

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON SPECIAL PLEAS

Case no.: HC-MD-CIV-ACT-OTH-2022/04992

In the matter between:

FRANKLIN JOSEPH IZAKS

PLAINTIFF

and

CITY OF WINDHOEK

DEFENDANT

Neutral citation: *Izaks v City of Windhoek* (HC-MD-CIV-ACT-OTH-2022/04992)
[2023] NAHCMD 583 (21 September 2023)

Coram: SIBEYA J

Heard: 11 September 2023

Delivered: 21 September 2023

Flynote: Civil Procedure – Special pleas – Lack of jurisdiction, *res judicata* and prescription – Labour Court is a division of the High Court created by art 78(1)(c) of the Constitution – Labour Court Act 11 of 2007 – Prescription Act 68 of 1969 – The

importance of admissible evidence, or established facts properly placed before court to efficiently determine special pleas.

Summary: The court was seized with three special pleas, namely: lack of jurisdiction, *res judicata* and prescription. The plaintiff being in the employ of the defendant was dismissed owing his unauthorised absence from work for a period exceeding two days. The plaintiff lodged a complaint with the District Labour Court where it was found that the dismissal was both procedurally and substantively unfair, and dismissal was set aside.

The defendant contended that this is a labour matter which falls only within the jurisdiction of the Labour Court established in terms of s 115 of the Labour Act, and that this court, therefore, lacks jurisdiction.

Held: that the finding in *Masule v Prime Minister of the Republic of Namibia and Others* 2022 (1) NR 10 (SC) that the Labour Court is but a division of the High Court, negates the contention by the defendant that this court lacks the necessary jurisdiction to adjudicate this matter. On the strength of *Masule*, the court found that it has jurisdiction to adjudicate this matter, and as a matter of consequence, the special plea of lack of jurisdiction lacks merit.

Held that: the absence of admissible evidence, or established facts properly placed before court, deprived the court of an opportunity to properly adjudicate the matter. The failure by the defendant to establish facts or lead admissible evidence on which the special pleas are based, is fatal to the special pleas of *res judicata* and prescription raised, and on this basis, the special pleas of *res judicata* and prescription must fail.

The defendant's special pleas are dismissed.

ORDER

1. The defendant's special pleas of lack of jurisdiction, *res judicata* and prescription, are dismissed.
2. The defendant must pay the plaintiff's costs for opposing the special pleas.
3. The parties must file a joint case management report on or before 2 October 2023.
4. The matter is postponed to 5 October 2023 at 08h30 for a case management conference hearing.

RULING

SIBEYA J:

Introduction

[1] To state that the dust refuses to settle in this matter is an understatement.

[2] The court is seized with three special pleas raised by the defendant, namely: lack of jurisdiction, *res judicata* and prescription. The defendant contends that the court lacks the necessary jurisdiction to entertain the matter due to the fact that the plaintiff's claim relates to an order that was delivered by the then District Labour Court and, therefore, only competent to be adjudicated upon by the Labour Court.

[3] The defendant further contends that the plaintiff's claim of reduction in salary and compensation was adjudicated on by the arbitrator and finalised. No appeal was lodged thereto. The matter had, therefore, been adjudicated to finality, contends the defendant. In respect of prescription, the defendant alleges that the plaintiff lodged a complaint with the Office of the Labour Commissioner about eight years after the dispute arose. The

defendant contends that as a result, the plaintiff's claim lapsed for not being instituted within a period of one year after the dispute. The special pleas are opposed.

The parties and their representation

[4] The plaintiff is Mr Franklin Joseph Izaks, an adult male, resident of Windhoek and employee of the defendant.

[5] The defendant is the City of Windhoek, a local authority established as such in terms of the Local Authorities Act 23 of 1992, with its principal place of business situated at the cnr of Garden and Independence Avenue, Windhoek.

[6] Mr Comalie appears for the plaintiff while Mr Ikanga appears for the defendant.

