NOT REPORTABLE

CASE NO.: A 291/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LABOUR CONSULTING GROUP CC **Applicant**

and

LOURENS JOHANNES WILLERS **First Respondent**
LJW LABOUR PRACTITIONERS CC **Second Respondent**

CORAM: **PARKER J**

Heard on: 2010 October 7
Delivered on: 2010 November 4

JUDGMENT

PARKER J: [1] In this matter the applicant has brought an application on notice of motion for relief in terms set out in the notice of motion, and has prayed this Court to hear the application on urgent basis. The founding affidavit in support of the application is sworn to by Johannes Jakobus De Klerk who describes himself as a labour consultant and sole member of the applicant in these

proceedings, being Labour Consulting

Group CC. I shall return to the applicant's appellation as a personally in due course.

[2] The 1st respondent has moved to reject the application and has filed an answering affidavit in support of its opposition to the application. The answering affidavit is sworn to be Lourens Johannes Willers who describes himself as a labour consultant and sole member of the 2nd respondent. In the answering affidavit the 1st respondent has raised a preliminary objection respecting the validity of an employment contract upon which the applicant has brought this application.

[3] From the founding papers it is clear that the application bases its *prima facie* right on the existence of a valid employment contract which contains a restraint of trade clause against the 1st respondent. It is the contention of the 1st respondent that no valid contract exists and so, in its view, the applicant cannot approach the Court to protect a *prima facie* right which does not exist in law.

[4] Since the applicant has brought the present applicant on that contract, whose validity is disputed, it behoves me to consider this preliminary objection before proceeding further, if that becomes necessary.

[5] The so-called contract of employment (as Annexure 'JJD3' to the papers in these proceedings) was entered into by the entity Labour Consulting Group

(Pty) Ltd ('the employer') on the one hand and Lourens Johannes Willers ('the employee') on the other hand and it was done at Windhoek on 26 June 2009. Thus, it is the position of the 1st respondent that this Court should not give effect to the contract because from the papers filed of record 'JJD3' was concluded between Labour Consulting Group (Pty) Ltd, a limited company, and the 1st respondent and not by the applicant in these proceedings, namely, Labour Consulting Group CC, a close corporation. For this reason it is argued on behalf of the 1st respondent that no valid agreement came into existence on 26 June 2009 because it is a legal impossibility for an entity that does not exist to enter into a contract.

[6] The 1st respondent's averments are predicted upon statements in the applicant's own papers filed of record that the applicant began its existence as a private company and that it later converted into a close corporation. The conversion took effect on 6 April 2009 as appears on the Certificate of Incorporation (as Annexure 'JJD2' to the papers in these proceedings).

[7] I accept the argument made by counsel on behalf of the 1st respondent that there is no valid contract upon which the applicant can base its prima facie right which it now wants the Court to protect by the interim relief sought in these proceedings. One must not lose sight of the fact that this preliminary objection was raised by the 1st respondent in an answering affidavit, and so the applicant was given ample notice and opportunity to have dealt with it in a replying affidavit. The applicant did not do that. I do not therefore take cognizance of any submission from the bar by counsel which is not based on the facts sworn to in an affidavit by the applicant. Counsel's submission on

that score amounted to giving evidence from the bar which cannot be accepted in application proceedings.

[8] For all the aforegoing, I uphold the respondents' point *in limine* as good and valid. The conclusion on its own is, in my view, dispositive of the application: there is no valid contract between the 1st respondent and the applicant from which the applicant in these proceedings can derive a *prima facie* right which the Court may protect by the interim relief sought. It follows that the application must fail. I do not think the requirements set out in s. 118 of the Labour Act, 2007 (Act No. 11 of 2007) exist, calling for mulcting the applicant in costs.

[9] In the result, I make the following order:

1. The non-compliance with the rules of Court by the applicant is condoned and the application is heard on urgent basis.

2. The application is dismissed.

3. There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Adv. Barnard

Instructed by: Koep & Partners

COUNSEL ON BEHALF OF THE 1ST AND 2ND RESPONDENTS:

Ms Campbell
Ms Du Plessis

Instructed by: Du Pisani Legal Practitioners