REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2016/02829

In the matter between:

NORBERT HERCULES **PLAINTIFF/APPLICANT**

vs

NAMIBIA SUBTECH DIVING AND MARINE (PTY) LTD **DEFENDANT/RESPONDENT**

Neutral citation: *Hercules v Namibia Subtech Diving and Marine (*Pty) Ltd (HC-MD-CIV-ACT-CON-2016/02829) [2022] NAHCMD 79 (25 February 2022)

Coram: Oosthuizen, J

Heard: **9 December 2021**

Delivered: **25 February 2022**

Flynote: Motion — issues to consider for allowing condonation — intended constitutional challenge — Prospects of success — *bona fide* case to be made out by plaintiff applying for re-opening of pleadings at a late stage.

Summary: Plaintiff brought an application to uplift the bar to file a replication, to re-open pleadings in order to file a replication containing a constitutional challenge in

respect of section 3(1)(b) of the Employee's Compensation Act of 1941. The facts, discussion, conclusion and orders appear from the Judgment.

ORDER

---

1. Plaintiff's application for the upliftment of the bar flowing from the Court Order of 12 June 2018 and application to re-open pleadings by allowing Plaintiff to file a replication on constitutional grounds against Defendant's special plea filed on 15 February 2018, is dismissed.

2. Plaintiff shall bear the costs of Defendant's opposition, which costs shall include the costs of one instructing and one instructed counsel and shall not be capped by Rule 32(11).

3. Parties shall file a joint pre-trial report on or before 30 March 2022.

4. The case is postponed to Monday, 4 April 2022 at 12h00 for a Pre-Trial Conference hearing at the SADC Tribunal.

JUDGMENT

OOSTHUIZEN J:

[1] On 31 August 2016 the Plaintiff instituted a delictual claim for damages against his erstwhile employer. Plaintiff amended his claim during June 2017.

[2] Plaintiff relies thereon that he was employed by the defendant when an accident happened which rendered him permanently incapable for employment as a diver.

[3] Plaintiff claims that he suffered damages as a result of the Defendant's negligence in the amount of N$ 3 018 049.90.

[4] Plaintiff alleges employment by Defendant commencing on 27 August 2013 as a result of a partly oral and partly written agreement. The written portion of the agreement is attached to his amended particulars of claim as annexure “A”.

[5] The written agreement states employment for a limited duration period which commences on 27 August 2013 and terminates on 19 September 2013. Under the preamble to the contract it is clarified that the employee acknowledges and accepts that the contract is for a limited duration only; there is no expectation of permanency; there is no expectation that the contract will be extended; the employee acknowledges and accepts this status and understands that this contract is not of a permanent nature; any extension beyond the termination date of this contract shall be placed in writing, in the form of a new contract of employment; etc.

[6] Clause 1 of the employment agreement deals with the costs of employment and clause 2 with a three month probation period.

[7] Plaintiff alleges in his claim further that he was promised a permanent position by the Defendant and that he was unfairly dismissed by the Defendant on 15 October 2013 by way of a letter annexed as annexure “B”, during his probation period.

[8] It is however common cause that the work related accident which rendered Plaintiff unfit took place on 6 September 2013.

[9] The contents of annexure “B” is not disputed by the defendant save therefore that defendant denies that it constituted an unfair dismissal.

[10] Annexure “B” dated 15 October 2013 reads as follows:

‘Our discussion held at your place of residence in Swakopmund on Thursday 10th October 2013 refers.

Firstly it was pleasure to meet both you and your wife last week – albeit we all wish that the reason for the visit did not exist. For your records and ours, I have highlighted the salient points of our discussion below:

- You were employed by Subtech as part of an extra diving complement required to complete a project in Walvis Bay Harbour for our client, EB&H. This project is now coming to a close and we no longer require any extra diving personnel to our usual complement of divers. There is thus no further work for you with Subtech at this time;
- We have filed all of the relevant paperwork with the authorities in Walvis Bay in terms of both the accident itself but also in terms of your access to any social security payments and medical treatment costs;

I have now had the opportunity to consult with the relevant authorities and can advise that the following is the way forward from a Subtech perspective:

