

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2021/02655

In the matter between:

NAMIBIA STUDENTS FINANCIAL ASSISTANCE FUND

PLAINTIFF

and

TOMAS AMEHAITI KONGHOLA

DEFENDANT

Neutral citation: *Namibia Students Financial Assistance Fund v Konghola* (HC-MD-CIV-ACT-DEL-2021/02655) [2023] NAHCMD 5 (23 January 2023)

Coram: USIKU J

Heard: 10-13 May 2022, 8 August 2022 and 23 September 2022

Delivered: 23 January 2023

Flynote: Practice – Application for absolution from the instance – Court satisfied that the plaintiff has established *prima facie* case requiring answer from the defendant – Application for absolution from the instance dismissed.

Summary: The plaintiff instituted action against the defendant claiming payment from the defendant in the amount of N\$529 250. The plaintiff alleges that the defendant, while employed by the plaintiff, unlawfully, dishonestly and fraudulently caused and/or facilitated payment from the plaintiff in the amount of N\$529 250 to a

certain Nelson Ndeitunga Sheefeni, who was not entitled to receive such payment. As a result of the defendant's aforesaid conduct, the plaintiff suffered financial loss in the amount of N\$529 250. At the end of the plaintiff's case, the defendant applied for absolution from the instance. The court dismissed the application for absolution.

ORDER

1. The application by the defendant, for absolution from the instance, is dismissed.
 2. The defendant is ordered to pay the plaintiff's costs occasioned by the application for absolution from the instance.
 3. The matter is postponed to 7 February 2023 at 08:30 in chambers for allocation of dates for the continuation of the trial.
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JUDGMENT

USIKU J:

Introduction

[1] This is an application by the defendant for absolution from the instance, made after the plaintiff closed its case.

[2] The plaintiff is a Fund established in terms of s 3(1) of the Namibia Students Financial Assistance Fund Act,¹ ("the Act"). According to s 4 of the Act, the purpose of the Fund is to provide financial assistance to students, in order to enable them to study or to do research and to facilitate the training of students in prescribed courses or fields of study, at approved institutions of higher education.

[3] The defendant was at all material times employed by the plaintiff as a Payments Officer in the Payments Division of the plaintiff until 25 March 2021, when he resigned from his employment.

¹ Act No. 26 of 2000.

[4] In the particulars of claim, the plaintiff alleges that the defendant unlawfully, dishonestly and fraudulently caused and/or facilitated payments from the Fund in the amount of N\$529 250 to a certain Nelson Ndeitunga Sheefeni, a person who was not entitled to such payment. As a result of the defendant's unlawful conduct, the plaintiff avers, the plaintiff suffered financial loss in the amount of N\$529 250. The plaintiff therefore sues the defendant for payment of N\$529 250 plus interest and costs of suit.

[5] The defendant defends the action and denies having unlawfully, dishonestly or fraudulently caused and/or facilitated the aforesaid payments in favour of Nelson Ndeitunga Sheefeni.

The trial

[6] At trial, the plaintiff called two witnesses, namely David Nathinge ("Mr Nathinge") and Harris Ntema ("Mr Ntema").

[7] Mr Nathinge testified that he is employed by the plaintiff as Manager: Payments. He is also the Acting Senior Manager: Operations of the plaintiff.

[8] He related that the defendant started employment with the plaintiff in 2014 as a Recovery Officer and was later redeployed as a Payments Officer, in the Payments Division, in 2016.

[9] Mr Nathinge explained the process regarding the preparation and procession of payments, that, every Payments Officer is allocated certain students portfolios, based on a number or group of Institutions of High Learning (IHL), which he or she manages on a day-to-day basis.

[10] Whenever the payments team have to make payments to IHL and/or directly to students, the relevant Payments Officer will use files received from Awards Division or requests the specific students' files for new intakes from Records Division, as per his/her students' portfolios.

[11] The payments processed are then submitted by a Payments Officer to his/her Supervisor for verification. After verification, the Supervisor forwards the same to the Manager : Payments, for validation.

