



CASE NO.: LC 22/12

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TITUS TULIPOHAMBA HAIMBILI

1ST APPLICANT

CHARLES MARTIN FUNDA

2ND APPLICANT

and

TRANSNAMIB HOLDINGS LTD

1ST RESPONDENT

FESTUS LAMECK

2ND RESPONDENT

THE LABOUR COMMISSIONER

3RD RESPONDENT

THE MINISTER OF WORKS, TRANSPORT

& COMMUNICATION

4TH RESPONDENT

CORAM: MILLER, AJ

Heard on: 27th April 2012

Delivered on: 14 May 2012

JUDGMENT:

MILLER, AJ: [1] The first respondent is a limited liability company controlled by a board of directors, of which the second respondent is the chairperson.

[2] The first applicant at the relevant time held the position of the chief executive officer of the first respondent. The second applicant held the post of chief operations officer.

[3] Both applicants were dismissed from their employment on 05 April 2012 following a resolution to that effect passed by the Board of Directors of the first respondent on 04 April 2012.

[4] The applicants thereupon approached this Court as a forum of first instance on 11 April 2012 and as a matter of urgency. The notice of motion claims the following relief:

“

1. Dispensing with the forms and service and compliance with the time limits prescribed by the Rules of this Honourable Court, as far as may be necessary, and condoning applicant's failure to comply therewith and directing that this matter be heard as one of urgency as envisaged in Rule 6(24) of the Rules.
2. That the first and second respondents be ordered to forthwith restore *ante omnia* to the applicants their peaceful and undisturbed possession of the following:
 - 2.1 their offices on the 2nd floor of the Transnamib Building, corner of independence Avenue and Bahnhof Street, Windhoek.
 - 2.2 their keys to the said offices;
 - 2.3 their access cards to the Transnamib building;
 - 2.4 their cellphones;

3. That the first and second respondents be ordered to reinstate the first and second applicants with immediate effect (retrospectively) pending the outcome of the following proceedings:
 - 3.1 A review application to be lodged by the applicants against the third respondent, to set aside the third respondent's decision taken on 10 April 2012, not to recognize and accept the first and second applicants' complaints filed on 03 April 2012, annexed to the founding affidavit as annexures "TH8".
 - 3.2 The complaints filed by the applicants against the first and second respondents filed on 3 April 2012 as well as on 4 April 2012, annexed to the founding affidavit as annexures "TH8", TH9" and "TH21" respectively.
 - 3.3 A review application of the first and second respondents' decisions taken on 23 March 2012 and 4 April 2012 in terms of which they decided to unilaterally change applicants' conditions of employment and to dismiss applicants summarily and without a hearing being afforded to them.
4. That those respondents who oppose this application shall pay the costs jointly and severally, the one paying the other to be absolved.
5. Granting the applicant such further or alternative relief as this Court may deem fit. "

[5] In essence the applicants contend that they were summarily and unfairly dismissed inasmuch as they were not afforded a fair hearing by an independent person prior to their dismissal. In view of the conclusions I have come to I refrain from expressing any view on the lawfulness or otherwise of the applicants' dismissals.

[6] They, the applicants, in addition claim that the first respondent unilaterally changed their conditions of employment by dismissing them without a hearing. Thus so the argument went Section 51 (4) of the Labour Act, Act 11 of 2007 is to the effect that the first respondent is compelled to restore their original conditions of employment until such time as the dispute is resolved by the Labour Commissioner.

[7] I am not persuaded that there has been a change in the applicant's conditions of employment. At best for the applicants on their own papers, the first respondent in dismissing the applicants acted in breach of their conditions of employment. It follows in my view that Section 51 (4) finds no application in the instant case.

[8] The applicants contend that this Court sitting as a Court of first instance has jurisdiction to determine the issue raised by virtue of the provisions of Section 117 of the Labour Act, which determines the jurisdiction of this Court in labour related matters. More specifically the applicants rely on Section 117 (i)(e) which reads as follows:

“The Labour Court has exclusive jurisdiction to:

(e) grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8.”

