

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) [2024] NAHCMD 41 (9 February 2024)

Coram: USIKU J

Heard: 10-13 May 2022, 8 August 2022, 23 September 2022, 23 January 2023, 24-25 July 2023 and 5 September 2023

Delivered: 9 February 2024

Flynote: Delict – Fraudulent representation – Elements thereof – Defendant representing to the plaintiff that a certain person was a legitimately funded student of the plaintiff and was therefore entitled to receive certain payments – Representation found to have been fraudulently made – Defendant found liable for damages suffered by the plaintiff.

Summary: The plaintiff instituted action for damages against the defendant, arising from alleged fraudulent representations made by the defendant, as a consequence of which the plaintiff suffered damages. The defendant defends the action and denies having engaged himself in any fraudulent or dishonest activities.

Held that the plaintiff has proved the elements of fraud and is therefore entitled to the relief that is seeks.

ORDER

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) payment in the amount of N\$529 250;
 - (b) interest on the abovestated amount at the rate of 20% p.a. calculated from the date of judgment to the date of final payment;
 - (c) costs of suit.
 2. The matter is removed from the roll and is regarded finalised.
-

JUDGMENT

USIKU J:

Introduction

[1] This is an action for damages instituted by the plaintiff against the defendant. The damages are alleged to have arisen from unlawful and fraudulent conduct on the part of the defendant. The plaintiff avers that as a consequence of such conduct, it suffered damages in the amount of N\$529 250, which amount the plaintiff now claims from the defendant.

The parties

[2] The plaintiff is a Fund established in terms of s 3(1) of the Namibia Students Financial Assistance Fund Act¹, ('the Act'). According to s 4 of the Act, the purpose of

¹ Act No 26 of 2000.

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 is an adult male person. He was at all material times employed by the plaintiff as a Payments Officer in Payments Division of the plaintiff.

Background

[4] On 3 November 2014, the defendant commenced employment with the plaintiff as a Recovery Officer. He was later redeployed from the Recovery Division to the Payments Division on 1 April 2016 as a Payments Officer.

[5] On 10 August 2020, the plaintiff suspended the defendant from employment with full pay, with immediate effect, pending investigations into the alleged irregular conduct on the part of the defendant committed in his office capacity as Payments Officer.

[6] On 13 October 2020, the plaintiff issued to the defendant a notice to appear before a disciplinary hearing and a charge sheet comprising 14 charges as well as some alternative charges. The notice of charges indicated that the disciplinary hearing was scheduled for Monday the 2 November 2020, and if not concluded, shall continue on a date to be agreed upon by the parties.

[7] On 25 March 2021, the defendant resigned from his employment, before the conclusion of the disciplinary proceedings.

[8] On 12 July 2021, the plaintiff instituted the present action. 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, ('Nelson Sheefeni') a person who was not entitled to such payment. As a result of the defendant's unlawful conduct, the plaintiff avers, it 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.

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

The trial

[10] At trial, the plaintiff called two witnesses, namely David Nathingé ('Mr Nathingé') and Harris Ntema ('Mr Ntema'). The defendant gave evidence and did not call further witnesses.

Plaintiff's case

[11] Mr Nathingé testified that he is employed by the plaintiff as Manager: Payments. He is also the Acting Senior Manager: Operations for the plaintiff.

[12] Mr Nathingé explained the process regarding the preparation and procession of payments. He asserted 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.

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

[14] The key documents for the procession of payments are the award letters, contracts, invoices from IHLs, Excel database, proof of registration, bank details and amounts to be paid.

[15] The Payments Officer then processes payments and submits same to his/her Supervisor for verification. After verification, the Supervisor forwards same to the Manager: Payments, for validation.

[16] Thereafter, the Operations Head (or his/her designated) would validate the processed payments and sign the same as a B-Authoriser. Finally, the Chief

Financial Officer (or his designate) would sign the processed payments as an A-Authoriser.

[17] 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 Nelson Sheefeni. According to Mr Nathinge, Nelson Sheefeni is not funded by the plaintiff as a student and, as such, is not eligible to receive any financial assistance from the plaintiff.

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

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

[20] The second and last witness of the plaintiff is Mr Harris 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 sector. Part of his working experience relates to the area of performing investigations into allegations of fraudulent activities by employees of his respective employers.

[21] 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 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 belongs to Nelson 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 Sheefeni from the payments database in order to conceal the fraudulent payments;

(b) Nelson 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 interest from which he receives 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 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 transfer and cash deposits and the total remuneration paid by the plaintiff to the defendant, amounts to N\$2 566 034.17.

[22] 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.

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

The defendant's case

[24] In his testimony, the defendant denies having wrongfully, fraudulently and unlawfully represented to the plaintiff that Nelson Sheefeni was a legitimately funded student of the plaintiff. He further asserts that there was no way of knowing the legitimacy of Nelson Sheefeni, as he only dealt with files from the Students Care Centre and did not, at any point, in the scope of his employment, have any face-to-face interaction with any student.

[25] The defendant further testified that, during his employment with the plaintiff his task was to prepare requisition documents. He explained that, he would receive from the Students Care Centre a contract of a student, identification document, bank details and proof of registration from an IHL. The defendant would then prepare a students list containing the names of all students that need to be paid, payment requisitions, general expenses and the Electronic Funds Transfer letter.

[26] The defendant asserts further that, after preparing the abovementioned documents, he would give those document to his supervisor for verification. Thereafter, to the Manager who would validate them and place the first signature as a B-Authoriser and then to the Chief Financial Officer who would finally sign as an A-Authoriser. The defendant avers that the documents he prepared went through the foregoing process and that if there was any issue with any of the documents he had prepared, they would have been returned to him for corrections.

