



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 157/2013

In the matter between:

TEACHERS' UNION OF NAMIBIA

APPLICANT

and

MINISTER OF EDUCATION

1ST RESPONDENT

PUBLIC SERVICE COMMISSION

2ND RESPONDENT

Neutral citation: *Teachers' Union of Namibia v Minister of Education* (LC 157/2013) [2014] NALCMD 2 (24 January 2014)

Coram: CHEDA J

Heard: 6 November 2013

Delivered: 24 January 2014

Flynote: Urgent application Return date – Final order– need to await the outcome of a labour decision – Deductions already made should not be refunded before the matter is finalized. Failure to cite the Permanent Secretary is not fatal to the proceedings as he is duty bound to implement government's decisions as he falls under first respondent.

Summary: Applicant's members went on an Industrial strike. Their salaries were deducted pending the hearing by the Labour Commissioner. No further deductions should be made pending the outcome of the decision by the Labour Commissioner

ORDER

1. The First and Second Respondents are hereby interdicted from making and or continuing to make any deductions from teachers' remuneration in lieu of leave without pay as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;
2. The First and Second Respondents are hereby interdicted from issuing teachers with written warnings as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;
3. Respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved.

JUDGMENT

CHEDA J [1] On 25 September 2013 applicant filed an urgent application with this court and the relief sought was couched as follows:

"That a Rule Nisi be issued calling upon the Respondents to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable court why an order should not be made in the following terms:

- 2.1 *An order interdicting the first and second respondents from making and or continuing to make any deductions from teachers' remuneration in lieu of leave without pay as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;*
- 2.2 *an order interdicting the first and second respondents from issuing teachers with written warnings as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;*
- 2.3 *Ordering the first and second respondents to immediately pay back any money deducted from teachers' remuneration after the referral of the dispute to the Labour Commissioner's office on the basis of the teachers' alleged participation in the strike;*
- 2.4 *Ordering the first and second respondents to immediately withdraw the written warnings issued against the teachers after the referral of the dispute to the Labour Commissioner's office, for their alleged participation in the strike.*
3. *Ordering the respondents to pay the costs of this application jointly and severally the one paying the other to be absolved.*
4. *That prayers 2.1 and 2.2 above shall operate as an interim interdict with immediate effect pending the return day of this order."*

The matter was argued by both parties and I granted the following interim order

" 1. Applicant's non-compliance with the forms and service provided for by the Rules of the above honourable court is hereby condoned and this application is heard as one of urgency as contemplated by Rule 6 (12) of the Rules of this Honourable court.

2. *A Rule nisi is hereby issued calling upon the Respondents to show cause (if any) on 30 October 2013 at 10H00, why an order in the following terms should not be made final:*

2.1 Interdicting the First and Second Respondents from making and or continuing to make any deductions from teachers' remuneration in lieu of leave without pay as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;

2.2 Interdicting the First and Second Respondents from issuing teachers with written warnings as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;

3. *Ordering the respondents to pay the costs of this application jointly and severally the one paying the other to be absolved.*
4. *Orders 2.1 and 2.2 above shall operate as an interim interdict with immediate effect pending the return of this order."*

[2] A Rule nisi was then issued with a return day of the 30 October 2013, however, it was further postponed to enable the parties to file their documents, which was done and the matter was argued on the 6th of November 2013.

THE BACKGROUND

Applicant is the Teachers' Union of Namibia [hereinafter referred to as "the Union"], a trade union duly registered in terms of the relevant laws of Namibia and has many teachers as its members. The teachers are employed by the second respondent.

[3] The first respondent is the Minister of Education (hereinafter referred to as "the Minister") cited in his official capacity and being represented by the Government Attorney General. The second respondent is the Public Service Commission (hereinafter referred to as "the Commission")

[4] During the period between the 12 October 2012 and 4 November 2012, there was a general strike by teachers which was later declared illegal by the court upon application by respondents. Consequently, the Permanent Secretary in a letter of the 14th November 2012 directed all the Chief Regional Officers to effect certain deductions from those teachers who had participated in a strike and part of the said letter reads as follows:

“In addition to the above, Regional Directors are directed to effect once-off deductions of leave without payment equal to the number of days that these teaches stayed away from duties without authorization. Regional directors are also instructed to ensure that the once-off deductions of leave without payment should be effected on January 2013 salaries.”

In compliance with this directive, deductions were effected and were spread over a period of time.

