REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT- CON-2019/02012

In the matter between:

AUGUSTINUS KATITI **PLAINTIFF**

and

NAMIBIA INSTITUTE OF PATHOLOGY LTD **DEFENDANT**

Neutral Citation: *Katiti v Namibia Institute of Pathology Ltd* (HC-MD-CIV-ACT-CON-2019/02012) [2022] NAHCMD 54 (11 February 2022)

CORAM: PRINSLOO J

Heard: **4 November 2021**

Delivered: **11 February 2022**

Flynote: **Action Proceedings** – Trial – Absolution from the instance at the close of plaintiff's case – When to be granted – Plaintiff must lead evidence on which a court, applying its mind reasonably to the evidence, could or might find for the plaintiff

Absolution from the instance – Production of documents by the plaintiff – Sole question is the proper interpretation of the document – Trial court should normally refuse absolution unless the proper interpretation appears to be beyond question.

Summary: The plaintiff was employed by the defendant as the Chief Executive Officer on a fixed-term contract commencing on 1 April 2014 until 31 March 2019. The plaintiff's claim against the defendant arises from a written contract of employment. According to the contract of employment, for two years after termination of the plaintiff's employment, he would be subject to a restraint of trade. In terms of the said clause, the defendant would be obliged to pay the plaintiff, on the date of termination of his contract, a once-off amount equal to the plaintiff's 'total guaranteed pay' for each year of restraint (ie two years).The defendant terminated the plaintiff's employment contract on 31 August 2018. Accordingly, it is the plaintiff's case, in terms of the relevant provisions of the agreement, that the defendant was obliged to pay him a once-off amount in the sum of N$ 3 837 429.12 in consideration for the restraint imposed. At the end of the plaintiff's case, counsel for the defendant brought an application for absolution from the instance on the basis that, when the plaintiff's testimony is considered *vis-à-vis* the defences pleaded by the defendant, the court must find that the plaintiff has failed to establish a prima facie case requiring the defendant to answer thereto.

Held that when absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established 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, nor ought to) find for the plaintiff.

Held that where the plaintiff's case rests on the interpretation of a document, the interpretation of which is in dispute, the interpretation on which the defendant relies has to be beyond question before its application for absolution will succeed. Where the defendant bears the onus in a dispute, absolution should not be granted.

ORDER

1. The application for absolution from the instance is hereby dismissed with costs. Such costs to include the costs of one instructing and one instructed counsel where so engaged.

2. The matter is postponed to **17 February 2022** at **15h00** for a status hearing and for the allocation of dates for the continuation of trial.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

PRINSLOO J:

Introduction

[1] The plaintiff is Augustinus Katiti, who was employed by the defendant, Namibia Institute of Pathology Ltd (NIP) as the Chief Executive Officer (CEO) on a fixed-term contract commencing on 1 April 2014 ending 31 March 2019. The defendant terminated the plaintiff's employment contract on 31 August 2018.

Background with reference to the pleadings

[2] The plaintiff’s claim against the defendant arises from a written agreement titled “Contract of Employment” entered into between the parties on 1 April 2014. Some of the salient terms of the agreement important for the current proceedings are as follows:

a) That the defendant employed the plaintiff as its chief executive officer on a fixed-term contract;
b) That the plaintiff, during his employment with the defendant, would be entitled to a 'total guaranteed pay' in the amount of N$ 1 500 000 per annum from the date of his appointment in April 2014.
c) That for two years after termination of the plaintiff's employment, he would be subject to a restraint of trade. In terms of the said clause, the defendant would be obliged to pay the plaintiff, on the date of termination of his contract, a once-off amount equal to the plaintiff's 'total guaranteed pay' for each year of restraint (ie two years).[1]

[3] The plaintiff's employment was terminated on 31 August 2018. Accordingly, it is the plaintiff's case, in terms of the relevant provisions of the agreement, that the defendant was obliged to pay him a once-off amount in the sum of N$ 3 837 429.12 in consideration for the restraint imposed.

[4] The plaintiff's case is that the defendant failed to make the once-off payment and is, as a result, in breach of the agreement resulting in a claim for the payment of N$ 3 837 429.12, interest on the aforesaid amount at a rate of 20% per annum *a tempora morae* and cost of suit.

