'Reportable'

SUMMARY

CASE NO.: I 887/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CLASSIC ENGINES CC *v* REINHOLD HASHETU NGHIKOFA

PARKER J

2012 July 25

Jurisdiction - Of the High Court (the Court) in labour matters in terms of the Labour Act, 2007 (Act No. 11 of 2007) – Defendant challenging *in limine* the jurisdiction of the Court to determine a labour dispute arising from breach of contract of employment – Court had found in earlier proceeding that plaintiff's claim is for delictual damages arising from breach of contract of employment – Court finding that the present dispute, though arising in a labour matter, cannot be resolved by conciliation or arbitration since the conciliator or arbitrator cannot in terms of the Labour Act, 2007, order damages (the only remedy claimed by the plaintiff) – Court, therefore, invoking the principle of *ubi ius ibi remedium* and the Court's common law, inherent power against the interpretation and application of s. 86(1) of the Labour Act, 2007, to hold that the Court has jurisdiction to determine the plaintiff's claim – Consequently, Court dismissing the defendant's point *in limine* with costs.

Held, that where the only remedy claimed by a party in a dispute, though concerning a labour matter (in the instant case delictual damages), cannot be granted by a conciliator in conciliation or by an arbitrator in an arbitration, after the dispute has remained unresolved after such conciliation, there is no purpose and sense in law for the party to report the dispute to the Labour Commissioner to appoint a conciliator or an arbitrator to resolve the dispute in terms of s. 86 of the Labour Act, 2007. In that case, the party is entitled to approach the High Court for redress, and the Court is entitled to exercise its common law, inherent jurisdiction to determine the claim.

CASE NO.: I 887/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CLASSIC ENGINES CC **Plaintiff**

and

REINHOLD HASHETU NGHIKOFA **Defendant**

***CORAM*: PARKER J**

Heard on: 2012 June 18

Delivered on: 2012 July 25

JUDGMENT

PARKER J: [1] As respects this matter, on 29 July 2011, this Court delivered a judgment in an interlocutory application where I dismissed with costs the defendant's application that certain statements in the pleadings referred to in the exception are vague and embarrassing. The defendant would not be deterred. On 3 February 2012 I dismissed with costs a recusal application brought by the defendant. The present proceeding concerns an application brought in terms of rule 33(4) of the rules of court in which the defendant prays that the factual question as to whether or not the plaintiff's claim in the action has prescribed in terms of s. 86(1) and (2) of the Labour Act, 2007 (Act No. 11 of 2007) (the Labour Act) should be decided at the threshold before trial of the action.

[2] Why does the defendant, represented by Mr Grobler, aver that the plaintiff's claim in the action has prescribed? It is this. 'The plaintiff's claim is in respect of an employment contract and therefore a dispute in terms of the Labour Act'. 'The dispute should have been referred to the Labour Inspector within one year after the dispute arising'. 'The plaintiff failed to refer the matter to the Labour Inspector within 1 (one) year and its claim therefore prescribed.' And Mr Grobler says he relies on s. 86(1) and (2) in support of the defendant's contention. To start with; the words 'Labour Inspector' do not appear anywhere in s. 86(1) and (2). I therefore, take it that Mr Grobler is referring to 'the Labour Commissioner' (s. 86(1)(a)) and 'any Labour Office' (s. 86(1)(b)). Furthermore, according to Mr Grobler the 'plaintiff's claim is in respect of an employment contract and therefore a dispute in terms of the Labour Act'. 'The dispute had to be referred to the Labour Inspector for Arbitration'. 'An arbitrator had to be appointed to resolve the dispute'. 'The Labour Court has exclusive jurisdiction in Labour matters and there is no concurrent jurisdiction of the High Court *per se*'. Here, too, the words 'Labour Inspector' do not appear anywhere in s. 86(3). I take it that Mr Grobler means 'the Labour Commissioner'. The following must be made clear: the two terms, namely, 'Labour Commissioner' and 'Labour Inspector' are not synonymous in the Labour Act.

[3] Be that as it may, bereft of their legal inaccuracies, the tenor of the defendant's points *in limine* seems to be four-fold, namely, the plaintiff failed to counterclaim before 11 November 2009, the plaintiff failed (and/or neglected) to file its current claim within one year of the alleged breach of the contract of employment, the plaintiff is not entitled thereafter to file the claim in the action in the Court (i.e. High Court) and the plaintiff should have proceeded in the Labour Court, and the claim, in any case, has prescribed in terms of s. 86(1) and (2) of

the Labour Act since 31 July 2009. And it appears that is how Mr Van Zyl, counsel for the plaintiff, also understands the points *in limine*. With that understanding, the plaintiff has moved to reject the points *in limine*.

