



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-LAB-MOT-GEN-2021/00001

In the matter between:

**NAMIBIAN FOOD AND
ALLIED WORKERS UNION**

APPLICANT

and

**SHOPRITE NAMIBIA (PTY) LTD
EMMA N NIKANOR N.O.**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Namibian Food and Allied Workers Union v Shoprite Namibia (Pty) Ltd* (HC-MD-LAB-MOT-GEN-2021/00001) [2021] NALCMD 1 (08 January 2021)

Coram: UEITELE J
Heard: 06 January 2021
Delivered: 08 January 2021

Flynote: *Court* - Jurisdiction – Jurisdiction of Labour Court to grant urgent interdictory relief– Labour Court’s jurisdiction to grant urgent interdict dependant on whether there is a pending dispute in terms of Chapter 8 of Act, 2007 – s 117(1)(e) of the Labour Act, 11 of 2007.

Statutory Interpretation - Section 76(3) of the Labour Act, 2007 s 76(3) of the Act is plain and clear and leaves little room (if any at all), for ambiguity absurdity, or inconsistency

Labour Law - The right to strike is an essential element in the principles of collective bargaining.

Summary: In this matter the parties wage negotiations failed prompting the applicant to refer a dispute of interest to the Labour Commissioner. The conciliator, on 8 September 2020, issued a certificate of unresolved dispute.

On 07 December 2020 the parties agreed on Strike and Lockout Rules, whereafter the employees of the first respondent commenced a lawful strike on 23 December 2020. During December 2020 the first respondents recruited employees classified as season staff or “fixed-term” employees. The applicant alleges that the recruited employees were required to perform the duties of the employees partaking in the lawful strike.

The applicant aggrieved by this position approached this court for relief on an urgent basis to interdict the first respondent from hiring seasonal or fixed-term staff employees for the purpose of performing, in whole or in part, the work of the employees on strike. First respondent opposed the application raising amongst other the technical objection that the jurisdictional facts required by s 117(1)(e) to confer jurisdiction on the Labour Court are absent.

Held – that the dispute regarding the interpretation and application of strike rules by the parties does in terms of s 84 (17) form part of the dispute of interest initially referred to the Labour Commissioner constitutes a dispute of interest as envisaged in the Act.

Held further that a legal person to whom the right of right to freedom of association apply, Shoprite has not only a negative obligation to not infringe a person’s right to freedom of association, which shall include freedom to form and join associations or unions, including trade unions, but also a positive obligation to ensure that the right is protected and fulfilled.

Held further that the strike by Nafau’s members is a strike as contemplated and protected by the Act,

Held further that strike or lock-out is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The Court is the referee. It does not intervene simply because one of the opponents is being hurt – that is the idea of the contest.

ORDER

1. The applicant's non-compliance with the forms and service provided for by the rules of Court is condoned and the matter is heard as one of urgency as contemplated under Rule 73.
2. The first respondent (Shoprite) is hereby interdicted and ordered not to hire so-called seasonal staff or "fixed-term" employees for the purpose of performing, in whole or in part, the work of the employees who embarked on a strike as from 23 December 2020 onwards for the duration of the strike.
3. The first respondent (Shoprite) is hereby interdicted and ordered not to require, permit or allow any of the so-called seasonal staff or "fixed-term" employees hired during 2020, and any other employees (including managerial or trainee manager employees) to do the work of an employee, who embarked on a strike as from 23 December 2020 onwards, for the duration of the strike.
4. The first respondent (Shoprite) must receive and accept the applicant's (Nafau's) representatives in accordance with clause 20 of the Strike Rules and allow them to remain present at Shoprite's premises for the duration of the strike.
5. Each party to pay its costs.
6. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J

Introduction

[1] Employees' right to strike is an essential component of the right to freedom of association, and one of the weapons wielded by trade unions when collective bargaining fails¹. Strike action is thus the most visible form of collective action during labour disputes, and is often seen as the last resort of workers' organisation in pursuit of their demands. Without the protection of the right to strike, employees cannot freely exercise the right to freedom of association². If the right to bargain collectively and to strike were not well recognised the right to freedom of association would remain hollow. Sachs opines as follows:

'The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights comprise the first group of rights. This group of rights consist of three rights namely the right to establish and join trade unions, the right to collective bargaining and the right to strike. These are the three pillars of the working people, of their capacity to defend all their other rights.'³

[2] Without protection of the right to strike, trade unions become pathetic, powerless bodies and the rule of management becomes absolute⁴. As far as employees are concerned, the right to strike is an integral part to sound industrial relations and the collective bargaining system. Thus without the right to strike, the right to bargain collectively is compromised. Similarly, without the right to strike, there cannot be genuine collective bargaining and collective bargaining will be nothing other than collective begging⁵.

