

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING: SPECIAL PLEA

Case no: HC-MD-CIV-ACT-CON-2020/03792

In the matter between:

**OLD MUTUAL LIFE ASSURANCE COMPANY
(NAMIBIA)LIMITED**

PLAINTIFF

and

JOHAN JACOBUS ERASMUS

DEFENDENT

Neutral Citation: *Old Mutual Life Assurance Company (Namibia) Limited vs Erasmus*
(HC-MD-CIV-ACT-CON-2020/03792) [2021] NAHCMD 261 (27 May 2021)

CORAM: SIBEYA J

Heard: 26 April 2021

Delivered: 27 May 2021

Flynotes: Practice – Special Plea of Jurisdiction – Defendant of the view that this court lacks the necessary jurisdiction to hear the matter as it is a to labour case – Plaintiff instituted a claim deriving from breach of agreement for a loan issued to defendant in order to pursue an MBA qualification – Court holding the view that the loan agreement entered into between the parties does not derive from the employment contract concluded between the parties – Court resultantly not excluded by the provisions of the Labour Act to hear matter – Lis pendens raised by the defendant pursuant to the arbitration proceedings pending at the Office of the Labour Commissioner found to be misplaced as the requirements of *lis pendens* were not met. Special pleas dismissed.

Summary: The defendant (employee) and the plaintiff (employer) entered into a loan agreement where the plaintiff granted a loan to the defendant to pursue MBA studies at a tertiary institution. It was agreed that the defendant would repay the loan through monthly payroll deductions or until full payment of the loan, whichever occurs first. It was further agreed that the defendant will remain so employed for the duration of the work obligation period. The defendant would immediately be liable to repay the full loan amount together with interest and costs, if he resigned prior to the completion of his work obligation period. The defendant resigned before his work obligation period was completed. As a result, the plaintiff claimed damages in amount of N\$368,886.59, in an action instituted in this court. The defendant raised special pleas of lack of jurisdiction and *lis pendens*. The defendant submitted that this court has no jurisdiction to entertain the plaintiff's claim as it emanates from a labour relationship, therefore only the Office of the Labour Commissioner has the authority as an institution of first instance in labour matters to adjudicate over the claim. The defendant further submitted that there are arbitration proceedings pending at the Office of the Labour Commissioner which are similar to the action *in casu* in nature and content. The special pleas are opposed and parties are locked horns over the jurisdiction of this court and the issue of *lis pendens*.

Held that, the loan agreement concluded subsequent to the employment contract is not dependent on the employment contract. It is distinctive from the employment contract in

its nature, form and kind. It is an added benefit distinguishable from the employment agreement.

Held further that, the distinctiveness between the employment agreement and the loan agreement, allows this court to retain and exercise its inherent jurisdiction in order to adjudicate the plaintiff's damages claim just like any other claim. There is further no law that prohibits the High Court from adjudicating over a damages claim arising from a contract of employment as observed by the Supreme Court in the *Nghikofa* case.

Held further that, regarding the plea of *lis pendens*, the defendant failed to meet the applicable requirements, in that even if pending proceedings are between the same parties with a probably similar cause of action, the subject matter is different as the defendant raises constructive dismissal against the plaintiff, while the plaintiff in its claim raises specific performance based on the loan agreement entered into between the parties. Both special pleas of lack of jurisdiction and *lis pendens* have no merit and dismissed with costs.

ORDER

1. The Defendant's special pleas of lack of jurisdiction and *lis pendens* are dismissed with costs.
2. The costs are limited in terms of rule 32 (11).
3. The matter is postponed to 15 June 2021 at 14:00 for case management conference hearing.
4. The parties must file a joint case management report on or before 10 June 2021.

RULING

[1] Before court is a special plea raised by the defendant challenging this court's jurisdiction to adjudicate the claim instituted by the plaintiff. The question is whether the High Court has jurisdiction to decide on a claim for damages resulting from a loan agreement concluded between the employer and the employee. The plaintiff's claim in summary is premised on the consequential effect of the termination of employment, resultantly, the defendant claims, this is a labour matter and the High Court of Namibia does not have jurisdiction to adjudicate the claim of the Plaintiff. The defendant further pleads *lis pendens* in that similar proceedings as in this matter are pending before the Office of the Labour Commissioner in the form of arbitration proceedings.