[4] In my view the points *in limine* taken in their cumulative thrust is that the plaintiff's claim has prescribed in terms of s. 86(1) and (2) of the Labour Act because the claim arose from a dispute respecting a contract of employment; and so the Court has no jurisdiction to hear and determine the claim. Mr Grobler summarizes it in this way in his submission: 'The plaintiff failed to refer the matter to the Labour Inspector (*sic*) within 1 (one) year and its claim therefore prescribed'.

[5] It seems to me that the present proceeding, despite the fact that submissions have been made extensively and I have been referred to a number of authorities, falls within an extremely short and simple compass.

[6] In terms of s. 86(1) and (2), read with the relevant provisions of s. 86, of the Labour Act the resolution of a dispute starts generally with the dispute being referred by the Labour Commissioner to a conciliator to conciliate in the dispute. If conciliation fails to resolve the dispute, the dispute is referred to an arbitrator by the Labour Commissioner for resolution of the dispute by arbitration. And the dispute *may* be referred to the Labour Commissioner or a labour office within six months after the date of dismissal, and if, as in the present case, the dispute concerns something other than a dismissal, then within one year the dispute arose. (Italicized for emphasis) On this procedure, I accept Mr Grobler's submission thereon with regard to the fact that it is the decision of the arbitrator that may be appealed from to the Labour Court or taken on review in the Labour

Court. But, with the greatest deference to Mr Grobler, Mr Grobler misreads s. 86(1) and (2) of the Labour Act, particularly the chapeau of s. 86(1) and, indeed, the entire alternative dispute resolution (ADR) mechanism under the Labour Act. Mr Grobler's submission that a 'dispute regarding a labour matter must be referred in terms of section 86(1) to the Labour Commissioner or the Labour Office in order to appoint an Arbitrator to resolve the dispute' is palpably wrong in law. The first reference by the Labour Commissioner must (and I use 'must' advisedly) be 'to a conciliator to attempt to resolve the dispute through conciliation'. And as I held in *National Housing Enterprise v Maureen Hinda-Mbaziira and Others*, Case No. LCA 17/2011 (Judgment delivered on 3 April 2012) (Unreported)) at p. 8, 'in the scheme of the alternative dispute resolution scheme (ADR) under the Labour Act, no arbitration can lawfully take place without the "dispute" involved having remained unresolved or unsettled after conciliation'.

[7] This conclusion brings me to the next level of the enquiry. To start with, by its very nature and in terms of our law the power of a conciliator in conciliation does not include the making of any enforceable order known to the law, and, *a fortiori*, this conclusion can be gathered clearly from the Labour Act. All that the Act says is that a conciliator should resolve the dispute referred to him or her by the Labour Commissioner through conciliation. What this means is that a conciliator appointed by the Labour Commissioner to conciliate a dispute in terms of the Labour Act has not one jot or tittle of power to order damages which is what the plaintiff claims in the action. And so, I ask; what would be the sense and purpose in law for a party who claims damages for breach of contract of employment to report a dispute to the Labour Commissioner for the Labour Commissioner to appoint a conciliator to resolve the dispute through conciliation? 'Damages' is not even a remedy mentioned in the Labour Act.

