



REPORTABLE

CASE NO: SA 76/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WILLEM GEORGE TITUS

Appellant

and

NATIONAL HOUSING ENTERPRISE

First Respondent

FABIOLA KATJIVENA N.O.

Second Respondent

OFFICE OF THE LABOUR COMMISSIONER

Third Respondent

Coram: FRANK AJA, ANGULA AJA and PRINSLOO AJA

Heard: 21 October 2024

Delivered: 7 November 2024

Summary: At all relevant times of this appeal, the appellant was employed by the first respondent. In October 2020 he noted on his payslip that his salary was not fully paid and that a substantial amount (ie N\$64 904,82) had been deducted from his salary. The events leading up to the salary deduction are as follows: The appellant was placed on paid suspension during September 2019 pending an investigation (the allegations he was being investigated for were not disclosed on record). On 26 June 2020, the appellant was summoned for a disciplinary hearing. On this date, the legal advisor for the first respondent (NHE) requested for the disciplinary hearing to be postponed because the chief executive officer (Mr Mkulu) who would be a witness for

NHE could not attend the hearing. The chairperson suggested to postpone the matter to 7-9 July 2020, however these dates were objected to by the appellant citing bias of the chairperson; his non-availability on the dates suggested as he wanted to consult and a chronic medical condition which had worsened as a result of intimidation by his employer. The appellant stated that he would only be available from 27 July 2020. The disciplinary hearing was then postponed to 27 July 2020. When he took up the issue of the deduction from his salary with the relevant department at NHE, he was informed that the amount was deducted for 'unpaid leave'. Mr Mkulu testified that he had addressed two letters to the appellant to account for his non-availability for the period subsequent to 26 June 2020 up to 27 July 2020 by way of a medical certificate. He further testified that there was a book in which deliveries of letters were recorded (this book was however not presented in evidence). Appellant maintained that he did not receive these letters. As the appellant's complaint for the deduction of his salary went unresolved, he referred the dispute to the Office of the Labour Commissioner alleging 'a unilateral change of his terms and conditions of employment' and 'unfair labour practice'.

The arbitrator found in favour of NHE on the basis that although the appellant testified that he was available at all times to provide his services to NHE, this was contrary to what he informed the chairperson of the disciplinary committee. The arbitrator found that the appellant was duty bound to give a reasonable explanation for his non-availability to attend the disciplinary hearing prior to 27 July 2020. That the appellant misrepresented to the chairperson that an illness prevented him from being available to attend the disciplinary hearing. Further, that in terms of the appellant's terms of his employment condition, absence from work for more than two days due to an illness and failing to present a medical certificate for leave is considered unauthorised leave. The appellant appealed the arbitrator's ruling to the Labour Court. That court found that the arbitrator did not err in her assessment of the evidence, and it dismissed the appeal.

On appeal, this Court must determine whether the court *a quo* erred when it dismissed the appeal by finding that the arbitrator was correct in her assessment of the evidence. The court must also determine whether to condone and reinstate the appeal due to the appellant's failure to file the appeal record timeously.

Held that, the manner in which to discipline employees is part of the conditions of employment. An employee must make himself available for such proceedings and failure to do so, without good reasons, is a breach of the employment conditions and would entitle the employer to continue with the proceedings in the absence of the employee.

Held that, part of the duties an employee owes his or her employer is to not act in a manner which would amount to a breach of faith towards the employer. Conduct that involves deception or misrepresentation may justify dismissal.

Held that, Mr Mkulu was entitled to rely on s 24(4) of the Labour Act 11 of 2007 which provides that when an employee, who claims sick leave, has been absent from work for more than two days and fails to provide a medical certificate to justify their absence, such employee is not entitled to payment for such absence from work.

This Court agreed with the finding of the Labour Court. This was not an instance where it can be said that the finding of the arbitrator was perverse in the sense that no reasonable arbitrator, applying the correct legal principles and having regard to the facts could have come to such conclusion.

