REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title:		**Case No:**
Willem George Titus	Appellant	HC-MD-LAB-APP-AAA-2021/00045
and		**Division of Court:** High Court (Main Division)
National Housing Enterprise	1st Respondent	
Fabiola Katjivena	2nd Respondent	
Office Of The Labour Commissioner	3rd Respondent	
Heard before: Honourable Lady Justice Rakow, J		**Date of hearing:** 18 March 2022
		Date of order: 10 May 2022

Neutral citation: *Titus v National Housing Enterprise (NHE)* (HC-MD-LAB-APP-AAA-2021/00045) [2022] NALCMD 28 (10 May 2022)

Ordered:

1. The appeal is dismised
2. No cost order is made

Reasons for orders:

RAKOW, J

Introduction

[1] This appeal rests against a decision by the second respondent, Ms. Katjivena who dismissed the appellant's referral of a dispute against the first respondent on 10 June 2021. The reason for her decision was that on all evidence and arguments presented before her, she found no substance in the allegations leveled against the first respondent. Initially, the prescribed time for the prosecution of the appeal had lapsed but this Honourable Court gave an extension to the time for prosecuting the appeal on 28 October 2021.

Background:

[2] The appellant is employed by the first respondent since 01 March 2014. At some stage during his employment, he was charged by the first respondent with several charges and was facing an internal disciplinary hearing. On 26 June 2020, the appellant appeared for a disciplinary inquiry and at the said hearing it was proposed that the matter could be postponed from 29 June 2020 to 27 July 2020. The appellant indicated that he would not be available on the said dates, as he "was sick because of the victimisation and that because of the victimisation of my employer my chronic condition has even worsened."[1] This was understood by the employer as a request for the hearing to be postponed because the appellant was sick. During cross-examination at the hearing before the second respondent, the appellant maintained that he was not booked off sick by a medical doctor and that his services always remained available to his employer. During his cross-examination of the representative of the first respondent, the CEO Mr. Mukulu, he also indicated that he needed to consult. Mr. Mukulu however indicated that consultation does not need weeks to happen and can happen after hours.

[3] It further transpired that Mr. Mukulu wrote two letters to the appellant, dated 06 July 2020 and 14 September 2020. According to Mr. Mukulu's evidence, these letters were handed to the appellant in line with company policy and he had to sign upon receipt of these letters, accepting that he received the said letters. The content of the letters were both directed to the same topic, requesting the appellant to submit a medical certificate for the period that he was booked off and could not attend a disciplinary hearing. It however seems that the first respondent, and for that matter, the second respondent acknowledged that the first respondent asked for the initial postponement to 6 – 9 July 2020 as their witness, Mr. Mukulu would not have been present on the initial dates of the hearing. It was with these dates that the appellant had an issue.

[1] Page 21 of the typed record line 16-19.

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[4] Mr. Mukulu then gave instructions for the deduction of unpaid leave for the period 29 June 2020 to 27 July 2020, which amounted to 21 working days and a total deduction of N$64 904.82, and it was subsequently deducted from the appellant's salary in October 2020. This deduction then lead to the appellant in the current matter raising a complaint with the Office of the Labour Commissioner on 18 November 2020 regarding unfair labour practice and unilateral change of terms and conditions of employment. This complaint was heard by the second respondent and subsequently dismissed on 10 June 2021. It is against the dismissal of the said complaint that the appellant now appeals.

Reasons provided by the second respondent

[5] In her written judgement, the arbitrator proceeded and set out the opening statements of both the appellant and the first respondent. The appellant contended that in terms of the company policy unpaid leave can only be granted for 15 days upon application by the party and upon the condition that the applicant had no vocational leave to his or her credit, and the deduction made for unpaid leave was therefore unlawful. The first respondent indicated that the deduction was indeed lawful and authorised by the company policies. She then proceeded and dealt with the evidence presented by both the parties and analyse the said presented evidence. She found that it was common cause that the applicant was on paid suspension and that the said deduction was done for unpaid leave and displayed on the payslip of the appellant for October 2020.

