

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 28/2016

In the matter between:

**CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES
OF NAMIBIA**

(INCORPORATED ASSOCIATION NOT FOR GAIN)

APPELLANT

And

SOCIAL SECURITY COMMISSION

RESPONDENT

Neutral citation: *Christian Congregation of Jehovah's Witnesses of Namibia v Social Security Commission* (LCA 28/2016) [2017] NALCMD 14 (27 April 2017)

Coram: UNENGU AJ

Heard: 10 February 2017

Delivered: 27 April 2017

Flynote: Labour Law – Appeal in terms of section 45 of the Social Security Act, 34 of 1994 against a decision of the Social Security Commission refusing to de-register the appellant as an employer – Set aside the decision and order the Commission to

de-register appellant as employer – After a survey of different statutes regulating employment relationship between employers and employees and the case law – the court held that the Social Security Act does not provide for de-registration of employers once registered as such nor does the Act exempt certain entities from liabilities provided for in the Act and dismissed the appeal with no order as to costs made.

Summary: The appellant, namely Christian Congregation of Jehovah's Witness of Namibia noted an appeal in terms of the Social Security Act, 34 of 1994 against a decision taken by the Social Security Commission not to de-register it as an employer

– seeking relief to set aside the decision and to order the Social Security Commission to de-register the appellant. However, the court after a survey of different Namibian statutes dealing with employment relationship in Namibia and the case law, it held that the Social Security Act does provide for de-registration of employers once registered as such nor does the Act exempt entities from liabilities provided in the Act and dismissed the appeal with no order as to costs made.

ORDER

1. The respondent's application for condonation for the late filing of its heads of argument is hereby granted.
2. The appeal is dismissed.
3. There is no order made as to costs.

JUDGMENT

UNENGU AJ:

Introduction

[1] The appellant noted an appeal on the 3 May 2016 pursuant to section 45 of the *Social Security Act, 34 of 1994* (hereinafter referred to as the 'SS Act') against the decision taken by the Social Security Commission (hereinafter referred to as the SSC), on the 1 March 2016.

[2] The appellant seeks the following relief:

An order that:

- '1.1 the Appellant is not an employer in terms of the Social Security Act, 1994;
- 1.2 the Social Security Commission decision (hereinafter called the SSC decision) dated 1 March 2016 may be set aside;
- 1.3 the Respondent may be ordered to de-register the Appellant as an employer; and
- 1.4 the Respondent may be ordered to de-register the members of the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses performing religious duties for the Appellant.¹

[3] The grounds of appeal relied upon by the appellant are as follows:

- '1. The Social Security Commission failed to take into consideration the decision from the Employment Equity Commission that the Appellant is not an employer for purposes of the Affirmative Action (Employment) Act, 1998, which contains a definition of employer virtually identical to the one of the Social Security Act and the Labour Act as amended;
2. The Social Security Commission erred in not considering that the decision from the Employment Equity Commission was made on 31 January 2014, after the Labour Amendment Act was passed;
3. The decision ignored the reasoning and arguments from the Appellant in its letter dated 16 January 2015. It only referred to the Appellant's letter dated 20 May 2014;

¹ Record of proceedings, p1 - 2.

4. The Social Security Commission erred in presuming that the members of the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses performing religious duties for the Appellant are employees in terms of section 128A of the Labour Amendment Act;
5. The Social Security Commission failed to consider and comment on the reasons provided by the Appellant to prove members of the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses performing religious duties for the Appellant are not employees in terms of section 128A of the Labour Act, which clearly states that the factors listed in it only establish a presumption of the status of employee "until the contrary is proved";
6. The SSC decision did not take into account the definition of an employer the Social Security Act, 1994 and invoked the presumptions contained in section 128A of the Labour Act without considering that the Appellant was not an employer.²

[4] The respondent filed its notice of intention to oppose the appeal³ on the 13 May 2016 and its relying grounds of opposition on the 15 September 2016⁴:

'1. The Appellant's purported appeal is not in terms of the Rules of this Honourable Court, in that:

- 1.1 the Notice of Appeal is not accompanied by duly completed Form 11 as contemplated in Rule 17(2)(a) and (b) of the Rules of this Honourable Court;
 - 1.2 the Appellant places reliance on material and or information in the appeal which material and or information did not serve before the Respondent when the Respondent considered and decided on the Appellant's request to be de-registered as an employer.
2. The Respondent's decision to reject the Appellant's request to be de-registered as an employer was correct and unassailable, considering the definition of "an employer" in section 1 of the Social Security Act, Act 34 of 1994, and sections 1 and 128A of the Labour Act, Act 11 of 2007.

² Record of proceedings, p2 - 3.

³ Record of proceedings, p329 -330.

⁴ Record of proceedings, p326 – 328.

