REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2022/00033

In the matter between:

OIDAMAE TOBIKO **PLAINTIFF**

and

UNIVERSITY OF NAMIBIA **DEFENDANT**

Neutral Citation: *Tobiko v University of Namibia* (HC-NLD-CIV-ACT-CON-2022/00033) [2023] NAHCNLD 39 (02 May 2023)

CORAM: **MUNSU J**
Heard: **09 March 2023**
Delivered: **21 April 2023**
Reasons: **02 May 2023**

Flynote: Stated case – Whether the dispute between the parties is one arising from an employment relationship and subject to adjudication in accordance with the procedures set out in the Labour Act.

Summary: By way of stated case, the parties approached the court to decide whether their dispute is one arising from an employment relationship, and thus, subject to conciliation and arbitration in terms of the Labour Act.

The plaintiff's claim against the defendant is one for alleged outstanding salaries for services rendered in terms of an oral agreement. The defendant contends that the dispute between the parties is one arising from an employment relationship and should have been referred to the Labour Commissioner for adjudication in terms of the rules relating to conciliation and arbitration. The plaintiff on the other hand contends that he was an independent contractor. The parties put forth compelling reasons in support of their contentions.

Held: Each case must be considered on its facts and the court must look at the substance of the relationship. The court applied different tests used to identify an employee and found that the relationship between the plaintiff and the defendant lacked the essential elements of employer-and-employee relationship.

ORDER

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1. The Defendant's special plea is dismissed.
2. The costs occasioned by the special plea are to be costs in the cause in favour of the plaintiff, subject to rule 32(11).
3. The parties are to file a joint case management report on or before 10 May 2023.
4. The case is postponed to 15 May 2023 at 10:00 for Case Management Conference.

JUDGMENT

MUNSU J:

Introduction

[1] The parties asked the court to hear the matter by way of stated case, to decide two issues:

1.1. Whether the dispute between the parties is one that arises from an employment relationship; and if so,

1.2. Whether it is subject to adjudication in accordance with the procedures set out in the Labour Act, 2007[1] (the Labour Act) and the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner.

Parties and representation

[2] The plaintiff is Dr Oidamae Tobiko, a major male person, with his occupation as a Medical Doctor (Specialist General & Laparoscopic surgeon) and resident of Komo Court, Wood Avenue, Nairobi, Republic of Kenya.

[3] The defendant is the University of Namibia, a public institution duly incorporated as such and duly registered as a tertiary institution in terms of section 2(1) of the University of Namibia Act 18 of 1992, with its principal place of business and registered address at 340, Mandume Ndemufayo Avenue, Pionerspark, Windhoek, Republic of Namibia.

[4] The plaintiff is represented by Mr Nyambe while the defendant is represented by Ms Katjipuka.

Brief facts

[1] Labour Act, 2007 (Act No 11 of 2007).

[5] The plaintiff alleges in the particulars of claim that on or about 18 January 2016 he entered into an oral agreement with the defendant, in terms of which the plaintiff was contracted by the defendant on an annual basis as a part-time Senior Lecturer at the University of Namibia, Oshakati Campus for the period 18 January 2016 to April 2021.

[6] It is alleged that the plaintiff would render his personal services as a Lecturer as soon as the medical students of the University of Namibia commenced with classes in January of each year and thereafter, the parties would sign a written contract of service during the months of April or May of the same year.

[7] It is further alleged that the plaintiff would be entitled to an annual compensation in the sum of N$ 201 300 at twenty hours per week.

[8] In addition, it is alleged that on or about 30 April 2021 the plaintiff, in writing delivered to the defendant a written notice of termination of the contract and further demanded payment in the sum of N$67 100 in respect of the services rendered for the period of four months as from January to April 2021.

[9] The plaintiff alleges that he duly complied with all his obligations in terms of the contract and performed all the services pursuant to and in accordance with the contract between the parties for the period of January to April 2021.

[10] In the premises, it is alleged that the defendant is indebted to the plaintiff in the sum of N$67 100.

[11] The plaintiff alleges that despite lawful demand, the defendant has failed and/or refused to pay the plaintiff the sum of N$ 67 100. Wherefore, the plaintiff prays for an order against the defendant for payment in the amount of N$ 67 100.

<u>The defendant's special plea</u>

[12] The defendant raised a special plea that:

12.1 The plaintiff's claim is one for alleged outstanding salaries for services rendered in terms of an employment contract.