[6] She further found that it was common cause that the disciplinary hearing of the appellant was set down for 26 June 2020 and was set to proceed from 7 – 9 July 2020, when the applicant informed the chairperson that he would not be available those days because he wanted to consult his lawyer and was sick because of the intimidation of his employer. She commented that she found it very interesting that the appellant's argument was at all times during the proceedings at the Labour Commissioner that his services were available at all times but yet he was not available at the dates proposed for the continuation of the hearing and as such, his employer expected for him to account for his non-availability. He was on paid suspension and as such should be available at all times to his employer. She further continued and pointed out that the CEO of the first respondent wrote to the appellant two letters to explain his absenteeism, to which no reply was received. She found that the appellant was evasive during the arbitration hearing and failed to give a valid explanation for his unavailability for the period 26 June to 26 July 2020.

[7] She further found that the unpaid leave that was awarded to the appellant was not in terms of the policy description referring to unpaid leave that was applied for but happened due to the appellant's failure to provide a medical certificate for the period he was not available for the disciplinary hearing. After considering all the arguments she then dismissed the applicant's claim and made no order for costs.

The appeal grounds

[8] The grounds of appeal raised by the appellant are as follows:

1. The arbitrator erred in law in finding that the First Respondent was entitled to deduct money for unpaid leave from the appellant's salary for alleged absenteeism for the period from 29 June 2020 to 22 July 2020 when:

1.1 the Appellant appeared at the disciplinary hearing on 26 June 2020 and indicated his unavailability for the proposed period of 29 June 2020 to 22 July 2020;

1.2 at the disciplinary hearing on 26 June 2020, the Chairperson of the disciplinary hearing made an Order postponing the matter to 28 July 2020;

1.3 no disciplinary hearing was held for the period of 29 June 2020 to 22 July 2020 and as such Appellant can not be said to have been absent from work;

2. The chairperson at the sitting of 26 June 2020, has agreed to postpone the matter to 28 July 2021, the proposed dates of 29 June 2020 to 22 July 2020 became academic and nothing can arise from them.

3. The arbitrator erred in law in dismissing the dispute referred to by the Appellant. No reasonable court or arbitrator, properly applying the correct applicable legal principles to the facts, could have arrived at this decision.

[9] The appeal was opposed by the first respondent on the following basis:

1. Regarding the first question of law, the Arbitrator made a correct decision in finding that the First Respondent was entitled to deduct money from the Appellant's salary, as a consequence of his unavailability for the continuation of the disciplinary hearing from the adjournment date and on dates as proposed by the Chairperson until after the 27 July 2020;

2. Furthermore, the Arbitrator made the correct decision in finding that the appellant was expected to avail himself during the disciplinary hearing at any time requested by his employer as he was on paid suspension. The disciplinary hearing could not continue in the absence of the appellant.

3. The Arbitrator further did not err in holding that the appellant's unavailability to attend the disciplinary hearing, in the absence of a valid reason, amounted to absenteeism. The Appellant further had not applied for and was not under any acceptable and/or authorized leave as stated in the First Respondent's leave policy. The medical certificate/doctor's note requested from the Appellant on 06 July 2020 and 14 September 2020 before the salary deduction was on both occasions not furnished to the First Respondent by the Appellant.

[10] Regarding the second question of law, the postponement of the disciplinary hearing to 28 July 2020 was a result of the appellant's indicated unavailability until 27 July 2020. This did not discharge the appellant of accounting for his absenteeism for the concerned duration to his employer. Further to the aforesaid, the deduction was appropriate and as a consequence of the appellant not furnishing a valid reason for his absenteeism during the concerned period. It is further submitted that the decision of the Arbitrator is one that any reasonable Arbitrator faced with the same evidence could have reached, and is not in any sense perverse or vitiated by lack of reason, such that the Honourable Court should interfere with the award.