Brief background

[2] The defendant commenced employment with the plaintiff on 01 January 2016. During February 2018, the plaintiff and the defendant entered into a loan agreement in terms whereof the plaintiff would loan money to the defendant in pursuance of an MBA qualification at a tertiary institution. The terms of the agreement were, *inter alia*, as follows:

- a) The payments to be made by the plaintiff would include, the prescribed course fees, travel costs to and from the prescribed study schools, accommodation whilst attending the study schools, the prescribed registration, class and examinations fees;
- b) The defendant would have to remain in the employ of the defendant for the entire Work Obligation Period; failing which;

c) The defendant would be liable for the full amount paid together with interest and costs. If the defendant resigns from the employ of the plaintiff prior to the completion of the Work Obligation Period, such amount would become due and payable immediately;

[3] The plaintiff, in accordance with the loan agreement, disbursed the monies in favour of the defendant. The defendant, however, allegedly breached the agreement by resigning in 2020 without completing the Work Obligation Period.

[4] As a result of the alleged breach of the loan agreement, the plaintiff instituted action proceedings in this court and claimed that the defendant is indebted to the plaintiff in the amount of N\$368, 886.59.

[5] Upon the issuance of the summons, the defendant raised a special plea of lack of jurisdiction to adjudicate this matter, as this matter should be adjudicated in the Office of the Labour Commissioner. The defendant further stated that the Office of the Labour Commissioner is the forum of first instance to hear and determine disputes related to employment agreements.

[6] The plaintiff opposes the special plea on the basis that the loan agreement is not an integral part of the employment agreement. Moreover, the plaintiff averred, the parties agreed that in the instance of breach of the loan agreement, a civil court, more specifically the Magistrate's Court, has jurisdiction to adjudicate the matter.

[7] With the brief summation of the issue before this court, I will now in no particular detail lay out the necessary submissions by counsel of record.

Submissions by Defendant

[8] Mr. Small, who appeared for the defendant submitted that the defendant referred a claim to the Office of the Labour Commissioner relating to the consequences of the termination of the employment relationship between the parties. He submitted further

that consequences of the termination of the employment relationship includes the repayment of the loan agreement entered into between the plaintiff, as the employer and the defendant, as the employee, and therefore, same should be adjudicated in that forum. Mr. Small drove his submission home by submitting further that the rights and obligations of the parties set out in the Loan Agreement are connected and related to the rights and obligations between the employer and employee, and any dispute resolution thereof, by law falls within the realm of the provisions of the Labour Act.

[9] Mr. Small submitted that, if there is any court that could adjudicate this matter is the Labour Court not the High Court, but also not as a court of first instance. The dispute pertaining to any labour matter, including the breach or enforcement of an agreement regarding a labour matter, had to be instituted by referral to the Office of the Labour Commissioner.

[10] Mr. Small insisted that the jurisdiction of the High Court was limited by statute and exclusive jurisdiction was allocated to the Labour Court and the Office of the Labour Commissioner in labour related matters. He placed reliance on s 84, 85 (2) and 86 (16) of the Labour Act. The jurisdiction of an arbitrator to adjudicate labour disputes between the parties is plain from s 84 (1) (a) read with s 86 (15) (b) of the Labour Act. If the argument that the arbitrator has exclusive jurisdiction is wrong, then the Labour Court has jurisdiction in terms of s 117 (1) (i) of the Labour Act, which also limits the jurisdiction of the High Court, so it was argued.

[11] Although not orally argued, Mr. Small stated in his heads of argument that the plaintiff's claim is in fact a request that the court direct performance by the defendant to pay compensation to plaintiff to remedy the wrong, which is the alleged breach of the defendant in that he resigned from the Plaintiff.