[12] Thereafter, the Operations Head (or his/her designate) would validate the processed payments and sign as a B-Authoriser. Finally, the Chief Financial Officer (or his designate) would sign the processed payments as an A-Authoriser.

[13] Mr Nathinge testified further that during the period of 1 January 2016 to 31 December 2019, the defendant unlawfully and fraudulently prepared several payment requisition documents, the basis upon which payment in the total amount of N\$ 529 250 was unlawfully paid in the bank accounts of one Nelson Ndeitunga Sheefeni. According to the evidence of Mr Nathinge, Nelson Ndeitunga Sheefeni is not funded by the plaintiff as a student and, as such, is not eligible to receive financial assistance from the plaintiff.

[14] It is also Mr Nathinge's evidence that in furtherance of this unlawful and fraudulent conduct, the defendant recorded personal particulars on the students' list but amended the bank account numbers by replacing and substituting them with the bank account numbers belonging to Nelson Ndeitunga Sheefeni.

[15] As a result of the defendant's unlawful and fraudulent conduct, Mr Nathinge asserts, the plaintiff suffered financial loss in the amount N\$529 250.

[16] The second and last witness of the plaintiff is Mr Ntema. He gave evidence as an expert witness. He is a qualified Internal Auditor, employed as such by the plaintiff. He has 18 years of experience in internal auditing in both the public and private sectors. Part of his working experience relates to the area of performing investigations into allegations of fraudulent activities by employees, in the course of their employment.

[17] Mr Ntema conducted investigations into alleged corrupt practices committed by the defendant, for the period from 1 January 2016 to 31 December 2019. His findings were that:

(a) during the period between 1 October 2016 to 30 April 2019, the defendant initiated, prepared and processed payments in favour of Nelson Ndeitunga Sheefeni, to the total amount of N\$529 250. In order to cover his tracks, the defendant recorded personal particulars of different students lists attached to the Electronic Funds Transfer (EFT) / Bank Instructions but captured the bank account numbers that belong to Nelson Ndeitunga Sheefeni, which are held at various financial institutions. Mr Ntema concluded from his investigations, that once the payments have actually gone through the Bank, the defendant would delete the bank account numbers of Nelson Ndeitunga Sheefeni from the payments database in order to conceal the fraudulent payments;

(b) Nelson Ndeitunga Sheefeni is not a legitimate student funded by the plaintiff;

(c) the contents of the defendant's personnel file show that the defendant had on 18 June 2018, made a declaration that he has no outside interests from which he received additional income;

(d) between the period of 3 November 2014 when the defendant assumed employment with the plaintiff and the period of 31 August 2020 when the defendant was put on suspension, the plaintiff had paid the defendant the total remuneration of N\$1 379 744.40. The alleged total transfers and cash deposits in the bank accounts of the defendant for the period of 1 January 2016 to 31 December 2019 shows a total amount of N\$3 945 778.57. The difference between the total transfers and cash deposits and the total remuneration paid by the plaintiff to the defendant, amounts to N\$2 566 034.17.

[18] On the basis of his findings, Mr Ntema recommended that disciplinary action, together with the institution of a civil claim and the laying of a criminal charge, be taken against the defendant.

[19] The plaintiff initiated disciplinary action against the defendant, however, same could not be completed in that the defendant decided to resign from the plaintiff's employment.