12.2 This being a dispute arising from an employment relationship, it is subject to adjudication in accordance with the procedures set out in the Labour Act and the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

12.3 Consequently, the plaintiff should have referred a labour dispute to the Labour Commissioner for dispute resolution in accordance with the applicable dispute resolution regime.

12.4 Therefor, the present action was improperly lodged in this court.

12.5 Wherefore the defendant prays that the claim be dismissed with costs.

Plaintiff's replication

[13] In reply, the plaintiff denies that he was an employee of the defendant because one or more of the following factors were not present in the relationship:

13.1 He was not subject to the control or direction of the defendant;

13.2 His hours of work were not subject to the control or direction of the defendant;

13.3 He had not worked for the defendant for an average of at least 20 hours per month over the previous three months before termination of the agreement;

13.4 He was not economically dependent on the defendant.

The issues

[14] As per the stated case, this court is called upon to decide the following questions:

14.1 Whether the dispute between the parties is one that arises from an employment relationship; and if so,

14.2 Whether it is subject to adjudication in accordance with the procedures set out in the Labour Act and the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner.

Facts agreed on by the parties

1. The plaintiff's claim is one for alleged outstanding salaries for services rendered in terms of an oral agreement.

2. In annexure "A" the plaintiff seeks to notify the defendant of his intention not to renew his employment contract with the defendant and demands payment of his salary for the months of January to April 2021.

3. The plaintiff in previous years was appointed as a part-time adjunct lecturer in the Department of Surgery at the School of Medicine of the University of Namibia, as reflected in the appointment letter dated 15 January 2020, marked "B".

4. In terms of annexure "B", the plaintiff was subject to complying with the policies, rules and regulations of the University and required to familiarise himself with the University's policies, rules and regulations together with the operations of the plaintiff's department.

5. Following the appointment letter marked "B", the parties in previous years entered into a fixed term contract of employment as reflected in annexure "C".

6. In terms of annexure “C”, the parties are referred to as “employer” for the defendant and “employee” for the plaintiff and the plaintiff agreed to adhere to all staff regulations and departmental rules in force at the University of Namibia during his period of employment.

Parties’ contentions

[15] The defendant contends that the dispute in question is one arising from an employment relationship, *albeit* a part-time employment relationship.

[16] The plaintiff on the other hand contends that he was an independent contractor, not an employee of the defendant for the following reasons:

16.1 He prepared bedside teaching sessions, tutorials and lectures as required and expected;

16.2 At all relevant times, his relationship with the defendant was that he worked individually and not subject to the control or direction of the defendant;

16.3 His hours of work were not subject to the control or direction of the defendant;

16.4 He worked part-time and not part of the defendant;

16.5 He worked an average of least hours per 40 hours per month (sic), taught every day from Monday to Friday;

16.6 He also taught over the weekends when on call (two weekends in a month);

16.7 He was not economically dependent on the defendant, in fact based on the previous contract prior to the agreement in contention the defendant was entitled to withhold his payments upon non-fulfilment of certain acts such as non-submission of examination papers, scripts, assignments and student marks;

16.8 Was not provided with tools of trade or work equipment by the defendant;

16.9 He never rendered any personal service to the defendant;

16.10 He could perform whatever external work he wanted, and could decide whether to work a shift or not, and when to do so.

16.11 The agreement between the parties never contained any reference to the kind of basic conditions of employment such as leave of absence, sick leave and registration with social security, medical aid and any other benefits.

Submissions by the defendant

[17] Ms Katjipuka for the defendant submitted that the exact nature of the relationship by the parties can be best determined by having regard to how the parties themselves viewed the relationship at the relevant time.

[18] According to counsel, the appropriate starting point in this exercise is the letter in terms of which the plaintiff terminates the purported agreement and demand payment of his salary. Counsel highlighted that, in the said letter, the plaintiff:

18.1 notes the subject matter of his letter to be "*non-renewal of employment contract*";

18.2 identifies himself to be "*one of the adjunct lecturers in the department of general surgery based in the state hospital Oshakati*";

18.3 expresses gratitude for having been granted the opportunity to be "*part of the teaching staff for 5 good years*";

18.4 clarifies that although he has "*not signed this year's contract, he has been teaching students from January 2021 to end of April 202*1" and requests the payment of his "*salary for those 4 months*".