[12] In driving towards his conclusion, Mr. Small submitted that the dispute between plaintiff and the defendant has employment agreement written all over it. Had it not been for the existence of the employment relationship between the parties, the loan

agreement would not have been entered into. The consequences of the breach of the loan agreement are therefore linked to the termination of the employment agreement. Consequently, the dispute regarding the loan agreement is therefore a dispute incidental to the function of the Office of the Labour Commissioner.

Submissions by Plaintiff

[13] Ms. Jason, who appeared for the plaintiff opposed the application with vigour. She submitted that the loan agreement is not an employment agreement and therefore the dispute arising therefrom should not be referred to the Labour Commissioner. She further submitted that the Labour Act does not deal with loan agreements between employees and employers, consequently the intention of the Legislator was not for the Office of the Labour Commissioner and the Labour Court to adjudicate on matters falling outside their scope.

[14] Ms. Jason further formed the view that had the parties intended the loan agreement to be under the auspices of the employment contract, they would not have entered into a separate agreement, but rather entered into an addendum to be regulated on the same terms as those of the employment contract. She further argued that, it is apparent on this premise that the parties intended the loan agreement to be governed on the terms as agreed to between the parties and no other.

[15] Ms. Jason relentlessly attacked the defendant's special plea of lack of jurisdiction as being fundamentally flawed. She based her contention on the premise that if the submissions of the defendant are to be correct, it would mean that any dispute between an employer and an employee of whatsoever nature should be adjudicated on at the Office of the Labour Commissioner. In instances where an employee steals from his employer, such misconduct should only be adjudicated on at the Office of the Labour Commissioner, which for obvious reasons cannot be the case, so she argued.

[16] Ms. Jason concluded her spirited submissions with a statement that the disputes between the parties are of two different kind, the termination of employment being a labour matter and breach of the loan agreement being of a contractual nature. Consequently, the disputes can and should be adjudicated in two different forums as the one has nothing to do with the other.

Analysis

[17] With the above in mind, it is clear that there is no dispute that the loan agreement was entered into between the parties. There appear to be no dispute that the employee resigned from employment without completing the Work Obligation Period. Work obligation period is defined in clause 3.6 of the Loan Agreement as:

'The period for which the employee contractually undertakes to work for Old Mutual, which period will be equal to the duration of the course successfully completed by the employee and which period ensues from immediately after the successful completion of the course studied and the work done for Old Mutual throughout the duration of the studies shall not be considered as time deductible from the Work Obligation Period'.

[18] To an extent, it would be noted that the defendant is also cognizant of the fact that the loan amount is to be paid back to the plaintiff as well. This view finds support in the submission by the defendant that he paid the monies equivalent to the loan amount in a trust pending the resolution of a dispute instituted at the Office of the Labour Commissioner.

[19] This court has no qualms with the jurisdiction of the Labour Court in strictly labour matters as laid out in the Labour Act. As pointed out in *FLM Fruit and Vegetable Namibia (Pty) Ltd t/a Namibia Fresh Produce Market & Fruit & Veg City v Van der berg*:¹

¹ *FLM Fruit and Vegetable Namibia (Pty) Ltd t/a Namibia Fresh Produce Market & Fruit & Veg City v Van der berg* (HC-MD-CIV-MOT-GEN-2019/00474) [2019] NAHCMD 569 (2 December 2019). *Katjiuanjo and Others v Municipal Council of the Municipality of Windhoek*, Case No. I 2987/2013, delivered on 21 October 2014 at para [7] and [14].

[12] The purpose for the enactment of the Labour Act appears already from its Preamble, which states, *inter alia*, that the Act was promulgated to establish a 'comprehensive' labour law for all employers and employees to entrench fundamental labour rights and protections and also to provide for the resolution of disputes in this particular sphere.

[13] Section 2 categorically clarifies that the Act applies to all employers and employees.

