REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 60923/16

DATE OF HEARING: 12 MAY 2019

1) REPORTABLE: YES/ ~~NO~~
2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO
3) REVISED.

.....
SIGNATURE

17/7/2019
.....
DATE

In the matter of:

RIAAN LASS **PLAINTIFF**

And

FRANCISCO ABILIO LUBAMBA **First DEFENDANT**

LANSERIA JET CENTRE (PTY) LIMITED **Second DEFENDANT**
(REGISTRATION NUMBER: 2004/002561/07)

JUDGMENT

Bam AJ

Introduction

1. This case is about a claim of unpaid remuneration arising from an international contract of employment. In the main, two issues must be resolved. They are: (i) whether, notwithstanding the wording of the contract, the defendant had an obligation to pay plaintiff's remuneration in US dollars in terms of the second or the 2015 contract; and, (ii) whether the plaintiff is owed any remuneration in respect of the third (the 2016) or the last contract. The defence denied that the 2016 contract was meant to be a binding contract of employment and provided reasons. They further alleged that the agreement was invalid for its failure to comply with certain Angolan laws. In interpreting the 2015 contract, the defence made submissions which can be summed as the golden rule of interpretation, while the plaintiff has argued for an interpretation which seeks to bring in extrinsic evidence in the nature of background or the factual matrix and urged the court to seek a sensible or businesslike meaning. Given the foreign elements in the contract, the search for the content of the *lex causae*, (the proper law of contract) led to nought, leading the court to resort to the *lex fori (the law of the forum or court where an action is instituted)*

2. Plaintiff, Mr Riaan Laas is a South African citizen with a commercial pilot's license of 24 years combined with an airline transport license. The defendant, Mr Francisco Abilio Lubamba, is an Angolan businessman and a peregrinus of South Africa as a

whole. To use the description adopted by the court in Jamieson[1], he is an 'an out - and - out peregrinus'. He resides in Angola and has no business presence in South Africa. He never had. His business headquarters is in Ondjiva, Angola. The contracts of employment the plaintiff relies on were concluded in Angola and the aircraft plaintiff flew has its hangar in Lubango, a province of Angola.

3. Before canvassing the relevant background details, I consider it convenient to note a few points: I was informed by the parties at the start of the trial that there is no second defendant. Indeed, a cursory perusal of the record reveals that the reference to second defendant arose from the background of the July 2016 motion proceedings which foreshadowed these proceedings. Those proceedings were pursued to secure an order to attach first respondent/first defendant's aircraft, a Learjet 45, described in the papers as a Bombadier with serial number 45-092 and registration number D2-srr to found jurisdiction[2]. The second respondent (second defendant) was cited then as an interested party as the aircraft was located in one of its hangars, following its service there. With that clarification, I shall from now on refer to the parties as plaintiff and defendant. Where necessary, I specify that I am referring to the second defendant.

Background

4. The background giving rise to the dispute is as follows: Plaintiff testified that during May 2014, while in the employ of Dana Air, Nigeria, he was introduced to the defendant who was looking for assistance in acquiring an aircraft and a person to act as captain in his employ. Plaintiff sent his curriculum vitae (CV) and was immediately offered employment without an interview. He accepted the offer as he preferred Angola. He explained his role as that of a pilot, adding that he was also tasked with

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[1] Jamieson Neil v Sabingo, Amindor Cesar, Case No: 329/2000 SCA Respondent, 27 March 2002 referring to (Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation) 1987(4) SA 883(A) at 886C)

[2] Case number: 57379/16: Note: The order to attach the aircraft was granted *ex parte* on 27 July 2016. Subsequent to the further discussions between the parties, the defendant submitted to the jurisdiction of this court and as security, an amount of R850 000 has been attached in the defendant's attorneys' trust account. Costs were also provided for. On this basis, the aircraft was released.

overseeing maintenance of the aircraft. He was informed that he would be paid a monthly remuneration of USD 9500. The defence, in refuting this last statement, stood by the contract pointing out that the contract states otherwise. So, plaintiff began flying for the defendant as of May 2014. He testified that he flew the defendant throughout Angola, Namibia and sometimes to South Africa. Throughout the year 2014, his remuneration was paid in cash. In addition, he was provided USD 500 as spending money. Before he signed the second contract, which began on 2 February 2015 and ended on 31 January 2016, he was asked to provide bank details to enable the defendant to pay him via electronic funds transfer (EFT). This the plaintiff did. At the time of signing the second agreement, the defendant also took the responsibility to apply for the plaintiff's work visa for a period of twelve (12) months.

5. The problems began in 2015 when the plaintiff's salary from January to May 2015 was not paid. Both parties testified that there was a shortage of dollars in the Angolan market. The full amount outstanding however, was paid on 17 June 2017 in the amount of USD 47 500. Plaintiff's salary from June to December 2017 was again not paid. During December 2015 the aircraft required service and plaintiff had to fly it to South Africa, to the second defendant, for the service. Prior to his departure, he made enquiries with the defendant about his outstanding pay and the status of his employment. In response, he was provided with what plaintiff terms proof of payment in the amount of R897 750 dated 30 November[3]. The two parties refer to the voucher either as proof of payment (the plaintiff) while the defendant refers to it as a payment requisition. Nonetheless, nothing appears to turn on these varied references. He was also handed an amount of Euro 9000 which plaintiff accepted as his January 2016 contract. There is a dispute regarding this amount. The defendant claims he paid Euro 13 300. Of this amount, Euro 9000 was the plaintiff's salary and the remainder (Euro 4300) was for the plaintiff to purchase accessories for the servicing of the aircraft. Since the plaintiff had not done so, the parties subsequently agreed that he retains the amount as credit towards his salary. The difficulty facing the defendant is the lack of proof. In any event, I address the issue later in this judgement.

