



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## JUDGMENT

Case no: A 261/2012

In the matter between:

**MINE WORKERS UNION OF NAMIBIA****APPLICANT**

and

**JOHANNES NDEUTEPO****1<sup>ST</sup> RESPONDENT****JONAS LUMBU****2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Mine Workers Union of Namibia v Ndeutepo* (A 261/2012) [2013]  
NAHCMD 182 (28 JUNE 2013)

**Coram:** UNENGU, AJ**Heard:** 31 October 2012, 22 January 2013 and 20 February 2013**Delivered:** 28 June 2013

**Flynote:** Labour Court – The President and members of the Union not following the constitution – The President suspending members of the NEC – The NEC members suspending the President – suspensions null and void – subsequent meeting by NEC valid.

**Summary:** Labour Court – A *rule nisi* was granted in favour of the applicant – the MUN interdicting its President and another from performing certain functions for and on behalf of the applicant. On the return date, the Court found that the applicant satisfied the requirements for a final interdict and confirmed the *rule nisi*.

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## ORDER

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1. The *rule nisi* is confirmed.
  2. The first and second respondents to pay the costs.
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## JUDGMENT

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UNENGU AJ:

[1] By way of Notice of Motion, the applicant approached the court on an urgent basis and sought relief in the following terms:

1. 'Condoning the applicant's non-compliance with the Rules of this Honourable Court and the time periods therein in so far as these have not been complied with and directing that the matter be heard as one of urgency as contemplated in Rule 6(12) of the Rules of the Court.
2. That the *rule nisi* be issued calling upon the respondents to show cause why they should not be interdicted and restrained from:
  - 2.1 entering upon the premises of the applicant situated at Mungunda Street, Katutura;
  - 2.2 interfering with the activities of the applicant, its employees, agents and/or office bearers in whatsoever manner;
  - 2.3 in any manner act or purport to act on behalf of the applicant;
  - 2.4 returning the assets of the applicant, inclusive of the Toyota Corolla motor vehicle, with registration number N 145470 W;
  - 2.5 adhering to the National Executive Resolution dated the 15<sup>th</sup> September 2012, and the Resolution dated the 6<sup>th</sup> October 2012, relating to the suspensions of the First and Second respondents until the convening of the Central Committee Meeting;

3. Ordering that the relief sought in terms of paragraphs 2.1 – 2.5 of the *rule nisi* operate as interim orders with immediate effect, pending the return date of the rule.
4. Directing the respondents to pay the costs of this application, in the event of them opposing same.
5. Granting the applicant such further or alternative relief as the Honourable Court may deem fit.'

[2] On 31 October 2012, after hearing submissions from counsel for the applicant and the respondents, I allowed the application as an interim order for relief sought in the Notice of Motion with a return date of 18 January 2013. Mr Boesak represented the applicant while the respondents were represented by Mr Isaaks.

[3] On 18 January 2013, the rule was extended by the judge on duty to 22 January 2013 and extended again to 20 February 2013 for submissions. The applicant was still represented by Mr Boesak whereas the respondents, this time by Mr Narib. Both counsel prepared written heads of arguments which they amplified with oral submissions.

[4] Mr Boesak moved for the confirmation of the *rule nisi* which Mr Narib opposed and requested the court to discharge it.

[5] The background of the application is briefly as follows: In September 2012, before the launching of the application, first respondent, at the time, the elected president of the applicant, suspended certain members of the National Executive Committee of the applicant, on allegations of clandestine activities.

[6] In paragraph 18 of his letter dated 19 September 2012 which letter has been attached to the founding affidavit of Mr Heita, who deposed to the affidavit on behalf

of the applicant and marked 'MH 5', first respondent justified the suspension of the National Executive Committee Members as follows:

#### 'NATIONAL EXECUTIVE COMMITTEE

I would like to take this opportunity to update you on recent developments in our organization. The NEC meetings of recent have been marred by ill-disciplined and clandestine acts. These clandestine activities being experienced at the National Executive Committee are spearheaded by some members of the executive in an attempt to oust senior leadership and appoint themselves into positions of power. This is a serious threat to the state of the Union and warrants a decision as a matter of urgency.