1. Your fixed term contract of employment was for the period 27th August 2013 to 19th September 2013. The accident that caused your injuries took place on 6 September 2013 and you have been unable to work since this date. Subtech has paid your salary for the entire period of your contract – i.e. you have been paid until 19th September 2013. Payment has been processed as follows:
   - 27/08 to the 13/09 – your nett (after deductions) salary was N$ 9 341.66 (paid on 28 September 2013)
   - 14/09 to the 19/09 – your nett (salary after deductions) will be N$ 771.45 (which will be paid on 28th October 2013)

2. As your contract would have completed on the 19th September 2013 and as there is nothing in the legislation that indicates that there is any obligation post the employment relationship, other than what has already been done regarding the normal reporting to the relevant authorities and the assessment by these authorities of any further payments based on the medical profile of the employee. The Workman's Compensation Act 30 / 1941 [as amended] makes provision for compensation to be paid by the by the Accident Fund which assumes the full liability of the payment of benefits to employees earning less than N$76,000 per annum.

3. Our conclusion is then that the obligation of payment falls under the Accident Fund and that Subtech has fulfilled its obligation by ensuring payment to you until the 19th September 2013.

Don't hesitate to contact the undersigned should you require any further information in this regard.'

[11] In Plaintiff's amended Particulars of Claim it was not pleaded that he had received payments under the Employee's Compensation Act, Act 30 of 1941.

[12] On 15 February 2018 the Defendant raised a special plea based on Section 7(a) of the Employee's Compensation Act, Act 30 of 1941 (hereinafter referred to as the 'Compensation Act') and plead over on the merits.

[13] Defendant's Special plea is framed thus:

'2. A claim in respect of the work related injury complained of by the Plaintiff was submitted to the Social Security Commission ("the commission") in terms of the Employee's Compensation Act 30 of 1941 ("the Act") and liability was accepted by the commission for the claim on or around 30 September 2013. It was accepted on the basis of a special arrangement as provided for in section 3(1)(b) of the Act that all persons in the Defendant's employ earning more than N$ 81,300.00 per annum (the applicable threshold as set by section 3(2)(b) of the Act) were still insured under this Act.

3. By virtue of this special arrangement the Plaintiff was and remains an "employee" as defined by section 3 of the Act.

4. The permanent disablement of the Plaintiff was assessed at a degree of fourty-six percent (46%), as per a final medical report dated 1 September 2015, and the commission rendered and continues to render payments to the Plaintiff in respect of a pension, medical expense refund and/or temporary total disablement pay out.

5. In accordance with section 7(a) of the Act no action at law shall lie by an employee or any dependant of an employee against such an employee's employer to recover any damages in respect of an injury due to an accident resulting in the disablement or death of such an employee. The claim for damages in this action falls within the scope of section 7(a) of the Act and the Plaintiff is accordingly barred and prevented from claiming against the Defendant for any damages suffered.'

[14] Defendant, in its plea on the merits, pleaded that it employed the Plaintiff on a fixed term contract from 27 August 2013 to 19 September 2013 as per page 1 of annexure “A” to the Amended Particulars of Claim and that the Plaintiff was paid all remuneration due and payable to him until 19 September 2013. Defendant’s plea made it clear that they admit the written employment contract as the exclusive memorandum in respect of Plaintiff’s employment and that it denied alleged oral, tacit, or implied terms in addition to the said annexure “A” to the Amended Particulars of Claim.

[15] While Plaintiff was still represented by Tjitemisa & Associates and on 12 June 2018, he was ordered to file a joinder application and his replication (to the special plea) on or before 20 July 2018. I mention here that by agreement between the parties, plaintiff’s time to file a replication was extended because he was awaiting opinion of counsel on the special plea. During August 2018 however plaintiff’s legal practitioners withdrew without any joinder application and replication being filed.

[16] On 31 January 2019 the defendant filed an application to amend its pleadings.

[17] Mr. Nixon Marcus of Nixon Marcus Public Law Chambers was appointed as amicus curiae for the Plaintiff on 11 February 2019.

[18] Defendant’s application to amend its pleadings was dismissed in January 2020 and leave to appeal declined on 12 June 2020.