[14] The Act also contains specific provisions how employees and employers are to deal with their disputes – and - more specifically - the Labour Act 2007 also prescribes how disputes - relating to the non-compliance with conditions of employment – and thus how breaches - relating to a contract of employment - are to be dealt with.²

[15] The term 'dispute' is defined³: it means 'any disagreement between an employer and an employee', which 'disagreement relates to a labour matter' and which includes 'complaints relating to the breach of a contract of employment'.⁴

[16] The dispute between the parties in this case emanates from the underlying contracts of employment relied upon by the applicant and more specifically from the breaches of the relevant restraint of trade clauses contained therein, or allegedly contained therein, which the applicant seeks to have enforced and the respondents seek to evade.

[17] This 'dispute' clearly relates to a labour matter and the disputes relate to disagreements/disputes between the former employer, the applicant and its former employees, the first to third respondents.

[18] Chapter 8 of the Labour Act regulates the prevention and resolution of such disputes and provides for the various ways through which this is to be achieved.

[19] Part C of Chapter 8 regulates the arbitration of 'disputes' – and - for purposes of this part the Act – in Section 84(a) – the section specifically defines what 'disputes' - under this part -

² See Sections 38(1) and (3) for instance.

³ See Section 1 and the definition of 'dispute' contained therein which reads: "dispute" means any disagreement between an employer or an employers' organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter;

⁴ See Section 84(a).

these provisions relate – and - that such ‘disputes’ include a complaint relating to the breach of a contract of employment.⁵

[20] Arbitration tribunals are then established in terms of the Act to hear and determine such “disputes”.⁶

[20] With the above in mind, it calls to be determined whether the loan agreement forms part and parcel of the employment agreement. The answer to this question in my view is dispositive of the matter before court. I will therefore limit myself to the above question and will thus, not venture into the issue of whether or not the parties could legally conclude and enforce an agreement which ousts the jurisdiction of the Office of the Labour Commissioner in a labour dispute, by opting for the magistrate’s court as a forum to resolve their disputes.

[21] The loan agreement was entered into subsequent to the conclusion of the conclusion of the employment contract. The terms of the employment agreement do not appear to include the provision of a loan to the defendant by the plaintiff. The provision of a loan is therefore a benefit extended by the plaintiff to the defendant and not a condition of employment. Conversely put, the employment relationship could exist in terms of the employment contract without the loan agreement in place. The loan agreement is therefore distinctive from the employment agreement in its nature, form and kind. In the foregoing, I am of the view that the loan agreement does not legally form part and parcel of the dispute instituted by the Defendant before the Office of the Labour Commissioner. This position is backdropped by the finding that the loan agreement is not directly derived from the employment agreement entered into between the plaintiff and the defendant, but it is an added benefit distinguishable from the employment agreement.

[22] When further regard is had to the employment contract entered into between the parties, it becomes plain that nothing in the contract indicates the ancillary nature of the

⁵ Section 84. For the purposes of this Part, "dispute" means- (a) a complaint relating to the breach of a contract of employment....

⁶ See section 85.

loan agreement to the conditions of employment. This, in my view, is indicative that the loan agreement was an entirely separate agreement entered into between the parties and not necessarily based on the conditions of employment, necessitating that this court be excluded to adjudicate the Plaintiff's claim and have same adjudicated upon by the Office of the Labour Commissioner. It thus follows that the dispute regarding the termination of employment and the other in respect of the loan agreement are two separate disputes in nature and can be adjudicated upon independent of the other.

[23] This court in *Namibia Protection Services (Proprietary) Limited v Humphries*⁷ discussed the claim for damages by the employer against the employee suffered as a result of misconduct at the hand of the employee and stated the following in para [110] to [111]:

'[110] *Prinsloo J in Shoprite Namibia (Pty) Ltd v Petrus*⁸ while discussing fiduciary duty said the following ...

"[73] Apart from subjecting the employee to appropriate disciplinary action up to and including dismissal from employment, an employer may also bring a civil suit against its employee or former employee to recover the amount of money that the employer lost or was misappropriated as a result of the employee's negligence, dishonesty or carelessness."