In observance of the above and the level of damage these activities have caused within the senior leadership and potential destruction to the Union. I have taken a decision as per the Constitutional obligation of the President to protect the organization from this inherent threat to its fibre and standing. I have therefore decided to suspend the following members of the National Executive owing to the fact that these activities render the NEC unable to carry out its functions objectively as entrusted. They are:

1. Cde M. Heita (Vice President)
2. Cde G. T Max (Acting National Secretary)
3. Cde P.. Munenguni (Vice Treasure)
4. Cde F. Kandenge (Regional Chairperson West)
5. Cde J. Mootseng (Regional Secretary West)
6. Cde M. Isak (Regional Chairperson South)
7. Cde R. Emvula (Regional Secretary South)
8. Cde U. Kamberipa (Acting Regional Chairperson)
9. Cde E. Hangulah (National Education Research OHS Co-ordinator)

Further to this suspension a proof into these activities will be launched on adoption of a report by me to the Special NEC scheduled for the 29<sup>th</sup> September 2012. I therefore call for patience amongst leadership as we deal with this very important but sensitive matter. Any form of intimidation or instigation should be reported directly to Head Office'

[7] It is clear from the above quoted letter and other documents filed of record and from both the affidavits that the decision to suspend the National Executive Committee members of the applicant was taken by the first respondent alone in his capacity as President of Mine Workers Union (MUN).

[8] After the suspension, on 21 September 2012, a letter titled 'UNCONSTITUTIONAL SUSPENSION OF THE NATIONAL EXECUTIVE COMMITTEE MEMBERS – NEC' signed by 11 of the NEC members, was sent to the first respondent and invited him to a special meeting on 29 September 2012 and informed him that in the interest of the organization they therefore disregarded his letter of suspension dated 17 September 2012 as null and void and unconstitutional.

[9] However, the meeting did not take place because the date of 29 September 2012 did not suit the first respondent. Therefore, the meeting was rescheduled to 6 October 2012, but again, without tendering an apology, the first respondent was absent and as such did not attend this meeting. The meeting went ahead without the attendance of the first respondent and 14 resolutions were taken.

[10] In that meeting, it was, amongst others, resolved to suspend the first respondent from all the Mineworkers Union (MUN) official duties and his self imposed rights as a signatory to financial documents of the MUN at financial institutions like Bank Windhoek and other banks, were cancelled with immediate effect. Instead, the Vice President and the National Treasurer were given rights as signatories on behalf of the MUN.

[11] On 11 October 2012, the first respondent was served with the letter of suspension, but despite the withdrawal of his right of signatory, the first respondent continued to withdraw money from the account of the applicant and use its motor vehicle. Therefore, as a result of the foregoing, the applicant approached the Namibian Police for assistance but they were unwilling to help. The applicant then launched an urgent application to the court for the relief sought in the Notice of Motion, which relief was granted as prayed for.

[12] On the return date of the *rule nisi*, Mr Boesak, counsel for the applicant, after giving the court an overview of the happenings which prompted the urgent application, argued that the applicant has established a clear right on a balance of probabilities with the facts placed before court. He submitted that the first respondent lacked authority to suspended members of the NEC of the applicant and that being so, the suspensions were null and void. Further, Mr Boesak submitted that the first respondent, again without due process, decided to cancel the suspensions of some of the suspended members. It is his further contention that the NEC members who attended the meeting of 6 October 2012 who resolved during that meeting to suspend the first respondent, constituted a quorum. In fact, he said the first respondent was suspended in September NEC meeting – at which meeting the first respondent was also present. He reiterated his submission that there was a quorum at the meeting of 6 October 2012 as the majority of the members of the NEC attended the meeting. He pointed out to the court that the management of the affairs of the Union is provided for in clause 13 of the constitution of the applicant while the procedure to be followed when voting is by a motion duly seconded by majority vote through the show of hands or on a secret ballot. After referring to businesses of the different committees, on how these committees vote, Mr Boesak, submitted that resolutions of the NEC are taken by a motion duly seconded by a majority vote through the show of hands or by a secret ballot because the constitution does not provide a quorum for the NEC meeting.

