

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/00761

In the matter between:

AGRA LIMITED

PLAINTIFF

and

LEONARDUS ABRAHAM ERASMUS

DEFENDANT

Neutral citation: *Agra Limited v Erasmus* (HC-MD-CIV-ACT-CON-2019/00761)
[2020] NAHCMD 526 (17 November 2020)

Coram: **UNENGU, AJ**

Heard: 27 October 2020

Delivered: 17 November 2020

Flynote: Civil Practice – Jurisdiction – Special Plea – Plaintiff claiming damages from defendant in High Court – Defendant raising special plea of jurisdiction – Court dismisses Special plea with cost – Held that High Court jurisdiction not excluded by s 86 of the Labour Act.

Summary: The plaintiff has issued combined summons against the defendant claiming damages in the amount of N\$ 30 538.97 with interest at the rate of 20% per annum and costs suits arising from a breach of agreement and employment relationship.

The plaintiff and the defendant agreed in clause 16 of the agreement that any party to the agreement may terminate the employment relationship by giving one month written notice to the manager or a person under whose control the party is placed. They further agreed in clause 17 of the agreement that should the employee decides to leave the service of the plaintiff without the required period of notice, the employee shall pay the plaintiff on demand an amount equal to the amount the employee would have received as remuneration from the plaintiff had the employee has given the correct notice.

In *casu*, the defendant instead of giving written notice of one month as agreed in clause 16 of the agreement, he gave one day notice. As a result thereof, the defendant was then required in terms of clause 17 to pay the plaintiff on demand the amount equal to the amount the plaintiff would have paid him had he given the correct written notice. The defendant again refused to pay the plaintiff this amount. When the plaintiff sued him for damages suffered for breach of the agreement in the High Court, he raised a special plea that the High Court has no jurisdiction to entertain and adjudicate on the matter.

Held: that the High Court has inherent jurisdiction to adjudicate on the dispute between the plaintiff and defendant.

Held further, that s 86 of the Labour Act 11 of 2007 does exclude the jurisdiction of the High Court from adjudication upon the dispute.

Held furthermore, that s 86 of the Labour Act does not empower arbitrators to make awards of damages whether or not arising from a breach of employment agreement.

ORDER

The special plea that the High Court does not have jurisdiction to hear the matter is dismissed with costs.

SPECIAL PLEA JUDGMENT

UNENGU, AJ

[1] In this matter, Agra the plaintiff has issued combined summons against the defendant Mr Leonardus Abraham Erasmus for payment of N\$ 30 538.97 with interest on the amount at the rate of 20% per annum from the date of demand to the date of payment and costs of suit. The claim is for damages suffered by the plaintiff as a result of a breach of the agreement and the employment relationship entered into between the plaintiff and the defendant signed on 11 August 2004.

[2] It was agreed between them in clause 16 of the agreement that any party may terminate the agreement and the employment relationship by giving one month written notice to the manager or a person under whose control the defendant was placed. Clause 16 stipulates, amongst others, as follows:

'Agra or the employee may end this agreement and the employment relationship by giving notice in writing. When the employee gives notice, he/she should address and give notice to the manager or other person under whose control he/she has been placed. Unless otherwise agreed, the notice period shall begin on the first (1st) or fifteenth (15th) day of the month on such notice is received by the manager or such other person under whose control the employee has been placed.'

[3] Meanwhile, clause 17 of the agreement stipulates that if the defendant leaves the services of the plaintiff without giving the required period of notice, he shall pay the plaintiff on demand an amount equal to the amount the defendant would have received as remuneration from Agra had he has given the correct notice.

[4] It is clear from the language used in the agreement that the terms of employment agreement are standard and applicable not only to the defendant alone but to all employees of Agra who had signed an agreement of employment with it. In this matter though, the defendant gave one day written notice to end both the agreement and employment relationship with the plaintiff contrary to clause 16. By failing to comply with the notice period provided in clause 16, the defendant was obliged to comply with clause 17 by paying the plaintiff on demand the amount the plaintiff is now claiming from him. This is mandatory as the word 'shall' not "may" was used in the clause.

