



**NATIONAL CONSUMER
TRIBUNAL**

Physical
Ground Floor
East Wing, Building B
Lakefield Office Park
272 West Avenue
(cnr West Ave &
Lenchen Ave North)
Centurion

Postal
Private Bag X110
Centurion 0046

Tel 012 663 5615
Fax 012 663 5693
Website www.thenct.org.za

Case No: NCT/33/2009/137 (3) (P)

In the matter between

LLOYD M. NEDOHE

APPLICANT

and

THE DEVELOPMENT BANK OF SOUTHERN AFRICA

AND THREE OTHERS

RESPONDENTS

RULING ON POINTS IN LIMINE

Background

1. The Applicant is Mr. Lloyd M Nedohe (Nedohe), an ex employee of the Development Bank of Southern Africa (the Development Bank). Nedohe was employed by the Development Bank in the capacity of relationship manager. On 30 June 2008, and following a disciplinary hearing, Nedohe was dismissed for misconduct from the employment of the Development Bank.
2. Nedohe challenged his dismissal by referring his case to the CCMA and to the Labour Court.
3. Nedohe has since lodged papers with the National Consumer Tribunal (the Tribunal) wherein he alleges that he was unfairly dismissed due to an incorrect interpretation of the Respondents Part Time Study Assistance for Employees Policy.
4. Nedohe contends that the misconduct should have been dealt with in terms of the National Credit Act (NCA).

5. Accordingly, the Tribunal should determine whether the conversion of the Applicants study assistance, granted in terms of the Employers Part Time Study Assistance for Employees Policy, into a loan was a developmental credit agreement.

Introduction

6. The Applicant alleges that his dismissal was unfair in that the Respondent should have dealt with his case as a developmental credit agreement and therefore not dismissed him.
7. Prior to the matter being set down for hearing at the Tribunal, the Development Bank, in their answering affidavit, raised a point in limine, which the parties at a pre-hearing conference were instructed by the presiding member to argue, prior to the commencement of the hearing into the matter.
8. In as much as the Respondent initially challenged the mandate of Sebola to represent the Applicant, the Respondent withdrew this issue at the hearing and proceeded to argue in regard to paragraph 9 below.
9. The issues to be argued by the parties, who both filed bundles with the Tribunal, in regard to the point in limine were:

9.1 The jurisdiction of this Tribunal to hear the matter; and

9.2 *Lis pendens*.

The Respondent

Jurisdiction

10. The Respondent, represented by Advocate Malan (Malan), firstly dealt with the aspect of the Tribunal having jurisdiction to determine the matter, which Malan stated was based on two legs.

These are:

- 10.1 Firstly, that the application before the Tribunal stems from the misconduct of the Applicant which resulted in his being dismissed from the employment of the Development Bank and not from a default related to the repayment of the Applicants part-time study assistance loan. Accordingly, the application relates to pure misconduct on the part of the Applicant and does not therefore fall within the jurisdiction of the Tribunal to be determined;
- 10.2 Secondly, that the transaction that forms the basis of the case of the Applicant is not an arms length transaction and therefore not a developmental credit agreement. Accordingly, the application does not fall within the jurisdiction of the Tribunal to be determined.
11. Malan, for the Respondents contended that the dispute relates to the Applicant's breach of the Applicants employers Part Time Study Assistance for Employees Policy and that this breach was not a default of the policy in terms of the NCA.
12. Further, the Respondents submitted that the study assistance agreement between the parties, was not an arm's length transaction as required in terms of section 4 (1) of the NCA.
13. The Respondents argued that the reason for the Applicant's dismissal is that the Applicant misconducted himself in breaching the employers Part Time Study Assistance For Employees Policy, and that the Applicant's misconduct arose out of the employment relationship. Accordingly, the Respondent followed the procedures under the Labour Relations Act 66/1965.
14. The Respondent's contended that the Applicant did not initially in his papers before the CCMA raise any breach of the NCA, but rather alleged unfair dismissal. The Applicant also elected to refer the matter to the Labour Court. The issue therefore before the Tribunal is an issue related to an employment relationship and not a contravention of the NCA.

15. The Respondents submission is that the agreement between the parties, was not a developmental credit agreement in that for example, there was no negotiation of rates, interest and terms, rather a breach of the policy of the First Respondent related to study assistance which study assistance employees such as the Applicant, could elect to use or not to use.
16. Furthermore, Malan submitted that the relationship between the parties was that of employer and employee, not that of a pure relationship between a debtor and a creditor and therefore the parties were not dealing at arms length.
17. Accordingly, Malan submitted that this Tribunal does not have jurisdiction to determine the dispute.

Lis pendens

18. The Respondents contended that the Applicant had initially referred this dispute to the Labour Court and that a settlement was reached. The Respondent's bundle, at page 102, includes a copy of the Applicant's application to the Labour Court under Case No: J1462/08 and the agreement of settlement at page 111.
19. Further the Respondent's argued and submitted at page 119 of their bundle, that the Applicant has again instituted proceedings in the Labour Court under Case No: JS560/08, on 21 August 2008, in which the Applicant challenges the lawfulness of his dismissal.
20. The dispute referred to the Labour Court is the same issue in contention before the Tribunal and is a dispute between the same parties. The Respondents submitted that the relief sought by the Applicant in the pending Labour Court matter is the same relief sought by this Applicant from this Tribunal and accordingly, the matter is *lis pendens*.

21. The relief sought by the Applicant, in the Labour Court, is essentially for an order:

*21.1 declaring the Applicants dismissal by the First Respondent to be unlawful;
and*

21.2 declaring that the conversion of the Applicants study assistance granted in terms of the respondents Part-Time Study Assistance for Employees Policy into a loan fulfills the requirements of a developmental credit agreement as defined in the NCA.