3. The decision of the Equity Commission, was made under or in terms of the Affirmative Action (Employment) Act, Act 29 of 1998, and the said decision was that the Appellant is not “a relevant employer” in terms of the aforesaid statute – and not that the Appellant is not “an employer”, and therefore the decision of the Equity Commission is not applicable nor relevant to the decision of the Respondent.
4. The Appellant did not discharge the presumption established by section 128A of the Labour Act, Act 11 of 2007 that it is an employer as defined in the said Labour Act in that more than two factors listed in the aforementioned provision are applicable to the Appellant’s employment situation.
5. The Appellant is seeking to avoid and evade the provisions of the Social Security Act, Act 34 of 1994 which will have the effect of:
 - 5.1 depriving the Appellant’s employees of payments of benefits in terms of and under the Social Security Act, including the maternity leave³, sick leave and death benefits, and future benefits such as the medical benefits and pension benefits to be established in terms of the aforesaid statute, and the employees’ compensation for injuries at work – which benefits and future benefits that the employees are entitled to by operation of the Social Security Act; and
 - 5.2 the Appellant evading the registration of its employees as contemplated under section 20(1) of the Social Security Act;
 - 5.3 the Appellant and its employees evading the prescribed contributions:
 - 5.3.1 towards the various Funds established under the Social Security Act as contemplated in section 21(2) of the Social Security Act; and
 - 5.3.2 the Employees’ Compensation Fund under section 64 of the Employees’ Compensation Act, Act 30 of 1941 (as amended).
6. The Respondent is not empowered by its enabling statute (i.e. the Social Security Act, Act 34 of 1994) or any other legislation to exempt or waive the requirements of the Social Security Act from any employer.’

[5] The hearing of this appeal took place on the 10 February 2017 and included a condonation application from the respondent for the late filing of the respondent’s heads of argument, which remained unopposed.

Background

[6] The appellant in the present matter is the Christian Congregation of Jehovah's Witnesses of Namibia, an incorporated association not for gain established under *section 21 of the Companies Act, 61 of 1973*, Windhoek, Republic of Namibia.

[7] The respondent is the Social Security Commission (hereinafter referred to as the SSC), a juristic person established and incorporated in terms of *section 3 of the Social Security Act, 34 of 1994*, with its main office at Kloppers Street, Khomasdal, Windhoek, Republic of Namibia.

[8] Since 2012, the appellant awakened the idea and conveyed to the respondent that it believes that the members of the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses (hereinafter referred to as the 'Order) in Namibia are not employees of the appellant and as a result the appellant cannot be regarded as an employer in terms of the *SS Act*.⁵

[9] More specifically, on the 20 May 2014,⁶ the appellant sought an advisory opinion from the respondent on whether it could be deregistered as an employer in terms of the *SS Act*, as it did not consider itself to be an employer in respect of such definition.

[10] On the 16 June 2014,⁷ the respondent replied to the appellant's request by confirming that the appellant is considered an employer in terms of the *SS Act* and consequently should be registered with the Employees' Compensation Fund established by the *Employees' Compensation Act, 1941*, as well as having the Order register its members with the Maternity, Sick Leave and Death Benefit established by the *SS Act*.

[11] In full opposition to the response of the respondent, the appellant sent another letter on the 16 January 2015⁸ requesting reasons for the respondent's conclusion. In

⁵ Record of proceedings, p15.

⁶ Record of proceedings, p284 – 286.

⁷ Record of proceedings, p60 – 61.

⁸ Record of proceedings, p298 - 302.

reply thereto, the respondent lodged an investigation into the matter including conducting interviews with the members of the Order at the appellant's premises, on the 19 October 2015, to establish the type of relationship between them.

[12] The respondent released its decision on the 1 March 2016,⁹ in which it confirmed its advisory opinion to the appellant. It is on this premise that the appellant has approached this court to grant a declaratory order that neither the appellant nor the Order can be regarded as an 'employer' and consequently should order the respondent to deregister the appellant as an employer under the *Act* as well as the members of the Order.

[13] This case, the first of its kind, produces many intertwining issues which include:

1. Whether the court has jurisdiction to hear the matter.
2. Whether the appeal noted is proper before this court.
3. Whether there is an employer-employee relationship between the appellant and the members of the Order.
4. Whether the respondent has the power to deregister the appellant as well as the members of the Order in terms of the *SS Act*.

Jurisdiction

[14] Jurisdiction refers to the competency of a court to hear and determine a matter. If jurisdiction is not established, a court lacks the power to make a competent order in a matter.

[15] *Section 117 of the Labour Act* confers exclusive jurisdiction on the Labour Court to hear *inter alia* 'all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.'¹⁰ In other words, the labour court will have jurisdiction in any matter if any law confers jurisdiction on such court.

⁹ Record of proceedings, p62 – 63.

¹⁰ *Labour Act, 11 of 2007, section 117(h)(i)*.

[16] In this matter, the appeal was noted in terms of *section 45 of the SS Act* which holds that:

'(1) Any person aggrieved by any decision of the Commission taken in the performance of the Commission's functions in terms of this Act may, within a period of 60 days from the date upon which he or she was notified of such decision, **appeal by notice in the prescribed form against such decision to the Labour Court** established by section 15(1)(a) of the Labour Act...'