Background

[7] In 2006, the plaintiff who was employed by the defendant as a Senior Emergency Officer, lodged a complaint of unfair dismissal in the then District Labour Court against the defendant. This resulted from a charge of unauthorised absence from work for a period exceeding two working days, without a medical certificate or reasonable excuse. The particulars of the charge revealed that the plaintiff was absent from work without permission from 3 to 11 September 2005. The disciplinary committee found the plaintiff guilty of absenteeism and recommended that he be demoted to a Junior Emergency Officer.

[8] The Head of City Police and Emergency Services, however, recommended to the Chief Executive Officer that the plaintiff be dismissed from employment. On 16 May 2006, the Chief Executive Officer dismissed the plaintiff. The plaintiff appealed to the Council of the defendant. The Council referred the matter to the management committee to investigate and to report back. In the interim, the plaintiff withdrew his appeal and lodged a complaint with the District Labour Court on 6 July 2006.

[9] In determining whether there was a valid and fair reason for the dismissal, the District Labour Court on 27 March 2007, found that the dismissal was both procedurally and substantively unfair, and set aside the dismissal. The court further ordered that the plaintiff be reinstated with effect from 1 April 2007, and that he should be compensated for loss of income from date of dismissal to date of reinstatement. The court further confirmed the decision of the disciplinary committee that the plaintiff be demoted to the position of Junior Emergency Officer.

[10] The plaintiff was reinstated to the position of Junior Emergency Officer on 1 April 2007. The plaintiff alleges that the defendant violated the court order of 27 March 2007, by failure to compensate him as ordered. It is further alleged that the defendant failed to pay the plaintiff his remuneration, which remained unaffected by his demotion in position.

[11] On 19 October 2016, the plaintiff launched a complaint of unfair labour practice with the Office of the Labour Commissioner. The ruling delivered by the arbitrator on 20 April 2017, found that the complaint of unfair labour practice was filed after the allowed period of one year after the dispute arose, and that such period had lapsed in terms of s 86(2)(b) of the Labour Act 11 of 2007 (the Labour Act).

Lack of jurisdiction

[12] As alluded to above, the defendant contends that this court lacks the necessary jurisdiction to adjudicate this matter as the plaintiff's claim relates to an order of the District Labour Court. It was argued by Mr Ikanga that this is a labour matter which falls only within the jurisdiction of the Labour Court established in terms of s 115 of the Labour Act, and this court, therefore, lacks jurisdiction.

[13] Mr Comalie argued contrariwise. He stated that the debt on which the plaintiff instituted proceedings is a judgment debt which prescribes after 30 years, as per s 11(a)(ii) of the Prescription Act 68 of 1969. He argued that the High Court and the

Labour Court have concurrent jurisdiction and called for the special plea of lack of jurisdiction to be dismissed.

[14] I accept on a *prima facie* basis that the plaintiff seeks to enforce a judgment debt of the then District Labour Court. It is an order made in the realm of the Labour Act. Does this court have the jurisdiction to adjudicate the matter or can this matter be adjudicated upon by the Labour Court only?

[15] There were several contradictory decisions from this court regarding the exclusive jurisdiction of the Labour Court in labour matters. In *Haindongo Shikwetepo v Khomas Regional Council & others*,¹ *Usakos Town Council v Jantze and others*,² and *Katjuuanjo and others v Municipality of Windhoek*,³ this court, differently constituted, concluded that the Labour Act created a Labour Court with exclusive jurisdiction in labour matters. These issues have been settled by the Supreme Court in *Masule v Prime Minister of the Republic of Namibia and Others*.⁴

[16] Section 117(1) of the Labour Act reads that:

‘(1) The Labour Court has exclusive jurisdiction to -

(a) determine appeals from -

- (i) decisions of the Labour Commissioner made in terms of this Act;
- (ii) arbitration tribunals’ awards, in terms of section 89; and Republic of Namibia 93 Annotated Statutes Labour Act 11 of 2007
- (iii) compliance orders issued in terms of section 126.