[3] The case before me concerns a trade union who asks this Court to assist it, as a

¹ E Manamela and M Budeli: Employees' right to strike and violence in South Africa. *The Comparative and International Law Journal of Southern Africa* Vol. 46, No. 3 (NOVEMBER 2013), pp. 308-336.

² *Ibid* at p 309.

³ A Sachs: "The Bill of Rights and workers' rights: an ANC perspective" in E Patel (ed) *Worker Rights: From Apartheid Do Democracy--what Role for Organised Labour*. 1994 - Juta & Company Limited.

⁴ *Ibid*.

⁵ Blampain: *labour law, human rights and social justice*. Quoted by Manamela and Budeli supra footnote 1.

matter of urgency, in protecting and vindicating its members' right to freedom of association and to strike.

[4] The applicant is the Namibian Food and Allied Workers Union, (I will, in this judgement and for ease of reference, refer to the applicant as Nafau), who is the recognised exclusive bargaining agent at the first respondent, in particular at its Shoprite, Checkers and U-Save stores across Namibia. The first respondent is Shoprite Namibia (Pty) Ltd (I will, in this judgement and for ease of reference, refer to Shoprite) with its principal office at 6 Diehl Street, Southern Industrial, Windhoek, Republic of Namibia.

[5] The Second Respondent is Emma N Nikanor, the conciliator who was appointed by the Labour Commissioner in terms of s 85 of the Labour Act, 2007 to conciliate the dispute between Nafau and Shoprite. The conciliator is cited in her official capacity and no relief is sought against her.

Background facts.

[6] The facts that gave rise to Nafau approaching this Court on an urgent basis are the following. During the first part of the year 2020 Nafau and Shoprite embarked on negotiations for the annual salary increases of Shoprite's employees (wage negotiations). The wage negotiations collapsed prompting Nafau to, on 26 June 2020, in terms of s 82 of the Act, 2007⁶ (I will, in this judgement and for ease of reference, refer to the Labour Act, 2007 as the Act), refer a dispute of interest to the Labour Commissioner, under case No CRWK 629-20.

[7] The Labour Commissioner, in terms of s 82(9) of the Act, 2007 referred the dispute to Ms Nikanor (the second respondent) for conciliation. Ms Nikanor conciliated the dispute, and on 8 September 2020, issued a certificate of unresolved dispute. The issuance of the certificate of unresolved dispute opened the way for industrial action on the part of Nafau. On 7 December 2020, Nafau and Shoprite agreed to and signed strike rules, which are attached to Nafau's founding affidavit.

[8] From 11 to 18 December 2020 Nafau held a ballot to determine whether or not to embark on a strike. The outcome of the vote was that more than 50% of Shoprite's employees voted in favour of a strike. Nafau alleges that on 14 December 2020 it

⁶ The Labour Act, 2007 (Act No 11 of 2007).

became aware that Shoprite was in the process of recruiting workers⁷ and that it (Nafau) had reason to believe that this was done with the intention to have the new recruits perform the work of the employees that voted to go on strike. Nafau furthermore contends that this belief was justified by the findings following a joint inspection of Shoprite stores.

[9] Following Nafau's awareness on 14 December 2020, it addressed correspondence through electronic mail to Shoprite with respect to what Nafau perceived as Shoprite's plans to circumvent the effects of the pending strike. The correspondence so exchanged was also attached to Nafau's founding affidavit. Shoprite's position was that it was not recruiting staff due to the strike and that the additional staff would, as part of its long standing business practice, attend to the increased demand during the holiday and festive season.

[10] Nafau demanded an undertaking from Shoprite that the additional staff that was being recruited would not be employed in contravention of clause 8 of the Strike Rules. Shoprite refused to give the requested undertaking that it would comply with the Strike Rules. When Shoprite refused to provide the undertaking, Nafau, on 22 December 2020, launched an urgent application, under case number HC-MD-LAB-Mot-GEN-2020/00322, to interdict Shoprite from contravening clause 8 and 9 of the Strike Rules and se 76(3) of the Act. On 23 December 2020 that application was struck from the roll.

[11] Following the striking of Nafau's application from the roll on 23 December 2020, and since Shoprite had concluded the recruitment of the seasonal/fixed-term employees, Nafau directed its attention at collecting evidence to show that the additional staff recruited during December 2020 were performing the work of the striking employees. On 24 December 2020, Shoprite and Nafau met to discuss Nafau's concerns regarding Shoprite's alleged non-compliance with the Strike Rules. The meeting did not yield any results. Another meeting was held between the parties in the presence of the conciliator on 29 December 2020. At the 29 December 2020 meeting the parties agreed to visit four Shoprite stores in Windhoek together with the conciliator, to ascertain whether any employees of Shoprite were performing the work of the striking employees.

