



REPUBLIC OF NAMIBIA

CASE NO.: I 3004/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TRUSTCO GROUP INTERNATIONAL (PTY) LTD

PLAINTIFF

and

STANLEY NICK KATZAO

DEFENDANT

CORAM: SMUTS, J

Heard on: 25 October 2011

Delivered on: 24 November 2011

JUDGMENT

SMUTS, J [1] The plaintiff's two claims in this action against the defendant, one of its former employees, arise from the employment contract between the parties.

[2] The first claim is for N\$90 000. It is based upon a term of the employment agreement which requires 3 month's notice of termination. It is alleged that the

defendant, in breach of this term, failed to give such notice and three month's remuneration is claimed from the defendant.

[3] In the second claim, the plaintiff seeks the repayment of a performance bonus paid to the defendant in the sum of N\$100 000. It is alleged that it was an express term and condition of the payment of that bonus that the defendant would be obliged to repay it if he resigned within one year of its award. It is alleged that the defendant's resignation occurred within a year of the payment of the bonus which rendered it due and payable to the plaintiff.

[4] The defendant raised a special plea denying that this court has jurisdiction to hear these claims despite pleading over on the merits and launching a counterclaim arising from their employment contract which was not conditional upon the plaintiff's claims not succeeding. The special plea asserts that the Labour Court has exclusive jurisdiction to hear the plaintiff's claims as they arise from an employment agreement by reason of s18(1) and/or s19(1) of the then applicable Labour Court Act, 6 of 1992 (the Act).

[5] When arguing the special plea, Dr. S. Akweenda, who appeared for the defendant, confirmed the defendant's reliance upon s18 of the Act (and dropped any reliance on s19). The jurisdiction and powers of the Labour Court are set out in s18. The legislature vested that court with exclusive jurisdiction to hear certain matters listed in the various sub-sections of s18. The exclusive powers of that court are clearly limited to those specific items enumerated in the sub-sections. Dr. Akweenda relied upon s18(1)(e), (f) and (g). I only quote those sub-paragraphs together with the introductory portion of s18(1) which provide:

"The Labour Court shall have exclusive jurisdiction –

- (e) *to issue any declaratory order in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment;*
- (f) *to make any order which it is authorized to make under any provision of this Act or which the circumstances may require in order to give effect to the objects of this Act;*
- (g) *generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law”.*

[6] Although s18(1)(e) confers exclusive jurisdiction on the Labour Court to issue declaratory orders in respect of a contract of employment, that is not what is sought by the plaintiff in this action. The action is instead for payment of two claims sounding in money arising from alleged breaches of the employment agreement between the parties. Even though this provision was referred to, I did not understand that reliance was placed upon it, given the nature of the relief sought by the plaintiff which was not of a declaratory nature.

[7] Nor was much reliance place upon s18(1)(f). There is no section in the Act which authorizes the Labour Court to make an order of the kind sought by the plaintiff. It was however argued that an order of that nature would be giving effect to the objects of the Act (because by doing so would be to uphold an employment agreement which had allegedly been breached). But a reliance upon s18(1)(f) to vest the Labour Court with jurisdiction in dismissal cases was on the basis of a similar argument rightly rejected in *Nyambe v City Savings Bank*¹. The objects of the Act would in my view appear to vest

¹ 1996 NR 31 (LC)

the district labour court with the power to enforce individual contracts of employment for payment of amounts owing under them if non payment of such items were to be covered by Part V of the Act. Part V vests the district labour court with the non exclusive power to enforce the rights created by the provisions in that Part.

[8] Part V includes s36 read with s37 and s44 which effectively provide employees with the right to enforce their rights in the district labour court to payment of their remuneration provided for in the Act. As I have stressed, the jurisdiction of the district labour courts under s19 of the Act is not exclusive. Claims sounding in money arising from a breach of contract, including dismissal or termination, are not confined to that court, as was, with respect, correctly held by this court in *National Union of Namibian Workers v Naholo*².

[9] The main thrust of Dr. Akweenda's argument was based upon s18(1)(g) with reliance placed upon what was stated by the Supreme Court in *Beukes and Another v CIC Holdings Ltd*³ concerning that provision. There was reference in that matter to the breadth of the phrase "including any labour matter whether or not governed by the provisions of this Act any other law or the common law". The *Beukes* matter however concerned and arose from a writ issued pursuant to a default judgment in a district labour court. The respondent had obtained an urgent interdict in the High Court for the warrant to be set aside.

The Supreme Court found that the High Court had no jurisdiction to deal with the matter as the correct procedure would have been to apply in the district labour court for rescission of the judgment or to have appealed against the judgment of that court. In the

² 2006(2) NR 569 (HC) at paragraph 36-49

³ 2005 NR 534 (SC)

latter event only the Labour Court would have jurisdiction. In the former event, only the district labour court could hear the matter. That matter is thus distinguishable. The comment by that court concerning s18(1)(g) relied upon by the defendant was thus *obiter* in the context of the holding of that case. It, in any event, with respect, contains an incorrect premise that both the labour court and district labour court have exclusive jurisdiction to deal with the matters assigned to them⁴. In the case of the district labour court, that is with respect, unfortunately incorrect. Section 19 does not confer exclusive jurisdiction to the district labour court in respect of the matters referred to. This incorrect premise does not however affect the holding of that case but does affect the *obiter* remarks concerning s18(1)(g) which I decline to follow.

