

**IN THE HIGH COURT OF NAMIBIA**

<p><b>Case Title:</b></p> <p>Kuiri Fanual Tjipangandjara                      Plaintiff</p> <p>and</p> <p>Namibia    Water</p> <p>Defendant</p> <p>Corporation Limited</p>	<p><b>Case No:</b></p> <p>HC-MD-CIV-ACT-DEL-2021/04068</p>
<p><b>Heard before:</b></p> <p>Honourable Lady Justice Rakow, J</p>	<p><b>Division of Court:</b></p> <p>High Court (Main Division)</p> <hr/> <p><b>Date of hearing:</b></p> <p>11 November 2022</p> <hr/> <p><b>Date of order:</b></p> <p>27 January 2023</p>
<p><b>Neutral citation:</b> <i>Tjipangandjara v Namibia Water Corporation Limited</i> (HC-MD-CIV-ACT-DEL-2021/04068) [2022] NAHCMD 12 (27 January 2023)</p>	
<p><b>IT IS HEREBY ORDERED THAT:</b></p> <ol style="list-style-type: none"> <li>1. The special plea of jurisdiction raised by the defendants is dismissed with costs.</li> <li>2. The matter is postponed to 28 February 2023 for Case Management Conference Hearing.</li> <li>3. The parties to file a joint case management report on or before 23 February 2023.</li> </ol>	
<p><b>Reasons for orders:</b></p>	
<p>RAKOW J,</p> <p><u>Background</u></p> <p>[1] The Plaintiff was employed by the Defendant, in the position of General Manager:</p>	

Operations, and a written contract was duly concluded between the parties. This contract of employment was subject to and regulated by the provisions of the Labour Act, 2007. During July 2005, the Plaintiff, entered into a written agreement with the Defendant in terms of which the Plaintiff was laterally transferred to the position of General Manager: Engineering and Scientific Services, a position he held up to 7th July 2014 when the Chief Executive Officer of the Defendant at the time, implemented a revised structure and unilaterally abolished the Plaintiff's position by handing him an appointment letter to a new a position of Chief: Water Supply – Central. The Chief Executive Officer in abolished the previous position held by the Plaintiff.

[2] The Defendant allegedly repudiated the agreement with the Plaintiff by unilaterally changing the Plaintiff's employment conditions, and unlawfully locking-out the Plaintiff from the workplace. The Plaintiff refused to accept such repudiation. On 25th February 2015, the Defendant and Plaintiff reached a voluntary agreement in which the parties agreed that the Defendant was to end the lock-out of the Plaintiff and allow the Plaintiff to return to work in order to facilitate proper consultations without any delay. As a result, the Defendant's decision was suspended until the terms of the settlement agreement were complied with, meaning that the Plaintiff was still employed on the same terms and conditions as prior to the purported restructuring.

[3] It seems that nothing came from the agreement and the Plaintiff approached the Labour Court with his complaint. On the 9th November 2018, the Labour Court (in the case of *Tj pangandjara v Namibia Water Corporation Limited & Others*<sup>1</sup> made a finding that the unilateral change of employment terms and conditions by an employer violated the provisions of s 34 of the Labour Act and hence the conduct of the second Defendant in continuing with the lock-out was wrongful and unlawful. In the current matter the Plaintiff is now claiming for the income he lost during the period 01 April 2015 to 01 April 2017 (24 months) and further damages he suffered.

#### The special plea

[4] The Defendant plead that:

'1.1. The plaintiff's claims are instituted in the High Court of Namibia (the High Court).

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<sup>1</sup> *Tj pangandjara v Namibia Water Corporation Limited & Others* (LCA 16 & 19/2017) [2018] NAHCMD 30 (9 November 2018)).

The High Court has concurrent jurisdiction to adjudicate and determine the plaintiff's claims as its jurisdiction has not been ousted, subject to what is pleaded below.

1.2. On 9 April 2015, the defendant issued the plaintiff with a notice of a lockout.

1.3. In *Tjapangandjara v Namibia Water Corporation Limited & Others (LCA 16 & 19/2017) [2018] NAHCMD 30 (9 November 2018)*, on the latter date, the Labour Court held the plaintiff's lockout to have been unlawful.