[5] The defendant defended the action and raised four main issues during its plea. Firstly, the defendant pleaded that clause 12.5 of the agreement relating to the payment in consideration of the restraint of trade clause is invalid for the reason that there was non-compliance with s 22(3) of the Public Enterprises Governance Act 2 of 2006[2] ('Governance Act'). The defendant pleaded that the defendant is a State-Owned Enterprise, thus, the remuneration and other service benefits given to its CEO were

[1] Clause 12.5 of the Contract of Employment: 'In consideration for the restraint imposed herein above, the Company shall for the duration of the restraint determined and agreed upon in clause 12.1 above, pay to the Chief Executive Officer on the date of termination of the Contract of Employment, a once-off amount equal to the Chief Executive Officer's Total Guaranteed Pay for each year of restraint as per clause 6.1 above.'
[2] Now repealed.

prescribed by the Act and the Directives in relation to remuneration levels of the CEO and senior managers of the public enterprise. The defendant secondly pleaded that the State-Owned Enterprises Board of the defendant did not determine nor approve clause 12.5 of the employment contract. Thirdly, the defendant pleaded that clause 12.5 of the employment contract is against public policy. In the alternative to the above, the defendant pleaded that the cancellation or termination of employment was predicated on clause 11.1.3 of the employment contract. Therefore, no amount was due and payable to the plaintiff.

[6] Clause 11.1.3[3] is predicated on documented acts of dishonesty, fraud or gross negligence by the CEO in connection with the performance of his duties to NIP. The defendant invoked this clause, in terms of which the employment contract of the plaintiff was terminated on 31 August 2018. In terms of the said clause, the plaintiff, on the execution of the contract, renounced all benefits arrived at *ex contractu*, save for the benefits that had accrued or those required by law beyond the cancellation date.

[7] The defendant, in turn, filed a counterclaim against the plaintiff. It is the case of the defendant that the plaintiff breached his fiduciary duty to the defendant and, further without authority or approval by the Board of Directors of NIP, perpetrated a number of wrongful acts which came to the knowledge of the Directors during July 2017 when an internal audit was served on them.

[8] The defendant's counterclaim consisted of 4 claims amounting to N$ 16 051 630.21 plus interest and costs. In summary, the defendant's claims comprised of the following:

[3] Clause 11.1.3: 'Documented acts of dishonesty, fraud or gross negligence by the Chief Executive Officer in connection with the performance of his duties to NIP, with those acts disclosed to the Chief Executive Officer, with the Chief Executive Officer accorded an opportunity to respond in writing or in person (at the Chief Executive Officer's option) to NIP, and with the Chief Executive Officer receiving no further compensation beyond the cancellation date other than benefits accrued or required by law.'

A. Claim 1

Pursuant to a memorandum of understanding reached between the defendant and ST Freight Services CC signed by the plaintiff, the defendant was obligated and indeed paid the sum of N$ 1 882 550 for the purchase of vehicles for usage by ST Freight Services to render transport services to the defendant at a monthly cost of N$ 211 600 amounting to N$ 1 269 600 for the period 1 October 2016 to 31 March 2017. The defendant pleaded that the said payments were made without any basis in law resulting in a loss of N$ 3 152 150.

B. Claim 2

During 2016/2017, in violation of the Tender and Procurement Policy and Procedure of the defendant and without the authority of the Board of Directors, the plaintiff allowed the defendant to make payment to Roma Kitchens the sum of N$ 8 101 025.11 in respect of procurement of furniture and fittings of the defendant's Head Office. The defendant pleaded that the plaintiff and his subordinates had no power to authorize expenditure in excess of N$ 1 000 000. As a result of the plaintiff's conduct, the defendant suffered a loss of N$ 8 101 025.11, for which the plaintiff is liable to the defendant.

C. Claim 3

That on 7 September 2016 and 20 June 2017, the plaintiff took a decision or caused a decision to be taken to disinvest funds from the defendant's Old Mutual Investment account without the approval by the Investment Committee and the Board of Directors resulting in an economic loss in the amount of N$ 2 056 285.22. The said sum represented the income loss on the average annual return of the investments for the period of three (3) years, which is at the rate of 5.61%, for which the plaintiff is liable to the defendant.