[10] Subsection 18 (1)(g) is in my view clearly subject to the other subsections as it relates to matters which are incidental to the labour court's functions under the Act. These functions are set out in section 18 and elsewhere. The term "**any labour matter**" is thus in my view to be read and interpreted in this confined and specific context. It is plainly any labour matter which is necessary or incidental to the Labour Court's functions under the Act. It cannot serve to prize the exclusive jurisdiction of the Labour Court any wider. The labour matter would thus need to be necessary or incidental to the functions which the legislature has accorded to the Labour Court.

[11] In my view this subsection, read within the context of section 18 construed as a whole merely, embodies a well established principle of statutory construction of the common law which posits that:

⁴ At 544 D-E

“whatever is reasonably incidental to the proper carrying out of an authorized power, is considered as impliedly authorized.”⁵

This principle was further summarized by the then South African Appellate Division in that matter in these clear terms:

“It is settled law that whatever is reasonably incidental to the proper carrying out of an authorized power, is considered as impliedly authorized. (Johannesburg Consolidated Investment Co. Ltd v Marshalls Township Syndicate Ltd., 1917 AD 662 at p. 666; Randfontein Estates G. M. Co. Ltd v Randfontein Town Council, 1943 AD 475 at p. 495). It is clear, however, that only such powers will be implied as are reasonably ancillary to the main purpose.

A power would be regarded as reasonably ancillary to the main power conferred if the true object which the Legislature had in mind in conferring that power, would be defeated if the ancillary power is not implied (Johannesburg Municipality v Davies and Another, 1925 AD 395 at p. 403 or if the power conferred cannot in practice be carried out in a reasonable manner unless the ancillary power is implied (City of Cape Town v Claremont Union College, 1934 AD 414 at pp. 420, 421).”⁶

[12] It follows in my view that subsection 18(1)(g) relates to matters which are incidental to the exercise of the Court’s functions and powers as provided for in the preceding subsections or elsewhere in the Act. A claim for payment under an employment contract – such as one for a bonus or reclaiming it - does not form part of any of the functions or powers of that court listed in s18 or elsewhere in the Act. Nor is the adjudication of claims for damages for breach of employment contracts included in the functions of the Labour Court listed in s18 or elsewhere in the Act.

⁵ Makoka v Germiston City Council 1961(3) SA 573 (A) at 581H-582B.

⁶ Supra at 581H-582B.

On the contrary and at best for the defendant, claims for payment of leave and other items in breach of conditions of employment may be enforceable through Part V of the Act and may in certain circumstance be prosecuted in the district labour court.

[13] Subsection 18(1)(g) cannot thus in my view be construed to confer a specific further power or function upon the Labour Court to deal with damages or other claims arising from breaches of employment contracts. The claims in this matter do not arise from any provision in the Act but rather have their origin in the contractual regime between the parties.

[14] This approach is further reinforced by the exclusive nature of the jurisdiction conferred on the Labour Court. There is a presumption against the ousting of the jurisdiction of the High Court, as was stressed by Totemeyer, AJ in the *Naholo* matter⁷. If the legislature intended to do so, it must be provided for in unequivocal language and for that unmistakable purpose⁸.

[15] This the legislature did not do. A contrary construction as contended for by Dr Akweenda is in my view contrived and must fail. Such an indeterminable conferral is

⁷ See: Devenish Interpretation of Statutes (1992) at 195-196

⁸ See: *De Wet v Deetlefs* 1928 AD 286 at 290 and at 292 where it was held in the context of the jurisdiction of a statutorily created water courts and their jurisdiction:

“In my opinion, however, in view of the fact that it ousts the jurisdiction of the ordinary courts of law in certain cases, it should be given a strict construction.”

See also: *S v Heita and Others* 1987 (1) 311 (SWA) at 315 I-J where this Court (as previously constituted) quoted *De Wet v Deetlef* with approval. *Publications Control board v CAN* 1970 (3) SA 479 (A) at 488 A-C.

untenable and would serve to oust the jurisdiction of the High Court which would likewise be untenable⁹.

[16] It would mean that the High Court's jurisdiction would be ousted in any contractual claim (as contended for) or even delictual claim which has its origin in employment as **"any labour matter."** A few examples would in my view underscore the untenability of the approach contended for. Claims for damages for breach of a restraint clause or for the negligent – or even fraudulent - performance of an employment contract would upon such an approach be the exclusive preserve of the Labour Court – a court where only applications are contemplated in its rules.

[17] A claim for a bonus in an employment sphere was successfully prosecuted in the High Court and upheld in the Supreme Court in Old Mutual Life Assurance Company (Namibia) Ltd v Symington¹⁰. Even though the point of jurisdiction (of the High Court) was understandably not taken, both the High and Supreme Courts could (and would) have raised the matter *mero motu* should they have considered that the High Court did not have jurisdiction to hear that matter.

[18] In my view the approach adopted by Totemeyer, AJ in *Naholo* is apposite and finds application in this matter. The High Court's jurisdiction to adjudicate claims of the nature brought by the plaintiff in this action is in my view not excluded by s18 of the Act. On the contrary, it would seem to me that this court is the correct forum for these claims.

⁹ See: Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises 1996 (4) SA 490 (A) especially at 494 H, 498 F, 499 H.

¹⁰ 2010(1) NR 239 (SC)

[19] It follows that the special plea must fail.

[20] The order I make is that the special plea is dismissed with costs. These costs include the costs of one instructing and one instructed counsel.

SMUTS, J

ON BEHALF OF THE PLAINTIFF:

Instructed by:

ADV. VAN DER WESTHUIZEN

ENGLING, STRITTER & PARTNERS

ON BEHALF OF THE FIRST DEFENDANT:

Instructed by:

DR. AKWEENDA

CONRADIE & DAMASEB