The court further found that appellant's non-compliance with rule 8 (the late filing of the record of appeal) was not a flagrant disregard of this rule. The appeal was thus reinstated.

APPEAL JUDGMENT

FRANK AJA (ANGULA AJA and PRINSLOO AJA concurring):

Introduction

[1] At all relevant times to this appeal, the appellant (Mr Titus) was employed by the first respondent (NHE) as a Senior Manager: Business Development and Operations.

[2] During September 2019 he was suspended pending an investigation involving him. The allegations that were being investigated against him are not disclosed on record.

[3] Appellant was summoned to a disciplinary hearing on 26 June 2020. On this date the legal advisor of NHE requested a postponement of the disciplinary hearing as the chief executive officer (Mr Mkulu) who would be the witness for NHE could not attend the hearing.

[4] The chairperson of the disciplinary committee suggested that the matter should be postponed to 7-9 July 2020. Mr Titus objected to this postponement averring that the chairperson was biased to postpone the matter simply because Mr Mkulu was otherwise engaged. He further stated that he was not available on the dates suggested by the chairperson as he still wanted to consult and because his chronic medical condition had worsened as a result of intimidation by his employer. He thus would only be available as from 27 July 2020. The chairperson then postponed the hearing to 27 July 2020 accordingly.

[5] What happened on the date the hearing was postponed to is likewise not part of the record nor was it canvassed in any of the proceedings relevant to this appeal.

[6] Be that as it may, when Mr Titus received his October 2020 payslip he noted that he was not paid in full and that a substantial amount (N\$64 904,82) had been deducted from his salary. When he took this up with the relevant department of NHE he was informed that the amount was deducted for 'unpaid leave'.

[7] It turned out that Mr Mkulu had addressed two letters to him to request a medical certificate for the period subsequent to 26 June 2020 up to 27 July 2020, when according to him he was not available for a disciplinary hearing.

[8] Mr Titus' complaints to Mr Mkulu in this regard came to naught and he referred the dispute to the Office of the Labour Commissioner indicating that he was at the receiving end of a 'unilateral change of his terms and conditions of employment' and 'unfair labour practice'.

[9] The arbitrator appointed by the Labour Commissioner found in favour of NHE on the basis that Mr Titus testified that he was available at all times to provide his services to NHE if he had been called upon to do so. This is contrary to what he informed the chairperson and that Mr Titus was duty bound to give a reasonable explanation for his unavailability to attend a disciplinary hearing prior to 27 July 2020. This he did not do as he misrepresented to the chairperson that an illness prevented him from being available prior to 27 July 2020. In terms of his conditions of employment, a failure to present a medical certificate for such leave where illness caused an absence from work for more than two days meant that such absence would be considered as unauthorised leave. According to the arbitrator, the averment by Mr Titus as to his illness and the duration thereof 'created an impression that he will submit a medical certificate'.

[10] Not satisfied with the ruling of the arbitrator, Mr Titus appealed to the Labour Court. The Labour Court was not convinced that the arbitrator erred at all or that her

assessment of the evidence led to a wrong conclusion of the matter and hence dismissed the appeal.

[11] Mr Titus, through his legal representatives, filed an appeal to this Court against the finding of the Labour Court aforesaid after obtaining leave from the Labour Court.

Brief synopsis of evidence at disciplinary hearing

[12] It is common cause that Mr Titus was on paid suspension pending the hearing by the disciplinary committee due to commence on 26 June 2020 and at that meeting NHE sought a postponement of the matter due to the unavailability of its chief executive officer, Mr Mkulu.

[13] The chairperson was prepared to grant a postponement and suggested the proceedings be postponed to 7-9 July 2020.

[14] Mr Titus accused the chairperson of bias for allowing such postponement but in the same breath indicated that he would not be available before 27 July 2020 as he still 'need to consult on the matter relating to that hearing' and 'indicated that I am sick because of the constant victimisation of my employer my chronic condition has worsened'.