[9] Mr. Heathcote SC, who appeared with Ms. van der Westhuizen on behalf of the applicants submits that Section 117 (i)(e) confines upon the Labour Court a wide and unfettered jurisdiction to grant any kind of urgent relief. He contends, if I understand him correctly, that the phrase “...pending resolution of a dispute

in terms of Chapter 8” is confined to and relates only to it granting an urgent interdict.

[10] Mr. Tottemeyer SC, who together with Mr. Khama appeared for the respondents submits that the phrase “...pending resolution of a dispute in terms of Chapter 8” confines this Court’s jurisdiction to grant urgent relief to those instances where a dispute in terms of Chapter 8 has been lodged and is awaiting resolution.

[11] I may add that it is common cause that the applicants did not avail themselves of the relevant provisions of Chapter 8 of the Labour Act.

[12] The proper approach to the interpretation of Section 117 (i)(e) is to give effect to the ordinary grammatical and literal meaning of the provision not in isolation but in the context of the Act as a whole and more specifically in the context of the dispute resolution mechanisms provided for in the Act itself.

[13] In ***Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia and All its members currently on strike in the Bongelfels Dispute Case No. LC 103/2011 (unreported)*** Smuts J. had occasion to deal with Section 117 (i)(d) of the Act and its interpretation which relates to the granting of declaratory orders. In dealing with the resolution of disputes and the jurisdiction of this court he states the following:

“But the Act did away with district labour courts. It placed greater emphasis on conciliation and, of importance in this context, it brought about a new regime of arbitration of disputes by specialised arbitration tribunals operating under the auspices of the Labour Commissioner. The provisions dealing with these

tribunals in Part C of the Act place emphasis upon expediting the finalisation of disputes and upon the informality of those proceedings. The restriction of participation of legal practitioners and the range of time limits for bringing and completing proceedings demonstrate this. Arbitrators are enjoined to determine matters fairly and quickly and deal with the substantial merits of disputes with a minimum of legal formalities.

The overriding intention of the legislature concerning the resolution of disputes is that this should be achieved with a minimum of legal formality and with due speed. This is not only laudable but particularly appropriate to labour issues. I stress that it is within this context that the Act places greater emphasis on alternative dispute resolution and confines the issues to adjudicated upon by this court in s117.”

[14] I respectfully agree with that approach. In applying those principles I conclude that this Court’s jurisdiction to grant urgent relief is confined to those instances where a dispute was lodged in terms of Chapter 8 and is awaiting resolution. The interpretation contended for by the applicants is not in harmony with the provisions of the Labour Act relating to the resolution of a dispute relating to whether a dismissal is unlawful. That is in the first instance a matter to be resolved by a process of conciliation and arbitration by the Labour Commissioner.

[15] It follows that the applicants must fail on this basis.

[16] Even if I am wrong in this finding I would have struck the matter for a lack of urgency. The applicants find themselves in a position no different from any other employee who is dismissed by his or her employer. The Labour Act

provides them with other effective remedies if the first respondent acted unlawfully in dismissing them.

[17] However, I need not dwell on that aspect because of my finding that I lack jurisdiction.

[18] In the result I make the following order:

- 1) The application is dismissed.
- 2) That there shall be no order as to costs.

MILLER AJ

ON BEHALF OF THE APPLICANTS:

Mr. Heathcote SC,
assisted by

Instructed by:

Ms. van der Westhuizen
Nederlof Incorporated

ON BEHALF OF THE 1ST & 2ND RESPONDENTS:

Mr. Tottemeyer SC,
assisted by

Instructed by:

Mr. Khama
Kwala & Company Inc.

ON BEHALF OF THE 3RD & 4TH RESPONDENTS:

Instructed by:

Mr. Khupe
Government Attorney