

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2020/01399

In the matter between:

NATIONAL DISABILITY COUNCIL OF NAMIBIA

PLAINTIFF

and

ADOLF H SHIPENA

DEFENDANT

Neutral citation: *National Disability Council of Namibia v Shipena* (HC-MD-CIV-ACT-DEL 2020/01399) [2022] NAHCMD 113 (15 March 2022)

Coram: TOMMASI J

Heard: 9, 10, 12 & 13 August 2021

Submissions: 19 October 2021

Delivered: 15 March 2022

Flynote: Tax – PAYE – agreement not to withhold and pay PAYE void in terms of Schedule 2, paragraph 7 Part 2 of Income Tax Act, 1981 (Act 34 of 1981) - liability of

employer for employee's tax when failing to withhold and pay employee's tax to the Receiver – If not absolved and employer's right of recovery set out in Schedule 2, paragraph 5, Part 2 in clear and unambiguous language – defendant to repay amount paid by employer to the Receiver.

Tax – section 91 – appointment of an agent – monies withheld in terms hereof must be paid to the receiver – allegation that monies were withheld but no allegation made that it was paid not valid reason for withholding unpaid leave and overtime worked.

Summary: The plaintiff employed the defendant and as such the plaintiff was required to pay employee's tax in terms of the provisions of the Income Tax Act, 1981 (Act 34 of 1981). The defendant addressed a letter to the plaintiff requesting for plaintiff not to withhold PAYE as he is registered as a provisional taxpayer. The plaintiff agreed and stopped deducting PAYE. Parties agreed that the defendant was an employee and received remuneration as defined in the Income Tax Act and the agreement not to withhold and pay over his employee's tax void in terms of Schedule 2, paragraph 7, Part 2 of the Income Tax Act. The Receiver of Revenue did not absolve the plaintiff and demanded payment from plaintiff. Plaintiff paid the capital amount, interest thereon and an additional amount claimed by the Receiver to be outstanding. The plaintiff now claims the repayment of the money it paid the Receiver on behalf of the plaintiff. The defendant denies that he is liable to repay the plaintiff in light of the fact that the agreement entered into is void and unenforceable. He furthermore claims that the statutory right of recovery contained in Schedule 2, paragraph 5, Part 2 of the Income Tax Act is flawed in that the plaintiff led no evidence establishing their right and such right can only be exercised by way of deduction from future remuneration in such manner as the Minister may determine.

The defendant instituted a counterclaim for damages as a result of a breach of employment contract, payment of unpaid leave and overtime. The court exercised its discretion to hear the counterclaim despite it being a matter which strictly speaking, ought to have been dealt with in terms of the provisions of the Labour Act 11 of 2007, as amended.

The parties entered into a settlement agreement which was made an Arbitrator's Award. In terms of the agreement the reinstatement of the defendant was made subject to the realignment of salaries. The defendant claims that the plaintiff breached the agreement by changing his paygrade from grade 5 to grade 6. He claims the difference in salary and benefits which was reduced by the changing of the grades. The court found that no breach of the agreement occurred and the claim of the defendant dismissed.

The plaintiff in terms of a Notice in terms of section 91 of the Income Tax Act withheld the defendant's payment of unpaid leave and overtime but failed to allege that same was paid over in terms of the directive received. Plaintiff's case was that all monies which was due was paid to the receiver. Plaintiff ordered to pay the amounts due for overtime and unpaid leave which was withheld and not paid to the receiver.

Held that the language of Schedule 2, paragraph 5, Part 2 of the Income Tax Act gives a clear right of recovery to the defendant and the second part thereof referred to by the defendant offers an additional right of recovery.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:

Claim 1

1.1 Payment in the sum of N\$334,622

1.2 Interest thereon at the rate of 20% from date of summons until date of payment in full;

- 1.3 Costs of suit, such costs to include the costs of one instructing and one instructed counsel.

Claim 2

- 1.4 Payment in the sum of N\$8553.06
- 1.5 Interest thereon at the rate of 20% from date of summons until date of payment in full;
- 1.6 Costs of suit, such costs to include the costs of one instructing and one instructed counsel.