1.4. Between 9 April 2015 (the commencement of the lockout) and 1 May 2017 (when the plaintiff reached retirement age) the plaintiff alleges that he was entitled to and or suffered damages in the claim 1 and 2 delineated in paragraphs 19 to 24 of his particulars of claim.

1.5. Although the plaintiff was entitled to institute his claim in the High Court, the plaintiff's claims were and remain disputed as envisaged in section 86 of the labour Act, Act No 11 of 2007 ("Act").

1.6. In terms of section 86(2)(b) of the Act, the disputes in paragraphs 19 to 24 of the plaintiff's particulars of claim must be instituted within one year after they arose.

1.7. The plaintiff instituted its action against the defendant on 26 October 2021.

1.8. The plaintiff instituted its action against the defendant more than 12 months from the date (9 November 2018 – the date of the determination of the unlawfulness of the lockout) on which its claims arose.

2. The High Court has concurrent jurisdiction to adjudicate and determine disputes as envisaged in section 86 of the Act.

3. The High Court does not have jurisdiction to hear adjudicate and determine a dispute outside of the time period.'

[5] The Defendant however limited its submissions to relating to the fact that this court does not have jurisdiction to hear this matter.

### The arguments

[6] On behalf of the Plaintiff it was argued that the Plaintiff's cause of action arose on 9 November 2018 when the Defendant's lockout was determined as unlawful by the High Court. It is important to distinguish that the Plaintiff's claims are claims for contractual

damages and damages arising from the unlawful repudiation/ breach of an employment contract and not a claim in the Labour Court.

[7] It was further argued that the Labour Court which draws its powers from the Labour Act, does not have jurisdiction to adjudicate and determine a claim for damages. That being the case, the Defendant has to utilize his or her common law right to sue the employee for damages in the High Court. Because of this, the provisions of s 86 of the Labour Act finds no application herein and the Plaintiff's claim is not time barred by that provision. It is a common law claim based on unlawful repudiation/breach contract and prescription should be determined in terms of the Prescription Act 68 of 1969

[8] The Defendant agrees that the Plaintiff's pleaded cause of action is premised on the Labour Court's finding in *Tj pangandjara v Namibia Water Corporation Limited and Others*<sup>2</sup>. In this case it was found that that the Defendant violated the Plaintiff's procedural and substantive rights in terms of the provisions of s 34 of the Labour Act, in that the Plaintiff undertook a sham restructuring which thereafter saw or resulted in the Plaintiff's "constructive" dismissal from the Defendant. It is further true that the Plaintiff instituted action in this court seeking loss of income and damages as a result of this finding.

[9] The Defendant argued that the cause of action is based on the Labour Act, 11 of 2007, in that s 34, amongst others, prescribe the procedure of dismissals arising from redundancy, s 38, amongst others, prescribe the manner in which disputes arising from the non-compliance with the provisions of s 34 of the Act are to be resolved, s 84, amongst others, define non-compliance with the provisions of s 34 of the Act as a dispute under the Act, and s 86, amongst others, makes provisions for the arbitration of disputes pertaining to non-compliance with s 34 of the Act and appropriate remedies.

#### Legal considerations

[10] In *Nghikofa v Classic Engines CC*<sup>3</sup> the Supreme Court found that the Labour Act did not exclude the jurisdiction of the High Court in respect of common law claims for

<sup>2</sup> *Tj pangandjara v Namibia Water Corporation Limited and Others* (LCA 19 of 2017) [2018] NALCMD 30 (09 November 2018).

<sup>3</sup> *Nghikofa v Classic Engines CC* 2014 (2) NR 314 (SC).

damages arising from contracts of employment. O'Reagen SJ said the following:

'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.

. . .

[20] I conclude, therefore, that given the absence of a clear legislative provision sustaining it, appellant's argument that respondent was compelled to bring its counterclaim in the proceedings under the Act cannot be upheld.'

[11] In *Swakop Uranium v Employees of Swakopm Uranium as Per Schedule Annexure POC1*<sup>4</sup> it was found that:

' . . . the fact that a breach of an employment contract may also, independently of the Act, give arise to the enforcement of a common law contractual remedy and may also amount to a dispute but this would not mean that the time bars contained in s 86(2)(b) would apply when those rights are enforced in that manner in the High Court. The time bars in s 86(2)(b) apply to the remedies invoked in the Act when referring disputes under the Act.'

