



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2987/2013

In the matter between:

SADRACK JEREMIA KATJIUANJO

FIRST PLAINTIFF

THEO KOTZE

SECOND PLAINTIFF

PHILLIP SHIKONGO

THIRD PLAINTIFF

SIEGFRIED GEISEB

FOURTH PLAINTIFF

EDWARD MWAFILA

FIFTH PLAINTIFF

JOHANNES BEUKES

SIXTH PLAINTIFF

MICHAEL R MOALUSI

SEVENTH PLAINTIFF

COLLIN NGUNOVANDO

EIGHTH PLAINTIFF

TOINI AUENE

NINTH PLAINTIFF

GERSON JAMES

TENTH PLAINTIFF

ABUID NAGANENE

ELEVENTH PLAINTIFF

MILTON BEUKES

TWELFTH PLAINTIFF

PHILLIPUS SWARTS

THIRTEENTH PLAINTIFF

IZAK BABISH

FOURTEENTH PLAINTIFF

FERDINAND KUZATJIKE

FIFTEENTH PLAINTIFF

JACOBUS IZAACKS

SIXTEENTH PLAINTIFF

HILARIA HESHEELA
 ADOLF KAGHUYU
 KALEB MATHEUS
 JOHANNES EICHAB
 VICTUS BIHITILE
 KENNEDY CHUNGA
 JAN COETZEE
 FESTUS TJAVARA
 WILLEM AFRIKANER

SEVENTEENTH PLAINTIFF
 EIGHTEENTH PLAINTIFF
 NINETEENTH PLAINTIFF
 TWENTEETH PLAINTIFF
 TWENTY FIRST PLAINTIFF
 TWENTY SECOND PLAINTIFF
 TWENTY THIRD PLAINTIFF
 TWENTY FOURTH PLAINTIFF
 TWENTY FIFTH PLAINTIFF

and

THE MUNICIPAL COUNCIL OF THE MUNICIPALITY OF
 WINDHOEK

DEFENDANT

Neutral citation: *Katjiuanjo v The Municipal Council of the Municipality of Windhoek* (1
 2987/2013) [2014] NAHCMD 311 (21 October 2014)

Coram: DAMASEB, JP

Heard: 5 August 2014

Delivered: 21 October 2014

Flynote: Jurisdiction of the High Court - Ouster of the High Court's jurisdiction is not readily assumed - Where a forum other than the High Court has been given jurisdiction by the legislature over a matter falling within the High Court's jurisdiction, the inquiry is not so much about whether that forum is the more convenient or suitable forum but whether the legislature in express language intended to exclude the jurisdiction of the High Court.

ORDER

1. This court has and assumes jurisdiction in the case of *Sadrack Katjuano and 24 others v The Municipal Council of the Municipality of Windhoek*, case no I 2987/2013. The costs associated with the argument on jurisdiction shall be in the cause.
2. The matter is postponed to **04 November 2014 at 14h15** for case management and for further directions and the parties are directed to comply with their obligations in respect of the case management conference; in particular, the parties are required in their joint proposals to consider referring the matter to mediation in terms of rules 38 and 39 of the Rules of Court.
3. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 53 and 54;
4. A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor within a reasonable time, by notice to the opposing party.

JUDGMENT

DAMASEB, JP:

Introduction

[1] The plaintiffs, proceeding by way of combined summons, sought relief on 10 September 2013 from the defendant for specific performance resulting from the alleged 'repudiation' by the defendant of certain terms and conditions of their employment

contracts. The relief sought includes an order for damages on account of alleged underpayments of remuneration and benefits. It is alleged in the particulars of claim that the defendant's actions founding the plaintiffs' cause of action occurred on or about 11 September 2012 when their conditions of service allegedly 'were unilaterally altered' by the defendant. It is apparent therefore that when the cause of action arose, the labour law regime in place was the Labour Act, No. 11 of 2007(2007 Labour Act).¹

[2] The plaintiffs were appointed as municipal police officers by the defendant. The following provisions of that Act are relevant in so far as dispute resolution is concerned:

'Chapter 8: Part C

Arbitration of disputes (ss 84-90)

84 Definitions

For the purposes of this Part, "dispute" means-

- (a) a complaint relating to the breach of a contract of employment or a collective agreement;
- (b) a dispute referred to the Labour Commissioner in terms of section 46 of the Affirmative Action (Employment) Act, 1998 (Act 29 of 1998);
- (c) any dispute referred in terms of section 82(16); or
- (d) any dispute that is required to be referred to arbitration in terms of this Act.

85 Arbitration

(1) There are established, as contemplated in Article 12(1)(a) of the Namibian Constitution, arbitration tribunals for the purpose of resolving disputes.

(2) Arbitration tribunals operate under the auspices of the Labour Commissioner, and have jurisdiction to-

- (a) hear and determine any dispute or any other matter arising from the interpretation, implementation or application of this Act; and
- (b) make any order that they are empowered to make in terms of any provision of this Act.