[111] The Supreme Court, although dealing with a labour matter, discussed the possibility of a claim for damages arising from contracts of employment in *Nghikofa v Classic engines CC*⁹ and said the following:

⁷ *Namibia Protection Services (Proprietary) Limited v Humphries* (HC-MD-CIV-ACT-DEL-2018/02888) [2019] NAHCMD 509 (20 November 2019).

⁸ *Shoprite Namibia (Pty) Ltd v Petrus* (HC-MD-CIV-ACT-OTH-2017/02057) [2019] NAHCMD 20.

⁹ *Nghikofa v Classic engines CC* 2014 (2) NR 314 (SC) at para [18].

“There is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment. Indeed, as pointed out above s 86(2) of the Act provides that a party *may* refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will ordinarily be slow to interpret a statute to destroy a litigant’s cause of action (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a different dispute, the court will rarely conclude that such a rule is implicit in legislation.”

[24] I find that in view of the distinctiveness between the employment agreement and the loan agreement, it is competent for this court to retain its inherent jurisdiction in order to adjudicate the Plaintiff’s claim in a manner equated to any other contractual damages claim. In any event there is no law that prohibits the High Court from adjudicating over a damages claim arising from a contract of employment as observed by the Supreme Court in the *Nghikofa* case. To the contrary, it seems that the defendant appears to be attempting to outmanoeuvre the plaintiff’s claim by any conceivable means necessary, inclusive of the attack on this court’s jurisdiction. I hold in the foregoing, that the special plea of lack of jurisdiction has no merit and falls to be dismissed.

Lis pendens

[25] With the above foreseeable decision, the defendant foresaw that in the event that this court finds that it has jurisdiction, Mr. Small raised the plea of *lis pendens* in view of the pending arbitration proceedings relating to the same parties.

[26] In *Schuette v Schuette*,¹⁰ Angula DJP made the following observations at para [14] regarding the concept of *lis pendens* and the court's approach thereto:

'The requirements for the plea of *lis pendens* in terms of the law are these: there must be pending litigations; between the same parties or their privies; based on the same cause of action; and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical.¹¹ The plea of *lis pendens* is not absolute. This means that even if it is found that the requirements have been met, the court has a discretion to allow an action to continue should that be considered just and equitable in the circumstances, despite the earlier institution of the same action.'

[27] On this score, Mr. Small did not endeavour to orally submit to this court that the requirements for *lis pendens* have been met. However, considering the requirements *mero motu*, I am of the firm view that such requirements have not been met. Notwithstanding the fact that the dispute is between the same parties and probably termination of employment being the same cause of action, the subject matter is not necessarily the same for the reasons that the defendant raises the issue of constructive dismissal against the plaintiff, while the plaintiff in its claim raises the issue of specific performance based on the loan agreement entered into between the parties.

[28] In the premises, I find that the proceedings pending before the arbitrator and the present proceedings are distinct from each other rendering the plea of *lis pendens* misplaced for non-compliance with the aforesaid requirements. The plea of *lis pendens* therefore also falls to be dismissed.

¹⁰ *Schuette v Schuette* (HC-MD-CIV-MOT-GEN-2019/00376) [2020] NAHCMD 426 (18 September 2020).

¹¹ LAWSA Vol 3 para 247; *Baker v The Messenger of Court for the District of Walvis Bay* (A 309/2015) [2015] NAHCMD 286 (23 November 2015) at para 6.

[29] It is established that costs follow the event. I have not been apprised of the compelling reasons that could persuade me to depart from the above-mentioned norm.

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

1. The Defendant's special pleas of lack of jurisdiction and *lis pendens* are dismissed with costs.
2. The costs are limited in terms of rule 32 (11).
3. The matter is postponed to 15 June 2021 at 14:00 for case management conference hearing.
4. The parties must file a joint case management report on or before 10 June 2021.

O SIBEYA

Judge

APPEARANCES:

FOR THE PLAINTIFF:

A Jason

Shikongo Law Chambers

FOR THE DEFENDANT:

A Small

Instructed by De Beer Law

Chambers