



CASE NO. LC 99/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PENDUKA DEVELOPMENT TRUST

APPLICANT

and

SUNNYBOY MBENGELA MWANAWINA

1ST RESPONDENT

TEOPOLINA N. SHINDUME

2nd RESPONDENT

CORAM: SMUTS J

Heard on: 2011.02.08

Delivered on: 2011.02.08

JUDGMENT

SMUTS J: [1] According to the founding affidavit in this urgent application brought by the applicant, it is a charitable trust. This application was brought in the recess on 31 December 2010. The applicant was granted the stay of an arbitration award to the

effect that the award made by the 1st respondent on 17 December 2010 was to be suspended until the finalisation of the application for review of the arbitration award brought on notice of motion dated 24 December 2010. That award was in favour of the 2nd respondent. The application was then postponed to 5 January 2011 and subsequently to 12 January 2011 and then for hearing on the opposed motion roll this week.

[2] On 31 December 2010, Muller, J made an order requiring the applicant to comply with Labour Court Rule 4(2) to file a resolution by the applicant to authorise Mr Ekandjo to represent the Applicant and to file the affidavit of Mr Kristian Larson referred to in the notice of motion. These documents were to be filed by 4 January. I noted on the Court file that Mr Larson's affidavit was duly filed together with what would appear to be a resolution of the board of trustees of the Penduka Development Trust. It is referred to as being a round robin resolution and is signed by two trustees.

[3] I accept for present purposes without any further material before me that these are then the trustees of the Trust and that this resolution seeks to authorise Mr Ekandjo in his capacity as an industrial relations officer to appear on behalf of the Trust. It goes further than that and also authorises the bringing of the application itself, which would be important for other purposes.

[4] What is presently relevant is whether the resolution and the position occupied by Mr Ekandjo would meet the requirements of Rule 4(2) of the Labour Court Rules. When the matter was called yesterday I enquired from Mr Ekandjo as to his position with the Trust. I was informed by him that he is an industrial relations officer of the applicant and had been appointed to that position as from 1 July 2010. He also stated that the position is part time and that he is required to work three days a

week.

[5] I adjourned the matter until 14:15 yesterday afternoon and asked Mr Ekandjo amongst other things to provide me with his letter of appointment or employment contract and also for a copy of the deed of trust. When the matter proceeded at that time, Mr Ekandjo provided both these documents. It is not necessary for present purposes to determine whether the trustees are authorised to bring the application in the manner in which it has been done and not in their own names as trustees. I do not go into that question and expressly leave it open. What I would rather propose to do is to address the question of

Rule 4(2).

[6] The employment contract is short. It is essentially one of part-time employment between the Trust and Mr Ekandjo. It requires him to work three days per week and five hours per day. The contract itself refers to his work as consultancy work. It may be a conducive to clarity to refer to its terms. After the citation of the parties, it states:

"Whereas the consultant has been rendering industrial relation service to the employer for eight months regularly

And whereas the employer has offered the consultant part-time employment services for all labour related matters.

And whereas the employer has accepted the said offer which evolve around three days of consultancy work per week.

1. **Starting date:** 1 July 2010,

2. **working hours:** *five hours per day*
3. **Remuneration:** *(which I will not refer to)".*

It also states that the contract can be terminated by either party giving the other party one months' written notice in advance.

[7] This is then Mr. Ekandjo's part-time employment contract. I then posed some questions concerning the contract to Mr Ekandjo. He explained that he is essentially in position of an employee and not an external consultant although he is at liberty to do other consulting work when he is not engaged for the applicant.

[8] I turn now to the provisions of Rule 4 because that is what is at heart of this inquiry. Rule 4 of the Labour Court Rules is entitled "*representation the parties*".

[9] The fundamental principle underpinning this rule is set out in Rule 4(1) which requires that a party to any proceedings before this Court may appear in person or be represented by a legal practitioner admitted to practise as such in Namibia in terms of the Legal Practitioners Act, 1995 (Act No 15 of 1995). Rule 4(2) is ancillary to this fundamental and proceeds to explain the nature of representation of a party when it is a company or other body corporate and not a natural person. It thus sets out how a non natural legal person is to be represented in proceedings when not represented by a legal practitioner. It does so in the following way:

" Where the party is a company or other body corporate or a trade union or an employers' organisation it may be represented by one of its directors or other officers or office bearers or officials, as the case may be, provided that a

resolution of the company or other body corporate, trade union or employers' organisation authorising such person to represent it is filed with the Registrar at the time that an application is filed or the appeal is lodged or, if that is not possible, at least five days before the hearing of the matter"

[10] The principle is thus that when a company is involved, it would entail one of his directors or other officers represent it. This would also apply to other body corporates. Without addressing the position of a trust, and the complex question as to its legal personality, it may be again conducive to clarity to refer to the position of a company.