[17] Accordingly, *the SS Act* specifically *section 45* thereof confers competency on this court to hear and determine the matter. I am therefore convinced that this court has the necessary jurisdiction to adjudicate over this matter.

Noting of the appeal

[18] In the respondent's listed grounds of opposition, it noted that the appeal filed by the appellant is not proper as it failed to complete the Form 11 as contemplated in *Rule 17(2)(a) of the Rules of this Court*.

[19] In reply thereto, the appellant explains that there is no 'prescribed form' when appealing a decision of the SSC in terms of *section 45 of the SS Act*. Further, the appellant notes that *section 45(3) of the SS Act* states that an appeal should be dealt with as if it is an appeal from the District Labour Court. Due to the fact that the District Labour Court is no more, reference to this court cannot be made and should be treated as if it never existed (*pro non scripto*).

[20] Furthermore, the appellant stresses that the appeal so submitted should be understood in the 'wider' sense i.e. in the sense that the SSC's decision was solely based on the investigations carried out by its office and failed to consider a recommendation from an independent decision maker and in addition followed an adversarial process.

[21] As discussed above, any aggrieved person may lodge an appeal to the labour court in the prescribed form. Unfortunately, the *SS Act* does not set out a certain form which the appeal should take, however *section 45(3)* does state that:

‘An appeal to the Labour Court in terms of this section shall be subject to the provisions of the Labour Act and its regulations and such appeal shall, for the purposes of that Act, be deemed to be an appeal from a district labour court established by section 15(1) (b) of that Act.’

[22] As a result, the appeal noted must comply with the form prescribed for appeals as set out in the *Labour Act* including the *Rules of court* and its regulations. The problem with this sub-section as quoted above is that the district labour court is no longer operational, so how should the appeal be noted in terms of legislation which no longer exists?

[23] The respondent suggests that such appeal should be noted in terms of the new *Labour Act* and its *Rules*. In other words, the *Labour Act* states that a party wishing to note an appeal in terms of *section 86*, should do so in accordance with the *Rules of the Labour Court*.¹¹ The *Labour Court Rules* stipulates that a party appealing may do so if its against a decision by the Labour Commissioner, or a compliance order issued in terms of *section 126 of the Labour Act* or an arbitration award issued in terms of *section 89 of the Labour Act*; and such appeals should comply with Form 11, setting out concisely and distinctly which part of the decision or order is appealed against and the grounds they are relying on.¹²

[24] Furthermore, the *Rules* state that cognisance must be taken of the *Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner* (hereinafter referred to as the ‘*Rules of Conciliation and Arbitration*’).¹³ In terms of the *Rules of Conciliation and Arbitration*, an appeal must be noted on a Form LC 41 outlining whether the judgment is appealed in part or wholly, the point of

¹¹ *Labour Act, 11 of 2007, section 89(2)*. ‘A party to a dispute who wishes to appeal against an arbitrator’s award in terms of subsection (1) must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on the party.’

¹² *Labour Court Rules, GN 279 in GG 4175 of 2 December 2008, Rule 17(2)*.

¹³ *Labour Court Rules, Rule 17(3)*.

law or fact appealed against if it concerns a breach of *section 7(1)(a) of the Labour Act* or just the point of law appealed against if the appeal relates to another dispute and lastly the grounds upon which the appeal lies.¹⁴

[25] It is clear that neither the *SS Act* nor the present *Labour Act* outlines a specific form which an appeal should take when it is done in terms of another Act of Parliament. However, the *SS Act* does state that an appeal noted in terms of the *SS Act* should be done in accordance with the prescribed forms as outlined in the *Labour Act*, that being the repealed *Labour Act*¹⁵.

[26] To repeal a law means that there is an 'annulment or abrogation of a previously existing statute by the enactment of a later law that revokes the former law'.¹⁶ Accordingly, if such Act has been repealed, then all its provisions have no force or effect and as a result cannot be applied. I believe accordingly that the legislature in these circumstances has intended that we look to the law replacing it and how it deals with appeals.

[27] In light thereof, the appellant should have noted their appeal on both a Form 11 and Form LC 41 in order to have been proper before this court. The appellant's appeal so noted was not in terms of the *Labour Act* and its *Rules* including the *Rules of Conciliation and Arbitration* and cannot be found to be proper before this court.

Condonation application for the late noting of the respondent's heads of argument

[28] The respondent filed an application for condonation for the late filing of its heads of argument on the 9 February 2017 and it remained unopposed.

[29] Mr Tjombe on behalf of the respondent noted that the respondent's heads of argument were late due to an oversight on the part of his office for which he apologises and submitted that no prejudice was suffered by the appellant and accordingly the application should be granted.

¹⁴ *Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007 (Act No. 11 of 2007), Rule 23(2).*

¹⁵ Act 6 of 1992.

¹⁶ *The Free Dictionary by Farlex.* Available at <http://legal-dictionary.thefreedictionary.com/repeal>; last accessed on 19 April 2017.