[12] At the meeting of 29 December 2020, the parties agreed that due to the

⁷ The first group of employees were allegedly recruited between 07 and 17 December 2020, and the second group between 18 and 21 December 2020 while there was still a group due to appointed by 23 December 2020.

impossibility of conducting an inspection of all Shoprite stores countrywide, they would limit the inspection to four Shoprite stores. The stores visited are Checkers Maerua Mall, Checkers Grove Mall, Shoprite Katutura and Shoprite Independence. The inspection took place on the afternoon of 29 December 2020. After the inspection Nafau compiled a report and summarised the findings of the inspection in a letter that was sent to Shoprite on 31 December 2020. The sum effect of the findings and the report is that the fixed-term/seasonal employees and some managerial employees of Shoprite were found performing the work of the striking employees.

[13] After the report, Nafau, on 31 December 2020, requested Shoprite to remove all fixed-term/seasonal employees that were doing the work of the striking employees, and to stop requiring non-striking employees and managers to perform the work of the striking employees. Shoprite was also asked to confirm the findings, and to undertake to comply with Strike Rules 8 and 9, as well as s 76 (3)(a) and (b) of the Act, 2007. Nafau furthermore demanded that Shoprite confirm that it will remove the employees that were performing the work of the striking employees by noon on 31 December 2020.

[14] Shoprite responded to Nafau's requests and demands of 31 December 2020 on the same day. In its reply, Shoprite stated that the majority of the employees (amounting to 95%) in the report by NAFU are "fixed-term" employees. Shoprite did not deny that the "fixed-term" employees were performing the work of the striking employees. Shoprite justified its conduct, stating that the use of the "fixed-term" employees did not affect the strike ('no bearing on the strike') as Shoprite recruited them before the strike commenced, and has been doing so for the last ten years. Shoprite did also not deny that its managers were performing the work of the striking employees. The explanation given was that employees who are part of management can do the work of the striking employees as they are the employer's representative.

[15] In response to Shoprite's attitude, Nafau, on 03 January 2021, on an urgent basis commenced proceedings by notice of motion issued out of this Court, seeking the following relief:

'1. That the applicant's non-compliance with the forms and service provided for by the rules of Court is condoned and that the matter is heard as one of urgency as contemplated in Rule 73;

2. interdicting the first respondent from hiring so-called seasonal staff or “fixed-term” employees for the purpose of performing, in whole or in part, the work of the employees on strike as from 23 December 2020 onwards for the duration of the strike;

3. interdicting the first respondent from requiring and/or allowing the so-called seasonal staff or “fixed-term” employees, hired during December 2020, and any other employee to do the work of an employee, hired during December 2020, and any other employee to do the work of an employee on strike as from 23 December 2020 onwards, for the duration of the strike;

4 Directing the first respondent to receive and accept applicant’s representatives in accordance with clause 20 of the Strike Rules and allow them to remain present at the first respondent’s premises for the duration of the strike.’

[16] Shoprite gave notice of its intention to oppose Nafau’s application. The essence of Shoprite’s answer to Nafau’s application is that it denies that it recruited seasonal/fixed-term contract employees to replace the lawfully striking employees. Shoprite said that it had always recruited employees as part of its long-standing business practice to deal with the increased demands during peak seasons. It said that there was no intention to engage the additional staff in contravention of clause 8 and 9 of the strike rules. Shoprite further contends that the seasonal/fixed-term contract employees can be required to work in other departments – when the need arises- as part of their job description.

[17] Shoprite in its opposing affidavit also raised three preliminary objections. The preliminary objections were framed as follows: (I quote verbatim from the opposing affidavit filed on behalf of Shoprite)

‘6. The technical deficiencies that plague the applicant’s application are the following:

6.1 Principally, whether this honourable Court is suitably clothed to be seized with this application in terms of Section 117(1)(e) of the Labour Act as there is no dispute pending before the labour commissioner;

6.2 Secondly the notice of motion is not only overboard and vague, it also speaks to a fatal non-joinder of persons that have and may have acquired rights as a consequence of the matters giving rise to the interdict sought by the applicant.

6.3 Thirdly, the applicant has not made out a case for the grant of the interim and or final interdict; in its founding papers; the applicant has not established the trite requirements. This more

so when the applicants have approached this court in breach of the strike rules as set out further fully below. The applicant has approached the court with unclean and the court is invited to exercise a discretion on that score.'

