REPORTABLE

CASE NOs: SA 43/2011

SA 55/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

Appellant

THOMAS ARNOLDUS GOUWS

and

OFFICE OF THE PRIME MINISTER **Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and CHOMBA AJA

Heard: **21 October 2015**

Delivered: **26 February 2016**

APPEAL JUDGMENT

CHOMBA AJA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] The brief history of this appeal is that the appellant, then holding the position of Chief Efficiency Analyst in the Office of the Prime Minister, the respondent, received a letter from the latter informing him that he had been deemed to have been discharged

from his employment. That action was taken pursuant to s 24(5)*(a)*(i) of the Public Service Act 13 of 1995, which provides that 'any public servant who, without permission of the permanent secretary of the office, ministry or agency in which he or she is employed, absents himself or herself from his or her office or official duties for any period in excess of 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'.

[2] The appellant was disenchanted by the plight in which he found himself as a result of the dismissal and, therefore, instituted a complaint against the respondent in the District Labour Court alleging unfair dismissal. To his disappointment that court's decision went against him. He thereafter appealed to the Labour Court but the outcome of that appeal was equally unpalatable. He, therefore, comes before this court as a last resort in the appeal process.

[3] In his endeavour to gain access to this court, by notice filed in the Registrar's office on 3 June 2011, the appellant besought the court *a quo* to grant him leave to appeal based on five grounds, *viz*:

> '1. That the learned President erred in law in that he misdirected himself by attributing and applying the wrong definition for days when it came to calculation of days contemplated in s 24(5)*(a)*(i) of the Public Service Act, Act 13 of 1995 (as amended).

2. That the learned President erred in law in the calculation of the 30 day period as envisaged by the provisions (of) s 24(5)*(a)*(i) of the Public Service Act, Act 13 of 1995 (as amended) by including into such calculation Sundays and Public Holidays whereas those days should have been excluded by virtue of the provisions of the Public Service Staff Code.

3. That the learned President erred in law whether an employee has been dismissed unfairly or whether any disciplinary action has been taken unfairly against such employee, by failing to have regard to the procedure by virtue of which the appellant was dismissed (*sic*).

4. That the learned President erred in law by ruling that the dismissal of the appellant was substantively fair.

5. That the learned President erred in law in that he found that the conduct of the Appellant amounted to misconduct as is envisaged by the provisions of section 25 of the Public Service Act, Act 13 of 1995 (as amended).'

[4] In granting him leave to appeal, the court *a quo* directed that only grounds 3 and 4, *supra,* were to be submitted for consideration by this court. Notwithstanding that directive, when filing the notice of appeal to this court the appellant's counsel purported to add seven further grounds. The following is the latter part of the notice filed on the appellant's behalf on 5 August 2013:

'In addition, the appellant's grounds of appeal are that the learned President erred in law by:

1. Not ruling that the dismissal of the appellant was procedurally unfair.

2. Not ruling that the dismissal of the appellant was substantively unfair.

3. Finding that the provisions of s 24(5)*(a)*(i) of the Public Service Act 13 of 1995 also applied in the circumstances of the appellant's case.

4. Not finding that s 24(5)*(a)*(i) of the Public Service Act 13 of 1995 does not include a fair and reasonable procedure as envisaged in the Labour Act 6 of 1995 and in the Constitution of Namibia.

5. Not declaring s 24(5)*(a)*(i) of the Public Service Act 13 of 1995 to be inconsistent with the Constitution of Namibia.

6. Not declaring s 24(5)*(a)*(i) of the Public Service Act 13 of 1995 to be inconsistent with the Labour Act of 1995.

7. That the dismissal of the Appellant procedurally unfair he misdirected himself by attributing and applying the wrong definition for days when it came to calculation of days contemplated in s 24(5)*(a)*(i) of the Public Service Act, Act 13 of 1995 (as amended) (*sic*).'

[5] The rest of the details of this appeal will unfold as I delve into the substantive aspects of it.

Application for condonation

[6] The first aspect calling for attention in this appeal is a peripheral one. The appellant is craving the indulgence of this court to grant him condonation for the late furnishing of security for the costs of the appeal. No notice was filed by the respondent to oppose the application and Mr Ncube, the respondent's counsel, quite rightly confirmed at the start of the hearing that condonation was not an issue in this

matter. That being the case, there is no need for this court to make any reasoned determination on the matter. In the event, condonation is hereby granted.