¹ *Haindongo Shikwetepo v Khomas Regional Council & others* Case No.: A 364/2008, delivered on 24 December 2008.

² *Usakos Town Council v Jantze and others* 2016 (1) NR 240 (HC).

³ *Katjuuanjo and others v Municipality of Windhoek* (I 2987/2013) [2014] NAHCMD 311 (21 October 2014).

⁴ *Masule v Prime Minister of the Republic of Namibia and Others* 2022 (1) NR 10 (SC).

- (b) review -
 - (i) arbitration tribunals' awards in terms of this Act; and
 - (ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of -
 - (aa) this Act; or
 - (bb) any other Act relating to labour or employment for which the Minister is responsible;
- (c) review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;
- (d) 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;
- (e) to grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8;
- (f) to grant an order to enforce an arbitration agreement;
- (g) determine any other matter which it is empowered to hear and determine in terms of this Act;
- (h) make an order which the circumstances may require in order to give effect to the objects of this Act;
- (i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.

(2) The Labour Court may -

- (a) refer any dispute contemplated in subsection (1)(c) or (d) to the Labour Commissioner for conciliation in terms of Part C of Chapter 8; or
- (b) request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.'

[17] The Supreme Court in *Masule*,⁵ found that it is a misconception to conclude that s 115 and 117(1)(i) of the Labour Act have the effect that the Labour Court, created in s 115 of the Labour Act, is a court other than a court contemplated by art 78(1)(b) of the Namibian Constitution. The Supreme Court remarked further that:

'[47] The Labour Court, just like the other divisions, is a division of the High Court established by art 78(1)(b), read with art 80 of the Constitution. It is not a court separate or independent from the High Court created by the Constitution. The procedures that the division uses and the scope of remedies that it can grant, are determined by the legislation that creates the division. Those procedures and remedies are the litigants' first point of call and make them subject to the limits they impose. That is the constitutional principle of subsidiarity.

[48] A judge of the High Court faced with a dispute which is governed by the Labour Act is required by the principle of subsidiarity to apply the procedures set out under the Labour Act and the rules made by the Judge President on its authority; and to grant the remedies chosen by the legislature for such disputes. Such a judge does so as a judge of the High Court.'⁶

[18] It has been made clear by the Supreme Court in *Masule* that the Labour Court is a division of the High Court created by Article 78(1)(c) of the Constitution. The Labour Court is, therefore, not a court created by the Labour Act distinct from the High Court, but it is part of the High Court. As a result, a judge of the High Court cannot refuse to

⁵ *Masule (supra)* para 26.

⁶ *Masule (supra)* para 47-48.

exercise jurisdiction over matters that come before him or her on the basis that such matters fall within the jurisdiction of the Labour Court.⁷

[19] The above conclusion and the finding in *Masule (supra)* that the Labour Court is but a division of the High Court, negates the contention by the defendant that this court lacks the necessary jurisdiction to adjudicate this matter. On the strength of *Masule*, I find that this court has jurisdiction to adjudicate this matter, and as a matter of consequence, I find that the special plea of lack of jurisdiction lacks merit.

Res judicata and prescription

[20] The defendant raised the special pleas of *res judicata* and prescription as follows:

2.1 The plaintiff's compensation claim was referred to the Office of the Labour Commissioner on the 19th October 2016 and the matter was determined and an award was made wherein the Arbitrator determined on the 20th May 2017 that the award could not be implemented because the plaintiff's claim prescribed because it was only lodged eight (8) years after the dispute arose.

2.2 No appeal was lodged against the aforementioned decision so the defendant therefore pleads that the matter has been adjudicated and decided and plaintiff no longer has a claim against the defendant.