[3] The voucher is RL5, on page 80, of Exhibit B, noted as Trial Bundle A - 23 April 2019

6. The payment of R897 750 failed, as did the next payment requisition in the amount of Euro 63 000 dated 9 December 2015[4]. By the time plaintiff realized the failure of these two payments he was already in South Africa, having left Angola on or about 18 December 2015.

7. While in South Africa, plaintiff often raised with the defendant the issue of his outstanding salary. He also enquired about his employment status. Two further payments were made by the defendant, one during March/April 2016 in the amount of USD 18000 and during July 2016 in the amount of USD 9500[5]. The plaintiff testified that he decided to allocate the latter payment to the oldest outstanding payment of June 2015 and leaving the defendant debt of USD 96 000[6] payable to the plaintiff. I deal with the mathematics at the end of this judgement. It transpired during the servicing of the aircraft, that there was a need to replace a particular windshield at the cost of USD 70 000. The relevance of this last detail will become apparent later in this judgement.

The relevant clauses of the contract

8. I now deal with the relevant clauses of the three contracts in broad outline. The first (2014) contract, against which there is no claim makes provision as follows:

9. Plaintiff is employed for a fixed period of six months as a pilot; the services are to be rendered in Ondjiva while the company reserves the right to transfer the employee. There is some reference to a salary scale classification group 0 – 21; the position commences on 14 May 2014 and remains valid for six months including a probation period of 30 days; the remuneration is noted as '*a monthly cash remuneration in the*

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[4] The voucher is marked RL6 on page 82 of Exhibit B, noted as Trial Bundle A - 23 April 2019

[5] There is some confusion about what amount was paid when. In some of the parties' papers in the record, the amount of USD 18 000 was paid during July and the USD 9500 during March/April. In some areas the amounts months of payment are swapped. But both parties agree that the amounts were paid.

[6] As the months of March and April were short paid by USD 1000, the total amount outstanding according to the plaintiff is the six months in 2015 (the last payment of USD 9500 having been allocated to June 2015), and the unpaid months in 2016 which brings the total amount outstanding to USD 96 000.

value of 950 000'. The last provision notes that two copies of the contract are to be forwarded to the Employment Centre, apparently a reference to the Department of Labour in Angola.

10. The second (2015) contract is symmetrical to the first in every respect save that it commences on 2 February 2015 and ends on 31 January 2016.

11. The third (2016) contract, is a mirror image of the first and second contracts, except that it notes the remuneration as a '*monthly cash remuneration in the value of USD 9500*'. This is the contract that is refuted by the defence.

12. During cross examination, the claim that the plaintiff was charged with overseeing maintenance was met with a riposte, leading to him conceding that he did not have the necessary certification by AMO[7]. In further explanation, the role was watered down to liaising with the party carrying out the maintenance. He further conceded that in terms of the 2014 and 2015 contracts, the monthly amount of 950 000 could only be a reference to the Angolan Kwanza. In other words, it could not be 950 000 US dollars or South African Rand that was payable monthly. He further confirmed that his work visa expired on 2 March 2016. To qualify to fly the kind of aircraft, the Learjet, the plaintiff had to have ratings assigned to him. His ratings would have expired in June 2016. In so far as the plaintiff's failure to attach his certificates for ratings and airline license, he replied that the Angolan authorities would have never allowed him to fly the aircraft without those certificates.

Absolution from the instance

13. After cross examination, the defence closed its case and applied for absolution from the instance. The thrust of counsel's attack comprised, *inter alia*, that plaintiff had not demonstrated the necessary capability for flying the kind of aircraft he was employed to fly and the court could not take his word for it. Counsel stressed the applicability of

[7] Aircraft Maintenance Organization certification

the best evidence rule. His claim extends beyond March 2016, a period for which he had neither his visa nor ratings. Plaintiff is seeking relief that the court cannot grant, namely, relief in US dollars relying on a contract where remuneration is depicted in Kwanza, adding that the court can only enforce a contract on its terms. There was, of course, reference to the payments made by the defendant (which were all denominated in Kwanza) with the conclusion that the defendant's liability pertaining to the 2015 contract had been extinguished. Consequently, there was no case for the defendant to answer to. After a brief interlude, I refused the application and the parties continued. I had undertaken to provide my reason/s at the end. These then are my reasons:

14. I had indicated during the trial, that I was not going to engage in an overall evaluation of the plaintiff's case and I still do not do so at this point. Neither is it necessary to do so. I reasoned that some aspects of the plaintiff's case called for answers. For example, in relation to the 2015 claim, the two failed payment attempts made in November and December 2015 in amounts one may consider significant in the circumstances of this case. These called for answers. In other words, a *prima facie* case had been made. It is trite law that the test is not whether, following the plaintiff's case, the court should or ought to find in favour of the plaintiff, but whether it might find for the plaintiff. Fortifying my views are the words of the SCA in *De Klerk v Absa Bank Ltd*[8], in an appeal against a ruling of dealing with absolution from the instance. The court reasoned the issue as follows:

> '.....The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.'.....

[8] Case No 176/2002, SCA, 6 March 2002

'[10] The correct approach to an absolution application is conveniently set out by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another 2001* (1) SA 88 (SCA) at 92E-93A:

> '[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel 1976* (4) SA 403 (A) at 409G-H in these terms:
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> "...(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes 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, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter 1917* TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson(2) 1958* (4) SA 307 (T).)"