[13] The above stated argument by Mr Boesak has been necessitated by the fact that the constitution does not provide for a quorum for the National Executive

Committee – whereas for other committees within the structures of the Union, it does. He pointed out that in view of such an eventuality of not providing for a quorum in the constitution, he was of the view that clause 24.10 of the constitution is applicable in respect of the National Executive Committee.

[14] Clause 24.10 of the applicant's constitution stipulates that except otherwise provided, all issues shall be decided by a motion duly seconded and by majority vote through the show of hands unless such meeting decides on a secret ballot. This he said that nine out of fifteen members of the National Executive Committee with voting rights participated in the voting to suspend the first respondent, making it a majority vote, therefore, constituted a quorum. Alternatively, so he argued, the National Executive Committee, when it took the resolution to suspend the first respondent, might have well acted in terms of clause 24.18 which caters for 20% of members in good standing who, by secret ballot determine whether an office bearer or an official should be removed or, if such person has been removed whether he should be reinstated.

[15] On the other hand, Mr Narib, counsel for the respondents has asked for the discharge of the rule. Firstly, he argued, because the procedure followed to suspend the first respondent (by suspending him during a meeting) was not in accordance with the constitution of the applicant. He submitted that the correct procedure to follow when removing an official of the Union, in this case the President from his position and to reinstate him in the position is to follow what is provided for in clause 24.18 of the constitution – which is that the National Executive Committee must call for a secret ballot. The other option, according to him, was for the National Executive Committee members in good standing to call for a secret ballot to remove the President.

[16] Mr Narib criticized the NEC members to have followed a wrong route when they removed his client from office *albeit* on a temporary basis. But, he does not blame his own client for doing the same thing also. The whole impasse in the running of the affairs of the Union came about as a result of the first respondent who without following the procedure provided for in the constitution, suspended members

of the NEC. I agree with Mr Narib that the constitution of the applicant is binding on the members because it is their contract they have voluntarily agreed to bind and regulate them. Not only the NEC members are bound to act in accordance with the constitution but the President of the Union also. The first respondent had a duty to see to it that the constitution of the applicant is obeyed and upheld by its members. A constitution of a body such as the applicants is a voluntary contractual agreement between the subscribing members and the Union itself.

[17] The first argument of Mr Narib is that the first respondent and the second respondent were in fact not suspended in view of the fact that the procedure followed to suspend them, is not provided for in the constitution, therefore, invalid. I agree<sup>1</sup>. The members who suspended the first and second respondents lacked authority to do so and thus such a decision taken is a nullity and from a nullity flows nothing<sup>2</sup>. The same goes for the purported suspension of the NEC members of the applicant by the first respondent.

[18] Mr Narib contended that the court should ignore the contention of the applicant that the suspensions by the President are a nullity. I do not agree with that argument of counsel. He is also contradicting himself with what he has said, earlier on – when he said that even if one multiplies 100 times with a nullity, it will still remain zero. A nullity is a nullity and nothing comes out of it. That being the case, it is irrelevant to deal with the issue of quorum. The issue to be determined by the court now is whether Mr Heita, who deposed to the founding affidavit of the applicant, had the necessary authority to do so on behalf of the applicant.

[19] Clause 13 of the constitution of the applicant vests the management of the affairs of the applicant in the NEC. In clause 13.4.9, the NEC amongst others, is given the powers to institute on behalf of or defend legal proceedings against the Union and its members; with a proviso that in urgent circumstances the General Secretary may institute or defend such proceedings, which, action can subsequently be ratified by the National Executive Committee.