D. Claim 4

Between 2016 and 2017 and without the approval by the Board of Directors, the plaintiff created positions on the organigram of the defendant and thereafter

appointed the General Assistant, Assistant OD Officer and Manager Process Analysis at the cost of N$ 7 742 169.99. The defendant pleaded that as a consequence of the said wrongful appointments, it became obligated to pay the said employees' salaries, benefits, and wages until they reach their retirements. As a result, the defendant claims the sum of N$ 2 742 196.99 representing the salaries, wages and associated costs for the said employees for a period of twelve months.

[9] I do not intend to delve into the plaintiff's plea to counterclaim but must mention that in his replication, the plaintiff joined issue generally with the allegations set out in the defendant's plea, and more so denies explicitly that s 22(3) of the Governance Act, read together with the Government Notice issued in terms thereof and the relevant terms of the agreement, renders clause 12.5 invalid. The plaintiff specifically put in issue that the restraint of trade payment provided for in clause 12.5 constitutes "remuneration" and/or "other service benefits" as pleaded by the defendant with reference to s 22(3) *supra*. The plaintiff further pleaded that approval was obtained from the Board of Directors with the concurrence of the Portfolio Minister. In the alternative, the plaintiff pleaded that should it be found that no such approval was given, the defendant is estopped from denying the authority of one Mr Mandela Kapere to enter into the agreement with the plaintiff on behalf of the defendant.

[10] The plaintiff further replicates that he denies committing any acts of dishonesty, fraud or gross negligence in connection with the performance of his duties, and further denies that he was given a fair opportunity to respond, his disciplinary hearing being unilaterally terminated by the defendant in August 2018. The plaintiff further pleaded that he is, in any event, on termination of the Agreement "entitled to benefits accrued or required by law". This would include payment due in terms of clause 12.5 of the agreement. Further, in any event, in terms of clause 11.1.5 of the Agreement, such benefits must be paid to the plaintiff upon the defendant unilaterally terminating his services.

The plaintiff’s case

[11] The plaintiff was the only witness called to testify in support of his claim against the defendant.

[12] I must at this stage point out that the witness statement of the plaintiff was admitted into evidence without any cross-examination by Mr Makando, acting on behalf of the defendant. Accordingly, Mr Corbett closed the plaintiff's case thereafter. Mr Makando indicated that the defendant would move an application for absolution from the instance, which was heard on 4 November 2021 and will be discussed further hereunder.

[13] The parties agreed that central to the determination of this matter is the interpretation to be given to s 22(3) of the Governance Act and the relevant clauses of the employment contract, and I will thus briefly summarize what the plaintiff’s evidence is regarding the validity of the employment contract.

[14] According to the plaintiff, Mr Mandela Kapere (the previous chairperson of the Board of Directors of NIP and now deceased) and Diina Shuluka (the chairperson of the Board of Directors of NIP at the time of termination of his employment contract) were both board members when his contract of employment was negotiated, concluded and signed in April 2014.

[15] The chairman of the Board at the time, ie. Mr Kapere, signed the contract of employment entered into with the plaintiff for and on behalf of the defendant and was duly authorized to do so.

[16] It is the plaintiff's evidence that in terms of clause 14.1 of the signed contract of employment, both ‘NIP and the Chief Executive Officer each represent and warrants that each has legal authority to enter into this contract and is not restricted from doing so by any governance documents or resolutions of NIP’.

[17] It is further the plaintiff's evidence that if one has regard to the Articles of Association of the defendant, all acts done by the chairperson of the Board at the time, including negotiating and concluding of the contract of employment in his capacity as the director, are binding on the Board and are thus valid acts.

[18] The plaintiff testified that he assumed that Mr Kapere, who had negotiated the agreement, had the necessary delegated powers to sign the contract of employment and that all pre-approvals that were necessary for his employment contract were undertaken prior to the appointment by the defendant.

[19] The plaintiff testified that he received a letter of appointment issued under the hand of Mr Kapere setting out his remuneration package. In the very same letter, Mr Kapere congratulated the plaintiff on his appointment and further clearly sets out that the Board of Directors of NIP has approved the plaintiff's appointment as CEO.