86 Resolving disputes by arbitration through Labour Commissioner

¹ Which came into force on 1 November 2008.

(1) Unless the collective agreement provides for referral of disputes to private arbitration, any party to a dispute may refer the dispute in writing to-

- (a) the Labour Commissioner; or
- (b) any labour office.

(2) A party may refer a dispute in terms of subsection (1) only-

- (a) within six months after the date of dismissal, if the dispute concerns a dismissal;
or
- (b) within one year after the dispute arising, in any other case.'

[3] As far as the Labour Court is concerned, in terms of s 117(1) (d) of the 2007 Labour Act, the Labour Court has exclusive jurisdiction to:

'grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought...' (my underlining for emphasis)

[4] I needed to be satisfied that the present is not the sort of matter where this court had consistently declined jurisdiction with the advent of the 2007 Labour Act. In *Kamati v Namibia Rights and Responsibilities Incorporated*², van Niekerk J held that the Labour Court does not have jurisdiction to entertain a claim for unfair dismissal and non-compliance with basic conditions of employment; and that in terms of s 38 of the 2007 Labour Act such a dispute may be referred to the Labour Commissioner who must, in turn, refer it to arbitration in accordance with Part C of Chapter 8 of the 2007 Labour Act. The ratio for this approach is the judicially recognised rationale that the legislature has chosen conciliation and arbitration as the primary means for the resolution of disputes under the auspices of the Labour Commissioner: the emphasis

² 2013 (2) NR 452(LC).

being on expeditious finalisation of disputes in an informal setting, as recognised by the restriction placed on the participation of legal practitioners in such proceedings.³

[5] The concern I had was therefore two-fold:

1. Was the matter subject to the Labour Commissioner's arbitration jurisdiction in terms of s 86 of the 2007 Labour Act?
2. Failing the above, did the matter not fall within the exclusive jurisdiction of the Labour Court considering the relief sought involved a declarator?

[6] Upon the matter being called before me, I had concerns if the High Court had jurisdiction, although the parties proceeded on the assumption that the High Court had jurisdiction. Jurisdiction is a matter a court is entitled to raise *mero motu* - hence my raising it and requiring the parties to argue it on 5 August 2014. Both parties submitted helpful heads of argument.

[7] During argument, I enquired from counsel why the matter was not referred to the Labour Commissioner for conciliation and arbitration under chapter 8 of the 2007 Labour Act. It was confirmed on the record that the Labour Commissioner declined jurisdiction. Mr Namandje argued that the Labour Commissioner declining jurisdiction was no answer to the question whether this court has jurisdiction. That is true of course, but the converse is also true: For the High Court not to entertain a matter, it must be clear that the original and unlimited jurisdiction it enjoys under Article 80 of the

³*Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia and Others* LC 103/2011, unreported delivered on 13 April 2012 , paras 12-13.

Constitution and s 16 of the High Court Act⁴ has been excluded by the legislature in the clearest terms.

The issue of jurisdiction considered

Plaintiffs' submissions

[8] Mr Van Zyl, on behalf of the plaintiffs, submitted that the 2007 Labour Act does not apply to the present dispute for the following reasons:

- a) The 2007 Labour Act makes no provision for the award of damages such as the plaintiffs seek alongside the declaratory relief;
- b) The 2007 Labour Act does not confer the power to determine contractual damages upon an arbitrator: s 86(15) (d) of the Act empowers an arbitrator to make 'an award of compensation' but does not expressly mention damages.⁵
- c) The plaintiff's fallback position is that even if I were to find that the Act applies, the High Court's jurisdiction is not excluded and that the court is competent to entertain the matter.

Defendant's submissions

[9] Mr Namandje, for the defendant, advanced the following reasons why, in his view, the High Court does not have jurisdiction in the matter before court: The decision in *National Union of Namibia Workers v Naholo*⁶ that the high court has inherent jurisdiction to hear a matter that appears to be of a labour nature was based on the

⁴Section 16 reads: **Persons over whom and matters in relation to which the High Court has jurisdiction**

The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power-

- (a) to hear and determine appeals from all lower courts in Namibia;
- (b) to review the proceedings of all such courts;
- (c)

[Para (c) deleted by sec 2 of Act 10 of 2001.]

(d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

⁵ Although in the case of *Reinhold Hashetu Nhikofa v Classic Engines CC*, Case no.: SA 53/2012, delivered on 26 March 2014, this question was left open.

⁶ 2006 (2) NR 659(HC)

inherent jurisdiction of the High court as contained in ss 2 and 16 of the High Court Act. He further developed the argument that s 115 creates the Labour Court as a division of the high court and vests it with exclusive and specialized jurisdiction to deal with all matters necessary or incidental to its functions under s 117(1) (a) concerning 'any labour matter', whether or not governed by the provisions of the Labour Act, any other law or the common law. Counsel argued that the Labour Court is vested with a wide discretion to deal with 'any labour matter' and that the plaintiff was accordingly not entitled to approach the High Court but the Labour Court.