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<sup>1</sup> See Case No: A 16/2006: National Union of Namibian Workers v Peter Naholo: delivered on 7 April 2006; paragraph 16 and cases referred to therein.

<sup>2</sup> Nedbank Namibia Ltd v Louw (LC 66/2010) [2010] NALC7 (30 November 2010), paragraph 10.



[20] Thus the power to institute or defend legal proceedings, is one of the functions of the NEC which it must carry out on the day to day running of the affairs of the Union. How the committee must carry out this function, is not stipulated in the constitution. The Secretary General, in urgent circumstances may perform this function alone. The only condition is that the NEC must ratify any decision taken by the Secretary General.

[21] Therefore, from the reading of clause 13 of the constitution as a whole, I take the view that no procedure is prescribed for the NEC on how to go about when taking a decision regarding the institution or defending legal proceedings on behalf of the applicant. That being the case, clause 24 dealing with Standing Rules and Procedures of the meetings of Union should be followed. Clause 24.10 in particular, would be, in my view, applicable and probably is the clause followed by the NEC when a decision was taken to, amongst others, authorize Mr Heita (Vice President of the Union) to sign and execute all legal documents pertaining to this application on behalf of the Union as well as mandating Clement Daniels' Attorney to move and defend the application. If I understand the arguments of both counsel correctly, the issue of a quorum was raised to object against the resolution taken by the Union to suspend the first and second respondents. No issue was taken by the respondents as regard the authority given to Mr Heita to represent the Union, though it was raised in the answering affidavit of the first respondent in the form of a point *in limine*. In any event, the point *in limine* in respect of the standing of Mr Heita was based on the assumption that first and second respondents were on suspension.

[22] Similarly, the first respondent was also of the view that Mr Heita was still on suspension, therefore, could not be authorized by the applicant to deposed to the founding affidavit. It is no longer the case. All suspensions are found to be null and void from the beginning as they were taken in violation of the constitution. And because the President (first respondent) is involved, the first person to take over from him to bring the application on behalf of the Union is the Vice President who happens to be Mr Heita.

[23] Mr Narib does not have a problem with that. His main concern was whether the applicant has satisfied the requirements for a final interdict. According to him the

applicant did not satisfy the requirements of the alternative remedy available to the applicant. Unfortunately Mr Narib did not assist the court in pointing out the alternative remedy the applicant have other than to follow the route it did. The applicant approached the Namibian Police for assistance but they were reluctant to help. Not even after a criminal charge was laid. What other alternative remedy was available to the applicant again to stop the first respondent from abusing its motor vehicle, and drawing money from its accounts at banking institutions and making amendments to its constitution? In my opinion, the applicant exhausted all other remedies at its disposal. The only remedy which remained to the applicant was to seek the relief in the Notice of Motion.

[24] The other issue which worried Mr Narib, is the issue of a quorum. As already indicated, the function to initiate on behalf of or defending legal proceedings against the Union and its members, is a function falling under clause 13 of the constitution i.e., the management of the affairs of the Union. To take such a decision, the NEC follows the Standing Rules and Procedures of the Union meetings. In this case clause 24.10 which requires a motion duly seconded by majority vote through the show of hands, which is also the submission of Mr Boesak, applies. It is a simple majority of the members of the NEC present in the meeting. It is common cause that the majority of the NEC members attended the special meeting of 6 October 2012 when the resolution was passed. Certainly, Mr Narib's objection regarding the quorum, is of no force and effect and is rejected.

[25] In the result, I am of the view that the applicant, on a balance of probabilities, managed to prove the requirements for a final interdict and as such persuaded the Court to confirm the *Rule nisi*. Therefore, I make the following order:

1. The *rule nisi* is confirmed.
2. The first and second respondents to pay the costs.

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Acting Judge

APPEARANCES

APPLICANT

Mr Boesak

Instructed by Clement Daniels Attorneys,  
Windhoek

RESPONDENTS

Mr Narib

Instructed by B D Basson Incorporated  
Windhoek