[19] On 2 September 2020 the parties concluded a joint case management report[1] wherein they jointly agreed that any request for further specific discovery shall be filed by 21 September 2020. They also agreed on a separate hearing of the Defendant’s special plea raised on 15 February 2018. Thereafter, the Plaintiff requested further discovery concerning the application by defendant for the special arrangement under section 3(1)(b) of the Compensation Act. Defendant obtained the document under subpoena from the Social Security Commission and availed same to Plaintiff on 24 February 2021. The document is marked “S1” and attached to the Defendant’s answering affidavit.[2]

---

[1] Hearing Index, pp 84 to 89.

[2] Hearing Index, p.56

[20] On 7 May 2021 the Plaintiff indicated his intention to apply for the re-opening of pleadings and permission to file a replication to defendant's special plea.

[21] On 26 May 2021 the Defendant indicated that it shall object to such an application.

[22] The application by Plaintiff was brought by way of motion on 9 July 2021.

The application

[23] Plaintiff's founding affidavit mentioned his claim; his first legal practitioners; their withdrawal; and fresh legal practitioners who assisted him with the amendment to the particulars of claim; the special plea by defendant; his obligation to replicate; and the development of the case until the present application was filed on 9 July 2021.[3]

[24] Plaintiff deal with his bona fide defence to Defendant's special plea only.[4]

[25] Plaintiff doubted whether the special plea arrangement applied for by Defendant in terms of Section 3(2)(b) of the Compensation Act was intended to be applicable to him because it did not specify divers as a class of person for which cover was sought.[5]

[26] Paragraphs 33 to 36 to Plaintiff's founding affidavit[6] are quoted verbatim:

'33. The Social Security Commission in the letter of 10 June 2011 approved the special arrangement and confers it to all persons in the Defendant's employ 'including working directors earning a fixed salary' whose earning exceed N$ 72 000 per annum.

34. The Commission has no jurisdiction to expand the class of persons from what the employer (Defendant) applied for (cover for 7 people). The Commission is not lawfully entitle to extend the categories of employee beyond that applied for by the Defendant.

[3] Hearing Index, pp 22 to 26.
[4] Hearing Index, pp 24 and 27, founding affidavit paragraphs 29 to 36.
[5] Hearing Index, p 26, paragraphs 31 and 32.
[6] Hearing Index, p 27.

35. Insofar as the special arrangement was applicable to me, I submit that, there was an obligation on the Defendant to disclose me this fact before employing me as a diver. This follows from the inherent dangerous operations that divers engage in. Had this fact been disclosed to me, I would not have taken up the employment with the Defendant, knowing that should I be injured my damages will be limited while ordinarily I would have an unlimited claim against the Defendant.

36. I submit that Defendant cannot make me an employee without my consent and without giving me an opportunity to be heard. I submit that this requirement must be read into section 3(1)(b) of the Act to be constitutionality compliant. I specifically rely on my right in terms of article 18 of the Constitution. Alternatively, I submit that the section is unconstitutional for violating my right to dignity in terms of Article 8, my right to property contained in Art 16 and my right to administrative justice in terms of Art 18 alternatively my right to a fair trial in terms of Art 12 of the Namibian Constitution.'

[27] It is noted that Plaintiff did not address the merits of his claim at all and focussed only on his intended special plea.

[28] It is also noted that the Plaintiff's founding affidavit was not initialled on any page by himself or the commissioner of oaths and neither was there specific referencing, incorporation and initialling of any annexures, although the hearing index purports to attach process from pages 29 to 38. Defendant did not take issue therewith.

Defendant's answering affidavit

[29] Defendant filed a detailed answering affidavit with proper incorporated annexures.[7]

[30] Defendant complained of the extensive delay by the Plaintiff in bringing this application; the paucity of details in founding affidavit; that neither the Attorney-General nor the Social Security Commission (necessary and interested parties) are joined to this application or to the action; defendant also mentioned the absence of

---

[7] Hearing Index, pp 39 to 109.

other employees of Defendant covered by the special arrangement; that the delay was unreasonable and not fully explained.