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff 1972* (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (*loc cit*)) – a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly; but when the occasion arises, a court should order it in the interests of justice.'

15. There is more one could refer to, to demonstrate the presence of prima facie case but as I had indicated early on, it is not necessary to embark on a wholesale evaluation of the plaintiff's case at this stage. But before I conclude, I believe it may be appropriate to refer to one passage in the *De Klerk*[9] case where, lightheartedly, the court shared the following:

> '[43] I refer back to what I have said in para [1] about the risks attendant upon an absolution application at the end of the plaintiff's case. I recall, when I was young at the Bar, a story of a judge (I forget his name, but he was quite well remembered) who said to counsel 'Mr So-and-So I am prepared to give you absolution if you insist, but let the consequences of an appeal be on your head'. Counsel for the defendant (who perhaps has better cause to be well remembered) withdrew his application.'

It was my conclusion then, that the plaintiff's case had reached the necessary threshold of a *prima facie* case.

16. At the start of the second day of the trial, the plaintiff, having come under attack by the defence for failing to provide proof of plaintiff's ratings, applied to open its case to introduce some documents to prove plaintiff's qualifications. The application was resisted by the defence, correctly so, as the time for discovery had closed and no good reasons had been shown for failing to discover the documents. Accordingly, the ruling was that the plaintiff ought to have foreseen the need to have his claims backed up by the relevant documentation, given the highly regulated nature of the profession. The parties proceeded but I had kept in mind to address this point and I do so now. Counsel had insisted upon the best evidence as proof that plaintiff was capable of flying the aircraft in question. Plaintiff had attached his licence as a pilot but failed to attach his ratings, which he testified had expired in June of 2016. He further added that if it was the case that he did not have the requisite qualifications to fly the Learjet, the Angolan authorities would have never allowed him to fly the aircraft.

17. Sometimes, the best evidence may derive from inference. As counsel made his point, I reasoned, based on the highly regulated nature of the profession, which the defence itself had alluded to, that it would be highly improbable that based only on the

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[9] Note 8 supra

employer's due diligence, an applicant for the position of pilot for this type and size of aircraft would simply be put on it to fly without any clearance from the regulatory authorities concerned with aviation in that particular country. I came to the ineluctable conclusion that there must be an international protocol which must bind the various states given the attendant risks, otherwise the entire aviation industry would be plunged into disrepute. The risks extend way beyond the risk facing the particular employer and the regulatory authority of the country that is responsible for the recognizing the candidate's credentials. In *De Klerk*[10] the court had occasion to refer (in the circumstances of that case, which were quite different from the present) to what constitutes best evidence and it noted:

> 'Facts may be proved not only by direct evidence but by inference also - a man's intentions may be provable through the observations of others. That one should not be doctrinaire about what constitutes 'best evidence' is well illustrated by the case of *Arendse v Maher* 1936 TPD 162. A widow sued for damages resulting from the loss of her husband's support. Greenberg J pointed out that had the evidence of an expert on actuary been led it would have been of great assistance. Without it, he had to make all sorts of calculations and assumptions. But this did not deter him from arriving at an amount. '

18. Based on the risk that could materialize were an unqualified person be allowed to fly this type and size of aircraft, I inferred it is almost unthinkable that there would be no risk mitigation strategies to minimize such a risk. On these grounds, I was not persuaded that the defence had a point.

Defendant's defence

19. Testifying through an interpreter the defendant gave very little. I attributed the reticence to the language barrier and nothing more. Neither would one conclude that counsel was gentle during cross examination. Nonetheless, in the main, the defendant denied that he was obliged to remunerate the plaintiff in USD in terms of the 2015 contract. He denied that the document signed in January 2016 was meant to be a

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[10] Note 8 supra

valid and enforceable contract of employment adding that it was signed with the exclusive intention of enabling him to purchase dollars on the Angolan market in order to effect payment due to the plaintiff in respect of services rendered during February 2015 to January 2016. He further referred to Presidential Decree 106 of 2011, issued on 25 May 2011[11], in terms of which, with effect from 31 August 2011, remuneration in an employment contract concluded in Angola, for services rendered in Angola, to an Angolan citizen, could only be expressed in Angolan Kwanza. Consequently, it was offensive to the law of Angola to provide for payment of remuneration in USD in the circumstances of the 2016 contract. As against the claim for remuneration pertaining to the year 2016, he responded thus: For the plaintiff to have been lawfully employed he had to: a) obtain an employment visa; (b) his contract of employment had to be registered with the Angolan Department of Labour to be valid and enforceable. (c) The document plaintiff relies on (the 2016 agreement), contrary to the 2015 agreement, was never registered with the Department of Labour as the law demands. Accordingly, no employment visa could have been issued, making it impossible for the plaintiff to have been .lawfully employed in terms of the alleged contract.

20. I interpose here that the defendant gave a convoluted narrative about why plaintiff was not entitled to remuneration for the 2016 contract during cross examination. He first stated that the plaintiff was not working for him. I understood this to mean that plaintiff had carried out no work for the defendant's benefit. Then came this complicated part: He stated that he had no intention that plaintiff would still be working for him because the aircraft was in South Africa. He could not explain why he did not cancel the contract if those were his intentions. He added that the aircraft plaintiff was employed to fly was delivered during December 2015 to second defendant for service and since then plaintiff never flew the aircraft again. He referred to the following payments made to the plaintiff:

    i) USD 47 500 - 15 April 2015[12] = Kwanza 5 850 453 ;

    ii) Euro 13 300 - December 2015 = Kwanza 2 902 800

[11]Article 51 number 2 Law 209, read with Law 2/12 of the Laws of the Republic of Angola

[12] This payment according to the plaintiff reached him on 17 June 2015

iii) USD 9500 - (no date) = Kwanza 1 235 000

iv) USD 18000 -June 2016 = Kwanza 3 600 000. In summation, defendant stated that his liability to the plaintiff in terms of the 2 February 2015 contract amounted to Kwanza 12 350 000. He had already paid plaintiff a total of Kwanza 13 583 253. Consequently, no payment is due to plaintiff.