The preliminary objections.

[18] For obvious reasons, I deal with the jurisdictional point first.

[19] Mr Muhongo who appeared on behalf of the Shoprite submitted that in terms of section 117(1)(e) of the Act, this court's power to grant the particular form of relief sought, is limited to those instances where a dispute has been lodged in terms of Chapter 8 with the Labour Commissioner and is pending. He argued that Nafau has not as required by the Act referred the dispute relating to the interpretation of the strike rules to the Labour Commissioner and as such there is no dispute pending before the Commissioner. He continued and argued that the jurisdictional fact (the existence of a dispute pending before the Labour Commissioner) required for this Court to exercise the jurisdiction conferred on it by s 117(1)(e), is absent. He argued that this court is only vested with jurisdiction to hear and adjudicate on the urgent relief sought in this matter, once a dispute to the Labour Commissioner has been lodged in terms of Chapter 8.

[20] In support of his contention, Mr Muhongo relied on the cases of *Haimbili and Another v TransNamib Holdings and Others*⁸, *Meatco v Namibia Food and Allied Workers Union and Others*⁹, *Negonga and Another v Secretary to Cabinet and Others*¹⁰ and *The Prime Minister & Others v Namibia National Teachers Union & Others*¹¹.

[21] In the matter of *Haimbili and Another v TransNamib Holdings and Others* the applicants were respectively employed as chief executive officer and chief operations officer of Transnamib. Both applicants were dismissed from their employment with Transnamib on 5 April 2012 following a resolution to that effect passed by the board of directors of Transnamib. The applicants thereupon approached this court as a *forum* of first instance on 11 April 2012 and as a matter of urgency, seeking amongst other relief to

⁸ *Titus Haimbili and Another v TransNamib Holdings and Others* 2013 (1) NR 101 (HC).

⁹ *Meatco v Namibia Food and Allied Workers Union and Others* 2013 (3) NR 777 (LC).

¹⁰ *Negonga and Another v Secretary to Cabinet and Others* an unreported judgment of the labour court (LC 56/2015) [2015] NALCMD10 (29 April 2015).

¹¹ *The Prime Minister & Others v Namibia National Teachers Union & Others* (LC 151/2015) [2016] NAHCMD 41 (24 October 2016).

compel Transnamib to reinstate them pending a review application to set aside their dismissal. The court held that the labour court's jurisdiction to grant urgent relief was confined to those instances where a dispute was lodged in terms of ch 8 of the Act and was awaiting resolution. Since there was no dispute lodged with the Labour Commissioner the application was dismissed.

[22] The *Negonga* case concerned the termination of contracts of employment of persons who were permanent secretaries. The dismissed Permanent Secretaries launched urgent proceedings in the labour court for interim interdictory relief in the form of reinstatement in their positions as Permanent Secretaries pending finalisation of a review application launched in the normal course in terms of s 117(1)(c) of the Act. The court held that the labour court does not have jurisdiction to grant urgent interdictory relief on an urgent basis except when a dispute has been lodged in terms of Chapter 8, which is pending. The court further held that even if the labour court has jurisdiction to hear the review, that jurisdiction relates to review proceedings launched in the normal course.

[23] The *Meatco* case concerned a refusal by the employees of the Meat Corporation of Namibia to work overtime. Meatco took issue with the refusal to work overtime and contended that the refusal constituted industrial action as defined in the recognition agreement between the parties, as well as a strike as defined in the Act. Meatco thus approached this court on an urgent basis for an order declaring the industrial action to be in contravention of the employment agreements. Meatco also applied for an interdict restraining the respondents from continuing with this overtime ban, interdicting the employees from obstructing its operations and from intimidating, harassing or interfering with other employees. At the outset, the point was raised that in terms of s 117(1)(d) of the Act, the Labour Court's jurisdiction to grant declaratory relief was limited to that form of relief only. The relief was later abandoned and Meatco only confined itself to the interdictory relief sought.

[24] In the *Meatco* case, the respondents, raised the question of the limits of the Labour Court's jurisdiction to grant urgent interdictory relief. They successfully argued that the question of the jurisdiction of this court to grant an interim urgent interdict arises only in instances where a dispute was lodged in terms of Chapter 8¹².

[25] I have no qualms with the decisions in the abovementioned matters and I agree

¹² At paragraph [27]

with conclusions reached by the court in those matters and am bound by those decisions. I am, however, of the view that those cases are, on their facts, distinguishable from the current matter. In those matters the parties agreed that no disputes had been lodged in terms of Chapter 8 and were pending before the Labour Commissioner. In the present matter, Mr Marcus (who appeared for Nafau) argued that a dispute of interest was pending before the Labour Commissioner.