[19] Counsel argued that in making reference to the previous five years and "*this year's contract*" referring to the year 2021, the plaintiff clearly intends to rely on the past arrangement between the parties and to have it apply to the year 2021. Accordingly, counsel submitted that the past arrangement between the parties is relevant to the plaintiff's claim.

[20] In addition, counsel submitted that the fixed-term contract of employment for 2020, refers to the parties as employer and employee. Further, in terms of the contract, the employee was to render the required services of part-time senior lecturer in the department of surgery. The employee also agreed to "*adhere to all staff regulations and departmental rules in force at the University of Namibia during his period of employment*".

[21] Moreover, Ms Katjipuka argued that, in attempting to establish himself as an "independent contractor", the plaintiff overlooks a number of important factors:

21.1 Firstly, the plaintiff was employed as a part-time adjunct lecturer, which means that he was at liberty to do other work as well. It also means that he would not be economically dependent on the defendant, at least not entirely.

21.2 Secondly, the context matters: the plaintiff was appointed to teach at the School of Medicine. In this regard, counsel submitted that the plaintiff's duties were set by the defendant and were listed in the appointment letter and employment contract. Also, the curriculum was set by the defendant, and the hours required to be taught were set by the defendant. It was submitted that in terms of the employment contract for the academic year 2020, the plaintiff, as the employee, agreed "*to execute any other duties, related to and generally flowing from (his) position as and when requested by his immediate supervisor*".

21.3 Thirdly, the defendant was not a "customer" of the plaintiff in any shape or form. This was not a situation where the plaintiff would invoice the defendant

for services rendered in the course of the plaintiff's business, undertaking or professional practice.

21.4 Fourthly, teaching medical students in the department of surgery at the school of medicine of the University of Namibia is to render personal service to the defendant. The plaintiff did so pursuant to written annual employment contracts for the years 2016 to 2020.

Whether the dispute between the parties is one that arises from an employment relationship

[22] At the hearing of the special plea, Mr Nyambe for the plaintiff argued that the court should not have regard to the documents referred to by the defendant. These documents are:

(a) The plaintiff's appointment letter (as part-time senior lecturer);
(b) The fixed term contract of employment; and
(c) The plaintiff's letter of non-renewal of employment contract.

[23] According to Mr Nyambe, the plaintiff's cause of action is premised on breach of an oral agreement for the period of January to April 2021. Counsel submitted that the above documents are not relevant to the plaintiff's cause of action as they were for previous years.

[24] Ms Katjipuka for the defendant submitted that the aforesaid documents are relevant to these proceedings as they are referred to by the parties in their stated case.

[25] Not only are the said documents referred to in the parties' stated case, but they form part of the background to the plaintiff's pleaded case. In this regard, I agree with counsel for the defendant.

[26] Ms Katjipuka made it clear that, it is not the defendant's contention that this court lacks jurisdiction to adjudicate the matter. Rather, the special plea is premised on the basis that complaints relating to breaches of employment contracts must in the first instance be ventilated through conciliation and arbitration created by the Labour Act. This is in line with the principle of subsidiarity in terms of which it is impermissible for litigants to by-pass avenues established by law.

[27] Should the court find that the dispute between the parties is one that arises from an employment relationship, and therefor justiciable in the first instance by the office of the Labour Commissioner, it may well decline to exercise jurisdiction over the matter.

[28] The parties disagree on the nature of their relationship. The question whether the dispute, in the instant matter, is one that arises from an employment relationship, is a daunting one. This is so because the parties put forth compelling reasons in support of their contentions. On the one hand, there are facts which point to the existence of an employment relationship while on the other hand, there are certain elements in support of the inference of absence of an employment relationship.

[29] For the court's consideration, the parties agreed on a set of facts which in my view characterised the parties' relationship.

[30] In *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another*[2] the Supreme Court stressed that each case must be considered on its facts and the trier of fact must look at the substance of the relationship.[3] This is particularly important in this matter where the annexures (appointment letter and the employment contract) clearly refers to the parties as employer and employee. Accordingly, if the matter is to be considered or decided solely on form (face value), as it were, then it would be the end of the plaintiff's case.

[31] Not every relationship in which a person through his or her labour assists in the business of another will result in an employer-and-employee relationship.[4]

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[2] *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another* 2016 (3) NR 849 (SC).
[3] At para 38.
[4] See *Swart v Tube-O-Flex Namibia (Pty) Ltd* supra footnote 2 at para 38.

