

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

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| Case Title: Kuiiri Fanual Tjipangandjara and Namibia Water Corporation Limited | Case No: HC-MD-CIV-ACT-CON-2021/04068 |
| | Division of Court: Main Division |
| | Heard on: 23 March 2023 |
| Heard before: Honourable Lady Justice Rakow | Delivered on: 5 December 2023 |
| Neutral citation: <i>Tjipangandjara v Namibia Water Corporation Limited</i> (HC-MD-CIV-ACT-CON-2021/04068) [2023] NAHCMD 795 (5 December 2023) | |
| Order: | |
| <ol style="list-style-type: none">1. The applicant is granted leave to appeal the Court's ruling of 27 January 2023.2. The costs of this application shall be costs in the appeal.3. The matter is postponed to 19 March 2024 at 15h30 for a status hearing. | |
| Reasons for order: | |
| RAKOW J: <u>Introduction</u> [1] This is an application for leave to appeal to the Supreme Court launched in terms of rule 115 of the Rules of this Court. On 26 October 2021, the plaintiff instituted an action in this court against the defendant for: | |

- a) Claim 1 - a claim for loss of "income lost" for N\$2 630 809,47, arising out of the defendant's violation of the plaintiff's right in terms of the provisions of section 34 of the Act; and
- b) Claim 2 - a claim for "damages" in the amount of N\$3 119 239,10, arising out of the plaintiff's alleged unlawful repudiation of the plaintiff's employment contract.

Background

[2] The plaintiff was employed by the defendant in the position of General Manager: Operations. 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 11 of 2007 (the Labour Act). In 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 7 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 position of Chief: Water Supply – Central. The previous position the plaintiff held was abolished by the Chief Executive Officer.

[3] 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 25 February 2015, defendant and plaintiff reached a voluntary agreement in terms of which the parties agreed that the defendant was to end the lock-out of the plaintiff and allow plaintiff to return to work 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 before the purported restructuring.

[4] It seems that nothing came from the agreement and the plaintiff approached the Labour Court with his complaint. On 9 November 2018, the Labour Court (in the case of *Tj pangandjara v Namibia Water Corporation Limited & Others* (LCA 16 & 19/2017) [2018] NAHCMD 30 (9 November 2018)), 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 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 1 April 2015 to 1 April 2017 (24 months) and further damages he suffered.

[5] When the matter came before me, I found that the civil court has jurisdiction over the matter and dismissed the special plea raised by the defendant. It is against this decision that they sought leave to appeal, which application was struck from the roll for failure to comply with the requirements for applications, in that no affidavit was filed. This decision was taken on special review and set aside and the matter referred back to this court to consider the application for leave to appeal afresh.

Grounds for appeal

[6] The applicant's application for leave to appeal was formulated and articulated as follows:

'The learned Judge, with respect, erred in law and or materially misdirected herself in law in one or more of the respects detailed below.

1. In arriving at the order set out above, underpinned by the - erroneously and legally untenable - finding in paragraph 15 of the ruling, the learned Judge, when regard is had to:

1.1. the respondent's pleaded cause of action;

1.2. the relief sought therein; and

1.3. the applicable provisions (namely, sections 34, 38, 84 and 86) of the Labour Act, Act No. 11 of 2007 (in relation to the respondent's claim), misapplied the ratio in *Swakop Uranium v Employees of Swakop Uranium* as Per Schedule Annexure POC1 (SA70-2022) [2022] NASC (14 November 2022), which the learned Judge quoted under paragraph 12 of the ruling:

"43. ... an examination of the nature of the cause of action and right(s) being asserted in support of the claims 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 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."

2. In paragraph 8 of the ruling, the learned Judge, correctly recorded that:

"The [applicant] agrees that at the [respondent's] pleaded cause of action is premised on the Labour Court's finding in *Tjipangandjara v Namibia Water Corporation Limited and Others* (LCA 19 of 2017)

[2018] NALCMD 30 (09 November 2018). In this case it was found that the [applicant] violated the [respondent's] procedural and substantive rights in terms of the provisions of s 34 of the Labour Act, in that the [respondent] undertook a sham restructuring which thereafter saw or resulted in the [respondent's] "constructive" dismissal from the Defendant. It is further true that the [respondent] instituted action in this Court seeking loss of income and damages as a result of this finding".

3. Consequent to paragraph 8 of the ruling, the learned Judge, erred in law and or misdirected herself in failing to uphold the applicant's submission, contained in paragraph 9 of the ruling, which submissions are congruent with the ratio in *Swakop Uranium v Employees of Swakopmund Uranium* as Per Schedule Annexure POC1 (SA70-2022) [2022] NASC (14 November 2022) that:

"... the [respondent's] 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 noncompliance with the provisions of s 34 of the Act are to be resolved, s 84, amongst others, define non-compliance with the provisions s 34 of the Act as a dispute under the Act, and s 86, amongst others, makes provision for the arbitration of disputes pertaining to non-compliance with s 34 of the Act and appropriate remedies."