[5] In his plea to the particulars of claim, the defendant, amongst others, pleaded that this court does not have jurisdiction to adjudicate on the matter. In addition, the defendant filed a counterclaim for overtime payment against the plaintiff. The issue of lack of jurisdiction by this court was repeated on 27 October 2020 at the start of the trial by Ms Celliers counsel for the defendant. Counsel raised lack of jurisdiction by the court in the form of a special plea which was opposed by Mr Kennedy Haraseb, counsel for the plaintiff. The defendant having raised jurisdiction as a special plea, I ordered counsel to address the court on the point first. It is only after the court has resolved the issue with regard to jurisdiction that the court would either proceed or not proceed with the trial of the case.

[6] As stated earlier, the defendant pleaded that the court does not have jurisdiction to adjudicate on the matter. By so pleading, the defendant challenged the competence of the court to entertain the matter. It is trite law that for the court to make a binding order, as is the position in *casu*, the court must have jurisdiction. A court cannot entertain a case and make orders when jurisdiction is put in issue by one of the litigants. If the court does, such orders would be null and void. It follows therefore, that the managing judge in this matter was required to first have resolved the issue of jurisdiction before conducting judicial case management proceedings in the case which

was not done. In that regard, the cart was put before the horse, the position which does not make sense because a cart cannot pull the horse.

[7] In the matter of *Haindongo v Khomas Regional Council and others*¹, referred to by Ms Celliers, it was stated that if the jurisdiction of this court, sitting as the High Court, was being challenged at the threshold, it would not be competent for this court to determine anything else without first deciding the issue of jurisdiction. Also in the matter of *Usakos Town Council v Jantjies & Others*² the court said the following:

'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 constitution (sic) and Section 16 of the High Court Act has been excluded by legislature in the clearest terms ...

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 before court.'

[8] It is clear from the above authorities relied upon by the defendant that the authorities do not support the defendant's contention that the High Court does not have competence to entertain and adjudicate on the matter. The defendant is alleging that the plaintiff sued him in a wrong court, the High Court, instead of the Labour Court. According to counsel, the Labour Act³ gives the Labour Court exclusive jurisdiction to hear disputes provided for in s 84 of the Act. However, s 117 does not state that the High Court has been precluded from hearing and making any determination on disputes mentioned in s 84.

[9] The claim of the plaintiff is in respect of damages in lieu of a required notice of resignation the defendant was supposed to give. Put differently, it is a claim of damages arising from a breach of an employment agreement by failure on the part of the defendant to comply with clause 16 of the agreement. In any event, s 84 of the Labour Act does not include damages as one of the issues to be resolved solely by the Labour Court.

[10] Section 84 (a) of the Labour Act, defines a dispute as a complaint relating to a breach of a contract of employment or a collective agreement. But there is nothing in

¹ Case No. 1 A364 /2008, delivered on 24 December 2008.

² Case No. 1 A222/2015 [2015] NAHCMD 225 (06 September 2015).

³ S 117 of the Labour Act 11 of 2007.

the section stating that the High Court is precluded from hearing a complaint relating to a breach of a contract of employment or a collective agreement.

[11] On his part, Mr Haraseb, counsel for the plaintiff argued that the plaintiff is claiming damages suffered as a result of short notice of termination of the agreement of employment and their employment relationship. Therefore, the plaintiff is correct to sue the defendant in the High Court, he said. Damages are not mentioned in s 86. In his book *Labour Law in Namibia*, on p 115 para. 6.3.3 titled “Damages”, Collins Parker authored that the Labour Act 2007 does not provide for the grant of damages. It follows therefore, that the Labour Court which draws its powers from the Act, does not have jurisdiction to adjudicate and determine a claim for damages. That being the case, the employer has to utilize his or her common law right to sue the employee for damages in the High Court.

[12] Section 16 of the High Court Act,⁴ grants the High Court jurisdiction over all persons residing or those finding themselves in Namibia and in relation to all causes arising from within Namibia, unless specifically excluded by legislation. Subsection (2) thereof provides that the High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder as well as jurisdiction to hear and adjudicate upon appeals from Lower Courts. This jurisdiction is generally referred to as inherent jurisdiction. Thus, to deny it its inherent power, an Act or legislation must expressly state that.

[13] In this instance, jurisdiction has not been ousted by section 86 of the Labour Act, expressly or by implication. As already indicated, section 84 defines a dispute to include a complaint relating to the breach of a contract of employment or a collective agreement. Similarly, s 86 also provides that a party to a dispute may refer the dispute in writing to the Labour Commissioner or any Labour office. Using the term may, the legislature intended to allow a complainant to a dispute mentioned in s 86 to choose a forum of his or her own choice. Subsection (15) thereof empowers the arbitrator to make an appropriate arbitration award and certain orders including an award of compensation but not an award for damages.