[5] In response to this action by the respondents, applicant filed an urgent application which was, however, later withdrawn as respondents then stopped making new deductions. In light of these activities it became clear that there was a labour dispute which was then referred to the Labour Commissioner for conciliation and arbitration. It is a legal requirement that there should be conciliation before arbitration. The said proceedings are still pending before the Labour Commissioner.

The Law

The labour industry in Namibia is regulated by the labour Act, Act 7 of 2007 and above all, by the Namibian constitution which is the supreme law of the land. This constitution is sacrosanct. The objective of the Labour Act is clearly spelt out in the preamble as follows:

“To further a policy of labour relations conducive to economic growth, stability and productivity by-

Regulating the conditions of employment of all employees in Namibia without discrimination.....

Setting minimum basic conditions of service for all employees”

The protection of employees from possible unfair and/or abusive treatment is further found in article 18 of the constitution which reads:

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.”

[6] It is not in dispute that applicant’s members engaged in an illegal strike. It is also not in dispute that certain deductions were effected as per the instructions of the Permanent Secretary, who is a policy maker under first respondent.

[7] After the parties had made their submissions I concluded that there was a need to present any further administrative activity by the respondents which might have an adverse effect on the whole process as the matter was still pending before the Labour Commissioner.

[8] On the return day, applicant argued through its counsel, Advocate Rukoro that there is no reason why respondents should not be interdicted from their actions of continuously writing warning letters to applicant’s members and effecting deductions pending the determination of the dispute by the Labour Commissioner. What should be made clear right from the start is that applicant cannot stop first respondent from disciplining its members in any manner it deems fit, but, in doing so, it should be in accordance with the terms of the provisions of the regulations in place, namely the State Finance Act, Act 31 of 1995. Mr Namandje for respondents has argued on three points:

(1) *Locus Standi in judicio*

It is his argument that as applicant is a Trade Union, it has no powers in common law, but, its powers are vested on it by s59 of the Labour Act (Supra)

(2) Case against Permanent Secretary

It is his argument that not all teachers who went on strike are members of applicant and as such it is not easy to determine which teachers were affected and whether all the affected teaches have legally authorized applicant to represent them. To buttress his argument he referred the court to s59 (1) (a) of the Labour Act which makes it clear that a Trade Union can only bring a case for and on behalf of its members (my emphasis). He further argued that the Permanent Secretary should have been cited as he is the repository of powers and is the person who is bound to carry out powers to stop deductions as he is the person who referred to in the relevant statute.

(3) Enforcement of interim orders

He also argued that the Permanent Secretary is responsible for the enforcement of court orders as it is his domain in his capacity as a policy maker and as such enforces government policies. This is in line with s 25 of the Public Service Act as read with s 26 of the said act.

The issue which falls for determination in my view is whether or not a case has been made for an order sought. This is a return day. These proceedings have been brought before the court in terms of s 117 (1)(e) of the Labour Act. In this matter a dispute has already been declared. In order for applicant to be covered by the provisions stated *supra*, it needs to establish the following as submitted by Advocate Rukoro:

- (1) that there is a dispute;
- (2) that the dispute is between the same parties;
- (3) that it pertains to the same issues; and
- (4) that the dispute has already been referred to the Laobur Commissioner's office and the resolution is pending.

[9] This issue was correctly determined in the matter of *Meatco v Namibia Food and Allied Workers' Union and 19 others* case¹.

In the said matter the court held that the provisions of a referral of a matter to the Labour Commissioner is not only a formality, but, a necessary legal requirement. In that matter Smuts J concluded at par 29:

“The referral of a dispute is not a mere formality which can be cured as an afterthought in the manner in which the applicant has sought to do in reply. The legislature in my view intended that the primary approach would be for a party to refer a dispute rather than approach this court for the determination of it, as the applicant had done. It should have followed that procedure and only applied for an interdict pending the resolution of a dispute. In this instance the applicant had approached the matter and this court on an incorrect basis.”

[10] The approach laid down in the above matter is the correct position of our law as is clear in the following cases, *Titus Haimbili and another v TransNamib Holdings Ltd and others*² and *Namdeb Diamonds Corporation (Pty) Ltd v Mine Workers' Union of Namibia and all its members currently on strike in the Bongelfe's dispute*³.

[11] This application is certainly not called upon to determine the merits of the industrial action that was embarked upon by members of the applicant or the legality or otherwise of the deductions together with warning letters. The issue is whether or not respondents were legally entitled to embark on deducting money which they believe correctly or wrongly was due to them due to the unsuccessful withdrawal of labour by applicant's members.