[30] To pay homage to the concept of brevity which oils the wheels of justice, I grant the application as its explanation remains sincere and without prejudice.

Merits of the appeal

[31] Be that as it may, although the appeal as noted is found not to be proper before this court, this court will adjudicate the merits of the case which still concludes this matter in the same way, that being, the appeal being dismissed.

The law on who are Employees

[32] The concept of who is an employee has been defined by many statutes, those of relevance have been quoted below.

[33] The *Labour Act* defines an employee as:¹⁷

- ‘an individual, other than an independent contractor, who -
- (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or
 - (b) in any manner assists in carrying on or conducting the business of an employer;’

[34] The *Labour Amendment Act* stipulates that:¹⁸

‘For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

- (a) the manner in which the individual works is subject to the control or direction of that other person;
- (b) the individual’s hours of work are subject to the control or direction of that other person;
- (c) in the case of an individual who works for an organisation, the individual’s work forms an integral part of the organisation;

¹⁷ *Act 11 of 2007, section 1.*

¹⁸ *Act 2 of 2012, section 128A.*

- (d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;
- (e) the individual is economically dependent on that person for whom he or she works or renders services;
- (f) the individual is provided with tools of trade or work equipment by that other person;
- (g) the individual only works for or renders services to that other person; or
- (h) any other prescribed factor.'

[35] An employee in terms of the *SS Act* means:¹⁹

'any person younger than 65 years, who -

- (a) is employed by or working for any employer; or
- (b) in any manner assists in the carrying on or the conducting of the business of an employer,

for more than two days in any week, and who is receiving or is entitled to receive any remuneration in respect thereof, and includes, in the case of an employer who carries on or conducts business mainly within Namibia, any such natural person so employed by, or working for, such employer outside Namibia or assisting such employer in the carrying on or conducting of such business outside Namibia, if such person is a Namibian citizen or lawfully admitted to Namibia for permanent residence therein, and "employed" and "employment" shall have corresponding meanings;'

[36] The *Affirmative Action (Employment) Act* defines an employee as 'defined in section 1 of the Labour Act, 1992...'²⁰ Accordingly, the old *Labour Act* defines an employee as:²¹

'any natural person-

- (a) who is employed by, or working for, any employer and who is receiving, or entitled to receive, any remuneration; or
- (b) who in any manner assists in the carrying on or the conducting of the business of an employer,'

¹⁹ *Act 34 of 1994, section 1.*

²⁰ *Act 29 of 1998, section 1.*

²¹ *Act 6 of 1992, section 1.*

[37] The *Common-law* describes an employee as a *locatio conductio operarum*. Accordingly, *Parker* in his book *Labour Law in Namibia*, sums up the position of an employee in the common-law accurately by stating that

‘the servant in a contract of service is under the orders of the master to render his personal service upon the master’s personal command. The service that is to be rendered is, therefore, subject to the orders and decisions of the master, and the servant is subordinate to the disposition of the master. He is, therefore, obliged to obey the lawful commands or instructions of the master who has the right of supervising and controlling him by prescribing to him what work he has to do, as well as the manner in which it has to be done.’²²

[38] These laws all share common features, namely, an employee is someone who renders a service to another and such service rendered assists such person or entity in conducting or carrying on his/her/its business; for a stipulated or agreed remuneration.

[39] This definition in itself remains broad resulting in our courts having formulated tests to assist in narrowing down who is regarded as an employee. These tests are reflective of the presumptions outlined in *section 128A of the Labour Amendment Act*.

[40] Firstly, our courts have adopted the supervision and control test as formulated in the *Yewens v Noakes*²³ case as far back as 1880. In *Ready Mixed Concrete v Minister of Pensions*, the court held that

‘Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master the other the servant.’²⁴

[41] Furthermore, Frank, AJ has outlined in the *Engelbrecht* matter that this factor alone cannot be conclusive of who is an employee and should be considered with other factors jointly, however, he mentions that the total absence of control would in his view be fatal in any claim to being an employee.²⁵

²² Parker, C.2012.*Labour Law in Namibia*.Windhoek: University of Namibia Press, p4.

²³ 1880 6 QB 530, at pgs 532 – 533.

²⁴ 1968 2 QB 433, at p440.

²⁵ *Engelbrecht and Others v Hennes* 2007 (1) NR 236, at p239B.

[42] Secondly, the organisation or integration test indicates that where a person is integrated into the enterprise or the business i.e. forms part and parcel of such organisation or entity, he/she can be considered to be an employee.²⁶ This test however, has been criticized severely for being vague and nebulous and accordingly a useless instrument in determining the status of a person as an employee.²⁷

[43] Thirdly, the proprietary test seeks to establish whether the person in question is carrying on the business for himself/herself or for another. In other words, the test takes cognisance of ownership and who bears the financial risk.²⁸ The person in question is not likely to be an employee if he/she owns the business and bears the risk of profit and/or loss of that business.