2. In respect of the Defendant's counterclaim the following order is made:

- 2.1 Special Plea of Jurisdiction:

The plaintiff's special plea of jurisdiction is dismissed with costs

- 2.3 Claim 1:

The Defendant's claim is dismissed.

3. The court grants judgment in favour of the defendant against the plaintiff in the following terms:

Claim 2

- 3.1 Payment in the sum of N\$12062.96
- 3.2 Interest thereon at the rate of 20% per annum from date of Summons to date of final payment;
- 3.3 Cost of suit

Claim 3

- 3.4 Payment in the sum of N\$43,382.78;
- 3.5 Interest thereon at the rate of 20% per annum from date of Summons to date of final payment;

3.6 Cost of suit

JUDGMENT

TOMMASI J:

[1] The plaintiff's case is for the recovery of PAYE tax paid to the Receiver of Revenue on behalf of the Defendant. The defendant defends the action and instituted a counterclaim.

Introduction

[2] The plaintiff employed the defendant and as such the plaintiff was required to pay employee's tax in terms of the provisions of the Income Tax Act, 1981 (Act 34 of 1981) (Income Tax Act). The plaintiff failed to deduct the employee's tax from the defendant's monthly salary and failed to pay it over the Receiver of Revenue on a monthly basis. The Receiver of Revenue demanded payment from plaintiff and it was obliged to comply. The plaintiff now claims the repayment of the money it paid the Receiver on behalf of the defendant.

[3] The plaintiff and the defendant entered into an agreement in terms of which the plaintiff agreed not to deduct employee's tax, as defined in the Income Tax Act, from the defendant's monthly salary. The plaintiff agreed to pay him his full salary as the defendant undertook to continue paying his tax as a provisional taxpayer. The defendant did not pay over the income tax and/or provisional tax to the receiver. As it turns out, this agreement between the parties was in contravention of the Income Tax Act.

[4] The defendant was an employee as defined by the Income Tax Act and the salary he received is defined as remuneration by the Act. The plaintiff is defined as an

employer by the Act. The Receiver of Revenue informed the plaintiff that it was at all times liable for withholding the defendant's PAYE deductions in terms of paragraph 5 of Schedule 2 of the Act and by failing to do so, the plaintiff failed to comply with the Act. The Receiver furthermore informed the plaintiff that the defendant's employee tax for the years 2016, 2017 and 2018 was outstanding. The plaintiff avers that the Minister did not absolve the plaintiff as contemplated in paragraph 5(3) of Part 2 of schedule 2 of the Act.

[5] The plaintiff made the payment to the Receiver on 7 December 2018 in the amount of N\$334, 622 which amount included the defendant's outstanding capital tax and interest thereon. The penalty was waived.

First Claim

[6] According to the plaintiff, it has a right of recovery against the defendant in terms of paragraph 5(3) of Part 2 of Schedule 2 of the Act. The plaintiff claims that, in the premises, the defendant is liable to pay the plaintiff the amount of N\$334 622. In light of the conclusion reached herein it would not be necessary to deal with the alternative claims.

Claim 2

[7] The plaintiff, in addition to the amount paid, the Receiver further required of the plaintiff to pay the amount of N\$8 553.06 which was still outstanding for unpaid taxes, interest and or penalties in respect of this matter which is due and payable by Plaintiff to the Receiver and which amount is recoverable from the defendant.

The defence

[8] The defendant denies that he entered into an agreement with the plaintiff and states that he addressed a letter to the plaintiff wherein he requested to pay tax as a

provisional tax payer because he was a registered tax payer since 2011. To this extent he denies that there was no tax arrangement with the Receiver. He maintained that he was allowed to pay tax twice a year in the months of February and August from 2012.

[9] The defendant agrees that the arrangement in which the Plaintiff agrees not to deduct or withhold employee's tax is void as it is in contravention of the Act. He pleaded that the common law principle of *ex turpi causa non oritur actio* finds application.

[10] The defendant denies that he made false representations as he is in fact registered as a provisional taxpayer.

