

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: (T) I 3253/2007

NAMIBIA POST LIMITED

PLAINTIFF

and

MARIA HIWILEPO

DEFENDANT

**Neutral citation:** *Nampost Limited v Hiwilepo (T) I (3253/2007)* [2013] NAHCMD 18  
(29 January 2013)

**CORAM:** NDAUENDAPO, J

**HEARD ON:** 27-28 October 2009, 13-14 June 2012

**DELIVERED ON:** 29 January 2013

Flynote: Law of contract—Plaintiff sued the defendant for N\$62 072.46 for money lent and advanced in respect of a study loan/bursary awarded to defendant—Term of the bursary agreement that defendant had to work for the number of years her studies were paid for, or failure to do that, she had to pay back—Defendant denied having signed a bursary agreement with plaintiff, in the alternative unenforceable contract as she was a minor and unassisted when she entered into agreement—Claim upheld.

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Summary: The plaintiff sued the defendant for N\$62 072.46 for money lent and advanced in respect of a study loan or bursary awarded to defendant. The terms and conditions of the bursary award were inter alia that the plaintiff will pay for her studies and in return she will work for the plaintiff on completion of her studies for the number of years her studies were paid for. Plaintiff complied with its obligations. Defendant after completing her studies failed to comply with her obligations as she resigned prematurely. Defendant denies that she was given a bursary with conditions attached. In the alternative, she pleaded that if court finds that she was awarded a bursary, the contract is unenforceable as she was a minor at that stage and she was unassisted when she entered into the agreement.

Held, that she was indeed awarded a bursary subject to certain terms and conditions as contained in the human resources policy documents. Held further that, on balance of probabilities she was assisted when she entered into the contract with plaintiff.

Held further on balance of probabilities plaintiff's version more probable than that of defendant.

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### ORDER

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1. The plaintiff's claim succeeds.
2. The defendant is ordered to pay the plaintiff the amount of N\$62072.46 together with interest at a rate of 20% per annum calculated from date of judgment to date of payment.
3. Costs of suit.

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### JUDGMENT

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**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 analyzing 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 with the defendant and she was not assisted by a guardian therefore that 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) 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 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 were, 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:

*“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.*

*(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. I was recommended that she takes up employment in the IT department to start on 1<sup>st</sup> 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 the meeting she was informed that she would be required to sign an acknowledgment 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 a Nampost. He obtained all the payments made by the plaintiff (human resource department) to the defendant and institution 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 a 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 purpose 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 acknowledgment 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 the 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 to 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 contact 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/pr 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 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.

After I dismissed the application for absolution from the instance the defendant filed an amendment to her plea. The amendment reads as follows:

*‘2.1 The defendant denies entering into any loan agreement with the plaintiff. The defendant however pleads that she was granted a bursary by the plaintiff in the amount of N\$70,939.89 at **no repayment term**. In the alternative and in the event of the court finding that there was indeed a loan agreement between the parties the defendant in any event pleads that such a contract is unenforceable as neither as at the relevant time she was a minor and was not assisted by her guardian nor was she self emancipated.*

2.2 Save to admit the content of 4.1 to 4.3, the rest of the terms alleged are denied. There was no replication filed to the amended plea.

After the amended plea was filed, the matter was set down for defendant’s case

## **[21] Defendant’s case**

Mr Namandje submitted that the failure to file a replication meant that the plaintiff would not be able to meet the defence raised by the defendant. I disagree with that submission. In terms of sub rule 25 (2) ‘it is unnecessary to deliver a replication which

would be a mere joinder of issue or bare denial of allegations in the plea. 'it follows that a replication need be filled only where the plaintiff wishes to admit allegations in the plea, or wishes to plead fresh facts by way of confession and avoidance in answer to the defendant's plea' (see Superior Court Practice Erasmus 1993 B1-167) From the above it follows that it was not necessary to file a replication as it would have been a bare denial.

The defendant's testified that she is currently 27 years old and a pilot. She finished grade 12 in 2000. She saw an advertisement for Nampost bursary and she applied. She was called for an interview. A panel of four people interviewed her for an hour. After the interview, she was informed that she was successful and that she must come and get her letter (indicating that she was awarded a bursary) to use it for registration purposes at Unam. She testified that she never signed any agreement nor was she ever assisted by her guardian or parents. She was 16 during February 2001. She denied ever being presented with a document where her parents signed. Her parents were in the North and they were not invited to a signing ceremony nor was she invited at such a ceremony. According to her, Mr Tweya never told her that if she resigns she must repay the bursary. He only told her that if there is a vacancy Nampost will employ her. She denied having been presented with the human resources policy document. She further testified that in 2005 she told Nampost that she wanted to resign and she was presented with an unsigned contract and Ms Tjipangandjara told her about her obligations and provided her with an unsigned copy of the agreement. She further denied having entered into an oral agreement that if she resigns she must pay back the money. That was the case for the defendant.