The law

—

[10] Parker J held in *Classic Engines CC v Nghifoka*⁷ that the alternative dispute resolution procedure laid down in s 86 of the Labour Act, which requires a complainant to first refer a dispute for conciliation/arbitration, did not make provision for damages and that a claim for damages in the employment context did not constitute unlawful dismissal and therefore fell outside the compulsory alternative dispute resolution process of s 86 and that the High Court was the competent forum to entertain such a dispute. Mr Namandje seemed to accept that the arbitration jurisdiction does not apply to the present dispute, and I am satisfied that the matter was not susceptible of referral to such jurisdiction.

[11] It is clear on the authority of *National Union of Namibian Workers v Naholo*⁸ that the High Court's jurisdiction can only be excluded in the clearest language and that absent such clear intent, the High Court has jurisdiction. That view finds support in the Supreme Court judgment of Reinhold *Hashetu Nhikofa v Classic Engines CC*,⁹ where O'Regan AJA, stated as follows:

'[18] There is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment. Indeed, as

⁷ 2013 (4) 659.

⁸ 2006 (2) NR 659(HC)

⁹ *Supra*, fn 3. Compare *Trusco Group International (Pty) Ltd v Katzao (I 3004-2007)* [2011] NAHC 350 (24 November 2011), paras 14-18.

pointed out above s 86(2) of the Act provides that a party *may* refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will ordinarily be slow to interpret a statute to destroy a litigant's cause of action (see *Fed life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a different dispute, the court will rarely conclude that such a rule is implicit in legislation.

[20] I conclude, therefore, that given the absence of a clear legislative provision sustaining it, appellant's argument that respondent was compelled to bring its counterclaim in the proceedings under the Act cannot be upheld.'

[12] In *Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia and Others*¹⁰, Smuts J recognised that s 117(1)(d) of the 2007 Labour Act (to the extent that it limits the court to granting declaratory relief in circumstances where declaratory relief is the only relief sought) is 'anomalous' but does not translate into a manifestly absurd result. The Labour Court will decline to grant declaratory relief where it was initially sought as part of other relief (such as an interdict) even if, when the matter is ultimately argued, it had become the only relief sought.¹¹ It becomes apparent therefore that where a party seeks a declarator in addition to other relief, the Labour Court does not have jurisdiction.

Application of law to facts

[13] As I understand Mr Namandje's argument, the Labour Court, to the exclusion of the High Court, has jurisdiction in this matter, because in terms of s 115 the 2007 Labour Act, The Labour Court, as a division of the high court, has the same inherent jurisdiction enjoyed by the high court; that in terms of s 117 the Labour Court has jurisdiction to entertain any labour-related matters and that, to the extent that damages relief may be additional to the declarator sought and thus on the face of it excluded from the Labour Court's jurisdiction, it falls within any 'labour-related matter'.

¹⁰ LC 103/2011, unreported delivered on 13 April 2012 at paras 26-28.

¹¹ *Meatco v Namibia Food and Allied Workers Union and Others*, NALCMD 14 (19 April 2013) at para 12.

[14] The issue in my view is not so much whether the Labour Court does have jurisdiction, but whether the legislature intended to exclude the High Court's jurisdiction in the kind of dispute now before court. Nothing which Namandje has said compels me to the conclusion that this court has no jurisdiction. The High Court authority bearing on the subject does not appear to me to be clearly wrong and the Supreme Court authority on the subject points to there being jurisdiction in this court to entertain the matter. Ouster of the High Court's jurisdiction is not readily assumed. Where a forum other than the High Court has been given jurisdiction by the legislature over a matter falling within the High Court's jurisdiction, the inquiry is not so much about whether that forum is the more convenient or suitable forum but whether the legislature in express language intended to exclude the jurisdiction of the High Court. Such clear intent lacking, this court assumes jurisdiction in the present matter.

Order

[15] In the premises, I make the following orders:

1. This court has and assumes jurisdiction in the case of *Sadrack Katjuano and 24 others v The Municipal Council of the Municipality of Windhoek*, case no I 2987/2013. The costs associated with the argument on jurisdiction shall be in the cause.
2. The matter is postponed to **04 November 2014 at 14h15** for case management and for further directions and the parties are directed to comply with their obligations in respect of the case management conference; in particular, the parties are required in their joint proposals to consider referring the matter to mediation in terms of rules 38 and 39 of the Rules of Court.
3. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 53 and 54;

4. A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor within a reasonable time, by notice to the opposing party.

PT Damaseb
Judge-President

APPEARANCE:

PLAINTIFF:

C J Van Zyl

On instructions of Mueller Legal Practitioners

DEFENDANT:

S Namandje

Of Sisa Namandje & Co Inc.