⁴ Act 16 of 1990.

[14] Section 16 (2) of the High Act above is couched in peremptory terms to emphasize the power this court has to hear and adjudicate upon all civil disputes and criminal prosecutions as long as the cause of action arose within the boundaries of the country; and over offences or crimes committed within by residents if not specifically excluded by legislation.

[15] Counsel for the plaintiff, Mr Haraseb referred to a Supreme Court judgment in the case of *Reinhold Hashetu Nghifoka v Classic Engines CC*⁵ wherein the Supreme Court dismissed with costs a point in *limine* raised against the decision of this court holding that this court has jurisdiction to hear and adjudicate upon a dispute of damages between Mr Nghifoka, an employee and Classic Engines an employer, in relation to a contract of employment. In the appeal, the appellant argued that the respondent was precluded from issuing summons in the High Court to recover damages related to a dispute arising from a contract of employment in terms of s 86 of the Labour Act and that the High Court has no jurisdiction to entertain such a claim.

[16] Dismissing the arguments O'Regan, AJA who wrote for the court disagreed and said the following.

[16] Section 84 of the Act defines 'dispute' to include 'a complaint relating to the breach of a contract of employment of a collective agreement.' Section 86 then provides that a party to a dispute *may* refer the dispute in writing to the Labour Commissioner or any labour office, which, in turn, may then be referred to conciliation as happened here.

[17] It appears that at no stage during the proceedings before the Labour Commissioner did the respondent raise the question of the contractual damages it had suffered. The Act does not expressly confer the power to determine contractual damages upon an arbitrator although s 86(15)(d) of the Act empowers an arbitrator to make 'an award of compensation' but does not expressly mention damages. The High Court judge, in his judgment in this matter, expressed the view that an arbitration tribunal acting in terms of s 85 of the Act has no power to determine claims based on damages arising from contracts of employment. It is not necessary for this court to determine that question here. It is only necessary for this court to determine the narrower question: assuming that the respondent could have raised its damages claim before the Labour Commissioner, was it compelled to do so?

⁵ Case No: SA 52/2012, delivered on 26 March 2014.

[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 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 *Fedlife 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.'

[17] Counsel for the appellant in that appeal, was at pains to convince the court to find in favour of his client. Counsel suggested that if the court were to apply the principle of fairness in the case, the court would prevent respondent from suing the appellant in the High Court because the matter has already been settled in proceedings under the Act. That suggestion was rejected by the court and held that the principle of fairness does not apply to the interest of one party only but to the interests of all parties to a dispute.

[18] Applying the legal principles laid in the case of *Nghikofa v Classic Engines supra* by in the High and Supreme Courts to the facts of the instant matter, and if regard is also had to the authorities referred to by counsel for the plaintiff in his written heads of argument, I agree with Mr Haraseb, counsel for plaintiff that by using the word "may", in s 86 of the Labour Act, the legislature's intention was not to exclude the High Court from assuming jurisdiction to entertain claims of disputes similar to the one in this case. If the intention of the legislature was to give exclusive jurisdiction to the Labour Court to the exclusion of the High Court to entertain these claims, the legislature would have say so in peremptory terms.

[19] In addition, the Labour Act does not empower the arbitrators to make awards for damages, arising from a breach of employment agreement or from an employment relationship. This is also an indication that the legislature intended to deny the arbitrator the power to entertain claims of damages in terms of the Labour Act. Once more, nothing was in the way of the legislature to give such power to the Labour Court to the exclusion of the High Court.

[20] Taking all the above into consideration and authorities cited in heads of argument by counsel, I am not persuaded by the defendant to uphold his special plea. He has failed to prove on a balance of probabilities that the Labour Act or any other law excluded this court (High Court) from adjudicating and determining the claim in the matter at hand. That said, I reject the argument that this court does not have jurisdiction to hear the matter and make the following order:

The special plea that the High Court does not have jurisdiction to hear the matter is dismissed with costs.

E P UNENGU
Acting Judge

APPEARANCES:

PLAINTIFF:

K Haraseb
ENSAFRICA I NAMIBIA
(Incorporated as Lorentz Angula Incl),
Windhoek.

DEFENDANTS:

C Cilliers
Erasmus & Associates
Windhoek