[11] Under the Companies Act, 28 of 2004 an officer of a company is defined (for the purpose of that Act) as *"including any managing director, manager or secretary but excludes a secretary, which is a body corporate"*. Although the question as to who is an "officer" of a company has arisen in other contexts, there has been some useful discussion of this concept. I refer to *Lipschitz v Wolpert and Abrahams 1977 (2) SA 732 (A)*, *Ensor, NO v Syfrets Trust and Executor Company (Natal) Limited 1976 (3) SA 762(D)* and *Baker and others v McHardy and others 1957 (4) SA 541 (N)* at 548.

[12] These decisions, although in different contexts, stress that in order to be an officer of a company (when this word is juxtaposed with the term director), it would connote persons who advance and protect the financial interests of a company. Furthermore, the term would in my view contemplate that the occupant of that position holds an office within a company or entity with particular duties of that nature in respect of that corporate entity. Rule 4 (2) significantly does not refer to an employee but confines representation to a director or officer of a company or body corporate, given the phrase "as the case may be" contained in the rule.

[13] In the case of a trust, those who hold office would then be the trustees. Where a trust engages in commercial activity or is even a charitable trust, the term may also include its general manager. It is not necessary for present purposes to determine that or even to express a view as to whether other members of management may be officers for the purpose of this rule. That is because Mr Ekandjo is not a manager in any sense of the applicant. He is merely a part-time employee and occupies a position of industrial relations officer. It would seem to me that despite the use of the word officer in the designation of his position, his position would not constitute "officer" for the purpose of Rule 4(2).

[14] I accordingly rule that he would not be authorised to represent the applicant in these proceedings in this Court. I noted in the original resolution when the application was brought that he did so because of the difficulty that arose at that specific time of year, at 31 December 2010, to procure the service of a lawyer. This is because it was during the recess. There would appear to be few legal practitioners available to provide services to the applicant or other employers at that time of year.

[15] When the matter was raised with Mr Ekandjo, he then requested a postponement of the application in the event of a ruling of this nature, namely that his position would not fall within the definition of officer for the purpose of Rule 4(2), and his inability to represent the Trust in these proceedings.

[16] I raised with him the question of the potential prejudice to the 2nd respondent whose award has been held up by more than a month by now. After this was canvassed with Mr Ekandjo, it would seem to me that the appropriate order would be to grant a postponement, but only until Friday of this week at 09h00 (on 11 February 2011), so that the applicant can be represented by one of its trustees or a legal

practitioner.

[17] This would then address the question of prejudice to the 2nd respondent. The Court will be available to hear full argument on the application on Friday. I want to indicate at this stage that, save for compelling circumstances, I would be disinclined to further postpone the matter in view of the potential prejudice to the 2nd respondent.

[18] It is unfortunate that I am driven to this conclusion in this instance because of the nature of the applicant, being a charitable trust. But Rule 4(2) requires that it is to be represented either by a legal practitioner or an officer. As I have indicated this would not include a part-time employee in the position occupied by Mr Ekandjo.

[19] The postponement would mean that the order made by Muller, J (that the award made by the 1st respondent in favour of the 2nd respondent would be suspended until the review application is finalised) would still operate and remain in place until Friday.

[20] Because of the short notice, I will not require heads of argument (if the applicant is represented by a legal practitioner) in accordance with the rules of this Court. That would not be possible. But if there is to be legal representation, it would be helpful if heads of argument could be filed by Thursday afternoon at 15h00.

[21] My ruling then is to the effect that the matter will be postponed, to Friday 11 February 2011 at 09h00 and that the further terms of the order made by Muller, J on 31 December 2010 would remain in place namely especially paragraph 2 which relates to the stay and the suspension of the arbitration award until the finalisation of the review.

SMUTS, J

ON BEHALF OF THE APPLICANT

MR SIMON EKANDJO

ON BEHALF OF THE 2ND RESPONDENT

IN PERSON