The scheme

21. Much was made of the invoice issued by the plaintiff dated 25 March 2015[13] in the amount of USD 47 500 during his cross examination. The invoice was handed in court by the defence as evidence of a stratagem in which both parties had participated to get plaintiff's money out of Angola. In the body of the invoice, items such as aircraft printer and catering equipment, along with prices for each item are recorded, evidencing some form of trade between the parties. Plaintiff confirmed that nothing had been sold to the defendant. The defence referred to two further pieces of evidence which were said to be in furtherance of the scheme. These are the payment requisitions marked RL5 in the amount of R897 750 and RL6, Euro 63 000[14] with the beneficiary noted as Sophia's Chocolate. Plaintiff confirmed that Sophia is his wife. If the plaintiff is to be believed, he did no more than respond to a request by the defendant in order to expedite the repatriation of his remuneration to South Africa. He identified the account into which the funds were deposited as 'my account'. He refuted the idea that he had knowingly participated in a scheme of any kind and noted that he had duly filed his returns with South African Revenue Services (SARS). According to the plaintiff, salaries of expats are the last in the queue in terms of processing in Angola. The defendant denied having made the request and the statements relating to the queue in the processing, stating that there was no such thing. He went further and explained that the plaintiff had informed him about his tax problems in South Africa and requested that he be paid in cash. When the scheme caught the attention of the

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[13] Exhibit AA7

[14] Exhibit B, Trial Bundle A, 23 April 2019, pages 80 and 82. The payments are dated 30 November 2015 and 9 December respectively

Angolan authorities, they investigated. Since then it became difficult to make payments to the plaintiff.

22. I note that the two payment requisitions failed. I have also noted from several papers provided by the parties that the account number remained the same, whether the beneficiary is noted as R Laas or Sophia's Chocolate, making it difficult or more correctly, undesirable, for this court to make hasty deductions. I find it noteworthy to record that an invoice had been issued, in circumstances where the nature of the income (a salary) required no such invoice which, on the face of it, may potentially create an opportunity for certain deductions, the nature of which is not ordinarily permissible in the space of employment income such as expenses incurred in the production of income. Whether or not there had been a scheme is not a matter for this court to enquire into. On the basis that there is insufficient information, I take the issue no further.

Analysis

Whether plaintiff is owed any money by the defendant on the strength of the January 2016 contract

23. I propose to start with the 2016 contract. This is the contract which was attacked by the defence as invalid. I note that no evidence was led as to the content of the law of Angola that makes it invalid. Nonetheless, I hold the question of whether the contract is invalid at this point and deal with the rest of the points raised by the defence against it. To the extent that it may be necessary, I mention this contract in the discussion regarding the rules of private international law.

(i) Plaintiff rendered no services to the defendant post December 2015

24. Counsel for the defendant submitted that plaintiff rendered no services to the defendant post December 2015. He mentioned that the basis of plaintiff's employment was to render services as a pilot, in Ondjiva. Consequently, plaintiff was not entitled

to any remuneration for 2016. Plaintiff accepted that the last time he flew the aircraft was in December 2015 when he brought it for service to the second defendant. It might be the case that plaintiff is not entitled to claim a salary for the rest of the months he is claiming in 2016 but I reach that conclusion for different reasons. Having said that, I disagree that plaintiff is not entitled to a salary for the month of January 2016. It is correct that plaintiff's core obligation with the defendant was to discharge services as a pilot. Notwithstanding, it is a fact that the plane was delivered to the second defendant for service on 18 December 2015. Aside from the fact that it was already nearing year end, there was no way plaintiff could fly the aircraft while it was being attended to. The aircraft may have been serviced in Namibia, Angola or USA, the effect would have been the same: that he would not have been able to fly an aircraft while it was being serviced. For that reason, there is no basis to deny plaintiff his salary for January 2016.

(ii) ***Plaintiff did not have the necessary papers to carry out his work with the defendant***

25. In the second instance, counsel submitted that plaintiff's last visa expired on 2 March 2016 and, for the plaintiff to perform his duties with the defendant he was required to have a valid work visa. Since the plaintiff had no valid employment contract at the time, no work visa could have been issued by the Angolan authorities. Against this, plaintiff testified that he had left his passport with the defendant for the latter to apply for his work visa in December 2015, a statement that was denied by the defendant. In my view, the issue is not only confined to the fact that plaintiff's visa expired on 2nd March, it extends to the fact that throughout his their interaction at the time, not once did the plaintiff enquire about the progress of his visa to demonstrate he was still interested in returning to Angola, his place of employment.