[44] Lastly, the dominant impression or multiple test acknowledges the difficulty of grey area cases of who an employee might be. Accordingly, these two related tests look at the merits of each and pin point what the indications are which created the impression on the court that such relationship should be considered as an employee-employer relationship. Subsequently, the court engages in a balancing act of factors against one another in order to determine which carry more weight and where a dominant impression of an employment relationship is created, the court should rule accordingly.²⁹

[45] It is of course a worrisome decision in choosing any one of the above tests to apply to a particular matter, however, the facts of each case considering modern employment practices should be the compass directing which test or tests have relevance in the matter.

The law on who are Employers

[46] The concept of who are employers have been defined by many statutes, those of relevance have been quoted below.

²⁶ *Bank voor Handel en Scheepvaart NV v Slatford and Antoher* 1953 1 QB 248, at p295.

²⁷ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A), at p63F – G.

²⁸ *Ready Mixed Concrete v Minister of Pensions supra* at p443.

²⁹ *Dempsey v Home & Property* (1995) 16 ILJ 378 (LAC), at p381B – C.

[47] *Section 1 of the Labour Act* defines an employer as:

‘...any person, including the State who –

- a) Employs, or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual;
- b) Permits an individual to assist that person in any manner in the carrying on or conducting that person's business; ...’

[48] An employer for the purposes of this *Act* includes a natural person or legal person or the State.

[49] *Section 1 of the SS Act* defines an employer as:

‘...any person, including the State who –

- a) employs, or provides work for, any person and who remunerates or expressly or tacitly undertakes to remunerate that person;
- b) who permits any person to assist him or her in any manner in the carrying on, or conducting of, his or her business, ...’

[50] *Section 1 of the Affirmative Action (Employment) Act* defines an employer as ‘defined in section 1 of the Labour Act, 1992...’ The old *Labour Act* defines an employer as:

‘...any person, including the State who –

- a) employs, or provides work for, any person and who remunerates or expressly or tacitly undertakes to remunerate him or her;
- b) who permits an individual to assist him or her in any manner in the carrying on, or conducting of, his or her business; ...’

[51] At common law an employer, also known as a *conductor operarum*, is 'any person – natural or legal – who has entered into a contract of employment with a natural person who has contracted to render his personal service to this other person'.³⁰

[52] These laws all share commonalities in defining the concept of an employer. In other words, all laws refer to someone or an entity who employs someone to render a service to him/her or it in order for him/her or it to carry on or conduct his/her or its business and in return such person is remunerated therefore.

The Employment Relationship

[53] In addition to noting who is an employee and an employer, it is equally important to look at the relationship between the parties to establish whether or not it can be classified as one of employment.

[54] 'A contract of employment is an agreement between two parties who have the legal capacity to enter into such agreement whereby one of the parties (the employee) agrees to render personal service to the other party (the employer) for an indefinite or definite period in return for an ascertainable wage or other remuneration. The agreement also entitles the employer, among other things, to determine what the employee's personal service will be, to generally supervise the employee when performing his personal service, and to generally control the manner in which the employee discharges such personal service.'³¹

[55] O'Linn, J as he then was stated in the case of *Paxton v Namib Rand Desert Trails (Pty) Ltd* that there is no requirement in our law for contracts of employment to be reduced to writing unlike other agreements.³² The essential requirements for a contract of employment to exist, include:³³

1. an agreement;
2. parties to the agreement;
3. an undertaking by the employee to perform a service for the employer;
4. such service be rendered for an indefinite or definite period of time;

³⁰ Parker, C.2012.*Labour Law in Namibia*.Windhoek: University of Namibia Press, p22.

³¹ Parker, C.2012.*Labour Law in Namibia*.Windhoek: University of Namibia Press, p25.

³² 1996 NR 109.

³³ Parker, C.2012.*Labour Law in Namibia*.Windhoek: University of Namibia Press, p26.

5. an undertaking by the employer to remunerate the employee for the service so rendered; and
6. the right of the employer to assign tasks to the employee and supervise and control how the employee performs his/her service.

[56] If there is a dispute regarding whether a contract of employment exists between the parties, reference can also be made to the written agreement entered into between the parties. However, where there is no written agreement, the court finds itself in a position to determine, from the circumstances the parties find themselves in, whether an employment relationship exists or not. Accordingly, the court must assess whether the above listed elements are present or not to come to a well-reasoned decision.

Arguments

Parties and their Employment contracts

[57] The normal principles regarding the law of contract should be noted here. As stated above, contracts of employment need not be in writing in terms of our law. As long as it can be proven that there are two parties who freely entered into the agreement on mutually acceptable terms, an agreement exists. Many a times, parties never reduce their agreement to writing and there is a dispute regarding whether a valid contract, if any, came into being. Where no written agreement exists between the parties, the 'court may hold a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that contract came into existence.'³⁴

[58] In the circumstances of this case, a contract of employment will have to be proven to exist between the appellant as well as the members of the Order. It is common cause between the parties that the respondent and its members never entered into written contracts of employment. The members of the appellant do however complete an application form to become a member of the Order in order to serve God in a full-time capacity. Once an applicant is accepted as part of the Order, he/she will need to take a vow – 'Vow of Obedience and Poverty for one serving as a

³⁴ *Joel Melamed and Hurwitz v Cleveland Estates Ltd; Joel Melamed and Hurwitz v Vornor Investments (Pty) Ltd* 1984 (3) SA 155 (A), at p165B.

regular member of the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses' (hereinafter referred to as the 'Vow').