[12] Mr Namandje for respondents has argued that applicant lacked *locus standi* in this matter as their resolution seems to include all teaches some of whom are not its members. This, indeed is a well-placed argument, but in essence the resultant

¹*Meatco v Namibia Food and Allied Workers' Union and 19 others* case No LC 61/2013 (unreported).

²*Titus Haimbili and another v TransNamib Holdings Ltd and others* LC 22/2012 (unreported)

³*Namdeb Diamonds Corporation (Pty) Ltd v Mine Workers' Union of Namibia and all its members currently on strike in the Bongelfe's dispute* case no LC 103/22011 (unreported)

order will only affect those members whose salaries suffered deductions which in their opinion were illegal. It is therefore not an argument which can prevent the directions sought by applicant as it is indeed capable of determination.

[13] An issue has been raised with regards to the non-citation of the Permanent Secretary as he is responsible for effecting the order of the court. This may well be so, but, the question requires more thought than that. The Permanent Secretary is an employee of first respondent and he works under his directives. His duties are to implement policies that are derived from the minister ostensibly from cabinet. Ultimately the directives become government decisions which he is legally obliged to implement. In that regard his non-citation for this purpose and for this purpose only is neither here nor there as he is duty bound to act as per first respondent's direction not only in policy and administrative matters but his duty is clearly unavoidable with regard to implementation of a court orders. To fault this application on the basis of failure to cite him, will be an exercise in futility and an unnecessary splitting of hairs as it were. The failure to cite the Permanent Secretary cannot render the order sought incapable of implementation.

[14] It is further necessary to examine the consequences of failure or neglect of determining this application. The Labour Commissioner is seized with the matter which deals with the declared labour dispute amongst which is the legality of carrying out deductions outside the provisions of the State Finance Act, Act 31 of 1991. This, of course, calls into sharp focus the motive by respondents of pre-empting the Labour Commissioner's decision by making deductions at this stage well knowing that the matter has not been finalized. This to me is a clear indication of negotiating in bad faith and is to say the least an unfair labour practice.

[14] The provisions of Article 18 of the constitution make it clear that all administrative officers shall (my emphasis) act fairly and reasonably and therefore comply with the law be it common or statutory law. Once the court notices any sign of a possible violation of people's rights by anybody, the executive included it has an

obligation to intervene in furtherance of the object of the constitution. This to me is democracy at work and democracy is the *mantra* of the nation.

[15] Applicant had sought an order that first respondent refunds them the deductions already made. I have examined this request, respondents are employers of applicant's members. It is common cause that an illegal industrial action was undertaken by its members. *Prima facie* an act of misconduct may invite discipline or punishment which may take the form of deductions in the event of these members being found liable. The consequences thereof may require deductions of their salaries. If respondents are ordered to refund the deductions it will be tantamount to putting the cart before the horse. Above all, it is tantamount to pre-empting the decision of the Labour Commissioner who is presently seized with the matter. This court cannot be seen to interfere with a legal process of that nature. Further, if deductions already made are refunded at this stage and the Labour commissioner finds that respondents were entitled to make such deductions, it then means that applicant's members will have to refund respondents. This to me is a see-saw game which these courts of law cannot be expected to engage in.

[16] I, therefore, find that, the decision by respondents whether was correctly or wrongly made should be best left as it is for the time being pending the finalization of this matter by the Labour Commissioner.

[17] I would like to pose at this stage and remind and warn representative of the union who has previously reported in the Press for having misled the nation with regard to the provisional order of this court by stating that the court had ordered a refund to its members. It is absolutely important for anybody in that matter to acquaint themselves with the orders of the court and such orders are always accurately captured by the Registrar of this court. This should be the official position and it is designed to eliminate or reduce the auditory challenges that may afflict the parties involved in court proceedings.

[15] It is for that reason and others stated above that applicants have made a good case for itself and the order is confirmed as follows:

FINAL ORDER

1. The First and Second Respondents are hereby interdicted from making and or continuing to make any further deductions from teachers' remuneration *in lieu* of leave without pay as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;

2. The First and Second Respondents are hereby interdicted from issuing teachers with written warnings as a result of the teachers' alleged participation in a strike during October and November 2012 pending the resolution of the dispute referred to arbitration under case number CRWK 478-13;

3. Respondents to pay the costs of this application jointly and severally the one paying the other to be absolved.

M Cheda
Judge

APPEARANCES

APPLICANT:

Advocate S Rukoro
Instructed by Hengari, Kangueehi & Kavendjii
Incorporated
Windhoek

STATE:

Mr S Namandje
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