26. Yet he knew that without a valid work visa he could not discharge services with the defendant.

(iii) Plaintiff's conduct

27. It is common cause that plaintiff queried the issue of his outstanding remuneration and employment status prior to departing for South Africa in December 2015. In response, he was provided with the payment requisition of R897 750. At that time, he also signed the contract which was meant to commence on 1 February 2016 (the January 2016 contract). While in South Africa, he realized that the payment had not gone through and made further enquiries, including enquiries about his employment status. He made enquiries on both issues continually until May of 2016. While there can be no questions raised regarding the constant enquiries about his outstanding pay, it is the enquiry relating to his employment status that concerns me. He had a contract to cover him but disregarded it. In pursuit of his claims for the months of April, May, June 2016 (plaintiff's version is that he had been paid for the months of January to March), he is placing reliance on the very contract he disregarded in 2016. When confronted during cross examination about the repeated enquiries about his job in the face of the January 2016 contract, his answer plainly avoided the question. He explained that he was concerned that the defendant was having financial problems or problems in remitting money to South Africa and he knew that the aircraft required a lot of money to fix. Neither answer addressed the question in my view. An employee who suspects that his employer is experiencing financial problems is hardly ever going to supplicate for his employment. He will, in all probability, seek alternative employment. Neither does the answer regarding difficulties in transmitting funds to South Africa. Both reasons will most likely drive even the most loyal of employees in the opposite direction.

28. Nonetheless, upon a proper evaluation of the record, one infers that plaintiff must have resolved he was better positioned to assert his rights for his unpaid emoluments while on South African soil. I must hastily record that there can be no criticism leveled against the plaintiff in that regard. What I disagree with is the fact that he wants the defendant to pay for his stay in South Africa while he was busy asserting his rights in recovering his outstanding emoluments, in circumstances where he knew that his

services are to be discharged in Angola. I refer to the email of 18 February 2016[15] from the plaintiff to the defendant, the relevant parts of which read:

> *'After our conversation, I do not know where I am with you. I do not think you trust me anymore do to what is best for you and your aircraft.....Please give me an indication if you still need my services because I need to start looking for another job If you are not interested for me to work for you, could you please let me know urgently and pay me my outstanding salary. I have been committed to you and have tried my best to help you where I can.....' Best regards Riaan.*

29. Once again, he disregards the employment contract as he calls upon defendant to make it clear whether he wants his services or not. In subsequent e-mails the gloves are off as plaintiff is unequivocal that he is not returning to Angola unless certain conditions are met. I refer to his e-mail of 24 March 2016[16]. The relevant parts read:

> *I trust you are well,*
> *.....You will understand that I cannot return to Angola without salary and without knowing if you are able to pay me the previous and future salary. I understand the difficulty sending money out of Angola, but please understand that I cannot leave my family without money or being able to arrange for money.... I am still committed to working for you.....'*

30. By putting the defendant on terms, plaintiff made his intention plain that he was not returning to Angola unless his employer met the conditions set forth in the e-mail, namely, the payment of his outstanding salary and an undertaking that he would be paid his future emoluments. Yet he testified in his examination in chief that there was a shortage of dollars in the Angolan market. The shortage of foreign currency in the Angolan market is not a matter the defendant could control. From the onset, this was

[15] Page 53/54 of Exhibit B, Trial Bundle A 23 April 2019
[16] Pages 56 and 96 Exhibit B

a present threat in their relationship which plaintiff should have investigated. Finally, in his email of 9 May 2016, plaintiff wrote:

> '*Please ask Chefe (his way of referring to the defendant) to answer me on the emails I send YESTERDAY about my job and when I will receive my and Wynand's Salaries. Also I need my passport.....Many thanks, Riaan*" (copied as is).

31. This is the same passport he had left with the defendant for his visa application. Without even so much as an enquiry about the progress into the process, he is calling for his passport. Plaintiff had made up his mind that he was not going back to Angola to work for the defendant. The constant enquiries about his job must have been a sop. A further inference to be drawn from the last email is that the two employees must have been sharing their stories about the outstanding pay, otherwise there would have been no basis for the plaintiff to enquire about his co-pilot's outstanding salary. It is also likely that they may have been collaborating because shortly after this e-mail, in May, the aircraft was the subject of an attachment order pursuant to court proceedings instituted by the co-pilot. Two months later, a further attachment order followed, pursuant to application proceedings launched by the plaintiff.

32. In his founding affidavit[17], plaintiff averred:

> '*On Friday 22 July 2016, I was in conversation with one Werner Nothnagel, being the accountable manager at 2nd respondent where the aircraft is currently positioned. I have certain documents in my possession that needs (sic) to be used in the current servicing of the aircraft. I was also under the impression that I am still in the employ of the 1st Respondent and suggested that I do the post service flight. During this conversation, I was informed by Mr Nothnagel that he was informed I am not allowed to come to there and that he*

[17] 26.1- 4 on page 67-68

was waiting written confirmation of the instruction by the 1st Respondent that I am not allowed near the aircraft.'

33. The founding affidavit- to the motion proceedings to attach the aircraft- was ready for the plaintiff to depose to two days after the plaintiff's conversation with Nothnagel. Surely plaintiff had no intention of going back to Angola and his mind was made up, not in July, but early in the year of 2016. He had no visa to work in Angola. It expired on 2 March 2016 yet he made no follow up enquiries about his visa. For all these reasons, plaintiff is not entitled to any remuneration post 31 January 2016 and his claim for same is unsustainable on the facts. Consequently, it is not necessary to consider the question of whether the 2016 contract is valid. In the event I am wrong, I again touch on it when I deal with the discussion on rules of private international law.

Whether the defendant has discharged his obligations with the plaintiff in terms of the 2015 contract?