The defendant's counterclaim

Claim 1

[11] The defendant claims that he was employed as an Accountant Grade 5. The defendant further claims that the plaintiff unfairly dismissed him sometime in 2017. The parties reached a settlement in which the plaintiff undertook to reinstate him. This agreement was made an arbitration award. He further claims that the plaintiff unilaterally reduced his grading from Grade 5 to Grade 6 without his consent. The plaintiff is therefore liable to pay him the amount of N\$271 661.04.

Claim 2

[12] According to the defendant, during his employment with the defendant he worked 40 hours overtime, such overtime was pre-approved by the plaintiff, and that the plaintiff is therefore liable to pay him the amount of N\$12 062.96.

Claim 3

[13] The defendant “vacated” his employment at the plaintiff during March 2019. He had 27 unpaid leave days owed to him and the plaintiff is thus liable to pay him in the amount of N\$43 382.78 for unpaid leave.

The plaintiff’s defence to counterclaim

Special Plea

[14] The plaintiff raised a special plea. The plaintiff submitted that the claims stem from an employment relationship and that the type of disputes raised by the defendant are those contemplated in chapter 3 of the Labour Act, 11 of 2007. Plaintiff submits that section 38 (3) of the labour act is peremptory and that the type of dispute raised by the defendant must be referred to an arbitrator to be resolved through arbitration in accordance with Part C of Chapter 8 of the Labour Act. The plaintiff pleaded that the disputes raised are disputes as defined in section 84(d) of the Labour Act and are disputes that are required to be referred to arbitration in terms of the act. The arbitration tribunal’s jurisdiction is set out in section 85 (a) and (2) of the Labour Act. It is a specialist body established *ex lege* to deal with labour matters and the High Court of Namibia will not readily assume jurisdiction. The plaintiff submitted that it would not be convenient for the court to assume jurisdiction and the plaintiff prays that the defendant’s counterclaim be struck from the roll.

[15] The plaintiff pleads that the defendant was never permanently employed during the period February 2015 – 2017. He was employed in terms of fixed term contracts. The Settlement Agreement does not provide for reinstatement as a Grade 5 employee. The defendant was reinstated as a permanent employee and no longer as a fixed term Grade 5 employee.

[16] The plaintiff’s response to the claim for overtime and unpaid leave is that it received a letter from Inland Revenue requesting/instructing it to withhold all severance pay and/or leave days and/or overtime due to the defendant.

Special Plea - Jurisdiction of the court

[17] The court was asked to determine whether it should exercise its discretion in favour of the defendant and to adjudicate the counterclaim despite the fact that the defendant's claim stems from an employment contract. The defendant referred this court to *Nghikofa v Classic Engines CC*¹. The headnote reads as follow:

'There is nothing in the Labour Act 11 of 2007 that expressly purports to exclude the jurisdiction of the high court in relation to damages claims arising from contracts of employment. Indeed, 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.'

I found the cited authority persuasive and decided to consider the defendant's counterclaim alongside that the plaintiff's main claim. The ruling was handed down before the commencement of the Defendant's case.

Evidence of the Plaintiff

[18] The plaintiff called Meliherius Haukambe, the former Acting director of the Plaintiff and Jessica Gawachab, the Plaintiff's head of legal compliance to testify. The salient points of their testimonies will be summarised below.

[19] Mr Haukambe testified that he was appointed during August 2015. The defendant was working for the plaintiff on a fixed term contract as an Accountant which was extended from time to time. During February 2016 he noticed that there was no tax deducted from the defendant's salary since April 2015. He learnt that the defendant informed a staff member that he was a provisional tax payer and no PAYE must be deducted for this reason. He received a letter from the Receiver confirming that it had

¹ *Nghikofa v Classic Engines CC* 2014 (2) NR 314 (SC) at 318G-H.- This case was cited with approval in a recent Supreme Court case, *Masule v Prime Minister of the Republic of Namibia and Others*, SA 89/2020 delivered on 4 February 2022.

no payment arrangement with the defendant and that the plaintiff was obliged to withhold the defendant's PAYE and to pay it over to the Receiver of Revenue. The Receiver confirmed that it had not received payments for the years 2016, 2017 and 2018. He was informed of the outstanding amounts due for the period before his employment and the period during his employment with the plaintiff together with interest and penalties. He confirmed that the Minister of Finance did not absolve the plaintiff and the plaintiff thus has a right to recover the amount from the defendant in terms of paragraph 5 (3) of Part 2 of Schedule 2 of the Income Tax Act. He confirmed the amounts due in terms of claim 1 and 2 of the plaintiff's particulars of claim.