[26] Mr Muhongo's fall-back position was the case *Prime Minister v Nantu*¹³ (the Namibia National Teachers Union). In that case the Prime Minister and other state functionaries filed an urgent application firstly, to interdict Nantu members from engaging in an industrial action and secondly, to have the decision of the conciliator set aside, in relation to strike rules pertaining to a seven day notice period of the said industrial action and the distance at which picketing in support of the industrial action was scheduled.

[27] Nantu opposed the application on the ground that the dispute purportedly lodged by the Prime Minister and Others was incompetent for the reason that it was not one under Chapter 8 of the Act. The Court upheld Nantu's objection. Masuku J reasoned that:

[29] The question falling for determination, in view of the foregoing is this: does a disparate interpretation and application of strike rules or matters arising therefrom concern new or changed conditions of employment within the meaning of dispute as envisaged in this Part? If it does, then this is a dispute of interest within the meaning of the Chapter in question and it can therefore trigger and consequently grant this court power to issue an urgent injunctive relief in terms of s. 117(1)(e). If it does not, then it means that the 1st respondent [Nantu] is eminently correct and its argument has to be upheld in the circumstances.

[30] In *Luckoff v The Municipality of Gobabis* (LCA 46/2014) [2016] NAHCMD 2 (2 March 2016), this court dealt with the meaning of a dispute of interest in the following terms, quoting from the work of Dr. C Parker:

"They are therefore disputes as to new and "wished for" terms. Consequently, they are not justiciable: their resolution is left to the parties to exercise their economic and industrial power. This is where employees want new employment terms to be created, they should bargain for them; they cannot refer a dispute in this regard to a court for determination."

¹³ Supra footnote 11.

[31] It may well be true that the initial dispute, which eventually gave birth to the newly lodged dispute, was one of interest as it related to the NANTU seeking to change the terms and conditions of their employment and thus being a dispute of interest. That fact does not render every dispute between the parties, even if it arises from one which initially was one of interest. It does not mean that every dispute between the parties will be coloured by the nature of the initial dispute. As much as children may bear the D.N.A. of their parents, they still have distinguishing features, characters, personality and an identity of their own. They cannot always be viewed from their parentage but should be seen as individuals in their own right. So is it, with the current dispute. It is one of a separate nature from the one that can be said to be the parent dispute. The two should not be forever be regarded as one type in spite of the uniqueness that is evident.

[32] I am of the considered view that since the dispute in issue in the current matter related to the application and interpretation of strike rules loosely put, by the parties, and I say so for reasons I shall advert to later, it is accordingly plain that the dispute is not one of interest which triggers the court's power to issue urgent injunctive relief.

[33] In the circumstances, I come to what I consider to be the ineluctable conclusion that the jurisdictional facts that serve to bring this matter within the court's power to issue an urgent interdict have not been established by the applicants. In this regard, it follows that the argument by the 1st respondent is sound and must be upheld.'

[28] The reasoning by Justice Masuku is cogent, but in the *Meatco case*¹⁴ Smuts J (as he then was) opined that the proper approach to legislative interpretation is to give 'effect to the ordinary grammatical and literal meaning of the provisions of the Labour Act, 2007 unless it would lead to a manifest absurdity, inconsistency, hardship or result contrary to the intention of the legislature'. I agree with the golden rule of interpretation relied on by Justice Smuts in the *Meatco case*. This would therefore involve interpreting s 117(1)(e) in the context of the Act as a whole, and specifically in the context of the dispute resolution mechanisms provided for by the Act itself.

[29] In the *Prime Minister v Nantu* case it is quite clear, that Justice Masuku's attention was not drawn to s 82(17) which reads as follows:

'(17) A conciliator referred to in terms of subsection (9)(a)-
(a) remains seized of the dispute until it is settled; and

¹⁴ *Meatco v Namibia Food and Allied Workers Union and Others* para [25].

- (b) must continue to endeavour to settle the dispute through conciliation in accordance with the guidelines and codes of good practice issued in terms of section 137.'

[30] I do not want to and will not speculate as to how Justice Masuku would have reasoned if his attention was drawn to s 82(17) of the Act, but in my view s 82(17) changes the complexion of Justice Masuku's reasoning for it explicitly provides that the conciliator remains seized with the dispute launched in terms of s 82(9) until it is resolved. This in my view means that on the analogy used by Justice Masuku the 'children' (who have developed distinguishing features, characters, personality and an identity of their own) will remain minor children without the capacity to engage in legal dealings independent of their parents. I therefore have no doubt that there is still pending a dispute between the parties as contemplated in chapter 8 of the Act and the jurisdictional fact for this Court to assume jurisdiction are therefore present and I thus assume the jurisdiction conferred on this Court by s 177(1)(e).