[20] In this appointment letter Mr Kapere stated that the plaintiff's remuneration package was a N$ 1 500 000 guaranteed package per annum, which included his basic salary, medical aid, pension, housing and motor vehicle allowance. The basic salary was 65% of the total package, which was N$ 975 000 per annum at the time.

[21] It was the plaintiff's understanding that the Board of Directors mandated Mr Kapere during the negotiations of his contract of employment to agree or disagree to the provisions of specific clauses of the agreement, subject to further consultation with the Board. Yet, no consultation was requested regarding clause 12.5 in respect of the restraint of trade clause. All those issues subject to further consultation with the Board were clearly demarcated in the draft contract of employment, which forms part of the annexures to the plaintiff's witness statement.

[22] Subsequent to the approval of the plaintiff's appointment by the Board of Directors, his appointment as CEO was endorsed by Cabinet. The plaintiff testifies that

the submission to Cabinet was made by the Minister of Health and Social Services as the presenter and the Minister of Public Enterprises as a member of Cabinet, who attended Cabinet meetings. Hence his appointment was made in concurrence with the Portfolio Minister, including his remuneration levels and benefits.

The basis for the application for absolution from the instance

[23] Mr Makando submitted that when the plaintiff's testimony is considered *vis-à-vis* the defences pleaded by the defendant, the court must find that he has failed to establish a prima facie case requiring the defendant to answer thereto.

[24] Mr Makando submitted that the defendant's application for absolution from instance should be granted on any of the following grounds:

a) Payment in terms of clause 12.5 of the contract was and still is, remuneration and/or a service benefit and therefore, for it to be valid, it required approval by the Board and concurrence with the Portfolio Minister;
b) There was absolutely no evidence presented to suggest that there was any compliance with s 22(3) of the Governance Act and that the payment under clause 12.5 is, therefore, ultra vires the Act and the GN No. 174, 12 August 2010;
c) There was also no evidence whatsoever that was led evidencing the approval by the Board of the defendant in terms whereof it had approved the said clause and/or the provisions of clause 12.5.
d) That clause 12.5 of the contract is against public policy;
e) Since the cancellation or termination of the employment was predicated on clause 11.1.3 of the said contract of employment, the defendant was absolved from paying any amount to the plaintiff, except those which had accrued or that which was lawfully due to him; and
f) That estoppel is not available to the plaintiff in light of the illegality of the aforesaid clause.

Opposition to the application for absolution from the instance

[25] Mr Corbett argued that the application for absolution from the instance by the defendant is without merit for a number of reasons. An important factor is that no evidence was led on behalf of the defendant as yet. There is thus no evidence to support the defendant's defence to the plaintiff's case nor to sustain a counterclaim against the plaintiff.

[26] Mr Corbett further argued that it is important to bear in mind the nature of the plaintiff's pleaded case and the defendant's plea and counterclaim thereto and that it is evident by the approach taken in the pleadings and that adopted in the defendant's heads of argument, that the defendant perpetuates a misconception and that there is overwhelming evidence that the defence of the defendant is not sustainable.

[27] Mr Corbett submitted that the defendant plea that a contract of employment containing a restraint of trade clause, in terms whereof the plaintiff is entitled to compensation, constitutes "remuneration" or "service benefits" as understood by s 22(3) of the Governance Act, and for this reason the plaintiff is disentitled from claiming what is due to him in terms of clause 12.5 of the contract of employment entered into between the parties. However, counsel submits that the approach taken by the defendant in its plea to the plaintiff's claim, and in this application for absolution from instance, is misplaced.

