



CASE NO.: I 3253/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA POST LIMITED

PLAINTIFF

and

MARIA HIWILEPO

DEFENDANT

CORAM: NDAUENDAPO, J

Heard on: 27 - 28 October 2009

Delivered: 17 June 2011

JUDGMENT

NDAUENDAPO, J: [1] At the close of plaintiff's case, the defendant applied for absolution from the instance.

[2] The plaintiff is represented by Mr Conradie and the defendant by Mr Namandje.

[3] Before analysing the evidence presented it is important to look at the pleadings in this matter. The plaintiff, Namibia Post Limited, issued summons against the defendant, Maria Hiwilepo. In the declaration plaintiff alleges that on or about 2001 to 2004 it lent and advanced a total amount of N\$62 072.46 to defendant at defendant's special instance and request in terms of a study loan/bursary agreement. The plaintiff further alleges that in terms of the agreement it was agreed that, inter alia, defendant would diligently pursue her studies, shall regularly report to plaintiff on progress of her studies upon successful completion of her studies she would take up employment with plaintiff, failure by defendant to take up employment or in the event of her resigning from the employ of plaintiff, the full loan amount under the bursary agreement shall become due and payable together with interest at 20% per annum, defendant's failure to complete the studies under the bursary agreement shall render her liable to repay the full amount of the loan. Defendant failed her studies and failed to repay the amount of N\$62 072.46. She commenced work with plaintiff as a temporary employee from 24 January 2005 until 31 December 2005. She was then appointed permanently on 01 April 2006 and resigned on 14 August 2006.

[4] In her plea, the defendant denies entering into a loan agreement with the plaintiff. She pleaded that she was granted a bursary by the plaintiff with no repayment terms.

[5] Mr Conradie closed the plaintiff's case after he called several witnesses. Mr Namandje then applied for absolution from the instance on the following two grounds:

Firstly, he submitted that the plaintiff's case is based mainly on the alleged written agreement failing which (if not proven) from an oral agreement between the parties. In the case were the agreement is disputed the plaintiff must not only prove the terms but must also prove that there was an enforceable agreement against the defendant. At the end of the plaintiff's case the alleged agreement (either written or oral) was not proved.

Secondly, he submitted that in view of the plaintiff's admission that the defendant was a minor at the time the agreement was concluded (if indeed such an agreement was concluded) it is a limping and unenforceable agreement as the defendant was not assisted by a guardian therefore that agreement is not enforceable. Mr Conradie submitted that there was an agreement with the defendant and she was assisted by her guardian when the agreement was entered into.

Test to be applied:

The test for absolution from the instance to be applied by a trial court at the end of plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403(A) at 409 G-H as follows:

"...(W)hen absolution from the instance is sought at the close of plaintiff's case the test to be applied is not whether the evidence led by plaintiff establishes what would finally be

required to be established, but whether there is evidence upon which a court,

applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff (Gascoyne v Paul and Hunter 1917 TPD 170 at 173, Ruto Flour Mills (Pty) Ltd v Adelson 1958(4) SA 307(T)”

This implies that a plaintiff has to make out a prime facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court would find for the plaintiff. See *Marine Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 at 37G-38 (A). In *Bidoli v Ellistron t/a Ellistron Truck and Plant* 2002 NR 451 at 453E-F Levy AJ said: *‘The phrase ‘applying its mind reasonably’ requires the court not to consider the evidence in vacuo but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case. Levy AJ further held that ‘if a reasonable Court keeping in mind the pleadings and the law applicable, considers that a Court ‘might’ find for the plaintiff, then absolution from the instance must be refused.’*

At this stage of the proceedings all what the plaintiff must show is that there is sufficient evidence to show that the plaintiff entered into an agreement with the defendant. That it complied with its obligations as per the agreement and the defendant being a minor was assisted by her guardian when she entered into the agreement.

[6] I now turn to the evidence presented by the witnesses for the plaintiff. Ms Tjipangandjara testified that she was employed by the plaintiff as a manager of training. Her duties where, inter alia, to execute training functions. She knew the defendant as she was awarded a bursary by the plaintiff. She testified that the plaintiff had a policy regarding the award of bursaries to students. That policy is embodied in a document titled 'Human Resources Policy and Procedures Manual (which was discovered by the plaintiff). At paragraph 19.8 of that document the following are listed:

“(a) When a bursary is awarded to a student the employee should have an admission or a provisional admission letter from an institution of higher learning within the SADC region. NAMPOST will then be liable for the following: Registration, tuition, accommodation, examination (where applicable) prescribed books, and related cost deemed as necessary by the training Department.

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.....