[59] This vow is merely indicative of the member accepting that he/she is prepared to live a modest lifestyle as traditionally established by the Order as well as performing any tasks designated to him/her by the Order. In addition, the vow makes provision that a member should abstain from gaining outside employment and any remuneration received should be given to the local organisation of the Order. The vow therefore results in a 'rule book' by which the member lives his/her life.

[60] The appellants argue on this point that by reading the memorandum of association as well as the articles of association of the appellant, one can draw the conclusion that the appellant is not a 'business' in the ordinary sense of the word, but rather concerns itself with the teachings and preaching of Jehovah/Jesus Christ. Further to that extent, being part of this Order is considered a desire to serve God and not for gaining a monetary reward.

[61] Mr. Frank continues to drive this point home by relying on the confirmatory affidavits filed by the members of the Order. He argues that it is clear from such affidavits that not one of the members of the Order regard themselves as employees or their relationship with the appellant as one of employment. The respondents argue that the relationship established between the appellant and/or the Order and its members is descriptive of an employment relationship considering the compliance with *section 128A of the Labour Act* as amended and failure by the appellant to rebut these presumptions. I agree entirely with the respondent's view. Although no written agreement exists, the conduct of the parties are reflective of an employment relationship considering the vast compliance with *section 128A of the Labour Act* as amended. The order for relief sought in prayers 1.1 and 1.2 of the Notice of appeal is therefore rejected.

[62] Accordingly, the respondent believes that the appellant's failure to contribute towards the various funds including *section 21(2) of the SS Act*, *section 64 of the Employees' Compensation Act*, etc. remains an intentional disregard for the law which aims to protect those exact members, who they say have a desire to follow in this relationship.

Services rendered

[63] The parties must agree that one party will render a service to another. Such service or services to be rendered must fall within the four corners of the law.

[64] It is also common cause between the parties that the members of the respondent perform religious works in furtherance of the objectives of the church. These 'works' or 'task's or 'duties' performed include translating the bible into various Namibian languages for distribution to persons who so wish to acquire one, free of charge; preparing food for other members of the Order; ensuring that the premises are maintained and kept clean; and other assignments so given.

[65] The appellant on this point argues that the services so rendered by the members of the Order are of a religious nature and is considered a lifestyle rather than 'work' or a 'job'. The respondent on the other hand with the court in agreement notes that the appellant has subjected itself to the laws of Namibia in that it registered itself as a company not for gain. The members of the Order do perform services or duties for the appellant which remains integral to the 'business' of the appellant and although this is a church we are dealing with, they cannot simply disregard the law or be automatically exempted due to their religious work.

Remuneration

[66] *Grogan* states that 'an employee may be paid wholly in money, wholly in kind or partly in money and partly in kind.³⁵ In other words, remuneration as such does not only have to sound in money, it may take other forms, for example accommodation, meals, transport, etc.

[67] It remains common between the parties that such members receive an estimated allowance of N\$940.00 per month regardless of what services they perform or the number of sick leave taken or whether such person can perform such duties due to old age or infirmity.

³⁵ Grogan, J (1993).2nd Ed.*Riekert's Employment Law*.Cape Town: Juta, p22.

[68] However, the appellants do argue that such stipend should not be seen as the equivalent of remuneration, that which is received by an employee who renders a service in exchange for a salary or wage. Such stipend can rather be described as assistance to such members for purchasing basic necessities of life, and accordingly, such support is not owed to the members, so they cannot claim or demand such assistance. Furthermore, the stipend is non-negotiable and the amount thereof is set regardless of the work or time spent performing their duties. Mr. Frank therefore argues that it cannot be equated to any compensation received in kind for their services rendered. The respondent on the other hand holds the view that each member receives N\$940.00 per month, which is paid at the end of the month, in addition to full board and lodging. The court agrees with the view of the respondent in that this allowance as paid by the appellant complies with the definition under *section 1 of the Labour Act*.

Supervision and Control

[69] It also remains common between the parties that the hours of service remains fixed, between 07h45 to 16h45, Mondays to Fridays. Furthermore, all members are at liberty to terminate their services rendered at any time, although a thirty (30) days' notice is requested, if possible. And finally, as no provision is made for children in the Order, any members having children will have to leave the Order as soon as their spouse is impregnated.