[31] As regards the second preliminary objection, Mr Muhongo after I engaged him abandoned that objection, in my view correctly so because the relief sought by Nafau is directed at Shoprite and not at the 'seasonal/fixed-term employees'. Shoprite has therefore not demonstrated that the rights or interest of the seasonal/fixed-term employees will be affected by the decision of this Court.

[32] The third preliminary objection relates to the allegation that Nafau approached the Court with unclean hands. I have no difficulty in rejecting this objection because firstly, the allegations of unclean hands directed at Nafau are vague, general and lack detail. Secondly, the Supreme Court in the matter of *Shaanika and Others v The Windhoek City Police and Others*¹⁵ the question of unclean hands will mainly prevail where a party dishonestly and fraudulently approaches the Court. It is not Shoprite's case that Nafau approached this Court in a dishonest and fraudulent manner. The Supreme Court in *Shaanika* said the following: (I have omitted references to the footnotes in the quotation.)

'The doctrine of 'unclean hands' appears to have originated as an equitable doctrine in England. As noted in a recent decision of this court, *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd*, the doctrine has largely found application in the area of unlawful competition law where its effect is that an applicant is prevented from obtaining relief where he or she has behaved dishonestly. Accordingly, in *Black Range Mining*, this court refused to uphold a

¹⁵ *Shaanika and Others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC).

challenge based on the doctrine of 'unclean hands' in the absence of any evidence showing that the appellant had acted dishonestly or fraudulently. Although the court in *Black Range Mining* did not expressly say so, I have no doubt that in using the words 'dishonestly or fraudulently', it would have considered bad faith or mala fides in the conduct of litigation to be included within its formulation.'

Did Shoprite contravene s 76 of the Labour Act and the Strike Rules?

[33] I have in the introductory part of this judgment made reference to the importance of the right of association and assembly. In addition to the right to assemble the Constitution in Art 21 (1)(f) states that:

'All persons shall have the right to withhold their labour without being exposed to criminal trial.'

[34] Article 95 of the Constitution deals with the Principles of State Policy. The principles oblige the State to actively promote and maintain the welfare of the people by adopting policies aimed at the active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices; to ensure that workers are paid a living wage adequate for the maintenance of a decent standard of living of the Namibian people and to improve public health.

[35] Since our law comprises a single legal system, guided by the Constitution, constitutional values and the rights enshrined in Article 3 must inform the interpretation of the Act. The rights to equality and human dignity are those which have the most direct influence on labour law. I therefore agree with the submissions by Mr Marcus that although the Principles of State Policy are not directly legally enforceable, courts are entitled to have regard to the principles in interpreting any laws based on them.

[36] In order to realise and give effect to the promises of the Constitution parliament enacted the Act.¹⁶ The Labour Act, 2007 furthermore seeks to further a policy of labour relations that is conducive to economic growth, stability and productivity. This is done in the Labour Act, by promoting an orderly system of free collective bargaining and promoting sound labour relations and fair employment practices by, inter alia,

¹⁶ Preamble to the Labour Act, 2007 (Act No 11 of 2007).

encouraging the formation of trade unions to protect workers' rights and interests. As I indicated earlier, in order to give meaning to the right of association and assembly, the Act provides the employees with a right to strike.¹⁷

[37] The right to strike is an essential element in the principles of collective bargaining. Parker¹⁸ puts it as follows:

'A strike, is therefore, a sharp economic instrument used as a last resort to propel parties to an industrial dispute to come to some agreement at the negotiating table. It has, therefore, become an indispensable tool in labour relations. Considering the huge economic power employers wield over employees, there must be a corresponding leverage at the disposal of employees, to enable them to take on the massive power of employers in negotiations, so as to bring about some equilibrium in the employer – and – employee relationship. However, there cannot be such a balance in labour or employment relations, in general, and collective bargaining, in particular, unless employees acting collectively and in concert have the right to strike. Herein, it is submitted, lies the *raison d'être* of the right of employees to strike.'¹⁹

[38] In the case of *Namibia Food and Allied Workers Union v McCarthy Retail (Namibia)*²⁰ (Pty) (Ltd), Justice Cheda opined that:

'[13] I should pause here and remark that members of applicant are already negotiating from a position of a weaker strength as they are economically disadvantaged in relation to the economic strength of respondent. It is for that reason that the legislature found it necessary to protect them from employers who would replace them willy-nilly in complete defiance of the terms and conditions of any agreement they would have entered into in good faith.'