Defence to first counterclaim

[20] Mr Haukambe mentioned that the defendant was reinstated in terms of a settlement agreement and paragraph 3 thereof stipulates that the plaintiff had gone through a realignment exercise where it realigned all of its salaries to that of the salaries (of equivalent positions) within the Public/Government Office and further that the reinstatement is subject to the salaries of the reinstated employees being so realigned as from 1 September 2017. He described the procedure and testified that all employees including the defendant consented hereto. The counsel for the defendant put it to this witness that there was no restructuring and there was no directive regarding the realignment, Mr Haukambe insisted that it took place.

Defence to 2nd and 3rd counterclaim

[21] Mr Haukambe referred to correspondence received from Inland Revenue advising that the plaintiff has been declared and/or appointed an Agent for the defendant in terms of section 91 of the Act. The plaintiff was thus required to withhold N\$5000 per month from the plaintiff's salary and any other income and to pay it over to the Receiver of Revenue. It is for this reason that they withheld the outstanding leave and overtime payment.

[22] Ms Gawachab by and large confirmed the testimony of Mr Haukambe. She highlighted that the N\$5000 deductions were made in respect of money owed by the defendant in his personal capacity prior to being employed by the Plaintiff.

The Defendant's Evidence

Defence to Plaintiff's claim

[23] The defendant testified that he was registered as a provisional tax payer and provided proof to support this averment. He does not deny that he wrote a letter to the plaintiff on 15 April 2015 to bring it to the plaintiff's attention that he was a provisional taxpayer and therefore eligible to pay taxes twice annually. He therefore sought to be exempted from the Plaintiff's tax deductions on his salary. It was not his intention to mislead the plaintiff and his averment that he was a provisional taxpayer was not false.

[24] The defendant testified that he was employed by the plaintiff on a fixed short term basis and he was not a permanent employee. There was no guarantee that his contract would be renewed and he found it unnecessary to disrupt his tax payment schedule for "a piece of temporary employment". He held the view that it was going to be prejudicial and inconvenient for him to pay PAYE monthly for the few months he was employed by the plaintiff and at the same time paying provisional tax twice a year.

[25] During the period 2013 – 2015 he was operating as a sole proprietor in the building industry. Due to the deterioration in the industry he could not pay the income taxes. He was not wilful in not paying his taxes but his income was overwrought.

[26] He testified that his agreement with the plaintiff is in any event tainted with illegality as it is in contravention with paragraph 7 of Part 2 of Schedule 2 of the Income Tax Act.

Evidence on Counterclaim

[27] The defendant testified that he was dismissed by the plaintiff during 2017 and the matter was referred to the Labour Commissioner. The parties eventually entered into a settlement agreement in terms of which the plaintiff undertook to reinstate him in the same role as he was in prior to his dismissal in which he earned a grade 5 salary (N\$ 33 333.42). This agreement was made an arbitration award. The plaintiff however breached this agreement and paid him a Grade 6 salary (N\$27 344.92). His housing benefits, pension benefits and the 13th cheque were also reduced as a collateral consequence. He gave some calculations which are contained in a document which he introduced into evidence.

[28] The defendant further testified that plaintiff's management approved his request to work overtime and he worked 40 hours overtime. The plaintiff refused to compensate him for his overtime in the sum of N\$12 062.01.

[29] Defendant testified that at the end of March 2019 he "vacated" his employment, and there was still 27.1 unpaid leave days owed to him. He pointed out that this can be seen on his last payslip.