Additional grounds of appeal

[7] Adverting to the substance of the appeal, I deem it imperative to start by commenting on the step the appellant's counsel took in submitting his grounds of appeal to this court. As earlier shown, the Labour Court granted leave to appeal in respect of only grounds 3 and 4 of the five original grounds. It was impermissible for counsel who had conduct of the appeal in the Labour Court to unilaterally add further grounds to supplement those permitted at the time leave to appeal was granted. This is because the rules of this court require that unless one has a right of appeal, one has to seek leave to appeal. In order to vindicate a party's request for leave to be granted to him or her, a party must disclose in his or her application for leave the grounds which he or she believes entitle him or her to be granted leave. Leave is granted based only on those grounds which, in the view of the judge considering the application, offer the applicant a reasonable chance of success. Subject to what I state later, it stands to reason that any disallowed grounds should not be persisted in when a party succeeds in obtaining leave. The impropriety herein identified was aggravated by counsel including in the appellant's heads of argument issues raised in additional grounds. It was highly improper to do so when counsel knew that no leave had been obtained to argue the additional grounds.

[8] In point of fact, additional ground 7 was a clandestine reintroduction of a ground which was rejected by the learned President of the court below when granting leave. It related to the issue whether or not the appellant's period of absence from work was the requisite period as stipulated by s 24(5)*(a)*, *supra.* As for the other additional grounds (for example additional grounds 4, 5 and 6), not only were they not included in the application for leave, but they also related to matters which were never canvassed in the court below and, therefore, needed not to be pronounced upon by that court. Regarding additional grounds 1 to 3 and 6, my view is that they add no value to the appeal beyond the embrace of the grounds which were authorised by the court below.

[9] However, I want to make additional remarks in relation to the so-called additional ground 3. It states:

> *'. . .* the learned President erred in law by "finding that the provisions of s 24(5)*(a)*(i) of the Public Service Act 13 of 1995 also applied in the circumstances of the appellant's case.'"

[10] I do not, frankly, understand the logic in that so-called additional ground. The circumstances of the present case as verified by the respondent's witness, one Jakobus Hermanus Brandt, were, in a nutshell, that the appellant absented himself from his office and duties as Chief Efficiency Analyst in the Prime Minister's office on dates which aggregated in excess of 30 days; that during the entire period he never obtained permission to be absent; that he never applied for sick leave; and efforts

which he, Brandt, made to communicate with the appellant by cell phone were never responded to.

[11] At the trial the appellant never offered any testimony despite the opportunity offered to him by the trial court. In declining so to testify the result was that the appellant failed to verify his pleading as is borne out by the following.

[12] The appellant's claim having been one of unfair dismissal, the respondent formally asked him to give further particulars of his claim. In providing these, the appellant stated the following:

> '3. At the time of the complainant's discharge, he was under medical treatment and was on sick leave;
>
> 4. An application for sick leave is in possession of the respondent;
>
> 5. Over and above the application for sick leave, the complainant, on a regular basis, informed his supervisor and Head of Department of his sickness.'

[13] The respondent gave the following responses to the further particulars given*:*

> '1. The dismissal was not unfair in that:

1.1 complainant absented himself from official duties for a period exceeding thirty days being the 5th of November 2003 until 9th December 2003;

1.2 complainant did not have permission to absent himself from official duty nor did he inform his supervisor or any other senior staff member of such absence;

1.3 complainant was accordingly deemed to have been discharged on account of misconduct in terms of s 24(5)*(a)*(i) of the Public Service Act (Act 13 of 1995).'

It is thus evident that the parties had joined issue, which meant that each had to adduce evidence in propping up their respective pleadings.

[14] Mr Brandt's evidence was confirmatory of the respondent's replies. In the teeth of the foregoing and the evidence in support thereof, the appellant chose not to testify. It is consequently untenable to put forward a ground of appeal suggesting that the trial judge had misdirected himself in law by finding that the provisions of the Public Service Act applied to the circumstances of the appellant's case. The implication of this ground is that the trial court should have turned a blind eye to the damning testimony justifying the dismissal in preference for the unproved allegations of the appellant. That in my view, cannot be correct.

[15] Further it is, in my view, sharp practice to criticise a trial judge for failure to arrive at a determination on matters which were never in contention before him or her during a trial. In addition it is unacceptable to, surreptitiously, reintroduce grounds which a judge who had considered the application for leave to appeal had expressly disallowed.

[16] The impropriety mentioned in para [8] above, in relation to additional grounds 4 and 5, was brought to the attention of Mr Frank SC the appellant's counsel, at the start of the hearing of the appeal and he graciously acknowledged the mischief. It should be mentioned that Mr Frank is not the counsel who argued the appeal in the court below.