34. The contract signed by the parties in 2015 states that the remuneration is Kwanza 950 000. The plaintiff however states that he was informed that he would be paid USD 9500 and so he was paid. The defendant conceded that he paid plaintiff in dollars but it was purely a means to assist the plaintiff to take his money out of the country just as he had done with many other foreigners. Such assistance cannot be turned into an obligation when the contract states he must pay in Kwanza. He added that if plaintiff was of the view that he was owed anything more, it was available in Angola in Kwanza. Perhaps it is apposite to quote the remuneration clause in the 2015 contract in full. It reads:

'The employee has the right to a remuneration paid on a monthly basis in the amount of 950 000.00 ....'

35. Counsel for the plaintiff submitted that in interpreting this clause the court would need to have regard to the contract as a whole, its nature, the surrounding circumstances including the exchanges between the parties prior to reaching the agreement and how

the parties conducted themselves in the discharge of their obligations. In short, he advocated to the court to have regard to the factual matrix or background information. In so doing, counsel referred the court to the case of *V v V*[18] and submitted that the court adopt an interpretation which would yield commercial or business sense. In addition, that having due regard to the two failed requisitions of R897 750 and Euro 66 500, the logical conclusion can only be that defendant owes plaintiff a salary for the seven months in respect of the 2015 contract plus the claim arising from the 2016 contract, which I have already dealt with.

36. In response, the defence reminded the court that it was dealing with a contract with foreign elements. As a result, the question of choice of law becomes relevant. Forsyth[19] suggests the four stages entailed in the choice of law as, (i) jurisdiction, (ii) characterization, (iii) determining the *lex causae (the law indicated by the relevant conflict rules as the law governing the dispute)*, and finally, (iv) ascertainment of the content of the *lex causae*. In addressing choice of law in contractual obligation, the learned author goes on to state that a contractual obligation cannot exist in a vacuum. It must draw its existence from a legal system, where norms specify that in the particular circumstances a contractual obligation exists[20]. Parties to a contract are at liberty to choose the law that will govern their relationship, referred to as party autonomy. Where the parties have not availed themselves of party autonomy, it is for the court to establish the law that has to be applied to resolve the dispute. Forsysth[21] puts it as follows: The correct approach is for the court, having determined that there was no choice of law, express or implied, to disregard the parties' intentions, actual or presumed, and weigh the factual links between the agreement and the various relevant legal systems.

37. The leading authority in this regard is *Standard Bank of South Africa v Eifroken*[22] where it was espoused that in the absence of any further indicators, the *lex loci*

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[18] (A5021/12) [2016] ZAGPJHC 311 (24 November 2016)
[19] Forsyth CF, Private International Law, 5th edition, 2012, page 10-11
[20] Page 316
[21] Page 330
[22] 1924 AD 1 71

contractus (the law of the place where the contract was concluded) governs the contract unless the contract is to be performed elsewhere in which case the *lex loci solutionis* (the law of the place where performance takes place) applies. A peek through the recently decided cases confirms that this still is the position. For example, in *Society of Lloyds v Rohman, Isle*[23] the same approach to establishing the *lex causae* was confirmed:

> 'This approach was confirmed by Trollip J in Guggenheim v Rosenbaum[24] (2): According to English and our law the proper law of the contract is the law of the country which the parties have agreed or intended or are presumed to have intended shall govern it; and in the case of a contract concluded in one country to be performed in another, then in the absence of an express term or any other indication to the contrary, it can be presumed that the proper law is the law of the latter (*lex loci solutionis*).'

38. There have been some developments lately which suggest a more centered or rather, objective approach. For example, in *Ziphakamise Capital Caterers v Wolmarans*[25] where the court was also concerned with an international contract, it noted:

> 'In terms of the test to apply in determining the proper law of contract and jurisdiction the court in **Kleinhans** (supra) noted that the subjective test which was applied in **Standard Bank of SA v Efroiken & Newman 1924 AD 171 at 185** had not been rejected. However, the court preferred the objective test which was enunciated in **Ex parte Spinazze & Another NNO 1985 (3) SA 650 (A).** The enquiry in terms of the objective test entails an investigation into which law and jurisdiction "does the contract have the most real connection?..."

39. The comments below from Lloyds[26] can only serve to re-affirm the shift towards the objective test. Most importantly, it is clear from these cases that the task facing the court is not only about connecting the contract to a legal system but the substance of

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[23] Society of Lloyds v Romahn , Society of Lloyd's v Ilse ; Society of Lloyd's v Ilse ; Society of Lloyd's v Ilse (5108/03 , 5105/03 , 5107/03 , 8588/04) [2006] ZAWCHC 7; 2006 (4) SA 23 (C) (3 March 2006, para 47
[24] 1961 (4) SA 21 at 31AB.
[25] Ziphakamise Capitol Caterers (Pty) Ltd v Wolmarans and Others (J537/04) [2008] ZALC 82 (20 June 2008) para 37-38
[26] supra

the obligation, or the transaction or, more clearly, what must be done in terms of the contract.

> 'Booysen J also had regard to *Improvair (Cape) (Pty) Ltd v Establissements NEU*[27], in which Grosskopf J pointed out that the "traditional" approach of imputing an intention to the parties was no longer followed in English law. Thus in *John Lavington Bonython and Others v Commonwealth of Australia,* Lord Simonds stated that "the substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection" (the so-called "Bonython formula"). This led Megaw LJ, in *Coast Lines Ltd v Hudig & Veder Chartering NV*,53 to comment as follows:
>
> I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the transaction, i.e. the transaction contemplated by the contract, and the system of law. That, I believe, indicates that where the actual intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the Bonython formula, the system of law 'by reference to which the contract was made'), more importance is to be attached to what is to be done under the [substance of the contract rather] than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract.'