[70] The appellant in response to this element as argued by the respondent holds that supervision and control cannot be seen as a decisive factor when establishing an employment relationship. Regard must be given to the intention of the parties, which in this instance, is not to create an employment relationship but rather that such members have voluntarily devoted their lives to God and in doing so they carry out 'his works' as a lifestyle, not a job. The respondent is in exact opposition of this argument. As stated above, the level of control and supervision the members have in terms of the hours they work, the notice upon termination of their services, the out-casting of members who fall pregnant, etc. is indicative of an employment relationship. Again, the court cannot turn a blind eye to this factor, although not decisive, is influential. The appellant has laid out the rules of the church and all the members must comply. Just because the appellant is a church which considers its operations to be *sui generis*

does not *per se* rule out that the presumptions of *section 128 of Amended Labour Act* have been rebutted. The court has given much weight to the intention of the parties, however, the court has however outweighed such intention holding that the appellant through its conduct simply wishes to evade the law and the court should protect those members blinded by the arguments of the appellant. Therefore the relief sought in paragraph 1.1 and 1.2 of the notice of motion is hereby rejected.

The Employment Equity Commission's (EEC) Decision

[71] On the 28 October 2009, the appellant sent a letter to the EEC requesting that it should not be considered a relevant employer in terms of the *Affirmation Action (Employment) Act*. Finally, on 31 January 2014, the EEC informed the appellant that based on the advice forwarded by the Office of the Attorney-General, the appellant was not considered a relevant employer in terms of the above-mentioned *Act*. On the basis of this, the appellant sent a similar letter to the SSC requesting advice on whether the appellant was considered an employer in terms of the *SS Act*.

[72] The appellant on this point argued that, the SSC failed to take into account the EEC's decision when it made its decision. Further, the appellant notes that the definition outlined in the *Affirmation Action (Employment) Act* and the *Labour Act* were almost identical to that given in the *SS Act*. Accordingly, the same conclusion should have been reached by the SSC as the EEC. Also, the appellant notes that the *Labour Amendment Act* came into force after the EEC took its decision, so the statutory circumstances were the same.

[73] The respondent notes that the EEC's decision cannot bear reference on the SSC's decision, because firstly the EEC took the position that the appellant was not an employer considering the *Affirmation Action (Employment) Act* and not the *SS Act*. Secondly, the *Labour Amendment Act* was not yet enforceable when the EEC made its decision and accordingly they never considered the presumptions outlined in *section 128A* thereof. Accordingly, the statutory circumstances in which the EEC took its decision were very different from that of the SSC's decision.³⁶

³⁶ Respondent's Heads of Argument, p14.

[74] This court cannot say with certainty what exactly was taken into account when the EEC made its decision or what the Office of the Attorney-General took into account when delivering its advice to the EEC. However, the phrasing and wording of the response in the letter from the EEC is clear and regard must be given to it. The letter of the EEC explicitly states that:

‘... your institution is not a relevant employer in terms of the Act referred to above.’³⁷

[75] In other words, it appears that the EEC states that the appellant cannot be a relevant employer for the purposes of the *Affirmation Action (Employment) Act*. This does not mean that the finding of the EEC is set in stone and the SSC is suppose to follow it. The SSC is an entity of its own, ruled entirely by a different statute and as a result, these entities may see things differently considering the Act and their considerations. Since the EEC’s decision is not under the microscope of this court, it merely can be used for persuasive value not for direct authority of its claim, that being, it’s not an employer.

Social Security in Namibia (SS Act)

[76] The *SS Act* was promulgated not only to establish the SSC and outline its powers, duties and functions; but also to provide for the payment of maternity leave, sick leave and death benefits to employees as well as to provide for payment of medical benefits and pension benefits to employees, the disadvantaged and unemployed persons.³⁸

[77] The *SS Act* is a vital piece of legislation, especially for employees who are not very well off, as the *Act* protects employees in the event they fall pregnant, become sick and assist their dependants in case such employee dies, etc.

[78] In order to reap the benefits provided for in terms of the *SS Act*, every employer and employee working for such employer must be registered. Registration is provided for in terms of *section 20 of the SS Act*:

³⁷ Record of Proceedings, p283.

³⁸ Preamble of the *SS Act*.

'... every employer shall, in the prescribed manner and within the prescribed period, register –

- a) himself or herself with the Commission as an employer; and
- b) every employee employed by him or her, as an employee,

for the purposes of this Act.

...

(4) Any person who fails to comply with subsection (1) shall be guilty of an offence.'

[79] Accordingly, this section presupposes that all entities or persons who are employers must (**peremptory**) register themselves under this *Act* as well as its employees. Failure to register constitutes an offence, which is punishable by law.

[80] Furthermore, after registration, the employer is obliged to deduct a certain amount, determined in terms of the *SS regulations*, from the employee's remuneration. Such contribution made and paid over to the SSC consists of an amount payable by the employee (which is deducted from his/her remuneration) as well as a contribution payable by the employer within a prescribed period.³⁹ If such employee's contribution towards the SSC is up to date, including the contributions payable by the employer, such employee is entitled to the benefits as provided for under this *Act*, subject to the provisions of the *Act*. Failure to pay over or make such contributions to the SSC, the SSC may institute legal proceedings subject to *section 25 of the SS Act*.