[17] Mr Ncube, the respondent's counsel, showed in his heads of argument how bitterly aggrieved he was to be faced with issues raising a constitutional challenge to the validity of s 24(5)*(a)*, in this highest appellate court, when such issues were never canvassed in the court below. He lamented that the gesture by the appellant's counsel tended to relegate this court to the level of a court of first instance. He has my sympathy. However, as the constitutional point was not persisted with in arguments and the appellant appears to have relied on certain Articles in the Namibian Constitution and one case in an attempt only to bolster the submission that

the adoption of a fair procedure in labour cases is a constitutional requirement, I do not find it necessary to decide the constitutional point.

Authorised grounds of appeal

[18] I now advert to the two authorised grounds of appeal. In the first place ground 3 appears to have excess baggage on it according to my understanding. It reads:

> '3. The learned President erred in law whether an employee has been dismissed unfairly or whether any disciplinary action has been taken unfairly against such employee, by failing to have regard to the procedure by virtue of which the appellant was dismissed.'

[19] In terms of the supporting arguments addressed to us at the hearing, the thrust of the present ground revolves around an alleged unfair procedure leading to the dismissal, and not unfair disciplinary action. Therefore, all those words referring to disciplinary action were unnecessary verbiage. The essence of this ground, as I understand it, therefore, is simply that the President in the court *a quo* is alleged to have erred in law by failing to find that the dismissal of the appellant was procedurally unfair.

[20] Ground 4 states:

> 'That the learned President erred in law by ruling that the dismissal was substantively fair.'

[21] In the language of s 45 of the Labour Act 6 of 1992, unfair dismissals are of two categories, namely (a) dismissals without a valid and/or fair reason and (b) dismissals without following fair procedure. In short, the section concerns itself with substantive and procedural unfairness. Therefore ground 4 effectively alleges that the learned President had erroneously found the dismissal of the appellant to have been substantively fair. In other words, the dismissal was effected for no valid and/or fair reason.

[22] I propose to tackle ground 3 first.

The dismissal was procedurally unfair

[23] In terms of the arguments presented on behalf of the appellant, the accent of the appellant's grievance has been predicated on failure to comply with the principle of *audi alteram partem.* In other words, it was argued that before dismissing the appellant, the respondent ought to have subjected him to disciplinary proceedings and thereby given him the opportunity to be heard in defence. Doing so, it was contended, would have satisfied the requirement of fairness in terms of the Labour Act of the day, namely Act 6 of 1992. Since the respondent had failed to employ that procedure, the appellant's dismissal became procedurally unfair and was, therefore, in contravention of the tenor of the said law, so the argument went.

[24] The appellant's counsel anchored his argument on what he considered to have been the *ratio decidendi* in *Hospersa & another v MEC for Health* [2003] 12 BLLR 1242 (LC), a South African case decided in the Durban Labour Court. That case was premised on a statutory provision, namely s 17(5)*(a)*(i) of the Public Service Act 103 of 1994, which uses a language similar to that employed in s 24(5)*(a)* in the instant case. The former section provided as follows:

> "(5)*(a)*(i) An officer, . . . who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, 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 duty.'

[25] The short facts of that case were the following.

[26] There was a collective agreement which had been adopted by the Public Service Co-ordinating Bargaining Council and which facilitated entering into further agreements for special secondment of public officials to a trade union pursuant to a secondment agreement. Consequently, a tripartite secondment agreement was entered into between the trade union, the employer (that is MEC for Health) and the official concerned, namely the employee of MEC for Health. The trade union undertook to reimburse the employer, and the latter was indeed being reimbursed, for the remuneration it continued to pay the official during the period of secondment. The official undertook to render services to the trade union during that period. The employer guaranteed certain protections to the official during the period of

secondment. That agreement facilitated a number of further secondments, but in due course a dispute arose as to whether the last of those secondments was valid, with the employer arguing that it was not while the trade union argued to the contrary. The dispute was arbitrated upon but despite the arbitral award granted in favour of the trade union, the employer directed the official to return to, and resume work for, the employer. After a period exceeding one month had elapsed without the official reporting back for duty, the employer invoked the deeming provision of the above section, thereby terminating the employment of the official. That dismissal was challenged in the Labour Court.