40. Coming back to the case under consideration and looking at the following connecting factors:

    i. The contract was concluded by the parties in Ondjiva, Angola.
    ii. The contract makes reference to Angolan law, for example, the requirement that the contract be registered or filed with the Employment Centre, (was

[27] 1983 (2) SA 138 (C) at 145FH. "Establissements" should read "Établissements"

said to be a reference to the Department of Labour in Angola). It was not disputed that the contract had been so filed.

iii. It required plaintiff to render services in Ondjiva, Angola. Counsel was emphatic on this point that notwithstanding the suggestion that the plaintiff flew the aircraft in and around Angola, Namibia and South Africa, the fact remained that aircraft ultimately returned to its hangar in Lubango, Angola.

iv. Plaintiff had to obtain a valid work visa from the Angolan government;

v. His license, even though it was issued in South Africa had to be recognized by the Civil Aviation Authorities in Angola;

vi. The contract is written in Portuguese, a language that is spoken in defendant's home country; and,

vii. Plaintiff's remuneration was denominated in Kwanza and paid from Angola. There can be no doubt that the substance of the obligation or the transaction between the parties has its closest and most real connection to the Angolan legal system. Before I leave this discussion, it is comforting to note that using the centered or the objective test is in harmony with the rules as espoused in *Standard Bank v Eifroken*[28] for, that ruling is binding to this court.

41. The difficulty however, is neither the plaintiff nor the defendant led any expert witness to establish the content of the Angolan law. In the circumstances, where my own research yielded little to nothing, I am grateful for the assistance offered by both counsel as both referred me to various authorities as means of addressing the situation. Counsel for the plaintiff referred the court to the unreported case of *Stars Away International Airlines (Pty) Ltd v Thee*[29] and that of *Casey and Another v First Rand Bank Limited*[30]. In referring the court to the aforementioned cases, counsel demonstrated that the courts have frequently made orders in US dollars. It needs to be mentioned, based on the circumstances of the case being considered. None other

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[28] Note 20 supra
[29] Stars Away International Airlines (Pty) Ltd v Thee NO 2013 JDR 0106 (LC)
[30] Casey and Another v First Rand Bank Limited 2014 (2) SA 374 (SCA)

than the case of *Maschinen Former GmbH & Co Kg v Trisave Engineering*[31] was on point. The extract produced here below confirm that sentiment. The case was referred to by the defendant's course:

> 'It is trite that a South African Court cannot take judicial notice of what the law of a foreign state is, unless that law can be ascertained readily and with sufficient certainty (section 1(1) of the Law of Evidence Amendment Act, No. 45 of 1988). Each aspect of foreign law is a factual question that has to be proved by someone with the necessary expertise (See: Schlesinger v Commissioner for Inland Revenue 1964(3) SA 389 (A) at 396G; Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen 1986(4) SA 865 (C) at 874F). Neither of the parties have considered it necessary to place any expert evidence before this Court so as to enable it to determine whether in terms of the law of Germany the provisions of clauses VIII and IX(2) of the general terms and conditions of sale, the Koblenz High Court has jurisdiction in respect of suits arising from the agreement of sale between the plaintiff and the defendant. In the absence of such evidence, one is driven to employ the contentious presumption that laws of foreign states are the same as that of the Republic of South Africa. Colman J said the following thereanent in Bank of Lisbon v Optichem Kunsmis (Edms) Bpk 1970(1) SA 447 (W) at 451A:
>
> "The presumption is, as I see it, no more than an arbitrary rule of convenience. It is based, not upon a belief that the laws of all countries are the same, but upon a useful fiction which facilitates the resolution of disputes and which works no injustice because it is always open to an interested party to displace the presumption by proving that the relevant foreign law is, in truth, different from our own. These considerations are, to my mind, no less appropriate to a matter which is governed in South Africa by a statute than to a matter governed by the common law."

42. Accordingly, I shall look no further than *Mashcinen* and adopt the useful fiction that Angolan law is the same as *lex fori* in resolving this dispute. In further submissions, counsel for the defence referred the court to section 32 (1) (a) of the Basic Conditions of Employment Act 97 of 1997 (the BCEA), and submitted that an employer, according

[31] Maschinen Frommer GmbH & Co Kg v Trisave Engineering & Machinery Supplies (Pty) Ltd 415/02 cod 2002

to this section, must pay an employee any remuneration that is paid in money in South African currency. Based on the presumption that the Angolan law is identical to South African law, it must be accepted that in terms of Angolan law, the employer was obliged to pay the plaintiff in Angolan currency. This approach will accord with the express terms of the 2014 and 2015 contracts. For this reason, the 2016 agreement would be repugnant of the presumed Angolan law and accordingly unenforceable. I deal with the two submissions in turn.

