REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 744/2012

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **PLAINTIFF**

and

JONAS NDIWAKALUNGA HEITA **DEFENDANT**

Neutral citation: *Government of the Republic of Namibia v Heita* (I 1402/2012) [2014] NAHCMD 69 (26 February 2014)

Coram: UEITELE J

Heard: 26, 27 March 2013, & 11 April 2013

Delivered: 26 February 2014

Flynote: Public Service Act, 1995 - Paragraph 5(h) of Annexure A to Part D.I /XI of the Public Service Staff Rules providing that staff member who was granted study to continuously serve the State in an office, ministry or agency – Words 'office, ministry or agency' in Public Service Staff Rules mean, office, ministry or agency established as contemplated in Article 32(3)(g) of the Namibian Constitution.

Practice - Pleadings - Purpose of - Such purpose to elucidate and not obfuscate issues - Party will not be allowed to raise a defence which is not covered in his plea.

Summary: The plaintiff is claiming an amount of N$ 23 095 -58 from the defendant in respect of damages allegedly suffered as a result of breach of contract by the defendant in respect of study leave granted to defendant whilst he was employed in the Ministry of Environment and Tourism.

Defendant denies breaching the contract and pleaded that he is still serving the State although in a separate department. In oral arguments it was argued (although not pleaded) that the defendant has served the State for one year after he completed his studies as is required in the agreement and that he was accordingly not in breach of the agreement.

Held that any interpretation or meaning which one assigns to the words ‘office, ministry or agency’ must be informed by the Public Service Act, 1995.

Held further that NAM-PLACE was not established as an office, ministry or agency as contemplated in Article 32(3) (g) of the Namibian Constitution and that the defendant is not serving the State in any office, ministry or agency.

Held further that the defendant is bound to what he has pleaded and will not be allowed to raise a defence which is not covered in his plea.

ORDER

(a) The defendant must pay the plaintiff the amount of N$ 63 498-92 less the amount of N$ 40 403-34 which is held by the plaintiff. The amount which the defendant must pay to the plaintiff is the amount of N$ 23 095-58.

(b) The defendant must pay interest at the rate of 12% per annum calculated on the amount of N$ 23 095-58 reckoned from 01 May 2011 to 26 February 2014 (both days included).

(c) The defendant must pay interest at the rate of 20% per annum calculated on the amount of N$ 30 700-76 reckoned from date of judgment to date of payment (both days included).

(d) Costs of suit.

JUDGMENT

UEITELE, J

INTRODUCTION

[1] In this action the plaintiff (who is the Government of the Republic of Namibia through the Ministry of Environment and Tourism) is claiming the amount of N$ 23 095 - 58 from Jonas Ndiwakalunga Heita (who is the defendant), I will for ease of reference refer to the plaintiff as the Ministry and to Mr Heita as the defendant.

[2] The facts which are not in dispute are the following:

(a) The defendant was employed by the Ministry as a Chief Warden from 19 October 1998 to 30 April 2011. On 30 April 2011 the defendant tendered his resignation and took up employment with NAMIBIA Protected Landscape Conservation Areas Initiative (NAM-PLCE).

(b) NAMIBIA Protected Landscape Conservation Areas Initiative (NAM-PLCE) is a project initiated by the United Nations Development Programme with the Ministry of Environment being the implementing partner. The project is jointly funded by the Global Environmental Facility and the Ministry.

(c) Whilst so employed the defendant embarked on fulltime studies at the Nelson Mandela Metropolitan University in the Republic of South Africa (he studied towards the Bachelor of Technology degree in Nature Conservation) this was during the year 2007. To enable him to pursue his studies, he was granted special study leave with full remuneration for the period January 2007 until December 2007.

(d) After successfully completing his Bachelor of Technology degree in Nature Conservation he again embarked on fulltime studies towards a Master degree in environmental science at the UNESCO-IHE University in the Netherlands. from 16 October 2008 to 20 April 2010. To enable him to pursue his studies, he was again granted special study leave with full remuneration for the period 16 October 2008 until 30 April 2010.