[20] At the end of the plaintiff's case the defendant applied for absolution from the instance on account that:

- (a) the evidence shows that the defendant did not have authority to instruct any Bank to make payments to Nelson Ndeitunga Sheefeni and that all payments initiated by the defendant had files from the students center and were verified by the Supervisor for Payments Division. The payments were also approved by Manager for Payments;
- (b) the plaintiff never located Nelson Ndeitunga Sheefeni to ascertain from him the basis on which he received the payments and to ascertain if he knows the defendant;
- (c) the plaintiff failed to show that the defendant was under any investigation from the Anti-Corruption Commission or that he know Nelson Ndeitunga Sheefeni;
- (d) the plaintiff failed to present lists of files from the Registry that were presented to the defendant for each payment in question, so that they could confirm that no file concerning Nelson Ndeitunga Sheefeni was presented to the defendant;
- (e) the plaintiff failed to show how the defendant was negligent, in light of the evidence that every payment was verified by the Supervisor and approved by the Manager of Payments, and that, the plaintiff failed to show how the defendant deliberately initiated payments to the benefit of Nelson Ndeitunga Sheefeni.

[21] The defendant therefore submits that, considering the evidence adduced by the plaintiff, there is no reasonable possibility that the court might find in favour of the plaintiff and prays for absolution from the instance.

[22] The plaintiff opposes the application for absolution from the instance.

[23] In response to the contentions advanced by the defendant, the plaintiff submits that:

- (a) it has led evidence that the defendant has unlawfully and fraudulently prepared and/or initiated several payment requisition documents which were used by the plaintiff's bank to process and effect payments in favour of Nelson Ndeitunga Sheefeni; and;

(b) when the defendant made the aforesaid payment requisition-documents, he knew or ought to have known such representations to be false and wrong and that Nelson Ndeitunga Sheefeni was not a legitimate funded student of the plaintiff and as such was not eligible to receive any financial assistance from the plaintiff.

[24] The plaintiff therefore contends that, in light of the evidence presented by the plaintiff, the application for absolution is without merit and be dismissed with costs.

Analysis

[25] It is trite law that the test for absolution from the instance is whether there is evidence at the end of the plaintiff's case, upon which a court could or might find for the plaintiff.

[26] The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial, which is: 'is there evidence upon which a court ought to give judgment in favour of the plaintiff.'²

[27] It is further trite that absolution, at the end of the plaintiff's case, ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and in law. In adjudicating an application for absolution, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.³

[28] Applying the above legal principles to the present facts, it is apparent that the plaintiff has placed evidence before the court alleging that:

(a) the defendant, while employed by the plaintiff, had unlawfully, fraudulently and dishonestly or facilitated payments from the Fund, in the amount of N\$529 250, to Nelson Ndeitunga Sheefeni;

² *Danneck v Leopard Tour Car and Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015) para 25.

³ *Ibid.*

(b) Nelson Ndeitunga Sheefeni is not a person entitled to the aforesaid payment;

(c) as a result of the aforesaid conduct by the defendant, the plaintiff had suffered financially loss in the amount of N\$529 250, which the plaintiff now claims from the defendant.

[29] On the facts of the present matter, it cannot be said that the evidence led by and on behalf of the plaintiff is incurably and inherently improbable or unsatisfactory as to be ejected out of hand.

[30] The facts that:

(a) the documents initiated by the defendant were verified by the Supervisor and Manager for payments;

(b) Nelson Ndeitunga Sheefeni has not been located to ascertain the reason for his receipt of the monies or whether or not he knows the defendant;

(c) the issue of whether or not the defendant is being investigated by the Anti-Corruption Commission; etc,

are not decisive of the issue at hand at the present moment. The crucial issue at the moment is whether, at present moment, there is evidence upon which the court could or might find for the plaintiff.

[31] Having assessed the evidence led by and on behalf of the plaintiff, I am of the opinion that there is evidence upon which a court, applying its mind reasonably to such evidence, could find for the plaintiff. For the foregoing reason, the application for absolution from the instance stands to be dismissed with costs.

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

1. The application by the defendant, for absolution from the instance, is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the application for absolution from the instance.
3. The matter is postponed to 7 February 2023 at 08:30 in chambers for allocation of dates for the continuation of the trial.

B USIKU
Judge

APPEARANCES

PLAINTIFF: F Bangamwabo
Of FB Law Chambers, Windhoek

DEFENDANT: M Siyomunji
Of Siyomunji Law Chambers, Windhoek