[27] For the purpose of the present issue, I shall quote the following paragraphs, namely 30, 31 and 32 from the judgment of Pillay J (the presiding judge) which are, in my view, germane with the instant case. He stated as follows:

> '[30] As a tripartite agreement for a fixed term, the respondent could not unilaterally terminate it. It conferred rights and protections in favour of the first and second applicants. In turn, the first applicant was obliged to reimburse the respondent for the cost of the second applicant's remuneration during the secondment. These rights and obligations could endure despite the demise of the Resolution 8 agreement. For example, the rights and obligations of parties to a retrenchment agreement are not extinguished if the currency of the recognition agreement which enabled the retrenchment agreement is terminated. Nor is the retrenchment agreement terminated if the employer is liquidated. The agreement will be enforceable against the liquidator. The employer would still be obliged to, for example, inform the trade union if vacancies arise.

> [31] Finding as I do, that the secondment agreement endured after the Resolution 8 agreement was terminated, it follows that the first applicant had a right to the services of the second applicant. Conversely, the second applicant's obligation was to perform official duties for the first applicant. The respondent have (*sic*) not placed in issue that he did not perform duties for the first applicant.
>
> [32] I accordingly conclude that the second applicant did not absent himself from his official duties for more than one calendar month. Furthermore, I find that the second respondent's purported withdrawal of its permission for such secondment to be unlawful and in breach of the secondment agreement.'

[28] After the foregoing pronouncements, the trial judge went on to comment on the effect of the deeming provision in s 17(5)*(a)*, *supra*. He expressed the opinion that the application of the deeming clause deprived an employee of all the rights and protections afforded by the unfair dismissal laws. He labeled the section as not only restricting, but also excluding the employee's right to a fair hearing before being found guilty and dismissed. He consequently condemned the section as having produced a draconian procedure in the dismissal of employees. In his view the section should be used only when an employee is not only on prolonged absence but also in circumstances where the employer has no clue as to the whereabouts of the employee. (My emphasis.)

[29] To my understanding, the discernible *ratio decidendi* arising from the above quoted paragraphs in *Hospersa* was the finding that at the time of the dispute there subsisted a secondment agreement under which the trade union was entitled to the services of the seconded official; that under that agreement the official was obliged to

render official duties to the trade union; and that the purported withdrawal by the employer of its permission for the official to perform services for the trade union was unlawful and in breach of the secondment agreement. In the result the judge held that the official did not in fact absent himself from his official duties as alleged by the employer.

[30] In the light of the foregoing, it is my firmly held view that all the subsequent pronouncements of the judge to the effect that the deeming provision engendered a deprivation of all rights and protections afforded by the unfair dismissal laws and that s 17(5)*(a)* was a draconian procedure amounted to no more than *obiter dicta*. This is because once the judge found that the official had not absented himself from performing his official duties, the question of getting permission did not arise. Therefore, the application of that section became otiose or superfluous. Yet it is that very *dictum* that gave anchor to the sustained and impassioned arguments made on the appellant's behalf in the present case. Unfortunately for the appellant, I am not inclined to accept those arguments.

[31] I do not accept that that *obiter dicta* should be granted the garb of a *ratio decidendi* in the instant case for the following additional reason. This court is the highest court in the land. On the contrary, *Hospersa* was heard in the Labour Court, a court which is inferior to this court. Moreover, *Hospersa* was appealable to a superior court in South Africa. It would be incongruous and embarrassing if this court were to uphold the *Hospersa obiter dicta* and thus elevate it to the status of its *ratio*

decidendi, but if, unbeknown to this court, a superior court in the Republic of South Africa were to explode the rationale of that *dicta* and declare it to be bad law.

Status of foreign judgments

[32] Further still, it is a well-known principle that foreign judgments have no binding authority over domestic courts; at most they are only of persuasive force. Consequently, it behoves those practising in our courts to ensure that before they resort to extra territorial terrain, they explore the home ground to satisfy themselves that no pertinent domestic judgments are available. In the instant case we were not assured that such an inquiry was made. In any case, this court is unaware of any domestic case in which the effect of the deeming clause has been described in as incisive a manner as Pillay J did.

[33] Contrary to Pillay J's pronouncement to the effect that when employees are dismissed through the application of the deeming clause they are deprived of all the rights and protections afforded by the unfair dismissal laws, the present judicial view in this country is the reverse. In *Njathi v Permanent Secretary, Ministry of Home Affairs* 1998 NR 167 (LC), Strydom JP, as he then was, had occasion to discuss the issue of rights of an employee whose employment was terminated through the application of the deeming clause of s 24(5)*(a)* of the Public Service Act. The then counsel for the Ministry of Home Affairs (the employer), Mr Smuts, had earlier made the following submission:

> ‘That the fact that a person discharged in terms of s 24(5)*(a)* of the Public Service Act, has the right to avail himself of the procedure contained in subsec (b), the sting contained in s 24(5)*(a)*, namely dismissal without a hearing, is removed.’