(e) Both the first and second periods of study leave were granted subject to certain conditions. The conditions were contained in an agreement signed between the Ministry and the defendant (but the signed agreement could not be located and was not produced as an exhibit). The conditions are also contained in paragraph 5(h) of Annexure A to Part D I/XI of the Public Service Staff Rules. The Ministry relies on paragraph 5(h) of Annexure A to Part D I/XI of the Public Service Staff

Rules for its claim. The conditions on which he was granted study leave were amongst others that:

(i) the defendant will successfully complete his studies with in the stipulated study period;

(ii) the defendant will resume his normal duties immediately after completing his studies and that he will, thereafter continuously serve the State for a period equal to that which he was released (obtained study leave) for study;

(f) The defendant undertook to, if he failed to comply with the conditions set out in paragraph (e)(i) &(ii) above, or resigns from the service of the Ministry, or is dismissed because of misconduct before the specified study has been successfully completed or before the expiry of the period of service after completion of the studies, refund the Ministry, as soon as he is called upon to do so, all monies received by him from the Ministry during the period of special study leave, together with interest thereon at a rate determined by the Ministry of Finance, calculated from the date of breach of contract.

(g) The defendant resigned from the employment of the Ministry on 30 April 2011 that is 6 months and 6 days short of the period which he had agree to serve the State after completing his studies.

(h) He was informed by the Ministry that he was in breach of his contractual obligations and was called upon to refund the Ministry all money's received by him during the period of special study leave together with interest thereon, and that he refused to effect the payments as called upon by the Ministry.

(i) The monetary value of the six months and six days period is the amount of N$ 63 498-82. That on the date of his resignation the defendant was entitled to a leave gratuity in the amount of N$31 960-16 and a *pro rata* bonus in the amount N$8 443-18 respectively. That the Ministry withheld those amounts (i.e. the $31 960-

16 and the N$8 443-18) and is now claiming the balance of N$23 095-58 from the defendant.

[3] The defendant is resisting the Ministry's claim. The ground on which he is resisting the claim is that the Ministry's claim is allegedly based on the false assumption that he was no longer in the services of the State. The defendant claims that his new employer NAM-PALCE is a fully-fledged government project and the project belongs to the same parent Ministry (the Ministry of Environment and Tourism) and that he is therefore still serving the State.

ISSUE FOR DECISION

[4] The determination of the dispute between the parties turns on extremely short and narrow compass. It concerns above all the interpretation and application of a clause in the agreement (which is an Annexure to Part D I/XI of the Public Service Staff Rules). Paragraph 3(1) to Part D I/XI of the Public Service Staff Rules provides that where a staff member is granted special leave with full remuneration to undertake studies that staff member must enter into an agreement with the government.

[5] The agreement is attached as an Annexure to that Part of the Public Service Staff Rules. Paragraph 5(h) of Annexure A to Part D I/XI of the Public Service Staff Rules reads in material terms as follows:

'5 The staff member undertakes:

(a) …

(h) to resume his/her normal duties immediately after expiry of the period of study, or the extended period of study in terms of clause 6(a), or after submission of the paper/thesis, or after obtaining the degree referred to in clause 1, whichever occurs first, and thereafter to continuously serve the State, in any capacity for which he/she may be regarded as suitable, for at least two years for every year or part of the year for which he/she was

> released for study/research in terms of this agreement, in any office, ministry, or agency in the rank and on the salary scale applicable to the post to which, he/she is appointed or to which he or she may be transferred or promoted, subject to the provisions of clause 6(e) hereunder.'

THE ARGUMENTS ADVANCED BY THE PARTIES

[6] As I have indicated above the only dispute between the parties is whether or not the defendant is still in the service of the State. Mr Ndlovu who appeared for the Ministry argued that when the defendant resigned from the services of the Ministry on 30 April 2011, he ceased to be employed by the State and is thus obliged to refund (proportionately) the moneys which the Ministry paid to him while he was pursuing his studies.

[7] Mr Ndlovu based his submission on the evidence of Mr Steven Mentor (the Human Resources Officer in the Ministry) who, in summary, testified that NAM-PLACE is not a ministry, office, or agency as defined in the Public Service Act, 1995. He testified that NAM-PLACE is a project under the auspices of the Ministry of Environment and Tourism. Mr Mentor further testified that the defendant does not have the fringe benefits (such as annual leave, housing, pension contributions by the Government, and medical aid,) in terms of the Public Service Act, 1995 and that the defendant's salary is paid by United Nations Development Programme.

[8] Mr Ntinda, on the other hand argued that the defendant did not breach the contract of employment because he still remains in the service of the State and has thus fulfilled his contractual obligations. Mr Ntinda further submitted that since the defendant has already served a period of one year (that is from 01 May 2010 to 30 April 2011) since his return from study leave, he has thus complied with his contractual obligations.