2.3 The defendant accordingly pleads that the dispute is accordingly *res judicata* between the defendant and the plaintiff as it had been finally adjudicated by the arbitrator designated by the Labour Commissioner.'

[21] The rationale behind citing the special pleas of *res judicata* and prescription is that during arguments, both in the written heads of argument and in oral argument, Mr Ikanga attempted to expand on the special pleas by introducing another dimension

⁷ *Masule (supra)* para 50.

relating to the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. Such new ground was not pleaded and I shall not have regard to it.

[22] Masuku J, in *Swanu of Namibia v Katjivirue*⁸ cited with approval a passage from Herbeinstein & Van Winsen, *The Civil Practice of the High Court of South Africa*,⁹ where it is stated that:

‘Special pleas ... do not appear *ex facie* the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and these facts have to be established in the usual way.’

[23] Masuku J, in *Swanu of Namibia* at para 19 - 20, further stated that in a trial, the usual way of establishing facts is to elicit or establish facts by adducing oral evidence through witnesses. The other approach is where most of the facts are common cause between the parties, and such parties invoke the provisions of rule 63 and make a written statement of agreed facts. In some instances, special pleas may be determined only on the pleadings.¹⁰

[24] In *casu*, no evidence was led to establish facts. No statement of agreed facts as provided for by rule 63 was delivered by the parties. It follows that no facts were established where the special pleas raised could be based.

[25] As alluded to above, the defendant’s special pleas of *res judicata* and prescription is based on the ruling of the arbitrator dated 20 May 2017. The plaintiff in replication to the special pleas contends that the award made by the arbitrator constitutes a nullity as the arbitrator could not adjudicate on an order emanating from the District Labour Court. The plaintiff further contends that his claim has not prescribed as it is based on a judgment debt delivered by the District Labour Court.

⁸ *Swanu of Namibia v Katjivirue* (HC-MD-CIV-ACT-OTH-2021/03315) [2022] NAHCMD 98 (09 March 2022).

⁹ Herbeinstein & Van Winsen, *The Civil Practice of the High Court of South Africa*,

¹⁰ *Swanu of Namibia v Katjivirue* (supra) para 19- 20. See also: *ADIDAS (South Africa)(Pty) Ltd v Jacobs* (HC-MD-CIV-ACT-CON-2019/02339) [2022] NAHCMD 451 (01 September 2022) para 9.

[26] The above reveals the contested issues which, if established as facts, could assist the court in the determination of the special plea raised. I find that the special pleas of *res judicata* and prescription raised, required evidence to be adduced in support of such special pleas.

[27] The absence of admissible evidence, or established facts properly placed before court, deprives the court of an opportunity to properly adjudicate the matter. In my view, the failure by the defendant to establish facts or lead admissible evidence on which the special pleas are based is fatal to the special pleas of *res judicata* and prescription raised. It follows that on this basis, the special pleas of *res judicata* and prescription must fail.

Conclusion

[28] In view of the findings and conclusions reached hereinabove, I am of the considered opinion that the defendants' special pleas of lack of jurisdiction, *res judicata* and prescription ought to fail. The defendant's special pleas are dismissed.

Costs

[29] The general rule is that costs follow the result. This case is no different. No reasons were advanced by any of the parties why the said well-established principle should not be adhered to. The plaintiff is successful in warding off the special pleas and will, therefore, be awarded costs.

Order

[30] In the result, it is ordered that:

1. The defendant's special pleas of lack of jurisdiction, *res judicata* and prescription, are dismissed.

2. The defendant must pay the plaintiff's costs for opposing the special pleas.
3. The parties must file a joint case management report on or before 2 October 2023.
4. The matter is postponed to 5 October 2023 at 08h30 for a case management conference hearing.

O S Sibeya
Judge

APPEARANCES

PLAINTIFF: J Comalie
Of BD Basson Incorporated,
Windhoek

DEFENDANT: M Ikanga
Of M Ikanga & Associates,
Windhoek