Discussion

[30] The following facts are not disputed. The defendant was first employed by the plaintiff in terms of a contract which provides that he would be employed from 2 February 2015 until January 2016. The defendant was employed on a salary scale of N\$25,216.33 (pay grade 5). The defendant wrote a letter to the Administrator of the Human Resources informing him that he has been registered as a provisional taxpayer since 2011 and that he is allowed by the Receiver of Revenue to pay tax twice a year (March and August each year). He requested the administrator to pay him his full monthly cost to company without taxing it. The plaintiff acceded to his request and stopped deducting or withholding tax with effect from end of April 2015.

[31] The contract was extended several times. The last extension occurred on 29 June 2017 and the defendant was informed that the contract would automatically terminate on the last day of the contract period i.e. September 2017. No Tax was deducted from the defendant's salary during the period 25 April 2015 – September 2017

[32] The defendant challenged the termination and lodged a complaint with the office of the Labour Commissioner. The parties reached a Settlement and it appears therefrom that the defendant received "backpay" for the period October 2017 – 15 March 2018. The salary advice dated 31 March 2018 reflects that PAYE was deducted in the sum of N\$74,367.52 for this period. The PAYE was thereafter deducted on a monthly basis. The plaintiff deducted a further amount for additional tax in the sum of N\$5000.00 monthly from November 2018.

[33] The period in dispute is clearly from April 2015 – September 2017. The plaintiff was informed by the Minister of Finance, Department Inland Revenue that the amount due in respect of the Tax Capital was N\$260,662 and the interest thereon was calculated at N\$73,960. Whilst the defendant disputed the document, it was not disputed that a total sum of N\$334,622 was paid by Plaintiff to the Receiver of Revenue on 7 December 2018. It was further not disputed that the penalties in the sum of N\$567 644 was waived by the Ministry of Finance. The documentary evidence show that the Minister, in writing and on 5 October 2018, appointed the plaintiff as agent in terms of section 91 of the Income Tax Act and instructed the plaintiff to deduct the amount of N\$5000.00 monthly from the salary of the defendant commencing 30 November 2018 and to, in the event of the taxpayer leaving the employment the deduction by instalments will fall away and the full amount still owing must be deducted from whatever moneys due to him and, if same is not sufficient to cover his indebtedness, it must be paid in full to the Receiver of Revenue.

[34] The defendant holds two degrees both with a background in accounting. He therefore conceded that he was an employee, the plaintiff was an employer and that he received remuneration as defined in Schedule 2, Part 1 of the Income Tax Act.

[35] The Income Tax Act further defines employee's tax as the tax required to be deducted or withheld by an employer in terms of paragraph 2 from remuneration paid or payable to an employee. Paragraph 2 (1) of Schedule 2, Part 2 provides as follows:

'Every employer (whether or not registered as an employer under paragraph 15) who pays or become liable to any amount by way of remuneration to any employee shall, unless the Minister has granted authority to the contrary, deduct or withhold from that amount by way of employees' tax an amount which shall be determined as provided in paragraph 9, 10, 11 or 12, whichever is applicable, in respect of the liability for normal tax of that employee and shall pay the amount so deducted or withheld to the Minister within 20 days after the end of the month during which the amount was deducted or withheld, or in the case of a person who ceases to be an employer before the end of such month, within 20 days after the day on which such person ceased to be an employer, or in either case within such further period as the Minister may approve.'

[36] There exists a clear liability on the plaintiff to withhold tax from the remuneration of the defendant and to pay same over to the Minister. Paragraph 5 (1) provides that any employer who fails to deduct or withhold the full amount of employees' tax shall be personally liable for the payment to the Minister of the amount which he fails to deduct or withhold.

[37] The plaintiff clearly did not take into consideration the definitions and the provisions referred to above when it decided to accede to the Defendant's request. Both parties were ad idem that the agreement which came into being is contrary to these provisions and consequently null and void. Paragraph 7 of Part 2 in fact provides that any agreement between an employer and an employee whereby the employer undertakes not to deduct or withhold employees' tax shall be void.