[32] Identifying the modern-day employee can be challenging at times since employment practices have evolved significantly over the years. Consequently, courts have over the years developed and applied various tests or approaches in their effort to determine who is an employee.[5] These tests or approaches are: the supervision and control test, the organisation or integration test, the proprietary test, the dominant impression test, the multiple test and the pragmatic approach.

[33] Section 1 of the Labour Act contains the following definition:

> '"employee" means an individual, other than an independent contractor, who –
>
> (a) works for another person and who receives, or is entitled to receive remuneration for that work; or
>
> (b) in any manner assists in carrying on or conducting the business of the employer.'

and

> '"employer" means any person, including the State who –
>
> (a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
>
> (b) permits an individual to assist that person in any manner in the carrying or, conducting that person's business.'

[34] The definitions section above must be read together with s 128A of the Labour Act in determining whether or not an employer-and-employee relationship exists.

[35] Section 128A (introduced by the Labour Amendment Act 2 of 2012 in the wake of the Supreme Court judgment in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others*[6]), states as follows:

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[5] See C Parker *Labour Law in Namibia* (2012) at 5.

[6] *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others* 2009 (2) NR 596 (SC) (APS).

'For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

(a) the manner in which the individual works is subject to the control or direction of that person;
(b) the individual's hours of work are subject to the control or direction of that other person;
(c) in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;
(d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;
(e) the individual is economically dependent on that person for whom he/she works or renders services;
(f) the individual is provided with tools of trade or work equipment by that other person;
(g) the individual only works for or renders services to that other person; or
(h) any other prescribed factor.'

[36] Given that the purpose of section 128A, read with the definitions section, is to provide the protection of labour legislation to persons who would otherwise be denied it through covert contractual arrangements intended to avoid the consequences of labour legislation, in my opinion, section 128A also confirms the correct approach to follow, and that is to consider the substance of the relationship rather than its form.

[37] The present matter is quite unusual because it is the alleged employee who claims that he was not an employee. It becomes necessary to look at the characteristics of the relationship against the backdrop of the above provisions of the Labour Act.

(a) The manner in which the individual works is subject to the control or direction of that other person

[38] The higher the degree of supervision and control that the alleged employer exercises or is allowed to exercise over the work of the alleged employee and over the manner in which the latter performs his work, the stronger is the indication that such a person is an employee.[7]

[39] The attached documents i.e. plaintiff's appointment letter and contract of employment stipulate the plaintiff's duties e.g. lecturing, tutoring, drawing up question papers, marking of examination papers, tests and assignments. Also, the plaintiff was to comply with the policies, rules and regulations of the university. Upon signing the contract of employment, the plaintiff agreed to adhere to all staff regulations and departmental rules in force at the university. The aforesaid policies, rules and regulations were not attached.

[40] According to the plaintiff, his relationship with the defendant was that he worked individually and not subject to the control or direction of the defendant.

[41] In *Ready Mixed Concrete v Minister of Pensions*[8] the court held that:

'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other the servant.'[9]

[42] The control test may be difficult to apply where the so-called servant exercises professional skills or performs work of highly technical nature.[10] Thus, courts have recognised the danger of making the control and supervision test decisive.

[43] In *Smit v Workmen's Compensation Commissioner*[11] the court had the following to say:

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[7] Parker *op cit* at 5.
[8] *Ready Mixed Concrete (South East) v Minister of Pensions* [1968] 2 QB 433.
[9] Ibid at 440.
[10] See Parker *op cit* at 7.
[11] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

'Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole *indicium* but merely one of the *indicia,* albeit an important one, and there may also be other important *indicia* to be considered depending upon the provisions of the contract in question as a whole.'[12]

[44] Whether the control exercised is such as to lead to the inference that the engaged person is a servant is therefore a question of degree.[13] In *Hannah v Government of the Republic of Namibia*[14] the court observed that "although not in itself conclusive, the presence or absence of supervision and control will be a relevant factor: a considerable measure of supervision and control will tend to indicate a master-and-servant relationship…".