[28] Mr Corbett further argued that central to the determination of this matter is the interpretation to be given to s 22(3) of the Governance Act and the relevant clauses of the agreement. In this context counsel referred the court to *Kotzé v Suid-Westelike Transvaalse Landbou Koöperasie*[4] wherein the Supreme Court of Appeal in South Africa stated, in the context of the interpretation of a contract at the absolution stage, as follows:

[4] 2005 (2) 295 (SCA) para [22]

'All that was relevant at this stage was whether there was evidence on which a court could (not should) reasonably find in favour of the respondent. Regarding the interpretation of a document the test at that stage is whether the document can have that meaning and not what it actually means. It follows that the ratio of that judgment cannot extend beyond a finding that the document was capable of being so interpreted (compare the test regarding the interpretation of a document at exception stage, as formulated by this Court in *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk*, 1988 (2) SA 493 (A) at 500E). Whether it should be so interpreted was a matter for the Court at the end of the trial.' [emphasis added]

[29] Mr Corbett submitted that it should accordingly follow that the test to be applied in respect of the interpretation of the Governance Act and the agreement is whether there is evidence on which the Court could reasonably find in favour of the plaintiff. The threshold is no higher than that.

[30] With regards to the contractual interpretation, Mr Corbett argued that it is to be presumed that the words applied by the parties in their contract were used in the ordinary, everyday sense and that the language contained in the agreement and particularly in clauses 11 and 12 thereof is unequivocal and unconditional. Mr Corbett pointed out that the plaintiff did not draft the agreement and therefore, the *contra proferentem* rule would not apply to the agreement.

[31] Mr Corbett argued that if the defendant disputes the validity of the restraint of trade, then it has an onus to rebut the presumption that states that no person writes what he or she does not intend[5].

[32] Mr Corbett strongly argues that the restraint of trade clause is valid and enforceable on the evidence before the court. Mr Corbett submitted that the principles as set out in *Total Namibia v OHM Engineering and Petroleum Distributors*[6], wherein the approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[7] should be

[5] *Sonap Petroleum (SA) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A).
[6] 2015 (3) NR 733 (SC).
[7] 2012 (4) SA 593 (SCA) para [18].

followed in the statutory and contractual interpretation in respect of the Governance Act and the agreement, in answer to the question of whether the restraint of trade clause is hit by s 22(3) of the Governance Act.

Legal principles applicable to an application for absolution from the instance

[33] The principles that apply in application for absolution from the instance have been set out in a plethora of cases. Both counsel are *ad idem* about the principles applicable, and I will therefore just briefly refer to the said principles.

[34] The applicable test to be applied by a trial Court when absolution from the instance is sought at the close of the plaintiff's case has been stated by Miller AJA in the matter of *Claude Neon Lights (SA) Ltd v Daniel*:[8]

'… when absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the 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, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 TPD 170 at p. 173; Ruto Flour Mills (Pty) Ltd v Adelson (2), 1958 (4) SA 307 (T)).' [emphasis added]

[35] Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another*[9] further explained that:

'This implies that a plaintiff has to make out a prima 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 could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93).' [emphasis added]

[8] 1976 (4) SA 403 (A) at 409 G – H.
[9] 2001 (1) SA 88 (SCA) at 92 H – 93 A.

[36] This approach has been followed in Namibia in a number of decisions of both the Supreme Court and the High Court[10].

[37] The learned authors, Herbstein and Van Winsen state that[11]:

'. . . it is clear that a trial court should be extremely chary of granting absolution at the close of the plaintiff's case. In deciding whether or not absolution should be granted, the court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. When the plaintiff relies on an inference the court will refuse the application for absolution unless it is satisfied that no reasonable court can draw the inference for which the plaintiff contends.'[12] [emphasis added]

[38] Insofar as documentary evidence is concerned and in particular the proper interpretation thereof, the following principle has been laid down in *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk*[13]:

'Where the plaintiff's evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that a reasonable man might give to the document and the interpretation that he ought to give to it tends to disappear. Nevertheless, even in such cases the trial Court should normally refuse absolution unless the proper interpretation appears to be beyond question.' (Emphasis added)

[39] This position set out by the Appellate Division was followed in a number of cases where the court was called upon to interpret a document during absolution proceedings at the close of the plaintiff's case.

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[10] *Stier v Henke* 2012 (1) NR 370 (SC) at 373 para [4]; *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd* 2007 (2) NR 494 (HC) at 496 para [12]; *Lofty Eaton v Grey Security Services Namibia (Pty) Ltd* 2005 NR 297 (HC) at 302 C – E; *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC) at 453 D – F.

[11] Herbstein and Van Winsen *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5 ed Juta & Co (2009) at 923.