22. Accordingly, the Tribunal does not have jurisdiction to determine the matter and the Respondent asks that the matter be dismissed with costs.

The Applicant

Jurisdiction

23. The Applicant, represented by Mr. M S Sebola (Sebola) referred the Tribunal to Page 2 of the Respondents bundle with particular reference to paragraphs 2.1 to 7.2 of the Respondents bundle.

24. Sebola submitted that the issue of the unfair dismissal was indeed referred to the Labour Court.

25. Sebola argued that the question to be determined by this Tribunal was whether or not the conversion of the Respondents study assistance in terms of the Respondents Part-Time Study Assistance for Employees Policy into a loan was a developmental credit agreement which Sebola submits is an issue that falls within the jurisdiction of the Tribunal to be determined.

26. Sebola argued further that in as much as the Applicant was an employee of the Respondent, the Respondents policy related to Part Time Study Assistance for Employees created another relationship between the Applicant and the Respondent when the Applicants study assistance agreement was converted into a loan.

27. Accordingly, the Tribunal must determine whether or not the agreement referred to in paragraph 26 above, was indeed a developmental credit agreement.

Lis pendens

28. Sebola contended that the issue of *lis pendens* was not raised in the Respondent's pleadings.

29. Sebola submitted that the matter before the Labour Court and the matter before the Tribunal are two different issues. The matter before the Labour Court concerns the issue of unfair dismissal and that the issue before the Tribunal is to determine whether the Respondents Part Time Study Assistance Policy which determines the relationship between the parties and where interest was charged was indeed a developmental credit agreement.

30. Sebola submitted that the reason for the dismissal of the Applicant was a reason arising out of a developmental credit agreement and for this reason the Applicant requires the Tribunal to rule whether the Part Time Study Assistance Policy of the Respondent and indeed the relationship arising out of that study assistance policy, was indeed a developmental credit agreement.

31. Sebola contends that the main reason why the agreement is a developmental credit agreement is because interest was charged.

32. Accordingly, the Applicant requires the Tribunal to determine whether the conversion of the Part Time Study Assistance for Employees Policy of the Respondent into a loan was a developmental credit agreement because an incorrect interpretation of the Respondents Part time study Assistance for Employees Policy may have resulted in the Applicant losing his job.

Analysis of the evidence

33. It is common cause that the Applicant was employed by the First Respondent and that the Applicant received study assistance from the First Respondent as part of the First Respondents Part Time Study Assistance for Employees Policy.

34. It is also common cause that the Applicant was dismissed for misconduct.

35. It is common cause that the relief sought by the Applicant, in the Labour Court, is essentially for an order:

35.1 declaring the Applicants dismissal by the First Respondent to be unlawful;
and

35.2 declaring that the Applicants study assistance loan was a developmental credit agreement.

36. The requisites *for lis alibi pendens* are:

36.1 there must be litigation pending;

36.2 the other proceedings must be pending between the same parties;

36.3 the pending proceedings must be based on the same cause of action; and

36.4 the pending proceedings must be in respect of the same subject matter.

37. The onus rests upon the party raising the defence to prove the requisites. In this matter, the Respondents raised these issues.

38. Counsel for the Respondent's, Malan, correctly submitted that:

"the reason why we can't have two cases between the same parties claiming the same relief based on the same heart of the dispute in different forums is that we might end up with two completely different decisions and then confusion follows".

39. In his prayer 4.1.2 before the Labour Court, the Applicant claims the following relief (included at page 131 of the Respondent's bundle):

"Declaring that upon conversion of part of the Applicant's study assistance student fees, that is the deferred payment for 2007 and 2008 student fees into a loan in terms of clauses 5.4.2, 5.4.3, 5.4.4 read with 5.4J of the Part Time Study Assistance for Employees Policy in the form of an acknowledgement of debt, that the said conversion was an agreement that fell within the ambit of a developmental credit agreement as defined in the National Credit Act 34 of 2005."

40. In paragraph 6 of the applicant's, Notice of Motion filed before this Tribunal, the Applicant seeks the following relief:

"Declaring that the agreement between the Applicant and the First Respondentis a developmental credit agreement as stated in section 10 (1) (b) (ii) read with sections 1 ("definition of a student loan" (a) and 8 (4) (f) of the National Credit Act 34 of 2005("NCA")".

41. Noting that this application was filed before this Tribunal on 11 March 2009, this Tribunal finds that the pending proceedings before the Labour Court under Case No: JS560/08 is based on the same cause of action and in respect of the same subject matter.

42. This Tribunal is therefore not persuaded by the Applicant's submissions that it should determine whether the applicants study loan agreement was a developmental credit agreement.

Ruling

43. Having considered the argument and the documentation submitted, this Tribunal finds that the dispute is essentially one governed by the Labour Relations Act and accordingly falls to be determined within the jurisdiction of the Labour Court.

44. Furthermore having found that there is a pending matter before the Labour Court on the same subject matter, based on the same cause of action, related to the same parties the Tribunal finds that there is *lis pendens* and therefore this Tribunal does not have jurisdiction to hear the dispute.

45. Accordingly it will serve no purpose for this Tribunal to make any finding as to the existence or not, of a developmental credit agreement.

46. Accordingly, the Tribunal makes the following ruling:

46.1 The application is dismissed;

46.2 No order is made as to costs.

DATED AT CENTURION THIS 23rd DAY OF SEPTEMBER 2009.

X. MAY

MEMBER

P. BECK

PRESIDING MEMBER

M. MPHAHLEHE

MEMBER