[31] Plaintiff in his replying affidavit[8] used the opportunity to declare that a constitutional challenge can be raised at any time of the proceedings; that the Court should pronounce itself on the interpretation of a statutory provision allowing an employer to curtail the rights of employees to claim compensation for harm suffered as a result of the employer's negligence; that the defendant robbed him by private fiat of his right to claim compensation; that the necessary application to join the interested parties will be made once the leave to file a replication is granted; denying knowledge of the special arrangement prior to or subsequent to his employment with Defendant.

Arguments and applicable law

[32] Plaintiff submits that the application to uplift the bar should be granted for two reasons. First, the Plaintiff intends to challenge the constitutionality of section 3(1)(b) of the Act. As a matter of constitutional law, a litigant can invoke any provision of the Constitution at any time during the litigation and even as late as the appeal stage. The ordinary common law principles relating to reopening of pleadings do not apply when a constitutional challenge is raised. Second, the Plaintiff has in any event given a reasonable explanation why the defence was not raised within the time ordered by this Court and should be allowed to present the constitutional challenge against section 3(1)(b) of the Act. Plaintiff submits that he has a *bona fide* defence against the special plea of defendant.

[33] The Plaintiff submitted that even if he is wrong, that the normal position does not apply when a constitutional challenge is raised; he has given a reasonable explanation to obtain this Court's indulgence. The reasons are that the Plaintiff did not receive legal advice with regard to the constitutionality of section 3(1)(b) by his previous legal representatives; the advice that he received related to section 7(a) of the Act, which was to the effect that a challenge to that section had no reasonable prospects of success; from 13 August 2018 to 11 February 2019 the Plaintiff was legally unrepresented; on 11 February 2019 the Plaintiff's current counsel was

---

[8] Hearing Index, pp 110 – 116.

appointed by the court as amicus curiae; from 11 February 2019 to 12 June 2020 the Plaintiff's current counsel was engaged with opposing interlocutory applications brought by the Defendant; the merits of the case were only considered in depth after the interlocutory applications were finalized; on 18 September 2020 the Plaintiff filed a request for specific discovery. The documents were only made available by the Defendant on 24 February 2021; delays occurred with regard to holding consultations on the discovered documents and the special plea; only then advice was given that a replication should be file to the special plea.

[34] The defendant's opposition relates to almost three years having passed after the pleadings have closed. Plaintiff seeks to open the pleadings and to introduce new challenges, which will only serve to delay of the progress of the matter. It was already agreed on 2 September 2020 between the parties that the special plea be argued next.

[35] Defendant further submitted that necessary and interested parties like the Attorney-General, Social Security Commission and other employees of Defendant who resort under the special arrangement in terms of section 3(2)(b) of the Compensation Act are not joined.

Delay

[36] Plaintiff argued on the basis of *Gurirab v Government of the Republic of Namibia and Others*[9] that a constitutional challenge can be raised at any time during litigation as long as the opposing litigant is afforded time to deal therewith.

[37] Gurirab is also authority for the Court to then consider a special order as to costs.[10]

[38] It seems therefore that in a case such as this case introducing an intended Constitutional challenge where a lengthy delay is present a Court should allow the re-opening of the case and the belated replication if the applicant for indulgence has made out a good case on the intended challenge.[11]

---

[9] 2006 (2) NR 485 SC, Paragraph [29].

[10] Op cit.

[11] The so called second leg of good cause.

[39] The Constitutional challenge, if it is properly pleaded by Plaintiff, will have the effect that the delay is less important.

Bona fide case

[40] In the subject matter Plaintiff's application for the upliftment of the bar, application to re-open pleadings and leave to file a replication was brought on notice of motion.

[41] The Supreme Court in *Nelumbu*[12] authoritatively pronounced on the requirements.

[42] Due to the extensive delay and the Constitutional challenge the Plaintiff wishes to mount, it is required from Plaintiff to show that he has a good triable case overall on the merits.

[43] Plaintiff is required to show a *bona fide* case on his main claim too, not only on his 'defence' to the special plea.

[44] Plaintiff did not touch on the merits of his claim in his application.

[45] When an application for re-opening of pleadings and filing of a replication attacking the constitutionality of section 3(1)(b) of the Compensation Act is launched 2 years after obtaining a third team of legal practitioners appointed as *amicus curiae*, it is required of the applicant for the indulgence to set out in his founding affidavit not only a *bona fide* case on the defence to the special plea, but also a good case in respect of his main case, which Plaintiff palpably neglected to do.