[39] Mr Muhongo raised the question of whether or not Nafau has satisfied the requirements for a final interdict. I am, however of the view that the ultimate and core question in this matter is whether the conduct of the Shoprite, in requiring season /fixed term employees and managerial employees to perform work of those employees who embarked on a strike since 23 December 2020, violated Nafau's member's right to withhold their labour. In my view, the answer to this turns on the determination of two sub-

¹⁷ The right to strike is however not absolute and is subject to procedural requirements having been met before it can be exercised.

¹⁸ Parker C: *Labour Law in Namibia*: University of Namibia Press, 2012.

¹⁹ *Labour Law in Namibia* at page 22.

²⁰ *Namibia Food and Allied Workers Union v Mc McCarthy Retail (Namibia) (Pty) (Ltd)* (LC 185/2013) [2014] NALCMD 3 (31 January 2014)

questions, namely:

(a) First, is the strike by Nafau's members a strike which is contemplated and protected under section 74 of the Act?

(b) Secondly, if yes, does Shoprite have an obligation to give effect to or refrain from interfering with that right?

Is the strike by Nafau's members as strike contemplated and protected under section 74 of the Act?

[40] In this matter there is no dispute that Nafau has followed the prescribed procedures and the strike by the Shoprite employees (who are members of Nafau) is thus a protected strike. The Act defines a strike as follows:

'...means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, any other employer or an employers' organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest.'

[41] I am therefore of the view that the strike by Nafau's members is a strike as contemplated and protected by the Act,

Does Shoprite have an obligation to give effect to or refrain from interfering with that right?

[42] The answer to the second sub-question is, quite simply, yes. Article 5 of the Namibian Constitution provides as follows:

'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

[43] Shoprite thus has a duty to not impair or diminish an employee's right to freedom of association, which shall include freedom to form and join associations or unions, including trade unions. Shoprite also had a corresponding duty not to prevent to

undermine the strike by Nafau's members. As a legal person to whom the right of right to freedom of association applies, Shoprite has not only a negative obligation to not infringe a person's right to freedom of association, which shall include freedom to form and join associations or unions, including trade unions, but also a positive obligation to ensure that the right is protected and fulfilled.

Do Shoprite's actions undermine Nafau's members' right to strike?

[44] To achieve the object of compelling the employer to accept, modify or abandon a demand, it is important that certain ground rules are established to strengthen the workers' position, who economically are much weaker position. To this end s 76 (3) (a) and (b) was enacted by the legislature which states that:

'(3) Despite the provisions of any contract of employment or collective agreement, an employer must not –

(a) require an employee who is not participating in a strike that is in compliance with this Chapter or whom the employer has not locked-out to do the work of a striking or locked-out employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual; or

(b) hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee." (Underlined for emphasis).'

[45] I indicated earlier in this judgment that Shoprite and Nafau on 07 December 2020 agreed to and signed rules that will regulate the strike. The Strike Rules agreed to by the parties have the same objective, and mirror the provisions of section 76 (3) (a) and (b). Rule 8 of the Strike Rules states:

'No scab labour (hiring any individual) may be engaged to replace the lawfully striking employees during the duration of the industrial action.'

And Rule 9 states:

'The employer will not require non-strikers or any employee to perform any duties, functions or work of the legally striking employees during the industrial action within the same department examples groceries, non-foods, perishable etc." (Underlined for emphasis).'

[46] The South African case of *Metal and Electrical Workers Union of South Africa v Panasonic CO (Parow) Factory*.²¹ graphically illustrates the nature and effect of a strike. There, the learned Judge says the following:

‘A strike or lock-out is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The Court is the referee. It does not intervene simply because one of the opponents is being hurt – that is the idea of the contest. The referee may intervene if one of them is struck below the belt, but he would be astounded while the bout is in progress to receive a complaint that something had gone wrong at the weigh-in. Parties to an industrial contest take time and trouble to shape up for the fight. There are all kinds of things which they are expected to do before they are permitted to enter the ring. Some of these things may be done carelessly or maybe not at all; but if the opponent has not taken the point before he has entered the ring, I do not think he should lightly be permitted to do so once the blows have started landing.’

[47] I am therefore of the view that a critical question here is whether one of the parties to the figurative contest has struck the other below the belt. Mr Marcus says Shoprite has struck below the belt. Mr Muhongo say the blow is not below the belt.

[48] Mr. Marcus argued that to determine whether specific conduct by an employer contravenes s 76(3)(a) and (b) or the Strike Rules (striking the contest below the belt) a good test to apply is to assess whether the conduct the party is accused of diminishes the effectiveness of the other party to compel the other to accept, modify or abandon any demand that may form the subject matter of the contest (in this case a dispute of interest). I agree with that approach and it is the approach I will adopt.

