NOT REPORTABLE

CASE NO: (P) I 366/2008

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **APPLICANT**

and

AINA NELAGO IMBILI **RESPONDENT**

CORAM: HOFF, J

Heard on: 08 August 2008

Delivered on: 22 March 2012

JUDGMENT

HOFF, J: [1] This is an application for summary judgment which is opposed by the respondent.

[2] The applicant claims payment in the amount of N$98 287.13 plus interest at the rate of 16% *per annum* from 1 June 2008 to date of payment.
In the alternative applicant claims payment in the amount of N$124 152.54 plus interest at the rate of 20% *per annum* from date of judgment to the date of payment.

[3] The particulars of claim stated that the respondent was employed by the applicant as a teacher from 1 June 1996 until 31 May 2006 on which latter date the respondent had resigned from her employment.

[4] During the period 1 October 2001 until 30 September 2004 the respondent was granted study leave on a full time basis to enable respondent to pursue undergraduate studies in psychology at the University of Luton, England and the respondent remained absent from her employment for the whole of this period.

[5] The applicant and respondent entered into a written agreement of which the material terms were the following:

> "1. that immediately after her studies the defendant would return to the Public Service in the Ministry of Basis Education for a continuous period corresponding with the period of special leave granted in any capacity for which she may be regarded suitable;
>
> 2. the respondent was granted study leave for the period of 218 days of which half (109 days) was special leave for study purposes;
>
> 3. respondent complied with her obligations by resuming her work after studies on 18 January 2005 and remaining in the employ of the applicant until 26 July 2005.

[6] The special leave was granted with full remuneration for the period 22 September 2003 until 31 December 2004 *inter alia* on the following conditions:

"(a) respondent would sign the prescribed contract in terms of the Public Service Staff Rules D.I Part XI;

(b) defendant would resume her normal duties as teacher immediately after expiry of the period of study or the extended period of study and thereafter to continuously serve the State for at least two years for every year for which she was released for study;

(c) upon failure to carry out her obligations set out in paragraph (b) *(supra)* defendant would immediately refund to applicant all moneys received by her from the State during the period of special study leave together with interest thereon at the rate determined by the Ministry of Finance *per annum* calculated from the date of breach of contract. The amount shall be reduced pro rate for every full month of service rendered by the respondent

(d) the applicable interest rate determined by the Ministry of Finance was 16%."

[7] Applicant in the particulars of claim stated that the respondent failed to sign aforesaid agreement. Applicant provided respondent with her full remuneration during the period she was on study leave.

Applicant pleaded that respondent as a staff member of the Public Service was aware or ought to have been aware of the contents of the Public Service Staff Rules and was bound by such Rules including Public Service Staff Rule D.I/XI which encapsulates the provisions relating to special study leave on remuneration.

[8] Applicant further pleaded that there was thus a tacit contract between the parties.

[9] Applicant pleaded that the respondent only served 10 months in respect of the period of 4 years she was required to serve in the employ of the State and thus breached the contract as she was required to remain in applicant's employ for the additional period of 3 years and 2 months.

[10] The respondent was therefore liable to refund applicant salary payments for the period of 38 months which amounted to N$98 287.13.

[11] In the alternative applicant pleaded defendant was unduly enriched in the amount of N$124 152.54 being the total amount paid to her as remuneration while absent from office for study leave purposes.

[12] Mr Vitalis I Ankama, the Permanent Secretary at the Ministry of Education, in his founding affidavit in support of the application for summary judgment repeated the claims, referred to *supra,* and the basis how the amounts were calculated.

[13] The respondent in her answering affidavit denied any liability. She stated that during her study leave she had applied for special study leave in order to complete her MSc in Phycology for the period September 2002 until September 2003. This application was unsuccessful. She stated that the special study leave with full remuneration relied on by the plaintiff only came to her attention during the course of 2007. According to her this agreement is invalid and does not bind her on account of the fact that she had no knowledge about it.

[14] Respondent further stated in paragraph 11 of her answering affidavit that the plaintiff stopped her salary effective from 21 June 2002 until 21 September 2003 without valid cause or explanation and that the plaintiff only reinstated her salary effective from 22 September 2003 until 31 December 2004.

[15] Respondent confirmed that she resumed duties as a teacher on 1 January 2005 and resigned on 31 may 2006 and that she had worked for a period of seventeen months and not ten months as averred by the plaintiff. She denied that she had breached the contract with the plaintiff and denied that she was obliged to remain in plaintiff's employ

for the additional period of three years and two months. According to her she has *a bona fide* defence to plaintiff's claim and that appearance to defend has not been entered solely for the purpose of delay.