[12] *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (e) at 526 – 527.

[13] 1961 (1) A 335 (AD) at 340 D-C.

[40] In *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad*[14] it was held that:

'When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established 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, nor ought to) find for the plaintiff. Where the plaintiff's case rests on the interpretation of a document, the interpretation of which is in dispute, the interpretation on which the defendant relies has to be beyond question before its application for absolution will succeed. Where the defendant bears the onus in a dispute, absolution should not be granted.'

[41] Also see *Build-A-Brick Bk en 'n Ander v Eskom*[15] wherein Hattingh J found that the test to be applied in determining the question whether the defendant's application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. The plaintiff's evidence should consequently at the absolution stage hold a reasonable possibility of success for him and should the Court be uncertain whether the plaintiff's evidence has satisfied this test, absolution ought to be refused. Where the claim is based on a document of which the interpretation is in dispute, the interpretation on which the defendant relies should be established beyond reasonable doubt before his application for absolution can succeed.

[42] C W H Schmidt *Law of Evidence*, loose leave edition at 3-16 to 3-18, the learned author stated that 'if the plaintiff's case is based on a document and the interpretation of the document is in dispute, the interpretation on which the defendant relies must be

[14] 1998 (2) SA 289 (O) at 293 B-C and 293 G-H and 296 G.
[15] 1996 (1) SA 115 (O).

virtually beyond doubt before his application for absolution can succeed. A decision on the meaning of a document is preferably reached only at the end of the case[16].'

[43] The aforementioned cases are all aligning with the argument of Mr Corbett with reference to the *Kotze* matter.

Discussion

[44] In the *Gafoor* matter Schreiner JA observed that 'as a rule when a trial court refuses absolution at the close of the plaintiff's case it should avoid an unnecessary discussion of the evidence, lest it seem to take the view of its quality and effect that should only be reached at the end of the whole case[17]'.

[45] The learned judge proceeded to make the following remarks which I deem to be apposite, albeit in a different context. He said:

'In the same way on appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed. Where, however, the issue turns on the interpretation of a document, the Appellate Tribunal, if it does not agree with the trial Court's view that the interpretation of the crucial document is so manifestly in favour of the defendant as to justify the granting of absolution at the close of the plaintiff's case, should at least make its reasons clear enough to provide some assistance to the trial Court in its eventual decision of the case. I think, however, that the Appellate Tribunal should preferably refrain from stating its reasons in such a way as to tie the trial Judge's hands unduly, for the proper interpretation of the document may be affected by circumstances appearing in the evidence led by the defendant.'

[16] *Gafoor* supra at footnote 14. Also see *HRH King Zwelithini of Kwa Zulu v Mervis* 1978 2 SA 521 (W) 526. It is also said that the difference between what a court can and should find tends to disappear when the point in issue is the interpretation of a document.
[17] Supra footnote 14 at 340 C.

[46] I am guided by the directions of the learned judge in this regard. I am of the view that any statutory or contractual interpretation of the agreement and within the context of the Governance Act should stand over to the end of the case, as the proper interpretation of the contract of employment may be affected by circumstances appearing in the evidence of the defendant.

[47] In following the direction evident from the case law discussed above dealing with application for absolution from the instance at close of the plaintiff's case and where interpretation of a document/agreement is required, the proper approach would be to consider the conspectus of the all the evidence at the end of the matter.

[48] I have considered the very able arguments advanced on behalf of the plaintiff and defendant but cannot find that the defendant's interpretation is beyond question and as a result this court must give the benefit of doubt to the plaintiff and consequently the defendant must fail.

[49] My order is therefore as follows:

1. The application for absolution from the instance is hereby dismissed with costs. Such costs to include the costs of one instructing and one instructed counsel were so engaged.

2. The matter is postponed to **17 February 2022** at **15h00** for status hearing and for the allocation of dates for the continuation of trial.

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JS Prinsloo

Judge

APPEARANCE:

PLAINTIFF/RESPONDENT:	A Corbett SC Instructed by Shikale Legal Practitioners, Windhoek.
DEFENDANT/APPLICANT:	S Makando Instructed by Bangamwabo Legal Practitioners, Windhoek.