[81] The *SS Act* does **not** provide for **de-registration** of employers. Accordingly, logic follows that once an employer has been registered under this *Act*, the obligations created in terms of this *Act* ceases to exist only where the employer (who is a natural person) dies or becomes insolvent or is sequestrated or is liquidated or wound up (where the employer is a juristic person). Employees may be 'de-registered' under that employer in the event they die or their services have been terminated.

[82] The SSC is noted as a statutory body who must operate within the four corners of the *SS Act* - its powers are outlined in *section 9 of the SS Act*. The *SS Act* does not

³⁹ SS Act, section 21(4).

empower the SSC to exempt certain entities from paying the prescribed contributions nor does the *Act* allow for deregistration.

[83] There is no dispute that the appellant is registered as an employer under the *SS Act*. The appellant seeks a declaratory order from this court compelling the SSC to deregister the appellant as well as the members of the Order under the *SS Act*.

[84] As a backbone to this contention or relief sought, the appellant explains that they are not 'employers' in terms of our law and sensibly their registration under the *SS Act* cannot stand. In addition to their standing, the appellant illustrates that their reasoning has legal basis considering that the EEC took a decision that the appellant was not an employer and accordingly the respondent must take the same approach.

[85] The respondent on the other hand examines the appellant's reasoning as a ploy to try and evade their obligations under the *SS Act*.⁴⁰ As discussed in detail above, the respondent took into account the EEC's decision, however, points out that the appellant misunderstood the EEC's decision, in that, the EEC regarded the appellant not as a **relevant** employer for the purposes of the *Affirmation Action (Employment) Act*. In other words, the EEC's decision has no bearing on the respondent's decision as the EEC made their decision in light of the *Affirmation Action (Employment) Act* and not in light of the *SS Act*.

[86] In terms of the relief sought in paragraphs 1.3 and 1.4 of the notice of motion, the respondent persists in arguing that the *SS Act* does not provide for de-registration and accordingly the court cannot give effect to the appellant's wishes in that respect.⁴¹

[87] The appellant failed to submit to this court why it registered itself as an employer in the first instance and why after a lengthy period of time considered itself not to be an employer for purposes of the *SS Act* anymore. In light of the above, the court makes the finding that the appellant intended that it be an employer, which intention is drawn from its own conduct, that being when it registered itself under the *SS Act* as an employer. Furthermore, the court agrees with the respondent's submission that the appellant is trying to evade its obligations under the *SS Act* and this court cannot

⁴⁰ Record of proceedings, p327, alternatively p2 paragraph 5 of the Respondent's Grounds of Opposition.

⁴¹ Respondent's Heads of Argument, p5.

allow the appellant's employees' to be unprotected in the event they fall ill, become pregnant or die, etc. Further, the *SS Act* does not provide for de-registration or exemption of certain entities in respect of the liabilities created in terms thereof. This court cannot therefore create or attribute functions and powers to the SSC, not explicitly provided for in terms of the *SS Act* or for that matter, any other law. Ordering a declaration of de-registration of the appellant and the members of the Order would be an impossibility as such act by the SSC would be *ultra vires*. Accordingly, this court dismisses prayers 1.3 and 1.4 of the relief sought⁴² under the notice of motion.

Constitutional argument raised by appellant

[88] Interestingly enough, the appellant raises a constitutional argument in that an interference by the court of imputing an employment relationship onto the parties is in clear violation of the right to freedom of religion and association. The appellant states that

'The application of the Social Security Act to the Appellant and to the members of the Worldwide Order in Namibia would change the entire relationship between members of the religious organization of Jehovah's Witnesses from one governed entirely by religious and spiritual considerations to one regulated by secular standards, which are contrary to their beliefs... The Appellant and the members of the Worldwide Order cannot be forced to recognize a secular, commercial motive and relationship that they do not have and that are contrary to their core beliefs. Such an imposition would violate the right to church autonomy, which is a fundamental element of the freedom of religion. Therefore, this would run contrary to the approach set out above and would constitute a violation of article 21(1)(c) of the Constitution of the Republic of Namibia.'

[89] The respondent articulates that the appellant is a registered *section 21* company and accordingly is incorporated under the laws of Namibia and should not be afforded a 'get out of jail – free card' just because it is doing the work of God.

Conclusion

⁴² Record of proceedings, p2.

[90] Accordingly, the appellant cannot pick and choose which laws should apply to them and which not. This court finds an employment relationship evident between the parties for the reasons stated above. In the result and for reasons and conclusions stated hereinbefore the court makes the following order:

1. The respondent's application for condonation for the late filing of its heads of argument is hereby granted.
2. The appeal is dismissed.
3. There is no order made as to costs.

E P UNENGU
Acting Judge

APPEARANCES

APPELLANT: TJ Frank SC (assisted by A Denk)
Instructed by Dr Weder, Kauta & Hoveka Inc.
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RESPONDENT: N Tjombe
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