[38] An employer whose failure is not due to intent to postpone payment of tax or to evade the employer's obligations is not left without any remedy. Paragraph 5 (2) of Part 2 of Schedule 2 of the Act provides for the Minister to absolve the employer from his liability if there is a reasonable prospect of ultimately recovering the tax from the employee; and if an employer is not absolved from his liability, the employer shall have the right of recovery in respect of the amount paid by the employer in respect of that employee, and such amount may in addition to any other right of recovery be deducted from future remuneration which may become payable by the employer to that employee, in such manner as the Minister may determine. (See paragraph 5 (3) of the Act).

[39] Mr Jones, counsel for the plaintiff, argues that the indisputable facts support a conclusion that the plaintiff has a statutory right of recovery against the defendant in respect of the amount of N\$334 622. He further submitted that the Receiver of Revenue actively pursued payment for the outstanding tax penalties and interest from the plaintiff and did not absolve the plaintiff from paying the amount. He submitted that the language of paragraph 5 (3) of Part 2 of Schedule 2 unequivocally gives the plaintiff a statutory cause of action.

[40] For the sake of completeness I shall include the submissions by Mr Bangamwabo, counsel for the defendant on the main and alternative claims. Mr Bangamwabo submitted that the plaintiff's claim is based on a partly written and partly oral agreement in terms whereof the plaintiff agreed not to withhold the defendant's tax as well as on the plaintiff's right to recovery as envisaged under paragraph 5(3) of part 2 of schedule 2 of the Income Tax Act. He argues that, since it is common cause that the agreement is null and void, there is no liability that can be attached to defendant based on this agreement. The statutory right of recovery, he submitted is flawed in that the plaintiff failed to lead any evidence establishing their right to recover the money paid to the Receiver of Revenue. He submitted the clear wording of Paragraph 5(3) of Part 2 of Schedule 2 can only be exercised by way of deduction from "future remuneration which may become payable by the employer to that employee, in such manner as the Minister

may determine. He submitted that there is no evidence which proves the plaintiff's claim is compliant with the two components.

[41] He further submits that there was no evidence adduced that the plaintiff applied to be absolved in terms of section 5(3) of Part 2 of Schedule 2 of the Act and that the instructions contained in Exhibit O are self-serving and unhelpful to its claim.

[42] Mr Bangamwabo further argued that the plaintiff cannot circumvent the enforceability of a void contract by pursuing an alternative claim based on unjustified enrichment referring to, *Moolman and Another v Jeandre Development CC 2016 (2) NR 322 (SC)*, *Schweiger v Müller 2013 (1) NR 87 (SC)*, *Kondjeni Nkandi Architects and Another v Namibian Airports Company Ltd 2016 (1) NR 223 (HC)* and *Ferrari v Ruch 1994 NR 287 (SC)*.

[43] In respect of claim 2, Mr Bangamwabo submitted that the same arguments as in claim 1 are applicable and that there was no single documentary evidence adduced to prove that the plaintiff made the payment in the amount of N\$8553.06. He encouraged the court in the event that this case warrants a relaxation of the *pari delicto* rule, that the defendant only be held liable to pay the capital amount and that the court consider that the amount of N\$74 367.52, which was deducted for the period October 2017 to February 2018, be deducted from the capital amount if the *pari delicto* rule is to be relaxed.

[44] The first main claim of the plaintiff is not based on the contract as it is acknowledged that it is void. The sole cause of action is the plaintiff's right of recovery in terms of paragraph 5 (3) of part 2 of Schedule 2 of the Income Tax Act. The defendant's argument raised that the plaintiff was only entitled to claim such an amount must be deducted from future remuneration was not pleaded. The onus however is on the plaintiff to show that it is entitled in terms of the statute to recover the amount which it paid to the receiver in terms of paragraph 5 (3) of part 2 of Schedule 2. Much was made by the defendant of the fact that the plaintiff ought to have applied to be absolved. Again

this issue was not pleaded and the defendant in any event relies on Paragraph 5 (3) to substantiate his argument that the plaintiff is not provided the right to recover the current claim against the defendant. In the absence of anything gainsaying the averment by the plaintiff, it is accepted that it was not absolved and that paragraph 5 (3) finds application.