[9] Mr Ntinda based his submission on the evidence of the defendant and Mr. Teofilus Nghitila (the Environmental Commissioner in the Ministry) who, in summary, testified that:

(a) That the interviews for the position of Landscape-Environmental Specialist for the NAM-PLACE project were conducted by the Ministry of Environment and Tourism at its offices and was chaired by the Director of Environmental Affairs. The appointments were approved by the Permanent Secretary of the Ministry of Environment and Tourism. Further that the defendant's supervisor is the Director of Environmental Affairs and the Permanent Secretary of the Ministry of Environment and Tourism. That NAM-PLACE letters are written on government logo and their cheques are written Ministry of Environment and Tourism. That everything done by NAM-PLACE is as per the Ministry of Environment and Tourism strategic Plan and is approved by the Ministry of Environment and Tourism. That his business card is also written: Ministry of Environment and Tourism.

(b) The Namibia Protected Landscape Conservation Areas Initiative (NAM-PLACE) project is a Ministry of Environment and Tourism project under the Ministry's Department of Environment Affairs because;

(i) The project (NAM-PLACE) is housed under the Ministry of Environment and Tourism and reports directly to the Ministry's Department of Environmental Affairs;

(ii) The project (NAM-PLACE) has as its principal place of business offices which it rents and which rent is paid for by the Ministry of Environment and Tourism;

(iii) The electricity and telephone bills at the offices is paid for by the Ministry of Environment and Tourism, and

(iii) All of the project's outputs are approved by the Permanent Secretary of the Ministry of Environment and Tourism.

[10] I will, in the next paragraphs briefly set out the legal principles which inform the interpretation of any written document before I evaluate the arguments advanced by the protagonists.

THE LEGAL PRINCIPLES

[11] I share the view that the starting point in the interpretation of any written legal instrument is to accord the words used in that document their ordinary grammatical meaning. In the matter of *Venter v R*[1] Innes, CJ held that:

> 'By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.'

[12] The above pronouncements were approved by the full bench of this court in the matter of *Van As and Another v Prosecutor-General*[2] where Levy, AJ said:

> 'It is true that a Court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by giving the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislator or authors of document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that intention.'

[13] In *Rally for Democracy and Progress v Electoral Commission*[3] Parker, J reasoned as follows:

> 'Logically, our next port of call is the interpretation and application of s 14 of Act 30 of 1998. The rule is firmly established in the practice of this court that in interpreting statutes recourse should first be had to the golden rule of construction because the plain

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1 *Venter v R* 1907 TS 910 at 913.
2 2000 NR 271 (HC) at 278.
3 2009 (2) NR 793 para 7.

> meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it will be permissible for a court of law to depart from such a literal construction, for example where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.'

[14] It is also important that the interpretation I put on paragraph 5(h) of D.I PART XI/3.1 of the Public Service Staff Rules must not be contrary to the parties' intentions. The question therefore is whether the ordinary and literal sense of the words "to continuously serve the State … in any office, ministry, or agency," is capable of more than one meaning.

THE LEGAL PRINCIPLES APPLIED TO THE FACTS

[15] It must be remembered that the Public Service Staff Rules are promulgated in terms of section 35 of the Public Service Act, 1995. Section 3 of that Act provides as follows:

> '(1) For the purposes of the administration of the Public Service there are-
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> (a) offices;
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> (b) ministries; and
>
> (c) agencies,
>
> established in terms of the Namibian Constitution.'

It thus follows that any interpretation or meaning which one assigns to the terms 'office, ministry or agency' must be informed by the Public Service Act, 1995.

[16] I find that the words – 'office, ministry, or agency,' can only have one meaning and it is the meaning assigned to them by the Public Service Act, 1995. Section 3 of the Public Service, 1995 confines the meaning of office, ministry or agency to the

institutions established in terms of the Namibian Constitution. In Schedule 1 to the Public Service Act, 1995 has defined *'office'* to mean the Office of the President and the Office of the Prime Minister. Ministry is defined to mean a Ministry established by Proclamation by the President in terms of Article 32(3)(g)of the Namibian Constitution. In Schedule 3 to the Public Service Act, 1995 'Agency' has been defined to mean the Anti-Corruption Commission, Electoral Commission, Namibia Central Intelligence Service, National Planning Commission, the Office of the Auditor-General and the Office of the Parliament.