4. That the cause of action and the rights asserted by the respondent in support of the his claim arise solely from the Labour Act, Act No. 11 of 2007, and further that the Labour Act, Act No. 11 of 2007, provides a remedy for the breach of that statutory right in a form of arbitration is without a doubt. The respondent is limited to asserting that right and seek the remedy for the alleged breach within the structures provided by the Labour Act, Act No. 11 of 2007.

5. That the respondent's claim against the applicant is (and as erroneously accepted by the learned Judge) articulated as one of an "action... seeking loss of income and damages", as erroneously contended by the respondent and erroneously found and upheld by the learned Judge, is of no moment and or consequence. The provisions of section 86 of the 10 Labour Act, Act No. 11 of 2007, provide for appropriate structures and remedies in respect of the respondent's claim.'

Arguments by the parties

[7] It was argued by the defendant that the cause of action and the rights asserted by the plaintiff in support of his claim arise solely from the Labour Act and further that the Labour Act provides a remedy for the breach of that statutory right in a form of arbitration. The plaintiff is limited to asserting that right and seeks the remedy for the alleged breach within the structures provided for by the Labour Act.

[8] It was further argued that the plaintiff articulates its claim against the defendant as one for “damages” is unavailing and of no consequence; the provisions of s 86 of the Labour Act provides for compensation.

[9] For the reasons set out in the defendant’s applications for leave to appeal, it is submitted that the defendant has prospects of success and that the Supreme Court shall come to a different conclusion on the applicant’s special plea of jurisdiction, i.e. that this court does not have jurisdiction to adjudicate and determine the plaintiff’s action.

[10] On behalf of the plaintiff it was argued that it seems the defendant merely brought this application to delay the speedy resolution of this matter, tactics they have been employing since 2015. They have completely disregarded the overriding objectives of this honourable court and have used every opportunity at their disposal to use interlocutory applications and defective appeals to delay the determination of this matter (and all the other matters between the parties) for the last 8 years.

[11] A consideration of the grounds illustrates that the defendant has no merits and is in conflict with, not only with what the plaintiff pleaded, but are also in conflict with the authorities they are now relying on. This court rightly held that the defendant’s claims are claims for contractual damages and damages arising from the unlawful repudiation/ breach of an employment contract. It followed, therefore, 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 had to utilize his common law right to sue the plaintiff for damages in the High Court.

Legal considerations

[12] In *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited*¹, the Supreme Court recounted that:

‘32. Section 18(3) of the High Court Act 16 of 1990 restricts appeals against interlocutory orders. The section provides that appeals against interlocutory orders are possible only with the leave of the

¹ *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited* (SA 92-2020) [2022] NASC (27 May 2022).

court that had given the judgment or made the order or in the event that leave is refused by that court, the Supreme Court grants leave upon petition for leave to appeal. The policy consideration informing this requirement has been stated to be the avoidance of piecemeal appellate disposal of the issues in litigation with the unnecessary expense involved. As was held in *Di Savino v Nedbank Namibia Ltd*, the scheme of s 18(3) is that the judgment or order sought to be appealed against must have the characteristics of an appealable judgment or order and where the judgment or order is interlocutory, leave to appeal is required.'

[13] In deciding whether an order or judgment is appealable, in *Di Savino v Nedbank Namibia Ltd*², Shivute CJ referred to the three attributes that must be present to identify an appealable judgement or order as follows:

'The three attributes counsel for the appellant referred to are those set out in the decision of the South African Appellate Division in *Zweni v Minister of Law and Order 1993 (1) SA 523 (AD)* and as endorsed in many judgments of this court, namely that (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief, and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

[14] Applying the above to the current matter before court, the court finds that the dismissing of the special plea in this instance indeed meets the three attributes as set out in the *Zweni* matter and is therefore an appealable order.

[15] The test to be applied on whether leave to appeal should be granted, the following was stated by this court in *African Selection Trust SA v Namsov Fishing Enterprises (Pty) Ltd*:³

'In terms of the applicable test, the court will now have to determine whether or not there is a reasonable possibility that the Supreme Court may come to a different conclusion.'

[16] After hearing and considering the arguments, this court is of the opinion that the Supreme Court may come to a different conclusion as to what this court came to and for that reason, the application for leave to appeal must succeed.

[17] I therefore, make the following order:

² *Di Savino v Nedbank Namibia Limited* (82 of 2014) [2017] NASC 32 (7 August 2017).

³ *African Selection Trust SA v Namsov Fishing Enterprises (Pty) Ltd* (HC-MD-CIV-ACT-CON-2016/03860) [2017] NAHCMD 363 (17 November 2017).

1. The applicant is granted leave to appeal the Court's ruling of 27 January 2023.
2. The costs of this application shall be costs in the appeal.
3. The matter is postponed to 19 March 2024 at 15h30 for a status hearing.

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| Judge's signature | Note to the parties: |
| E RAKOW Judge | Not applicable |
| Counsel: | |
| Plaintiff: | Defendant: |
| K Kamuhanga Of Kamuhanga Hoveka Samuel Inc., Windhoek. | T Muhongo (with him Ms Brinkman) Instructed by LorentzAngula Inc., Windhoek. |