[27] If Nelson Sheefeni was not a legitimate beneficiary of the Fund, the defendant contends, his name would have been removed from the list during the verification process.

[28] The defendant testified further that, apart from his salary, he did not receive other money from the plaintiff. He asserts that, apart from his salary from the plaintiff, the defendant sells second hand cars and runs a bar, from which he earns extra-income. The defendant did not declare his extra-income with the plaintiff because his private business ventures are not registered.

[29] It is also the defendant's testimony that he was suspended from his employment on 10 August 2020. He appeared before a disciplinary hearing. He was charged with various disciplinary charges including fraud and forgery. The disciplinary hearing was not concluded because he resigned from his employment with the plaintiff. He resigned in order to venture into a new career opportunity.

[30] The defendant denies having engaged himself in any fraudulent or dishonest activities and denies having defrauded the plaintiff as alleged in the particulars of claim.

Analysis

[31] The plaintiff's claim against the defendant is based on fraud emanating from a fraudulent scheme involving the initiation of several payment requisition documents in favour Nelson Sheefeni who was not a legitimately funded student of the plaintiff. The essential elements for a claim of fraud are the following:

- (a) a representation;
- (b) by the defendant which to the knowledge of the defendant is false;
- (c) which the defendant intended the plaintiff to act upon;
- (d) which induced the plaintiff to act upon; and
- (e) which resulted in damages being suffered by the plaintiff.

[32] The *onus* rests on the plaintiff to prove the elements of fraud. The plaintiff's case is that the defendant initiated and prepared payment requisition documents aimed at facilitating transfer of money by the plaintiff in favour of Nelson Sheefeni. Nelson Sheefeni is not a legitimate student, and as such, was not ineligible to receive any financial assistance from the plaintiff.

[33] It is further the case of the plaintiff that, when the defendant initiated those payment requisition documents, he knew, or ought to have known, that Nelson Sheefeni was not a legitimately funded student of the plaintiff. As a result of the aforesaid representation by the defendant, the plaintiff says, a total amount of N\$529 250 was paid by the plaintiff into the bank accounts of Nelson Sheefeni.

[34] The defendant conceded during cross-examination that he was the initiator of all payments requisition documents and the electronic funds transfer students-lists which were used to effect payments into the bank accounts of Nelson Sheefeni.

[35] One of the defences put forth by the defendant is that he got all the information he used in initiating the payment requisition documents from the files he received from the Students Care Centre. The evidence by Mr Nathinghe and Mr Ntema, which is uncontested, is that Nelson Sheefeni is not a legitimately funded student of the plaintiff and was not therefore eligible to receive any financial assistance from the plaintiff.

[36] The payment requisition documents, prepared by the defendants as appear between pages 9 to 28 of the plaintiff's discovery documents, represent Nelson Sheefeni as legitimately funded student of the plaintiff, studying at International University of Management, in Windhoek, but having different student numbers, studying different courses and having different identification card numbers.² The banking details, however, are consistently those of Nelson Sheefeni, which are either No. 622 572 101 97 (FNB), 1299 0720 337 (NEDBANK) or 6000 142 9271 (STD BANK).

[37] In the payment requisition documents prepared by the defendant as appear from pages 33 to 93 of the plaintiff's discovery documents³, the particulars therein reflect those of legitimately funded students of the plaintiff, with the exception that the bank account details belong to Nelson Sheefeni.

[38] From the evidence on record, it is apparent that it is not by coincidence that the aforesaid requisition documents were prepared in the way that the defendant prepared them. I accept the evidence by Mr Nathinge and Mr Ntema to the effect that the defendant devised that scheme and was instrumental at every stage of its development with a view to ensure that money from the bank account of the plaintiff is channelled into the account of Nelson Sheefeni.

[39] Given the extent to which the defendant went in manipulating the information referred to above, but remaining consistent in regard to the bank accounts to which the money was to be diverted, I accept the plaintiff's submissions that the plaintiff's witnesses' evidence points overwhelmingly to the fact that the defendant was at all material times aware that the representations he made were false and intended the plaintiff to act upon those representations. The blunt denials by the defendant to the effect that he did not know that the representations were false, or that he merely relied on information from the files from Students Care Centre, are therefore rejected as false.

² . See Exhibits A1 – E4 at pp 9 to 28 of the plaintiff's discovery documents.

³ See Exhibits F1 – P7 at pp 33 to 93 of the plaintiff's discovery documents.

[40] In addition, there is also the uncontested evidence from Mr Ntema that during the time of his employment by the plaintiff, the defendant managed to generate additional income over and above his only known source of income (his salary from the plaintiff), amounting to N\$2 566 034.17. It is apparent that while employed by the plaintiff, the defendant was able to receive vast sums of money, without any known legitimate additional source of income.

[41] In conclusion, I am satisfied that the plaintiff has proved on the balance of probabilities, that it is entitled to the relief it seeks and I shall therefore grant an order in its favour.

[42] In regard to costs of suit, the plaintiff is successful and there is no reason to depart from the general rule in relation to costs. I shall therefore grant a costs order in favour of the plaintiff.

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

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) payment in the amount of N\$529 250;
 - (b) interest on the abovestated amount at the rate of 20% p.a. calculated from the date of judgment to the date of final payment;
 - (c) costs of suit.
2. The matter is removed from the roll and is regarded finalised.

B USIKU
Judge

APPEARANCES

PLAINTIFF: F Bangamwabo
Of FB Law Chambers, Windhoek

DEFENDANT: M Siyomunji
Of Siyomunji Law Chambers, Windhoek