[46] Another matter which the Plaintiff has failed to do, is to disclose in his amended particulars of claim and in his founding affidavit that he applied for and obtained remuneration from the Social Security Commission under the Employee's Compensation Act. It was important to make that disclosure when plaintiff intends to

[12] *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 SC, Paragraphs [40] to [44]. See also *Balzer v Vries* 2015 (2) NR 547 SC, Paragraph [21].

challenge the very system under which he obtained financial aid from November 2013 onwards.

[47] I concur with Defendant that plaintiff's explanation and evasiveness concerning knowledge of the special arrangement with the Social Security Commission at an early stage, is unconvincing and not credible.

[48] I refer to plaintiff's failure to attach, refer to and verify annexures to his founding affidavit. *Vide* paragraph [28].

[49] Defendant's annexures "S2" reveals important representations made by Plaintiff in affidavits under the Employee's Compensation Act, 1941. In the absence of explanations by the Plaintiff, the Social Security Commission could have made a valuable input, if joined timeously.

[50] Plaintiff in his founding affidavit launch an attack on the Social Security Commission in their absence and the Court is required to consider without having heard the Social Security Commission. *Vide* paragraph [26].

[51] At least the Attorney-General and the Social Security Commission should have been joined to this application introducing a constitutional challenge. It is not an answer to say we first want the reopening of the pleadings by uplifting the bar and for filing of our constitutional challenge to section 3(1)(b).

[52] In order to show good cause on the merits of the challenge, the Attorney-General and Social Security Commission were necessary interested parties whom should have been heard, especially the Social Security Commission.

[53] To obtain consent to file the constitutional replication and thereafter intending joinder is to put the cart in front of the horse. The Attorney-General and Social Security Commission joined subsequently, is to put them and the Court at a disadvantage. Allegations concerning the Social Security Commission and its *modus operandi* is now before Court without them (Social Security Commission) being able to respond thereto. That is definitely not the manner and way to disclose facts constituting a triable case which is good in law.

[54] This non-joinder at this stage contribute nothing to the obligation of Plaintiff to show a good triable case. What make the situation worse for the Plaintiff was that he was already ordered to file a joinder application and to replicate during June of 2018 after receiving opinion from counsel regarding section 7 of the Compensation Act. Plaintiff did not mention, refer or request condonation for the non-compliance with the said joinder order.

[55] The Court order of 12 June 2018 and his non-compliance therewith now stands in the way of the excuses and application proffered by Plaintiff. Mr. Nekwaya, the instructed counsel for Plaintiff at the stage and during the appearance requested time for joinder and replication and defendant concurred.[13]

[56] In the result the following orders are made:

[56.1] Plaintiff's application for the upliftment of the bar flowing from the Court Order of 12 June 2018 and application to re-open pleadings by allowing Plaintiff to file a replication on constitutional grounds against Defendant's special plea filed on 15 February 2018, is dismissed.

[56.2] Plaintiff shall bear the costs of Defendant's opposition, which costs shall include the costs of one instructing and one instructed counsel and shall not be capped by Rule 32(11).

[56.3] Parties shall file a joint pre-trial report on or before 30 March 2022.

[56.4] The case is postponed to Monday, 4 April 2022 at 12h00 for a Pre-Trial Conference hearing at the SADC Tribunal.

---

[13] 'Having heard **MR NEKWAYA** for plaintiff and **MS VON FINCKENSTEIN** for defendant in HC-MD-CIV-ACT-CON-2016/02829:

IT IS HEREBY ORDERED THAT:

1. The case is postponed to 20/08/2018 at 14:00 for Status Hearing (Reason: Documents Exchange).
2. Plaintiff to file joinder application, and his replication on or before 20/07/2018.
3. Defendant shall file its answering papers on or before 10/08/2018.'

GH Oosthuizen

Judge

APPEARANCES:

PLAINTIFF/APPLICANT:	N Marcus Of Nixon Marcus Public Law Office Windhoek, Namibia
DEFENDANT/RESPONDENT:	C van der Westhuizen Instructed by Koep & Partners Windhoek, Namibia