The learned Judge-President tacitly agreed with counsel when he stated that if all that one could say in one’s defence concerning subsec (a) of the section is that ‘there is still s 24(5)*(b)* in terms whereof the Prime Minister can be approached and a reinstatement can be ordered on the recommendation of the Public Service Commission’.

[34] I am in agreement with the court’s opinion in *Njathi* that subsection (b) of s 24(5) does take away the sting which, conceivably, takes away an employee’s right to be heard. That therefore belies the statement in *Hospersa* that employees who are discharged pursuant to the application of the deeming clause are deprived of ‘all the rights and protections of the unfair dismissal laws’. That statement suggests that the person affected has reached a *cul-de-sac* and there is no alternative avenue open to him or her to regain his or her rights. The position of the law in this country is captured in the saying that what one loses on the swings one gains on the roundabouts. The failure of the right to be heard is precedential to the dismissal, while there is a counterbalancing right to be heard exercisable by a discharged employee, with a reasonable chance of redeeming his or her lost rights. In other words, there is a possibility of reinstatement with only a loss of salary occasioned by virtue of the absence.

[35] The deeming clause was also considered by Silungwe P, in *Tjivikua v Minister of Works, Transport and Communication* 2005 NR 403 (LC). The factual situation in that case was, in a nutshell, that the appellant had initially taken French leave from his official duties in order to be deployed in the Directorate of Elections as a helping hand, with remuneration, in the registration of voters. His truancy came to light only when he sought leave from his permanent secretary for taking a second stint at the Directorate. Leave was denied but he nonetheless continued with the escapade on the pretext that his immediate superior, who was herself below the rank of permanent secretary, had given him permission. His absence eventually matured into the requisite period of mischief contemplated by the section under consideration. In the result the deeming clause was resorted to without the appellant being afforded the opportunity to be heard. The headnote in that case simply states that the appeal against dismissal was not allowed as the Ministry was entitled to dismiss the appellant, noting that the provisions of s 24(5)*(a)*(i) of the Act were peremptory, the court having observed earlier in the judgment that the section was invoked by operation of law.

[36] In the light of all the foregoing discussions, I have found no merit in the third ground of appeal. I now move to the fourth ground, which has challenged the existence of valid and fair reasons for the appellant's dismissal. To put it in the parlance of the appellant, the learned President of the court below erred in law when he held that the dismissal was substantively fair.

[37] At the expense of repetition, let me acknowledge the legal proposition that substantive fairness in a dismissal in terms of the labour law calls for the existence of valid and fair reasons for any dismissal. (See s 45 of the Labour Act 6 of 1992). In dealing with this ground I shall first of all outline the factual position as it emerged from the evidence presented in the court of first instance.

Factual situation leading to the dismissal

[38] That situation has already been summarised when I referred to the unchallenged evidence in support of the respondent's allegations and contentions. It only remains to underscore the fact that the appellant's failure to testify produced the result that his allegations that his absence was occasioned by his sickness; that he was granted sick leave; and further still that he was under medical treatment during the period of absence cannot stand the test of scrutiny. The further consequence is that the evidence of Mr Brandt, the sole witness for the respondent, remained unchallenged. The inevitable conclusion to be drawn is that as a public servant the appellant was indeed absent from his official duties or his office without the permission of the permanent secretary in the office of the Prime Minister and that the absence was for a period in excess of 30 days. He thus placed himself within the contemplation of s 24(5)*(a)*(i) of the Public Service Act, *ante*. That having been the factual position, what further valid or fair reason would anybody have to search for to justify the deeming clause being invoked by operation of law against him?

Order

[39] In the ultimate, I have no compunction in determining that the verdict of the court below was unassailable. Consequently the following orders are hereby made:

1. Condonation is hereby granted.

2. The additional grounds of appeal are disallowed.

3. The appeal is dismissed with costs in this court, such costs include the costs of one instructing and one instructed counsel.

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CHOMBA AJA

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SHIVUTE CJ

_____

DAMASEB DCJ

APPEARANCES

APPELLANT:	T J Frank SC Instructed by Du Pisani Legal Practitioners
RESPONDENT:	J Ncube Instructed by Government Attorney