[49] It bears reminding that Nafau’s complaint is that Shoprite is making use of seasonal/fixed-term employees and its managerial employees to perform the work of those employees who embarked on a strike as of 23 December 2020. Shoprite does not deny that it employed seasonal/fixed-term employees, stating that:

For the festive season period of the year December 2020 and January 2021, the first respondent during September 2020 established (regard being had to the first respondent’s forecasted business operations and projected sales) the peak period of 07 December 2020 to 15 January 2021 ... it has been the *modus operandi* to employ fixed term employees during the

²¹ *Metal and Electrical Workers Union of South Africa v Panasonic CO (Parow) Factory* 1991 (2) SA 527 (C) at 530, per Conradie J.

peak season including the Christmas holiday season and January back to school campaign for operational reasons. The 2020/2021 season has been no exception.

[50] Shoprite furthermore does not deny that the seasonal/fixed-term employees and its managerial employees perform the work of those employees who embarked on a strike as of 23 December 2020. Shoprite states that:

'... fixed term employees were not recruited to do the work of striking employees. During the joint inspection of four Shoprite shops in Windhoek, front end general assistants and general assistants are permitted to work in the bakery, deli, butchery, groceries, perishables, non-foods and cashiers. Therefore fixed term employees were assigned to these positions before the notification of the strike was given and the strike rules were signed.'

AD PARA 13

... Fixed term employees are regarded as employees in terms of the Labour Act, 2007...

AD PARA 14

... as far as it relates to management staff being prohibited from doing the work of striking employees. Management staff of the First Respondent includes: Junior management, Stock administrators, trainee managers, head office staff, Admin managers, Branch managers, Sales managers, Fresh food managers and the executives. These employees do not form part of the bargaining unit therefore these employees may be permitted to do the work of the First Respondent for operational reasons.'

[51] In my view s 76(3) of the Act is plain and clear and leaves little room (if any at all), for ambiguity absurdity, or inconsistency. I have demonstrated in this judgement that the legislative purpose of the Act is to ensure full enjoyment by the employees of the right to freedom of association which includes the right to strike. Section 76(3) thus makes is clear that irrespective (despite is term used in the Act) what a contract of employment or collective agreement states, an employer must not require an employee who is not participating in a 'protected strike' to do the work of a striking unless the work is necessary to prevent any danger to the life, personal safety or health of any individual.

[52] Shoprite in its affidavit concedes that both seasonal/fixed-term employees and management staff (including) junior management, stock administrators, trainee managers, head office staff, admin managers, branch managers, sales managers, fresh food managers and the executives are employees for the purpose of the Act. Shoprite's

argument that these employees do not form part of the bargaining unit and therefore may be permitted to do its work for operational reasons is untenable and rejected.

[53] In my view, Shoprite's conduct of requiring seasonal/fixed-term employees and management staff (including) junior management, stock administrators, trainee managers, head office staff, admin managers, branch managers, sales managers, fresh food managers and the executives are employees to perform the work of those employees who embarked on a strike since 23 December 2020 is tantamount to a strike below the belt and is thus not in accordance with the rules of the contest. As Justice Conradie says the aim of the contest is to hurt the other party as long as the hurting blows are in accordance with the rules.

[54] For the reasons that I have set out in this judgement I make the following orders:

1. The applicant's non-compliance with the forms and service provided for by the rules of Court is condoned and the matter is heard as one of urgency as contemplated under Rule 73.
2. The first respondent (Shoprite) is hereby interdicted and ordered not to hire so-called seasonal staff or "fixed-term" employees for the purpose of performing, in whole or in part, the work of the employees who embarked on a strike as from 23 December 2020 onwards for the duration of the strike.
3. The first respondent (Shoprite) is hereby interdicted and ordered not to require, permit or allow any of the so-called seasonal staff or "fixed-term" employees hired during 2020, and any other employees (including managerial or trainee manager employees) to do the work of an employee, who embarked on a strike as from 23 December 2020 onwards, for the duration of the strike.
4. The first respondent (Shoprite) must receive and accept the applicant's (Nafau's) representatives in accordance with clause 20 of the Strike Rules and allow them to remain present at Shoprite's premises for the duration of the strike.
5. Each party to pay its costs.

6. The matter is regarded as finalised and is removed from the roll.

S F I UEITELE

Judge

APPEARANCES

APPLICANT:

Nixon Marcus
Of Nixon Marcus Public Law

Office

RESPONDENTS:

Tuhafeni Muhongo
Instructed by ENSAfrica