[45] From the parties' stated case, it is clear that the defendant was central in deciding on the nature of the work to be done by the plaintiff (e.g. lecturing, tutoring, marking of examination papers etc), however, the supervision and control element appears to have been minimal if not absent. I say so because it was the plaintiff and not the defendant who decided on the way in which the work was to be done, the means to be employed in doing it, the time when and the place where it was to be done. Undoubtedly, this could apply differently to other part-time lecturers. Hence, this test, although not decisive, leans heavily in favour of the plaintiff.

(b) The individual's hours of work are subject to the control or direction of that other person

[46] The attached documents i.e. the appointment letter and the fixed term contract are silent on the hours of work applicable to the plaintiff.

[47] In terms of the stated case, the plaintiff's hours of work were not subject to the control or direction of the defendant. The plaintiff would sometimes work after hours or during weekends when on call.

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[12] At 62F.

[13] See *R v Feun* 1954 (1) SA 486 (T).

[14] *Hannah v Government of the Republic of Namibia* 2000 NR 46 (LC) at 50C.

[48] There was nothing placed before court by the defendant to gainsay the plaintiff's assertion that he was employed as a Medical Doctor elsewhere and that he was not subject to the defendant's normal working hours.

[49] Accordingly, this test favours the plaintiff.

(c) In the case of an individual who works for the organisation, the individual's work forms an integral part of the organization

[50] The approach underlying the organisation or integration test is that a person is an employee if he is integrated into the enterprise or business. Those who are sufficiently integrated into the enterprise or business are employees; those who are not so integrated are not.[15]

[51] In the years preceding 2021, the plaintiff was contracted as a "Part-time Adjunct Senior Lecturer". An argument was advanced on behalf of the plaintiff that "adjunct" means "additional" or "supplementary".

[52] There is nothing in the appointment letter or contract of employment that suggests that the plaintiff was integrated into the defendant's organisation. It appears in the parties' stated case that the plaintiff worked part-time and not part of the defendant. As pointed out above, it is undisputed that the plaintiff was employed elsewhere as a Medical Doctor. It would also appear from the parties' stated case that the work done by the plaintiff was not carried out on the defendant's premises. As such, this issue too, is in favour of the plaintiff.

(d) The individual has worked for that other person for an average of at least 20 hours per month over the last three months

[53] The appointment letter and fixed term contract of employment do not refer to the number of hours the plaintiff was required to work. It is also not clear from the stated case. However, it seems that the number of hours changed from year to year.

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[15] Parker *op cit* at 10.

[54] There is only the plaintiff's version on this issue. Such version is, however, not clear. In terms of paragraph 4.2 of the particulars of claim, the plaintiff would be entitled to an annual compensation in the sum of N$ 201 300 at 20 hours per week. In replication, the plaintiff states that he had not worked for the defendant for an average of at least 20 hours per month over three months before termination of the agreement. However, in the stated case, the plaintiff contends in unclear terms that:

> "He worked an average of least hours per 40 hours per month/per month, taught every day from Monday to Friday."

[55] In terms of this test, the plaintiff would be required to work for the defendant for an average of at least 20 hours per month over the last three months. In the absence of a version from the defendant and an acknowledgement by the plaintiff, it cannot be said that this test is satisfied. Thus, this issue favours the plaintiff.

(e) The individual is economically dependent on that person for whom he or she works or renders services

[56] The defendant acknowledges that, by being employed as a part-time adjunct lecturer, the plaintiff was at liberty to do other work and that means that he would not be economically dependent on the defendant, at least not entirely.

[57] It has been established that the plaintiff was employed elsewhere as a Medical Doctor. There is no material upon which this court can reject the plaintiff's assertion that he was not economically dependent on the defendant. Similarly, this issue favours the plaintiff.

(f) The individual is provided with tools of trade or work equipment by that other person

[58] In *Ready Mixed Concrete v Minister of Pensions* (supra), MacKenna, J held as follows:

'If a man's activities have the character of a business, and if the question is whether he is carrying on the business for himself or for another, it must be relevant to consider which of the two owns the assets ('the ownership of the tools') and which bears the financial risk ('the chance of profit', the 'risk of loss'). He who owns the assets and bears the risk is unlikely to be acting as an agent or servant. If the man performing the service must provide the means of performance at his own expense and accept payment by results he will own the assets, bear the risk and be to that extent unlike a servant.'[16]

[59] It was persuasively argued on behalf of the plaintiff that the defendant did not provide him with tools of trade. The premises on which the plaintiff carried out the work was not for the defendant, neither did the defendant pay rent thereanent.

