

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 1319/21

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES:NO

REVISED: NO

Date: 22 March 2024

In the matter between:

NISSAN SOUTH AFRICA (PROPRIETARY) LTD

PLAINTIFF

AND

SENYATSI, BENNITA PHASHA

RESPONDENT

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF E- MAIL/ UPLOADING ON
CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 22
MARCH 2024**

NTANGAAJ:

1. This is an application of absolution from the instance initiated by the Defendant after Plaintiff had closed its case. This application is made in terms of Rule 39(6) of the Uniform Rules regulating the conduct of proceedings of the several Provincial and Local Divisions of the Supreme Court of South Africa.

2. This matter commenced for trial proceedings on March 11, 2024. Plaintiff lead evidence by calling one witness and thereafter closed its case on the second day of proceedings on March 13, 2024.

3. Subsequently, Defendant indicated her intention to apply for absolution from the instance, which she did.

4. Defendant argued that Plaintiff is required to make a prima facie case and it has failed to do so. Its failure justifies Defendant in bringing this application. Defendant argued that Plaintiff failed to call witnesses who were directly involved in drafting and execution of the JICA Agreement, and this failure is fatal to Plaintiff's case.

5. Defendant further argued that Plaintiff's case is founded on the agreement for participating in the African Business Education Initiative for Youth (ABE) of the Japan International Cooperation Agency ("JICA Agreement"). Defendant argues that Plaintiff cannot go beyond clause 14 of the JICA Agreement.

6. Defendant argued that clause 14 is a resolutive clause and that once a new contract was entered into the JICA Agreement ceased to exist. Clause 14 of the JICA Agreement provides that:

"14. The Employee acknowledges that after completion of the Program, this Agreement shall become null and void and provisions of the new Agreement to be entered into between the Parties shall apply."

7. Defendant also argued that Plaintiff had failed to prove quantum as it merely relied on the spreadsheet. Defendant argues that the amounts in the spreadsheet are based on a miscalculated average net monthly stipend of R25 806.94. Defendant argues that this net monthly average is for twenty-six months and for thirty months the net monthly average for thirty months should be R22

366.00. Secondly, Defendant argues that payment for the programme was made by Nissan Global not Nissan South Africa as alleged.

8. Defendant also disputes Plaintiff's claim that it made payment for the flight tickets and argues that what was produced during Plaintiff's evidence was an invoice from Global Business Travel (American Express) and this is not a proof of payment for the flight tickets.

9. Defendant finally argued that Plaintiff failed to prove existence of the contract it relied on and that it failed to lead evidence on the quantum. Defendant argues that there are no proven damage on the part of the Plaintiff.

10. Plaintiff responded by arguing that the issue is whether Plaintiff has made out a prima facie case or not. It argued that its evidence has established a prima facie case. It argued that it is absurd to expect it to bring the person who effected payment of the expenses which are the subject of its claim against the Defendant. It argued that Defendant did not dispute that she received the stipend.

11. Plaintiff argued that the evidence of hearsay is incorrect. Plaintiff referred to clause 3.3 of JICA Agreement which reads:

"3.3 NSA envisages that the Program will contribute to its long-term strategy and viability, and the Program will assist the Employee to develop an active role within NSA managerial structures after the Employee gains experience during the Program."

12. Plaintiff argued that the purpose of the program was to train Defendant to enable her to make valuable contribution to Plaintiff. Plaintiff further argued that the contract must be interpreted in reference to its context and purpose.

13. Crisply, this Court is required to determine whether Plaintiff has established a prima facie case. Should the finding be that prima facie has been

established, then the application for absolution from the instance will not succeed. Should the Court find that Plaintiff failed to establish a prima facie case, then the application for absolution from the instance will succeed.

14. Further this Court is called upon to determine whether the Plaintiff established a prima facie case for its quantum. Should the finding be in the negative, then the application from absolution from the instance should succeed, if the finding is that a prima facie case has been established to prove a quantum, then the application should not succeed.

15. Rule 39(6) provides that:

"At the close of the case for the Plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."

16. In commentary of Uniform Rules of Court, Erasmus states that:

"In deciding whether absolution from the instance should be granted at the close of plaintiffs case it must be assumed that, in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true".¹ Erasmus further states in the commentary that "The court will refuse the application unless it is satisfied that that no reasonable court could draw the inference for which the plaintiff contends. The court is not required, in the case of application for absolution at the end of the plaintiffs case, to weigh up different possible inferences, but merely to determine whether one of the reasonable

¹ Erasmus, Superior Court Practice, second edition, volume 2 at D1-531.

inferences is in favor of the plaintiff.²

17. In *Claude Neon Lights (SA) Ltd v Daniel*³ the then Appellate Division formulated the test for absolution as follows:

"When absolution from the instance is sought at the close of the plaintiffs case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."

18. In the application test set out in the *Claude Neon Lights (SA) Ltd v Daniel* decision, in this case it is common cause that Plaintiff entered the JICA Agreement. After conclusion of the JICA Agreement, Defendant attended the training programme in Japan as envisaged in the JICA Agreement. Stipend was paid to the Defendant in accordance with the JICA Agreement. Flight tickets for Defendant's travel were issued through American Express, a service provider of the Plaintiff.

19. Defendant disputes that expenditures related to flight tickets and the program were paid by the Plaintiff. In this regard Defendant argues that Plaintiff has failed to lead evidence on quantum or causality. Defendant substantiated this by arguing that Plaintiff failed to call people who made payment as witnesses.

20. What is clear is that the JICA Agreement regulated obligations of both Plaintiff and Defendant. In the main Plaintiff undertook to subsidize the program by covering personal expenses for traveling to Japan and a stipend in lieu of a salary. Plaintiff also undertook that after completion of the Program it shall, based on the availability of roles upon Defendant's return, endeavor to provide the Defendant with a role like and at the same job level the Defendant occupied upon

² Erasmus, *Superior Court Practice*, second edition, volume 2 at D1-532.

³ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

her departure.

21. It is a common cause that upon Defendant's return from the Program she was offered a new employment contract to which she accepted and continued to work for Plaintiff for fifteen months. It is Defendant's contention that this new contract of employment brought an end to the JICA Agreement and that the JICA Agreement became null and void as contemplated in clause 14.

22. This Court is then required to decide after taking all of this evidence adduced on behalf of Plaintiff, whether a prima facie case has been established. In simple terms, this court is to make an evaluation of whether Defendant has a case to answer.

23. In making an evaluation of Plaintiffs case this court is bound to follow the test outlined in the *Claude Neon Lights (SA) Ltd v Daniel* decision. This Court must determine whether Plaintiffs evidence places it in a position where it could or might find for the Plaintiff. On evaluation of Plaintiffs evidence, JICA Agreement was entered into between the parties to achieve two purposes, firstly, to develop Defendant's skill and capability to serve the Plaintiff. Secondly, upon completion of the Program it appears that the parties intended for Defendant to apply her improved skill for the benefit of the Plaintiff. The JICA Agreement seems to have been entered into to benefit both Plaintiff and Defendant. It does not seem to have been entered into to benefit one party to the agreement. The program was undertaken for the purpose of contributing to Plaintiffs long- term strategy.

24. For the purposes of determination of absolution from the instance it is not necessary at this stage to determine whether Plaintiff has proved its case on a balance of probabilities. It suffices for this court to enquire whether Plaintiff has established a prima facie case.

25. Both Plaintiff and Defendant submitted that this Court should follow the

interpretation principle set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ where the Court set out the proper approach to interpretation principle as follows:

"[18) Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable or businesslike for the words used,

The 'inevitable point of departure is the language of the provision itself , - read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."⁵

26. Plaintiff relied on the matter of *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren*⁶. In this decision the Supreme Court of Appeal stated that the law of interpretation has evolved since the decision of *Coopers & Lybrand & Others v Bryant*⁷ where the court set out the principles of interpretation as follows:

"The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 262 (SCA).

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 262 (SCA).

⁶ *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* 2015 (5) SA 426 (SCA).

⁷ *Coopers & Lybrand & Others v Bryant* 1995 (3) SA 761 (A).

phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interpretation to the contract, including the nature and purpose of the contract.
- (2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...; and
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

27. The Court in *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* followed decision of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*⁸ where the court held that:

"Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly, it is no longer helpful to refer

⁸ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

to the earlier approach."

28. In considering whether novation has occurred, the Court in *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* stated that the court is entitled to have regard to the conduct of the parties, including any evidence relating their intention.⁹

29. The issue raised by the Defendant is that when applying the language interpretation to the JICA Agreement, clause 14 is unambiguous and that it became null and void at its termination. Defendant further argued that the new contract of employment brought an end to the JICA Agreement.

30. This was disputed by Plaintiff who argued that in applying the *Natal Joint Municipal Pension Fund v Endumeni Municipality* judgment, this Court must in addition consider the context and purpose which gave rise to the JICA Agreement.

31. Plaintiff's witness explained the context and purpose of the programme which gave rise to the JICA Agreement. On evaluation of Plaintiff's evidence, I am of the view that a *prima facie* case has been established and Defendant has a case to answer. I must point out that the court is not making a finding on whether Plaintiff has proved its case on a balance of probabilities. It will be premature to make such a finding.

32. The Court is not in a position to pronounce on credibility of evidence adduced as that may upset trial proceedings prematurely.

33. With regard to the quantum, the court in *Claude Neo Lights (SA) Ltd v Daniel* stated that "If in the Court below, respondent's counsel had applied for absolution from the instance on the ground that insufficient evidence as to

⁹ *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* 2015 (5) SA 426 (SCA).

damages had been led, it would unquestionably have been open to appellant to attempt to meet that argument by asking leave to re-open his case for the purpose of leading further evidence relative to quantum loss."¹⁰

34. In this matter, no application was made for re-opening the case after Defendant had argued for absolution from the instance both on merits and quantum. Plaintiffs damages claim arise from three categories, namely:- (i) Programme expenses; (ii) Stipend paid in lieu of salary; and (iii) Flight ticket expenses from Johannesburg to Japan.

35. Defendant argued that Plaintiff failed to adduce evidence to prove that it has paid for these expenses. Her submission was that Plaintiffs witness could not testify on payment of these expenses as he is not the person who actually made payments. Plaintiffs witness did concede that he is not the person that actually pressed a button to effect payment, his testimony was limited to his knowledge that the expenses were approved for payment. He testified that all the expenses were paid by Plaintiff and the source of funds was income derived from selling cars.

36. Whilst Defendant placed a version that programme expenses were paid by Nissan Global, no version was placed on the Plaintiffs witness as to who paid for the stipend and flight tickets. Plaintiff bears the onus to prove its damages, however, at this stage of the proceedings, the Court is not able to make a finding of whether damages have been proved.

37. I am satisfied that Defendant has a case to answer regarding the damages claimed by the Plaintiff. The Court is of the view that a prima facies case for damages has been established. I must point out that this is not a finding that Plaintiff has proved its damages.

38. I therefore make the following order:

¹⁰ Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A).

1. The application is dismissed.
2. The Defendant is directed to pay the costs of the application.

M NTANGA
ACTING JUDGE OF THE HIGH COURT
PRETORIA DIVISION

Date of Hearing: 13 March 2024

Date of Judgement: 22 March 2024

Appearances:

Applicant's counsel: Adv M R Maphuthu

Respondent's counsel: Adv De Han