[15] Mr Titus insisted that he was available at all times to render his labour or services to NHE had they requested him to do so.

[16] Mr Titus stated that he never applied for unpaid leave and that he in any event could not do so. This was because unpaid leave was only granted in exceptional

circumstances, such as when normal leave has already been fully utilised, and according to him he still had 42 normal days leave to his credit and if he wanted to take leave he would have to use these 42 days standing to his credit.

[17] Mr Mkulu in his evidence referred to conditions of employment relating to sick leave requiring a person on such leave to provide a medical certificate in support of such leave within two days of absence from work for this purpose. Failing such medical certificate such leave would be considered as unauthorised leave. Mr Mkulu maintained this is the condition of employment he implemented when he ordered a deduction from the October 2020 salary of Mr Titus. This stance is also in line with s 24(4) of the Labour Act 11 of 2007.

[18] Mr Titus in response to the stance by Mr Mkulu disputed his authority to use this source for the deduction as he was at all times available to render his services to NHE. He also stated that it was the chairperson that postponed the matter and not himself and flatly denies he was unavailable due to ill health.

[19] Mr Mkulu testified that he directed two letters to Mr Titus to request a medical certificate from him in respect of the period from the initial hearing by the disciplinary committee up to the postponement date of 27 July 2020. Mr Titus denied receiving these letters and Mr Mkulu indicated that there was a book in which deliveries of letters were recorded and that the delivery of the letters should be reflected in that book. The book, however, was not presented in evidence and in the circumstances, I cannot accept that the letters were delivered to Mr Titus. When asked by Mr Titus' representative whether 'consulting your lawyer amounts to leave from work for about

a week or two' Mr Mkulu stated 'not really that can be done during the normal course of work'. The issue was not pursued any further.

Evaluation

[20] Mr Titus was very adamant in his evidence that NHE had to adhere to their employment contract with him and as this contract did not provide for unpaid leave the use of this mechanism amounted to a unilateral change of employment conditions and amounted to an unfair labour practice.

[21] Mr Titus was also very aware of the fact that his suspension did not mean he could go on vacation but that he was at the beck and call of his employer to return to work. He was adamant that he was available at all times to provide his services if so requested.

[22] As pointed out by the arbitrator, Mr Titus' stance in this regard was contradictory. He told the chairperson he was not available for disciplinary proceedings from at least between 26 June 2020 to 27 July 2020, but insisted he was, at all times, during the relevant period available to render his services.

[23] The manner in which to discipline employees is also part of the conditions of employment. An employee must make himself available for such proceedings and failure to do so, without good reasons, is a breach of the employment conditions and would entitle the employer to continue with the proceedings in the absence of the employee.¹

¹*Namdeb Diamond Corporation (Pty) Ltd v Coetzee* 2022 (2) NR 578 (SC) and *Nghiwete v Namibia Students Financial Assistance Fund* (SA 8-2023) [2024] NASC (6 September 2024).

[24] Part of the duties an employee owes his or her employer is not to act in a manner which would amount to a breach of faith towards the employer. Thus, conduct that involves deception or misrepresentation may, even in itself, justify dismissal.²

[25] Mr Titus raised two reasons why he would not be available prior to the end of July 2020 for a disciplinary hearing namely he needed to consult and, in essence, his illness which he blamed on the victimisation by his employer. There are no reasons, seeing his availability at all times to work, why the consultations could not proceed prior to the dates suggested by the chairperson for the hearing to commence, namely 7-9 July 2020. This motivation is very unlikely to have led to the postponement of the proceedings to the end of July 2020. The second reason, namely that his illness which worsened an unspecified chronic condition is the likely cause for the long postponement. For unknown reasons Mr Mkulu decided to check this reason advanced by Mr Titus for the long postponement and the evidence of Mr Titus showed this was a fib and in essence a misrepresentation or deception to the chairperson and to the employer so as to obtain a postponement while he was at all times, at least, from 7 July 2020 onwards available for work and hence also able to attend a disciplinary hearing.