[8] Even, assuming an intrepid conciliator attempts to conciliate and conciliation is unsuccessful, the next stage is for the dispute to be resolved through arbitration. Here, too, in terms of s. 86(15) the arbitrator cannot order damages; he or she may order compensation in terms of s. 86(15)(e). But compensation in labour disputes and mentioned as one of the remedies in the Labour Act is not the same as damages; for, compensation awarded in labour disputes cannot be equated with contractual and delictual damages. The purpose of compensation is not only to provide for the positive or negative interest of the injured party: there is an element of *solatium* present aimed at redressing a labour injustice. (*Pep Stores Namibia (Pty) Ltd v Iyambo* 2001 NR 211) And so, therefore, as respects arbitration, too, I ask a similar question; what is the purpose and the sense in law for a party who claims damages for breach of a contract of employment to report the dispute to the Labour Commissioner for the Commissioner to appoint an arbitrator to resolve the dispute by arbitration after conciliation has been unsuccessful, when the arbitrator cannot grant the relief sought, namely, damages? Indeed, in my opinion, the Parliament is alive to situations where disputes may arise in a labour matter but the aggrieved parties cannot get redress by pursuing the avenues available in the Labour Act, namely, through conciliation and arbitration; hence the use of the word 'may' in the chapeau of s. 86(1), that is, 'any party to a dispute *may* refer the dispute in writing to ....'. The awareness of the Parliament – I would say – is in line with the legal maxim '*ubi ius ibi remedium*'. (*Asby v White* (1703) 2 Ld. Raym 955; *Minister of the Interior v Harris* 1952 (4) SA 769 (A); *NedBank Ltd v Kindo and Another* 2002 (3) SA 185 (C)). In the circumstances of this case and on the law, it would be absolutely otiose, as demonstrated previously, for the plaintiff to report a dispute to the Labour Commissioner in terms of s. 86 of the Labour Act. And so, therefore, the lawful avenue open to the plaintiff to reach the seat of judgment is,

in my opinion, to approach the Court (the High Court) for relief; and that is what the plaintiff has done. Accordingly, I find that the plaintiff is before the correct judicial forum, that is, the Court.

[9] In this regard, I accept Mr. Van Zyl's submission that the Court retains its common law, inherent jurisdiction to consider the plaintiff's claim for damages; a relief which a conciliator or an arbitrator, *pace* Mr Grobler, cannot in terms of the Labour Act grant. Thus, if I were to accept the defendant's averments and submission by the defendant's counsel, it would come down to this, namely, that the plaintiff claims a right but there is no remedy. Such a situation, in my opinion, cannot be part of our law. In the instant case, the Court is the competent Court to determine the plaintiff's claim within the meaning of Article 12(1) of the Namibian Constitution even if it concerns a labour matter, as I have reasoned in the aforegoing analyses of the relevant provisions of the Labour Act and the authorities referred to thereanent.

[10] It follows that in my judgment; I find that the defendant has failed to establish any valid basis that can prevent the Court from exercising its common law, inherent jurisdiction to determine the plaintiff's claim for damages for breach of a contract of employment. Consequently, I conclude that the defendant's point *in limine* fails.

[11] Besides, the settlement agreement concluded by the parties concerns only the dispute of unfair dismissal raised by the defendant against the plaintiff, and so it was only in respect of the plaintiff's liability towards the defendant flowing from the unfair dismissal of the defendant. The issue in the present proceeding is not about unfair dismissal.

[12] I pass to consider costs. Mr Van Zyl submits that it is the prayer of the plaintiff that the court should grant costs on the scale as between attorney and client on the basis that the *point in limine* 'carries no merit whatsoever and has been introduced solely to harass the plaintiff'. It would seem so. As I have itemized them previously, the defendant brought an exception application. It failed. Thereafter, the defendant brought a recusal application. It, too, failed. And now the points *in limine* have also failed. But I do not think the conduct of the defendant in the listed scenarios have reached the bar set by the high authority of Strydom CJ in *Namibia Grape-Growers and Exporters v Ministry of Mines and Energy* 2004 NR 194 (SC) (followed by the Court in the recent case of *Andreas Vaatz v The Municipality of Windhoek* Case No. A 28/2010 (Unreported)) so as to justify the award of costs on the scale as between attorney (legal practitioner) and client. The defendant may have been misadvised, seeing his misunderstanding of the relevant provisions of the Labour Act, particularly in the present proceeding, respecting the ADR mechanism and the role of the Labour Court thereunder; and this unfortunate lack of understanding may have stoked up the defendant in bringing the present abortive application which, with respect, has not even a semblance of merit. But I do not think the misreading and the misunderstanding of the law and acting along that misreading and misunderstanding should be visited with a punitive costs order. Be that as it may, I must signalize the point that the same largesse will not be available to the defendant if a similar hopelessly baseless application is brought to harass the plaintiff and delay the plaintiff in having his claim determined.

[13] From the aforegoing analyses, reasoning and conclusions I hold that the points *in limine* fail, and they are dismissed with costs on the scale as between party and party, and such costs include costs occasioned by the employment of one instructing counsel and one instructed counsel.

____

PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Mr C Van Zyl

Instructed by: GF Köpplinger Legal Practitioners

COUNSEL ON BEHALF OF THE DEFENDANT:

Mr Z J Grobler

Instructed by: Grobler & Co.