REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 61/2013

In the matter between:

MEATCO	**APPLICANT**
and	
NAMIBIA FOOD AND ALLIED WORKERS UNION	**1st RESPONDENT**
AND 19 OTHERS	**2nd TO 20th RESPONDENTS**

Neutral citation: *Meatco v Namibia Food and Allied Worker Union & Others (LC 61/2013) [2013] NALCMD 14 (19 April 2013)*

Coram: Smuts, J
Heard: 17 April 2013
Delivered: 19 April 2013

Flynote: Urgent application to interdict overtime ban as unprocedural industrial action – requirements of s79 of Act 11 of 2007 discussed – jurisdiction of the Labour Court to grant urgent interdicts raised and found to be confined to pending disputes referred under Chapter 8 of Act 11 of 2007

ORDER

The application is dismissed, no order as to costs.

JUDGMENT

SMUTS, J

(a) The applicant is a statutory body corporate, established by s 2 of Ordinance 2 of 1986 and continuing to exist under Act 1 of 2001. The applicant's statutory objects include serving, promoting and coordinating the interests of livestock producers in Namibia and to strive for the stabilisation of the Namibian meat industry in the national interest. Its objects also include marketing products in Namibia or elsewhere to the best advantage of Namibian livestock producers.

(b) The first respondent is a registered trade union and the recognised exclusive bargaining agent for the bargaining unit of the applicant's employees (the union). The other respondents are union shop stewards and its employees within the bargaining unit at its Windhoek and Okahandja abattoirs.

(c) This application relates to the refusal on the part of employees within the bargaining unit to work overtime. This refusal is in concert and is confirmed in a letter by the union representing those employees. That letter dated 11 March 2013 was addressed by the union to the applicant, confirming that the workers within the bargaining unit would no longer work overtime at the Windhoek and Okahandja abattoirs as from 18 March 2013.

(d)

(e) The applicant takes issue with this refusal. It contends that it constitutes industrial action as defined in the recognition agreement between the parties as

well as a strike as defined in s 1, the definitions section of the Labour Act, 11 of 2007 ("the Act"). That definition includes the disruption or retardation of work by employees when it is done to compel the employer to accept, modify or abandon any demand that may form the subject matter of a dispute of interest. The applicant points out that this refusal has been engaged in at the time of the annual wage negotiations and is thus unprocedural industrial action and constitutes a strike in conflict with both the Act and the recognition agreement. The applicant points out that this action is unprocedural as the respondents have not followed the dispute mechanisms contained in the recognition agreement and the Act. The applicant also contends that the respondents are also engaged in a "go-slow" which also constitutes strike action. It submits that the overtime ban and go slow are in contravention of the contracts of employment of the workers as well as being in conflict with the recognition agreement and s 74 of the Act.

(f) The applicant accordingly approached this court on an urgent basis for an order declaring this industrial action as being in contravention with the employment agreements, the recognition agreement and the Act. The applicant also applied for an interdict to restrain the respondents from continuing with this overtime ban. It also sought further interdicts to restrain the respondents from interfering with or obstructing its operations and from intimidating or harassing or interfering or preventing other employees from entering or initing the applicant's Windhoek and Okahandja abattoirs and/or encouraging or exciting other persons to commit any of the acts specified in the interdicts. The applicant also seeks costs against the first respondent.

(g) The applicant points out that the refusal to work overtime on the part of these workers comes at a particular difficult time for both the applicant and livestock producers in Namibia. It points out that Namibia is in the grip of one of the most severe droughts in the past 14 years. As a consequence, the organisations representing the agricultural industry in Namibia had called upon their members to destock as a matter of some urgency. By doing so, producers would protect what was left of grazing and should attempt to sell their livestock whilst it is still in a reasonable condition. This call by the representative

organisations in the agricultural industry has been supported by the Government of Namibia which has likewise urged farmers to slaughter their livestock in order to reduce numbers and in the best interests of the industry and of the national economy.

(h) The applicant points out that the conditions of employment of its permanent employees within the bargaining unit include an express obligation to work overtime if and when required by operational requirements. It is explained in the applicant's founding affidavits that the express agreement on the part of its workforce is required for the performance of overtime because of the seasonal and operational requirements which occur within the industry. Those employees working overtime would be compensated in accordance with the Act for their overtime work. The applicant refers to other terms in the conditions of employment which also refer to the operational requirements of the industry with regard to its unpredictable nature with reference to available volumes, selling capacity and hygienic and health requirements in the context of the perishable nature of the products.