[26] In these circumstances Mr Mkulu was entitled to rely on s 24(4) of the Labour Act which provides that when an employee, who claims sick leave, has been absent from work for more than two days and fails to provide a medical certificate to justify such absence, that employee is not entitled to payment for such absence from work.

²*Zieve v National Meat Suppliers Ltd* 1937 AD 177 at 192 and *President of the Republic of Namibia & others v Shivute* (SA 86-2022) [2024] NASC (14 May 2024) para 85 and cases cited thereat.

[27] Counsel for Mr Titus submitted that he was granted a postponement for the purpose of consulting lawyers and hence there was no basis at all to consider the question in the context of sick leave. For the reasons set out above, I cannot accept his submissions. Whereas Mr Titus did mention the fact that he needed to consult, he also mentioned the fact that the actions of his employer caused him to be sick and caused his chronic condition to worsen. Mr Mkulu made short thrift of such a long extension for consultations and it is probable that Mr Titus could have consulted comprehensively from the time the original hearing was postponed up to the initial dates suggested by the chairperson about ten days later. It was clearly implicit in the stance of Mr Titus that he would need more time to recover from the progressive worsening medical condition caused by his employer and for this purpose he suggested a longer period where he would not have contact with his employer.

Conclusion

[28] In view of what is stated above, I agree with the finding of the Labour Court that this was not an instance where it can be said that the finding of the arbitrator was perverse in the sense that no reasonable arbitrator, applying the correct legal principles and having regard to the facts could have come to such conclusion.

Application to reinstate the appeal

[29] The record was filed late and an application for condonation and reinstatement of appeal for this non-compliance was filed.

[30] A candidate legal practitioner at the legal firm used by Mr Titus was tasked to see to the finalisation of the record. She unfortunately injured her foot to such an extent that she had to undergo surgery leading to her being booked off from work and

upon her return to work she initially could not work at full pace but in a piece-meal fashion until she returned to her ordinary health and vigour. In the process she overlooked to follow-up to ensure the timeous finalisation of the record.

[31] Whereas some criticism can be levelled at her principal for not having followed up on what cases she was involved with prior to the injury and to deal with it herself or to allocate it to someone else. I do not view this as a flagrant disregard of the Rules of this Court and this is more so where no real prejudice was caused to the respondents because of a more or less three weeks delay in the filing of the record.

[32] In addition, the Labour Court granted Mr Titus leave to appeal which is indicative of the fact that it was of the view that the appeal had some prospects of success. As is evident from the background of the matter it was quite a unique matter and as far as I am aware the first case where a decision of a chairperson to postpone a hearing to a certain date was used to test the veracity of the reasons given by the employee seeking such postponement in the manner it was done.

[33] I am thus of the view that appellant's non-compliance with rule 8 (the late filing of the appeal record) was not a flagrant disregard of this rule and coupled with the fact that the attack on the merits of the appeal was arguable and could not be said to be without any prospects that the appeal had to be reinstated.

[34] As the seeking of condonation for non-compliance with the rules of the court is the seeking of an indulgence. The normal rule is that an applicant for condonation must pay the costs of such application where it is not unreasonably opposed. For the

reason that will become apparent below, I shall however make no costs order in respect of the condonation application.

Orders

[35] The NHE, who was the only respondent opposing the condonation application, indicated in the appeal that it is not seeking costs against the appellant. In the circumstances, I make the following orders:

- (1) The application to condone the late filing of the record and to reinstate the appeal is granted and the appeal is thus reinstated.
- (2) The appeal is dismissed.
- (3) There is no order as to costs.

FRANK AJA

ANGULA AJA

PRINSLOO AJA

APPEARANCES

APPELLANT:

T Muhongo

Instructed by Appolos Shimakeleni

Lawyers

FIRST RESPONDENT:

T Chibwana

Instructed by MM Legal Practitioners