[45] The provisions of paragraph 5 (3) are clear. It provides that an employer who has not been absolved from liability as provided in subparagraph (2) shall have a right of recovery against the employee in respect of the amount paid by the employer in terms of subparagraph (1) in respect of that employee, and such amount may in addition to any other right of recovery be deducted from future remuneration which may become payable by the employer to that employee, in such manner as the Minister may determine. Mr Bangamwabo focuses on the latter section of the said provision which provides an additional right of recovery from future remuneration which may become payable.

[46] In the above premises, I conclude that the plaintiff has made out a case that it has a right of recovery under paragraph 5 (3) and is entitled to claim all of the amount it paid to the Receiver of Revenue in the sum of N\$334,622. The defendant's submission that the amount which was paid for the period of October 2017 – February 2018 ought to be deducted from the amount paid, will not be dealt with because; the issue was not pleaded and it was not placed in issue at the pre-trial stage. There is no ground upon which the court can therefore make an order in this regard.

Claim 2

[47] The claim is that the Receiver of Revenue communicated to the plaintiff that an amount of N\$8553.06 was still outstanding. To support this claim, the plaintiff annexed a print-out received from the Receiver of Revenue reflecting the balance due as N\$8553.06. The defendant in its plea merely indicated that the contents hereof are noted. The authenticity of the document was not challenged nor was the missive dated

5 October 2018 wherein the plaintiff was appointed as an agent in terms of Section 91 of the Income Tax Act. These two documents establish the fact that the plaintiff remains liable to deduct any amount from monies (salary or any other income) due to the defendant. Mr Haukambe testified that this moneys was paid and I have no reason to disbelieve his evidence in this regard. In the premises the plaintiff discharged the onus to prove, on a balance of probability that this amount is due and it may equally be recovered from the Defendant.

Defendant's Counter claim

[48] Mr Bangamwabo submitted that the defendant proved that he earned a Grade 6 salary in the amount of N\$27 344.92 after his reinstatement instead of the grade 5 salary in the amount of N\$33 333.42 he was paid prior to his unlawful dismissal. He submitted that as a result of the unlawful breach the defendant was entitled to the difference as well as the consequential reductions of the benefits ancillary to pay grade 5 such as housing benefits, pension contributions and the 13th cheque. Mr Bangamwabo submits that there was no such re-alignment as alleged by Mr Haukambe who did not tender any evidence of such an exercise. He further submits that a case has been made out for overtime and unpaid leave which was not disputed. He submitted that if plaintiff paid the overtime and unpaid leave days to the Receiver of Revenue, it must be deducted from the capital taxes owned by the defendant if the court is to relax the *in pari delicto* rule.

[49] The defendant maintained that the plaintiff breached the settlement agreement entered into between the parties. I accept as common cause that the defendant was employed as an Accountant at Grade 5 salary level. I shall also accept that the defendant's position was changed to a Grade 6 level after his reinstatement. The question for determination is whether plaintiff breached the agreement when doing so.

[50] The plaintiff relies on paragraph 3 of the Settlement Agreement which reads as follows:

'All parties record, briefly and for context, that the applicants were on fixed term contracts of employment, which contracts were not renewed because the respondent had gone through a realignment exercise where it realigned all of its salaries to that of the salaries (of equivalent positions) with a public/ government office. The reinstatement is subject to the salaries of the reinstated employees being so realigned as from 1 September 2017.' [my underlining].

[51] The plaintiff's evidence was that the defendant was reinstated in terms of the Settlement Agreement which provides that the reinstatement is subject to the salaries of the reinstated employee being realigned as from 1 September 2017. Mr Jones, referring to *Mbambus v Motor Vehicle Accident Fund 2015 (3) NR 605 (SC)* submitted that once a *transactio* had been concluded that would be the end of the matter. Its effect would be the same as *res judicata* on a judgment given by consent and neither party would have any cause of action thereafter on the same facts, unless the right to rely thereon was reserved. Mr Haukambe explained that the exercise of realignment was an exercise to realign the remuneration of their employees to that of the Public Service Sector. The defendant flatly denied the existence of such an exercise.