[60] It is established in the parties' stated case that the plaintiff prepared bedside teaching sessions, tutorials and lectures as required. However, he was not provided with the tools of trade or work equipment e.g. knifes or any tools necessary for surgery. Also, the defendant did not provide the patients or guinea pigs. Equally, this issue favours the plaintiff.

(g) The individual only works for or renders services to that other person

[61] As stated above, the plaintiff was contracted by the defendant on a part-time basis. He was not subject to the normal working hours of the defendant. Furthermore, the plaintiff could perform whatever external work he wanted. In fact, the plaintiff was employed somewhere else as a Medical Doctor. Therefore, this factor too, favours the plaintiff.

(h) Any other prescribed factor.

[62] It appears from the parties' stated case that the agreement between the parties never contained any reference to the kind of basic conditions of employment such as

[16] At 443.

leave of absence, sick leave or vacation leave etc. In addition, it was not required that the plaintiff be registered with social security, medical aid or for any other benefits. As such, the circumstances relevant for consideration equally favour the plaintiff.

[63] From the foregoing, it is evident that the substance of the relationship between the parties reveals a different picture than its form.

[64] In terms of the dominant impression test, where the relationship has indications tending to show the existence of employer-and-employee relationship and some other relationship, one must considering all the facts, endeavour to determine which sort of relationship comes off best, or what 'dominant impression' such a contract leaves on one's mind.[17]

[65] Thus, the South African Labour Appeal Court observed in *Dempsey v Home & Property*, thus:

> 'no single factor is considered determinative and the Court has to examine the relationship in its totality to identify those aspects of their relationship which tend to indicate the existence of an employment relationship, and those which indicate a relationship other than that of master and servant. The factors are then weighed against each other and where the dominant impression indicates the existence of a contract of service, the court has to rule accordingly.'[18]

[66] The multiple test is not so much different from the dominant impression test. Under the multiple test, what are seen to be relevant *indicia* are considered in relation to the particular situation, and the court embarks upon the exercise of balancing the various *indicia* against one another to determine what weight ought to be attached to each one of them.[19]

[67] In addition, in terms of the pragmatic approach, the facts of the particular case must be considered and the tests that are applied must have relevance to modern employment practices.

[17] Parker *op cit* at 12.
[18] *Dempsey v Home and Property* (1995) 16 *ILJ* 378 (LAC) at 381B-C.
[19] Parker supra at 13.

[68] Applying the abovementioned tests to the facts in *casu*, it is inexorable to draw the conclusion that the relationship between the plaintiff and defendant lacks the essential elements of a master and servant relationship, and as a result, the special plea cannot be upheld.

[69] Given the conclusion I have reached, it is not necessary to decide the second issue raised in the stated case. Suffice to mention that s 2 of the Labour Act prescribes the scope of application of the Labour Act.

[70] It seems to me that there is another reason that justifies the rejection of the special plea. It is this: The plaintiff's claim is one for alleged outstanding salary. In its plea, the defendant denies that it did not employ the plaintiff for the period in question. The defendant further states that the plaintiff was not selected to lecture during the relevant period and no offer containing terms of employment was extended to the plaintiff. In addition, the defendant states that the parties did not sign a contract for the period in question and that the plaintiff did not commence or perform any work pursuant to any employment agreement with the defendant. Given that the jurisdiction of the Labour Commissioner is circumscribed (limited to employment relationships), how then does the defendant expect the plaintiff to approach the Labour Commissioner?

Costs

[71] Mr Nyambe for the plaintiff urged the court to order that, costs in respect of the special plea be costs in the cause. Given that the special plea is unsuccessful and the matter will have to proceed, the issue that was subject to adjudication becomes strictly interlocutory.

The order

[72] In the result, I make the following order:

1. The Defendant's special plea is dismissed.

2. The costs occasioned by the special plea are to be costs in the cause in favour of the plaintiff, subject to rule 32(11).
3. The parties are to file a joint case management report on or before 10 May 2023.
4. The case is postponed to 15 May 2023 at 10:00 for Case Management Conference.

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D. C. MUNSU

JUDGE

APPEARANCES:

PLAINTIFF	M NYAMBE Of Mukaya Nyambe Incorporated, Ongwediva.
DEFENDANT	U KATJIPUKA Of Nixon Marcus Public Law Office, Windhoek.