to the arbitrator, the arbitrator's supposition is totally wrong. It overlooks the definition of the proscription containing the concise description of the requirements set by the DCP for liability for the specific offence of desertion, as I have demonstrated. Ms Williams stands in the same boat as the arbitrator on this issue.

[17] The rest of the provisions going with clause 6.2 are clauses 6.1 and 6.3. Clauses 6:1, 6.2 and 6.3 provide:

'Guidelines on handling absenteeism

6.1 In the event that a staff member absent him/herself from work without approval, it will be required from the staff member to contact the Corporation and explain his/her whereabouts.

6.2 A staff member's service will be terminated after 5 consecutive working days absence from work without notice or authorization from his/her supervisor.

6.3 A staff member who returns to work after his/her services have been terminated does so as an ex-staff member, but will be entitled to state his/her case. If the reason for the unauthorized absenteeism is valid, consideration may be given to reinstate the staff member.'



[18] The provisions of clauses 6.1, 6.2 and 6.3 are guidelines, as the title of the provisions clearly indicates; that is, guidelines on absenteeism. In any case, absenteeism in labour law is a term for absence from work which has become a pattern or a persistent behaviour or practice. None of clauses 6.1, 6.2 and 6.3 creates an offence. On the other hand, paragraph (vii) is part of clause 2.10.1 of the DCP; and clause 2.10.1 has this chapeu: 'The following list of *offences* is illustrative'. (Italiized for emphasis). Clause 2.10.1 provides that one of the offences is desertion, which is found in para (vii) thereof; and so, para (vii) provides the definition of the proscription containing 'the concise description of the requirements set by the law (ie the DCP in this proceeding) for liability for a specific type of crime'. (CR Snyman *Criminal Law* 3<sup>rd</sup> ed (1995) at 60) If the *Snyman* principle is extrapolated to clause 2.10.1 (vii) of the DCP, this emerges irrefragably. The requirement set by the DCP for liability for the specific offence of desertion is 'absence (from work) for 5 and (or) more consecutive working days without permission (see Snyman *Criminal Law* loc cit).'

[19] For the foregoing reasoning and conclusions, I find inevitably that the arbitrator misdirected himself on the law and fact. The respondent was absent from work for more than five consecutive working days; and so, she clearly committed the offence of desertion, and the result, according to the aforementioned provisions of the DCP, is 'automatic dismissal'.

[20] On the authority of *Kandetu v Karibib Town Council* 2014 (4) NR 1097 (LC), which relied on *Njathi v Permanent Secretary, Ministry of Home Affairs* 1998 NR 167 (LC); and *Gouws v Office of the Prime Minister* 2011 (2) NR 427 (LC), the respondent's dismissal was for a fair and valid reason and in accordance with a fair procedure within the meaning of s 33 (1) of the Labour Act 11 of 2007. The court in *Kandetu* was interpreting the provisions of s 29 (4) (a) of the Local Authorities Act 23 of 1992, which are identical to clause 2.10.1 (vii) of DCP on automatic dismissal when the errant staff member absented himself from work without permission for 30 or more days. The court in *Njathi* and in *Gouws* were interpreting similar provisions in the PSA, and they came to the same conclusion.

[21] Based on these reasons, I conclude that respondent's dismissal is for a fair and valid reason and in accordance with a fair procedure. And so, dismissal is an appropriate punishment in the instant matter (See *Njathi* at 172B-C.) I find that the arbitrator misdirected himself on the law and fact; and the misdirection is of the kind that made the arbitrator's decision perverse (*Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC)), entitling this court to intervene (see *Paweni v Acting Attorney-General* 1985 (3) SA 720 (ZS), approved by the court in *S v Kuzatjike* 1992 NR 70 CHC)).

[22] In the result, the appeal succeeds; whereupon, I make the following order:

1. The appeal is upheld.
2. The respondent's dismissal is for a fair and valid reason.
3. The arbitrator's award is set aside.
4. There is no order as to costs.
5. The matter is considered finalized and is removed from the roll.

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C Parker  
Acting Judge

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