[52] The Settlement Agreement clearly indicates that the plaintiff had gone through a realignment exercise where it realigned all of its salaries to that of the salaries (of equivalent positions) with a public/ government office. This corroborates the testimony of Mr Haukambe in respect of the existence of such an exercise. The defendant offers no valid explanation for the fact that he acceded to an agreement in terms whereof his salary was clearly to be affected. A further factor is the fact that he failed to lodge a complaint with the Labour Commissioner after receiving his first salary. The change in salary was thus in accordance with the Settlement Agreement and no breach thereof has been proven on a balance of probability. The defendant's claim for damages therefore stands to be dismissed.

[53] The defendant's claims for the overtime and unpaid leave pay were properly proven with the necessary supporting documents and it was in essence not disputed by

the plaintiff. The plaintiff maintained that it was entitled to withhold same in terms of a directive received from the Ministry of Finance. The directive referred to is dated 5 October 2018 it appoints the plaintiff as an agent in terms of section 91 of Income Tax Act. The terms thereof are referred to above. Mr Haukambe testified that the amount claimed in respect of claim 2 was outstanding and he paid it to the Receiver of Revenue. He understood the instruction from the Receiver of Revenue was to retain all accrued income and to pay this over to the Receiver of Revenue. There is however no evidence that these amounts which the plaintiff withheld in respect of unpaid leave and overtime, were paid to the Receiver of Revenue. One would expect that the plaintiff would make such an allegation that it was indeed paid to the Receiver but he merely states that it was withheld. The instruction is to withhold and to pay to the receiver in full. The evidence supports a conclusion that the monies were withheld but not paid to the receiver. It is in fact the Plaintiff's case that all amounts due to the Receiver was paid. In light hereof the plaintiff is obliged to pay the monies the defendant claimed for overtime worked and unpaid leave days to the defendant.

Costs

[54] The plaintiff submitted this court should award punitive costs on a scale of attorney and client as the defendant's defence was dilatory and not *bona fide*. The plaintiff however prays in his particulars of claim for costs of suit, such costs to include the costs of one instructing and one instructed counsel and the defendant was not advised that such a cost order would be sought. The costs order claimed in the pleadings would therefore be the appropriate order under the circumstances.

[55] The defendant however successfully resisted the special plea of jurisdiction and is entitled to costs. The defendant was partially successful in respect of his counterclaim and there is no reason why cost should not be awarded in his favour in respect of the counterclaim.

[56] In the result the following order is made:

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:

Claim 1

- 1.1 Payment in the sum of N\$334,622
- 1.2 Interest thereon at the rate of 20% from date of summons until date of payment in full;
- 1.3 Costs of suit, such costs to include the costs of one instructing and one instructed counsel.

Claim 2

- 1.4 Payment in the sum of N\$8553.06
- 1.5 Interest thereon at the rate of 20% from date of summons until date of payment in full;
- 1.6 Costs of suit, such costs to include the costs of one instructing and one instructed counsel.

2. In respect of the Defendant's counterclaim the following order is made:

- 2.1 Special Plea of Jurisdiction
- 2.2 The plaintiff's special plea of jurisdiction is dismissed with costs
- 2.3 Claim 1:
The Defendant's claim is dismissed.

3. The court grants judgment in favour of the defendant against the plaintiff in the following terms:

Claim 2

- 3.1 Payment in the sum of N\$12062.96

3.2 Interest thereon at the rate of 20% per annum from date of Summons to date of final payment;

3.3 Cost of suit

Claim 3

3.4 Payment in the sum of N\$43,382.78;

3.5 Interest thereon at the rate of 20% per annum from date of Summons to date of final payment;

3.6 Cost of suit

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF: JP Jones
 Instructed by Köpplinger Boltman
 Windhoek

DEFENDANT: F Bangamwabo
 of F.B. Law Chambers
 Windhoek