[16] Mr Swanepoel who appeared on behalf of the applicant submitted in regard to the claim against the respondent, that such claim is based on a tacit contract between the parties. Should this Court find there existed no such tacit contract the alternative claim is based on enrichment, i.e. that the respondent had received monies paid to her to which she was not entitled to.

[17] Mr Swanepoel further submitted that respondent's opposing affidavit discloses no bona fide defence to the applicant's claim. It was submitted that the requirement is that respondent's opposing affidavit must set out facts which if proved at the trial would constitute a defence to plaintiff's action and that failure to allege an essential element of the defence may result in summary judgment being granted. It was submitted that the opposing affidavit of the respondent did not disclose such essential element and that the application for summary judgment should succeed.

[18] It is common cause that no written contract was signed between the parties in relation to the special leave granted to the respondent. It is also not in dispute that the crux of the claim of the applicant relates to the remuneration the respondent had received during the period 22 September 2003 to 31 December 2004. The respondent does not deny receipt of such remuneration during aforesaid period.

[19] Mr Ipumbu who appeared on behalf of the respondent submitted that the defence of the respondent is one of set off. He referred to paragraph 11 of respondent's opposing affidavit in which she stated *inter alia* that the applicant had stopped the payment of her salary for the period 21 June 2002 until September 2003 without a valid cause or any

explanation and that as a result of the unlawful conduct of the applicant she was left without means to finance her studies.

[20] The respondent admitted that special leave was granted but not with full remuneration as claimed by the applicant. Respondnet attached to her opposing affidavit a letter from the acting director in the Ministry of Basic Education, Sport & Culture dated 16 September 2002 which motivated the decision why the Ministry could not grant study leave with full remuneration to the respondent.

[21] Mr Ipumbu submitted the period during which the Ministry of Basic Education failed to pay the salary of the respondent (i.e. 21 June 2002 until 21 September 2003) corresponds with the period which the respondent admitted she received payment of her salary from the Ministry (i.e. from 22 September 2003 until 23 December 2004). The months contained in each of aforementioned periods are about 15 months.
It was thus submitted by Mr Ipumbu that the amount received by the respondent for the period 22 September 2003 until 31 December 2004 was the amount the applicant should have paid respondent for the period 21 June 2002 until 21 September 2003.

[22] Mr Swanepoel submitted that the respondent had failed to raise set off as a defence in her opposing affidavit and thus failed to prove a *bona fide* defence. It was submitted that there is not evidence in the opposing affidavit that the respondent was entitled to remuneration for the period 21 June 2002 until 21 September 2003.

[23] Regarding the existence of a tacit contract, the following principle is axiomatic: it is possible to make an offer tacitly which may be tacitly or expressly accepted. The primary test is whether an agreement can be inferred from the proved facts and circumstances.
Every offer and every acceptance thereof must be “unequivocal i.e. positive and unambiguous”.

(See *Boerne v Harris* 1949 (1) SA 793 (A) at 799).

The plaintiff must produce evidence which justifies an inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was in fact *consensus ad idem*.

(See *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 95 – 96).

[24] The applicant contends that the respondent received remuneration for in respect of special leave granted to her during aforementioned period. It appears from a letter attached to respondents opposing affidavit that the Ministry of Basic Education in fact disapproved that any remuneration be paid to the respondent in respect of the special leave granted to her.

[25] It is impossible for this Court in view of the dispute between the parties to infer that a tacit contract was proved by the applicant.

[26] In respect of the alternative claim of enrichment the respondent's case is that she was entitled to the monies paid to her and there could have been no possibility that she had been enriched at the expense of the applicant.

[27] Although the respondent in her opposing affidavit did not categorically mention set off she stated in her opposing affidavit that the applicant acted unlawfully by withholding her salary for the period 21 June 2002 until 21 September 2003.

A defendant in order to avoid a summary judgment must depose to allegations which if accepted as the truth or subsequently proved at the trial will constitute a defence to the plaintiff's claim. It is further trite law that a defendant must disclose the nature and grounds of his defence.

[28] A summary judgment is an extra-ordinary remedy which closes the door to the defendant and will only be granted to a plaintiff who has in effect an unanswerable case.