[12] Regarding the approach to follow when deciding whether this court has jurisdiction, the court in *Swakop Uranium*<sup>5</sup>, explained that

' . . . an examination of the nature of the cause of action and right(s) being asserted in support of the claims was required in order to determine whether the High Court has jurisdiction or not. If the right asserted solely arises from the Act and the Act provides a remedy for the breach of that statutory right in the form of referring a dispute, resulting in arbitration, then it would follow that the employee or employer would be limited to asserting that right (breach of the statutory right) and seek the remedy for its breach within the structures provided for by the Act

[34] The fact that the employees' claims constitute disputes for the purpose of s 84 does not however mean that the time bar in s 86(2)(b) results in the High Court not having jurisdiction if the

<sup>4</sup> *Swakop Uranium v Employees of Swakopm Uranium as Per Schedule Annexure POC1* (SA70-2022) [2022] NASC (14 November 2022)

<sup>5</sup> *Supra*

time limit has expired, as the appellant would have it. If the employees' claims also amounted to the assertion of an identifiable cognisable common law contractual claim separate and additional to the right referred to as a dispute, the High Court would have jurisdiction to hear the claim in accordance with the approach of this court in *Nghikofa*, as was correctly found by the High Court. In that event if the employees' claims amount to a separate claim enforceable as a common law contractual claim, then prescription would be determined in accordance with the Prescription Act.'

[13] The court in *Swakop Uranium*<sup>6</sup> then concluded regarding that the Labour Act is not necessarily exclusive of all the remedies employees have available upon breach of an employment contract. It said:

'(T)he Act is not exclusive of the rights and remedies that accrue to employees and employers upon termination or upon a breach of an employment contract. *Nghikofa* makes that clear. Recognisable common law contractual remedies of repudiation, interdicts and a damages action may arise under common law which are enforceable in the High Court. A breach of a restraint of trade term in an employment agreement is but one example of the latter. It is not necessary for present purposes to delineate which common law contractual remedies in an employment setting are capable of being heard in the High Court. Some of these may simultaneously also constitute disputes under s 84 because they may arise from issues relating to a breach of contract of employment, as was held in *Nghikofa*.

[40] The fact that a breach of an employment contract would also, independently of the Act, give rise to the enforcement of a common law contractual remedy and may also amount to a dispute would not mean that the time bars contained in s 86(2)(b) would apply when those rights are enforced in that manner in the High Court. The time bars in s 86(2)(b) apply to the remedies invoked in the Act when referring disputes under the Act.

[14] In the matter of *Agra Limited v Erasmus*<sup>7</sup> Unengu AJ found that the Labour Act does not provide for the granting of damages. He said:

' . . . the Labour Act does not empower the arbitrators to make awards for damages, arising from a breach of employment agreement or from an employment relationship. This is also an indication that the legislature intended to deny the arbitrator the power to entertain claims of damages in terms of the Labour Act. Once more, nothing was in the way of the legislature to give

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<sup>6</sup> Supra.

<sup>7</sup> *Agra Limited v Erasmus* (HC-MD-CIV-ACT-CON 2019/00761) [2020] NAHCMD 526 (17 November 2020).

such power to the Labour Court to the exclusion of the High Court.’

### Conclusion

[15] Using the approach proposed in *Swakop Uranium*<sup>8</sup> regarding the determination of the jurisdiction of this court to hear the matter. The court needs to determine whether the relief the Plaintiff seeks, falls within the ambit of the Labour Act. It is clear from the authority quoted above that the Labour Act does not provide for the recovering of damages and for that reason the special plea raised by the defendants stand to be dismissed.

I therefore make the following order:

1. The special plea of jurisdiction raised by the defendants is dismissed with costs.
2. The matter is postponed to 28 February 2023 for case management hearing. The parties to file a joint case management report on or before 23 February 2023.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW  Judge	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondent</b>
Katuna Kamuhanga  Of Kamuhanga Hoveka Samuel Inc, Windhoek	Raywood Rukoro  Of LorentzAngula Inc, Windhoek

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<sup>8</sup> Supra