[17] In the instant case, NAM-PLACE was not included, designated or established as an office, ministry or agency as contemplated in Article 32(3) (g) of the Namibian Constitution. I am thus of the view that NAMP-PLACE is not an office ministry or agency as contemplated in the Public Service Act, 1995. The defendant is thus not serving the State in any office, ministry or agency.

[18] I now turn to the second argument of Mr Ntinda namely that the defendant was required to work for one year and not 18 months after completing his studies and since he worked for a period of one year (since his return from study leave) he is not in breach of his contractual obligations.

[19] I find it necessary to pause and make the following observations. In terms of Rule 22(3) a plea must 'admit or deny or confess and avoid all the material facts alleged' and 'shall clearly and concisely state all the material facts' upon which is relied. The material terms of Rule 22(3) provide as follows:

> '(2) The defendant shall in his or her plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he or she relies.'

[20] In this regard Frank, AJ had the following to say:[4]

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[4] Makono v Nguvauva 2003 NR 138 (HC) at 139-140.

'To start off, pleadings are supposed to elucidate and define the issues between the parties and not obfuscate them so as to leave either the parties or the Court to guess at what the true issues are… The dominant purpose of all pleadings is to present and clarify the true issues between the parties.'

[21] In the present matter the plaintiff amongst others formulated its particulars of claim as follows:

'6 The DEFENDANT committed breach of contract in that –

(a) he failed to continuously serve the PLAINTIFF for a period equal to that which he was released for study purposes after obtaining a degree in that he resigned from the employment of the PLAINTIFF on 30th April 2011 , 6 months and 6 days shy of his obligations.

(b) He failed to refund the PLAINTIFF all moneys received by him during the period of special study leave together with interest thereon, upon demand on the basis that claims he is still serving State" in terms of the Public Service where he is currently employed …despite his resignation from the Public Service. '

[22] The defendant, in his plea, replied as follows to that allegation by the plaintiff:

'AD PARAGRPH 6 (a) THEREOF

The defendant admits having resigned from the employment of the Ministry of Environment and Tourism, but pleads that he took up a position within the Ministry of Environment and Tourism, reporting to the Director: Directorate of Environmental Affairs.

AD PARAGRPH 6 (b) THEREOF

The defendant admits not refunding the plaintiff the money received by him during the period of special study leave together with interest thereon but, pleads that he was not required to do so and the plaintiff was entitled to such refund, as the defendant is still serving the State.'

[23] As far as a plea is concerned the defendant is required to adequately inform the plaintiff what the defence is.[5] It is clear from the paragraphs of the plea quoted above that it was never the defendant's case that he had complied with his contractual obligation and served the State for one year. If that was his defence he should, in my view, have made it clear in his plea.

[24] The plaintiff did not at any stage apply to amend its plea. He is thus bound to what he has pleaded and will not be allowed to raise a defence which is not covered in his plea. I remind myself of the principle that the purpose of pleadings is to define the issues in the litigation and to enable the other party to know what case he has to meet. A litigant is not entitled to conceal material allegations in order to obtain the advantage over his opponent and that litigation is not a game where a party may seek tactical advantages by concealing facts from his opponent.[6] It is on this basis that I dismiss Mr Ntinda's argument that the defendant has served the period that he has undertaken to serve.

[25] In the result, therefore, the plaintiff's claim must succeed. There are no special circumstances which might suggest any modification of the general rule that costs follow the result. In the result I make the following order:

1) The defendant must pay the plaintiff the amount of N$ 63 498-92 less the amount of N$ 40 403-34 being held by the plaintiff. The amount which the defendant must pay to the plaintiff is the amount of N$ 23 095-58.

2) The defendant must pay interest at the rate of 12% per annum calculated on the amount of N$ 23 095-58 reckoned from 01 May 2011 to 26 February 2014 (both days included).

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5 Cf. *Hlongwane v Methodist Church of South Africa* 1933, W.L.D. 165 at 169.

6 *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 84I - 85A.

3) The defendant must pay interest at the rate of 20% per annum calculated on the amount of N$ 30 700-76 reckoned from date of judgment to date of payment (both days included).

4) Costs of suit.

SFI Ueitele

Judge

APPEARANCES

PLAINTIFF:	N Ndlovu Of Government Attorneys
DEFENDANT	M Ntinda Of Sisa Namandje & Co Inc, Windhoek