### **Plaintiff's submission**

[20] Counsel for the plaintiff submitted that the witnesses for the plaintiff clearly set out the procedures, terms and conditions when a bursary is awarded to a student. Those terms and conditions are also contained in the human resources policy document.

According to counsel, the defendant was awarded the bursary subject to the terms and conditions of the bursary policy. He argued that the plaintiff does not award free bursaries. He further submitted that the plaintiff complied with its obligations as per the agreement and paid all the tuition and other expenses to Unam on behalf of the defendant. He further submitted that the defendant was assisted by her parent/guardian when she entered into the bursary agreement otherwise the plaintiff would not have granted the bursary.

### **Defendant's submission**

[21] Counsel submitted that if the plaintiff is relying on a written agreement then the terms must be proven. According to counsel, plaintiff failed to do that. In the alternative, counsel submitted that if the court should find that there was a loan agreement that agreement is unenforceable as the defendant was a minor and she was not assisted by her guardian nor was she self emancipated.

### **[22] Applicable legal principals**

It is trite that a party who asserts has a duty to discharge the *onus* of proof. In *African Eagle Life Assurance Co Ltd v Cainer*,<sup>1</sup> Coetzee J applied the principle set out in *National Employers' General Insurance Association v Gany* 1931 AD 187 as follows:

'Where there are two stories mutually destructive, before the *onus* is discharged the Court must be satisfied that the story of the litigant upon whom the *onus* rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the *onus* rest is the true version...'

The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in *National Employers' General v Jagers*,<sup>2</sup>

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<sup>1</sup> 1980 (2) SA 234 (w) at 237 D.H African Eagle life Assurance Co Ltd v Cainer

<sup>2</sup> 1984 (4) SA 437 at 440 D-E

as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rest on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false.'

[23] The plaintiff called five witnesses in support of its case. The witnesses testified about the procedures when a bursary is awarded. Mr Tweya, who was employed as a general manager, testified that before a bursary is awarded the short listed candidates are called for an interview. He testified that during this interview the terms and conditions of the bursary are explained to the candidates. Although the signed contract between the plaintiff and defendant is missing, the terms of the agreement are as contained in the human recourse policy documents and they are standard and applicable to all those who receive a bursary from Nampost.

The defendant confirmed that she attended an interview which lasted for an hour. She however denied that it was explained to her that if she does not honour her contractual obligations such as working for Nampost for the number of years that her studies were paid for or that if she resigns prematurely she must pay back the money which was paid for her studies. The denial by the defendant that those terms were not explained to her is highly improbable. Ms Mostert who was also awarded a bursary by the plaintiff

testified that those terms were fully explained to her during the interview. In addition those terms and conditions are also set out in the human resources policy which Ms Tjipangandjara testified were fully explained to the defendant. Those terms and conditions form the cornerstone of the plaintiff's bursary policy and I cannot see how a panel consisting of four people who interviewed the defendant could have failed to explain those important terms to the defendant. I honestly do not believe her when she said it was not explained to her. She on the other hand conveniently remembered that she was supposed to work during holidays, but does not remember that she had to pay back the money if she resigns prematurely.

[24] On the aspect of not being assisted by her guardian the evidence was that if the bursary recipient was a minor he/she had to be assisted by her guardian. Mr Tweya testified that all successful candidates had to sign a contract and the plaintiff would not have paid for her studies had she not signed the contract. He also testified that if the bursary recipient was a minor than a guardian would had assisted her in signing the contract. Eliot Musasa also testified that he specifically remembered 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 contract was signed otherwise he would not have processed any payment to Unam for defendant's studies.

I closely observed the witnesses for the plaintiff when they testified and I must say that they made a good impression on me. They were credible witnesses.

[25] On a balance of probabilities the version of the plaintiff is more probable than that of the defendant. The defendant was one of the lucky grade 12 pupils to be awarded a bursary. I am sure that she was excited to be granted a bursary and I am also sure that she would have done everything, including signing the contract with the assistance of her guardian, to conclude the bursary agreement with Nampost for her, it was an opportunity not to be missed. I therefore accept the version of the plaintiff as more probable and reject the version of the defendant as false.

In the result I make the following order.

1. The plaintiff's claim succeeds.
2. The defendant is ordered to pay the plaintiff the amount of N\$62 072.46 together with interest at a rate of 20% per annum calculated from date of judgment to date of payment.
3. Costs of suit.

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**GN Ndauendapo**

**Judge**

**APPEARANCES**

**PLAINTIFF:**

**DIRK CONRADIE  
OF CONRADIE & DAMASEB LP**

**DEFENDANT:**

**SISA NAMANDJE  
OF NAMANDJE & CO**