- (i) Students obtaining a bursary will enter into an agreement stipulating the obligation of both parties; the student and the sponsor.*

- (j) Students will be required to perform holiday work within the company against a payment during the December/January vacation.*

- (k) *After completion of studies, a student shall be required to serve NAMPOST for a period equal to the years for which the bursary had been granted. In case the employee takes up a job with another company or resigned, then he/she will be required to reimburse the full amount about (sic) 20% that was granted to him or her for the duration of studies. However, if there is no suitable vacancy, students shall be absolved from this obligation after a period of Ninety days."*

[7] She further testified that there was a bursary agreement concluded with the defendant. She also testified that the signed agreement could not be found, but she was adamant that there was indeed a signed agreement between the defendant and the plaintiff. The terms of the agreement are as set out in the human resources policy and procedures manual. Her bursary covered registration, tuition, accommodation, meals and prescribed books. In total Nampost financed her studies to the amount of N\$62 072.46 over a period of four years (2001-2004). She further testified that the defendant was supposed to complete her studies at the end of 2004 and she was requested to commence her job on 01 January 2005. She failed her final examination and did not report for work on 01 January 2005. After various attempts to trace her, she came and met with her and the acting general manager Human Resources, Mr Moses Ikanga on 18 January 2005. She requested study leave of one year and a half, but the request was declined. It was recommended that she takes up employment in the IT department to start on 1st of January 2005. In April 2006 the defendant submitted her results and she was appointed as a fulltime graduate trainee. She resigned from Nampost on 14 August 2006. Nampost indicated to her that she was

having a bursary obligation and would be required to pay back the company. She testified that a meeting was held between the defendant; herself and the company secretary (Eldorette Harmse) and at that meeting she was informed that she would be required to sign an acknowledgement of debt. She did not dispute her liability to the plaintiff, but she stated that she was only prepared to pay N\$20 000.00.

[8] George Itembu testified that he is the head of internal audit and risk management at Nampost. He obtained all the payments made by the plaintiff (human resource department) to the defendant and institutions on her behalf. He testified that the total amount paid by Nampost was N\$62 072.40.

[9] Tyekero Tweya testified that he was employed as general manager human resources at Nampost (during 2001-2004). He testified that he knows the defendant as one of the recipient of a scholarship. He further testified that the procedures were that advertisements for bursaries will be placed in newspapers and a panel will interview the applicants. Once the process is dealt with contracts for the successful candidates would be prepared. All the successful candidates had to sign an agreement and the finance department would not have paid for her studies had she not signed the agreement. He also testified that if the bursary recipient is a minor than a guardian would have assisted her in signing the agreement.

[10] Eliot Musaso testified that he was employed by the plaintiff as a training officer in the human resources department. He testified that he remembers specifically that the defendant came to him and he gave her a contract. He discussed the content of the contract with her. She was a minor and she was informed to bring her guardian for purposes of assisting her in signing the contract. He further testified that the agreement was signed otherwise he would not have processed any payment to UNAM for defendant's studies. He testified that the defendant was assisted by her guardian when she signed the

contract otherwise there would not have been a contract and payments to UNAM would not have been processed.

[11] Ms Harmse testified that she was employed as the company secretary towards the end of 2006. Ms Tjipangandjara asked her to facilitate a meeting between her and the defendant. At that meeting they discussed her obligations towards the plaintiff as she was about to resign prematurely. She testified that she prepared an acknowledgement of debt and she (the defendant) told her that she wanted time to consider and asked for receipts of all payments made on her behalf. According to Ms Harmse, the defendant never disputed her liability towards the plaintiff. She testified that at the last meeting in 2006 the defendant informed her that she only owed the plaintiff

an amount of N\$20 000.00 and she was informed that that amount was not correct and the correct amount was the one given to her.

[12] Lavina Mostert

She testified that she received a bursary from the plaintiff in 2003 for studies at Polytechnic. In 2005 she started working at Nampost as a graduate trainee for 2 years. She met the defendant while a student and they worked during vacation at Nampost. The contract with Nampost stipulates the terms and conditions and it stated that if you do not work the number of years for which you were sponsored, then you have to pay back. The defendant and another person witnessed her contract and she in turn also witnessed the contract on 9 February 2005 in the boardroom of Nampost.

That was the case for the plaintiff.

[13] I now turn to the two grounds advanced by Mr Namandje in support of the application for absolution from the instance. Mr Namandje submitted that the plaintiff did not prove the agreement (either written or oral). Mr Conradie applied for an amendment to the declaration to the effect that the contract was either in writing and/or an oral contract. That amendment was granted. The evidence by Ms Tjipangandjara was clear as to the procedures which were applied when a bursary was awarded. She testified that she fully explained the terms and conditions as set out in the human resources policy and procedures manual to the defendant. She further testified that the plaintiff honoured its financial obligations towards UNAM in respect of the

defendant, the other witnesses also testified about the terms and conditions of the bursary and that the plaintiff met its financial obligations towards the defendant. Based on the evidence by the witnesses for the plaintiff, I am satisfied that sufficient admissible evidence has been placed before court which shows that a reasonable court may find that indeed an agreement was entered into between the parties.

[14] The second ground on which the application is based, is that the defendant was a minor at the time the agreement was entered into and she was not assisted by her guardian and therefore the contract is unenforceable. It is trite law that the defendant is bound by her pleadings. The defendant pleaded that she denies entering into any loan agreement with the plaintiff. She

pleaded that she was granted a bursary by the plaintiff. Nowhere in the plea does the defendant say that she was a minor and unassisted by her guardian when she entered into the agreement. Nor was an amendment sought to amend her plea to say that she was a minor and was unassisted when the agreement was entered into. I therefore reject that second ground.

[15] For all those reasons, I am satisfied that sufficient evidence has been placed before court on which a reasonable court could or might give judgment in favour of the plaintiff.

[16] In the result the following order is made:

The application for absolution from the instance is dismissed with costs.

NDAUENDAPO, J

ON BEHALF OF THE PLAINTIFF

Instructed by:

Mr Conradie

Conradie & Damaseb

ON BEHALF OF THE DEFENDANT

Instructed by:

Mr Namandje

Sisa Namandje & Co.