[29] In *Maharaj v Barclays National Bank Ltd* 1976 (1) (SA) 418 (AD) at 432 Corbett JA remarked that a summary judgment is an extraordinary and drastic remedy and is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law.
(See *also Standard Krediet Korporasie v Botes* 1986 (4) SA 946 (SWA).

[30] There is ample authority that summary judgment should be refused in the face of any doubt whether to grant it or not.
This principle is founded on the consideration that an erroneous finding in summary judgment proceedings has more drastic consequences for a defendant than for a plaintiff.
A court has a discretion (which must be judicially exercised) to refuse summary judgment even if the defendant has not in an opposing affidavit disclosed a *bona fide* defence.

[31] In *Gilinski v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (CPD) at 811 E – F the following was stated regarding a court's approach in cases of doubt:

> "It is important to note that a decision as to whether a plaintiff's claim is unanswerable or not must be founded on information before the Court dealing with the application. This information is derived from the plaintiff's statement of case, the defendant's affidavit or oral evidence and any documents that might properly be before the Court. It would be inappropriate to allow speculation and conjecture as to the nature and ground of the defence to constitute a substitute for real information as to these matters. On the other hand, even if a Court concludes that such information as is disclosed by defendant in his affidavit is not a sufficient compliance with the provisions of Rule of Court 32(3), it may nevertheless consider that it is sufficient to raise a doubt as to whether plaintiff's

> case can be characterised as "unanswerable". In that case the Court would in the exercise of its discretion refuse summary judgment."

[32] In the matter of *Fashion Centre and Another v Jasat 1*960 (3) SA 221 NPD at 222 B the following was said regarding summary judgment:

> "To keep it in perspective, however, one must remember that summary judgment is a drastic and extraordinary remedy involving the negation of the fundamental principle *audi alteram partem*, and resulting in final judgment which is normally only granted in clear cases, and where there is any doubt, in which latter event leave to defend ought to be given."

[33] In *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 CPD the court expressed itself as follows on 180 A – F:

> "The defendant, in order to resist summary judgment, must satisfy the Court that he has a defence which is good in law and *bona fide*. Rule 32(3)(b) of the Uniform Rules of Court requires the defendant to disclose fully the nature and grounds of the defence and the material facts relied upon by the defendant for the defence. Such information must be disclosed with sufficient particularity and completeness to enable the Court to properly evaluate the defence and decide whether or not the affidavit discloses a *bona fide* defence which is good in law. (*Maharaj v Barclays National Bank Ltd (supra* at 426 A – D); *Arend and Another v Astra Furnisher (Pty) Ltd* 1974 (1) SA 298 (C) at 303 H – 304 A; *District Bank Ltd v Hoosain and Others* 1984 (4) SA 544 (C)at 547 I – 548 A – B).
>
> Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and *bona fide* defence. It is an extraordinary and stringent remedy. It has the hallmark of a final judgment and closes the door to the defendant to ventilate his defence at the trial. (*Maharaj v Barclays National Bank Ltd (supra* at 423 F – G) and *Arend and Another v Astra Furnishers (Pty) Ltd (supra* at 304 F – G)).
>
> Because of the drastic nature of the relief sought, the Court has, in terms of Rule 32(5), a discretion to grant the defendant leave to defend the action even where he has failed to comply with Rule 32(3)(b). The Court will grant summary judgment where plaintiff has an unanswerable case. If the Court has the slightest

> doubt, the Court will not grant summary judgment. (*Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 347 H; *Gilinski v Superb Launderers And Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (C) at 811 E – H)."

[34] It appears to me that the applicant has approved the special leave granted to the respondent but disapproved full remuneration during such period, and therefore the respondent has a bona fide defence on the basis the monies paid to her during the special leave period were monies she had been entitled to during the earlier period when the payment of her salary had been stopped by the applicant.
In any event even if it is accepted that the opposing affidavit of the respondent disclosed no bona fide defence her opposing affidavit contains sufficient information to raise a doubt as to whether applicant's case can be characterised as "unanswerable".

[35] In view of the aforementioned I am of the view that this court's discretion should be exercised against granting the application for summary judgment.

[36] In the result the following orders are made:

1. The application for summary judgment is dismissed with costs.
2. Respondent is granted leave to defend the action.

_____

HOFF, J

ON BEHALF OF THE APPLICANT:	**MR SWANEPOEL**
Instructed by:	**GOVERNMENT ATTORNEY**
ON BEHALF OF THE RESPONDENT:	**MR T IPUMBU**
Instructed by:	**TITUS IPUMBU LEGAL PRACTITIONERS**