The Arguments

[11] On behalf of the appellant it was argued that on 26 June 2020, the respondent sought to postpone the hearing ‘to any date after the 26th June 2020 including the 7th, 8th, and 9th July 2020 and after the appellant indicated his unavailability on the proposed dates, the chairperson was the one who agreed to postpone the matter to 28 July 2020. It was never the chairperson’s condition of postponement that it was subject to the appellant providing proof for his unavailability on the initially proposed dates. The respondent further did not suffer any prejudice as a result of agreeing to postpone the matter to 28 July 2020. It was further argued that the moment the chairperson decided to postpone the matter, the proposed period fell away. If the respondent was unhappy with the chairperson’s decision, it was free to take such a decision on review.

[12] On behalf of the first respondent, it was argued that the deduction of the appellant's salary was consequential to the appellant's failure to provide a sick leave note for the concerned period.

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The deduction was made in terms of clause 2 of the Conditions of Service. The first respondent at no point contemplated deducting the appellant's salary in terms of Clause 9 of the Conditions of Service, on account that the appellant did not qualify for the invocation of such clause. In terms of clause 9 of the Conditions of Service, an employee may apply for unpaid leave, at the discretion of the management, if he or she does not have vacation leave days to his credit. It is argued that for one to determine if the deductions were made in terms of the unpaid leave application (clause 9 of the Conditions of Service) or unauthorised sick leave (clause 2 of the Conditions of Service), the intention of the first respondent should be the decisive factor. And it is clear that there was never any intention from the first respondent to provide unpaid leave under clause 9 of the Conditions of Service, and neither was it applied for by the appellant.

Legal and other considerations

[13] Section 12 of the Labour Act, Act 11 of 2007 deals with deductions, and section 12(1) reads as follows:

'An employer must not make any deduction from an employee's remuneration unless -

(a) the deduction is required or permitted in terms of a court order, or any law; or

(b) subject to subsection (2), the deduction is -

(i) required or permitted under any collective agreement or in terms of any arbitration award; or

(ii) agreed in writing and concerns a payment contemplated in subsection (3).'

[14] Sick leave however is regulated in the Labour Act, Act 11 of 2007 under section 24, and specifically section 24(4) reads as follows:

'Despite subsection (3), an employer is not required to pay an employee for sick leave in any of the following circumstances:

(a) if the employee -

(i) has been absent from work for more than two consecutive days; and

(ii) fails to produce a medical certificate by a medical practitioner or any other evidence of proof of illness as may be prescribed;

[15] It is therefore clear that in terms of the Labour Act, employees who are on sick leave for longer than two days and who fail to produce a medical certificate are not entitled to payment of remuneration for the period that they are not available due to sick leave. Clause 2 of the Conditions of Service of the first respondent requires that the appellant furnishes a medical certificate if absent from work, the clause reads as follows:-

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'On the first day of absence, an employee must ensure that the employer is informed of his incapacity to work. Failure to do so will be considered as absence without leave...'

[16] In *Commercial Investments Corporation v Shalyolute and Another*[2] Parker, AJ said the following regarding the grounds of appeal:

'In considering this ground, one must not lose sight of the trite and entrenched principles that –
(a) the function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal, and the Labour Court will not interfere with the arbitrator's findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record (see S v Slinger 1994 NR 9 (HC)); and

(b) where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on the facts if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion, it must uphold the trier of fact (see *Nathinge v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014)).'

[17] The appellant therefore must convince the court that the interpretation provided by the arbitrator is factually wrong, which in this instance the court believes was not done. The court is not convinced that the interpretation and conclusion reached by the second respondent were incorrect.

[18] For that reason, I make the following order:

1. The appeal is dismissed.
2. No order to costs.

Judge's Signature	**Note to the parties:**
RAKOW Judge	Not applicable.
Counsel:	
Appellant	**First Respondent**
H Shimakeleni of Appollos Shimakeleni Lawyers, Windhoek	M Mombeyarara of MM Legal Practitioners, Windhoek

[2] *Commercial Investments Corporation v Shalyolute and Another* (HC-MD-LAB-APP-AAA 41 of 2018) [2019] NALCMD 5 (07 February 2019).

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