43. In interpreting the contract and, in particular, the remuneration clause counsel had already submitted, the court had to enforce the contract on its express terms. How the parties behaved towards each other, and the pre-contract exchanges as alleged by the plaintiff, i.e. that he was told would be paid in US dollars are irrelevant. In so doing, in terms of the 2015 contract, background and factual matrix disregarded, the defendant's liability to the plaintiff was to pay the latter in Kwanza, not dollars and, given the evidence of the defendant's payments, there is no more money due to the plaintiff and that should be the end of the case. Respectfully, I do not agree with that interpretation, given the following background facts: (i) the two failed payments made at the end of December 2015 in the amount of R897 750 and Euro 63 000. With no evidence of a successful payment thereafter, if it is indeed the case that the defendant had discharged his obligations to the plaintiff, those payment attempts ought to have an explanation; however, no such explanation has been tendered by the very party who attempted the payment. It cannot be that in making those attempts the defendant was still in pursuit of assisting the plaintiff; (ii) the evidence that it was impermissible to take the Kwanza out of Angola; (iii) the payments made to the plaintiff for the year 2014 and during 2015; all of which were made in cash in 2014 in US dollars (these payments are supported by pay slips depicting US dollars), and in 2015 all the payments were in US dollars bar one which was in Euro; (iv) the parties' evidence that since May 2015 there had been a shortage of dollars in the Angolan market which made it impossible to pay the plaintiff for some time; and finally, (v) plaintiff's allegation that he had an agreement with the defendant that he would be paid in US dollars. I add to the latter the following: given the parties' evidence that it was impermissible to

take the Kwanza out of Angola, then it is highly improbable that the plaintiff, in the absence of evidence that he had intentions to re-establish himself in Angola and relocate his family there, would have agreed to be paid in Kwanza and accumulate Kwanza in Angola leaving his family in South Africa with no means of support. It simply makes no sense. Reading the remuneration clause with complete disregard of all the factual matrix would produce an absurd and insensible meaning to the contract. On this basis, the background information introduced by both parties must be considered. In this respect I can do no more than refer to the reasoning of the court in *Dexgroup (Pty) Ltd v Trustco*[32]

> 'The attack in this case was that in interpreting a particular clause - which was clear in its terms - the arbitrator had regard to extrinsic evidence to provide the context within which the clause fell to be interpreted. On this basis and another point, the arbitrator had committed irregularity.
>
> 'In regard to the interpretation of the contract it was submitted that the arbitrator was bound by 'the well-established rule that a contract must be interpreted by construing its plain words' and that it is only in cases of ambiguity or uncertainty that an arbitrator can take account of surrounding circumstances 'or its so-called factual matrix'. It is surprising to find such a submission being made in the light of the developments in the interpretation of written documents reflected in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*[33] and *Natal Joint Municipal Pension Fund v Endumeni Municipality*[34]. These cases make it clear that in interpreting any document the starting point is inevitably the language of the document, but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. The approach of the arbitrator cannot be faulted in this regard.'

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[32] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd(687/12)[2013] ZASCA 120 (20 September 2013)
[33] KPMG Chartered Accountants (SA) v Securefin Ltd & another 2009 (4) SA 399 (SCA) paras 39 and 40
[34] 19.Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 18 and 19

44. *In KPMG Chartered Accountants (SA) v Sercurefin &O*[35], this is what the court had to say on interpretation:

> 'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) para 33-64. Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCA 132 at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything'), to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7.)'

45. I conclude that the correct interpretation of the clause, reading into it the factual matrix, is that the plaintiff would be paid in US dollars. In respect of his obligations in terms of this agreement, defendant conducted himself in exactly that fashion not because he was helping; he was fulfilling his duties in terms of the agreement. His repeated but failed attempts to make the transfers during November in the amounts of R897 750

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[35] Note 33 supra

and December 2015 in the amount of Euro 63 000, demonstrate his efforts to uphold that agreement, otherwise there would have been no need for these payments.

46. With regard to the second contract, based on the assumption that the Angolan law would be exactly on the same footing as South African law, it would not have been competent for defendant to pay the plaintiff in US dollars as remuneration in South Africa in a contract of employment between South Africans is paid in Rand. The contract therefore would not have been enforceable. My view in this regard is fortified by the fact that neither the 2014 nor the 2015 contract used the US dollar for remuneration. They both referred to the Kwanza. Notwithstanding, the parties paid each other in dollars and, on the odd occasion, in Euro. Such conduct suggests that there must have been a legal impediment that the parties wanted to address with the written agreement that the plaintiff be paid in Kwanza, yet the practice throughout the existence of their employment relationship was to pay each other in US dollars. I conclude that the 2016 contract must have been invalid in terms of Angolan law.

Conclusion

47. The plaintiff testified early in his examination in chief about an instance when he was paid Euro13 000. Of this amount, Euro 9000 was his salary and Euro 4000 was the co-pilot's. This payment took place during 2014. He testified that he gave this money to the co-pilot. The amount allegedly paid by the defendant during December 2015 is Euro 13 300, while the plaintiff acknowledges only Euro 9000. Since the defendant is an experienced businessman, there is no need to debate the issue further and make unnecessary credibility findings. In the absence of proof, I accept the common amount between the parties, Euro 9000. Plaintiff testified that against the seven months owed from year 2015 (as represented by the two payment requisitions, RL5 and RL6), he was owed USD 66 500. He was paid USD 9500 in July 2016, which he decided to allocate to June 2015. This reduces the debt of 2015 to USD 57 000. He had further received USD 18 000 which he allocated to February and March 2016. I have already ruled that plaintiff is not entitled to any remuneration beyond 31 January 2016. Thus, the 18 000 must further reduce the outstanding USD 57 000.

48. In the result then, plaintiff is owed an amount of USD 39 000. I am not entirely persuaded that it would be proper to mulct the defendant with all the costs in the circumstances of this case. Accordingly, the following order is made:

i. Plaintiff's claim succeeds partially.
ii. The defendant is hereby ordered to pay the plaintiff an amount of USD 39 000 (using the exchange rate as at date of this order.)
iii. Interest is to be paid on the said amount of USD 39 000 *a temporae morae*
iv. The defendant is to pay 50% of the plaintiff's taxed or agreed costs.

pp **NN BAM**
ACTING JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING: **13** May 2019

DATE OF JUDGMENT:

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