(i) The applicant points out that the contracts of employment of temporary employees also includes an acceptance of unavoidable seasonal and periodical fluctuations requiring overtime work. But the applicant points out that the contracts of temporary employees expired at the end of 2012 and that it is presently negotiating new contracts for such employees.

(j) The respondents in their answering affidavit took the position that a proper interpretation of their conditions of employment would require that employees would still need to be approached for an agreement to work overtime on any particular day when operational requirements dictate the need to do so. This despite the express terms of the agreement. This approach was however correctly jettisoned in argument by counsel representing the respondents, Mr TJ Frank SC, assisted by Mr S Namandje. Once the conditions of employment included an obligation to work overtime when required, it would follow that the refusal in concert to do so during wage negotiations would in my view constitute

industrial action on the part of those employees[1].

(k)

(l) Mr Frank however argued that the position of temporary employees however was different. He contended that there would only be a tacit relocation of the essential terms of the contract of employment pending agreement on all the terms and conditions. This approach, he submitted, was in accordance with common law principles. Mr Corbett, who represented the applicant countered by submitting that the obligation to perform overtime work was one of the essentials the employment with the applicant. In view of the conclusion I reach with reference to certain other related provisions of the Act, it would not be necessary to express my own view on this issue. I can however indicate that it would seem to me in the context of the applicant's business that it would be a material term of the employment of employees – whether temporary or permanent – that they would need to work overtime if operational requirements would dictate that.

(m) In addition to opposing the application on its merits, the respondents took certain preliminary points in opposition to the application in the answering affidavit and supplemented in argument. I deal with them in the sequence they are raised.

Declaratory relief

(n)

(o) In the first instance, the respondents took the point that it would not be open to the applicant to seek the declaratory relief contained in the notice of motion by virtue of the provisions of s 117(1)(d) of the Act. This subsection confers upon this court its jurisdiction to grant declaratory relief. But it contains a proviso that this jurisdiction can only be exercised if the declaratory relief is the only relief sought. This anomolous provision was dealt with in an earlier unreported judgment by this court[2] where the following was said:

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[1]See *Numsa and Others v Macsteel (Pty) Ltd* 1992(3) SA 809 (A) and also *Ford Motor Co of SA (Pty) Ltd v Numsa and Others* (2008) 29 ILJ 667 (LC).

[2]*Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia and Others* LC103/2011, unreported 13 April 2012.

'[26] This overall approach and underlying intention would appear to have inspired the provisions of s 117(1)(d). Both sets of counsel questioned the wisdom behind it. They correctly contended that the proviso may well give rise to anomalies. But this does not translate itself into manifestly absurd results. In the absence of the latter, I am obliged to give effect to the unambiguous terms of proviso. It means that this court can only grant a declaratory order if it is the only relief sought.

[27] In this application the declaratory relief sought in paragraph 2 was not the only relief sought in the application. The applicants also sought interdictory relief in paragraphs 3 and 4 of the notice of motion. The fact that it became the only relief sought when the matter was ultimately argued before me would not in the face of the clear wording of s 117(1)(d) avail the applicant.

[28] It follows that s 117(1)(d) obliges me to decline the declaratory relief sought in paragraph 2 of the notice of motion on jurisdictional grounds. . . . '[3]

(p) After being alerted to this authority, Mr Corbett accepted that the applicant would no longer seek the declaratory order in the notice of motion but would confine itself to applying for the interdicts against the respondents which he further confined and sought to amend in the respects I set out below.

Notice under s79

(q) A further point taken by the respondents was that the applicant had not complied with the express requirements of s 79 of the Act. This section provides under the heading "urgent interdicts":

'(1) The Labour Court must not grant an urgent order interdicting a strike, picket or lockout that is not in compliance with this

[3] *Supra* par [26]-[28].

Chapter, unless-

(a) the applicant has given to the respondent written notice of its intention to apply for an interdict, and copies of all relevant documents;

(b) the applicant has served a copy of the notice and the application on the Labour Commissioner; and

(c) the respondent has been given a reasonable opportunity to be heard before a decision is made.'

(r) Mr Frank submitted that the court would have no discretion in condoning any non-compliance with the express requirements set out in this section. Mr Frank pointed out that the section posited a prior notice of an intention to apply for an interdict being given to a respondent and to the Labour Commissioner in addition to the court application itself.

(s)

(t) Mr Corbett however contended that the mischief which the section sought to address was not to permit applicants approaching the court on an *ex parte* basis without giving any notice to respondents. He submitted that the service of the notice of motion constituted written notice of the intention to apply for an interdict in compliance with s 79(1)(a). He pointed out that s 79(1)(b) required service of both the notice and application on the Labour Commissioner but there was no such requirement in respect of respondents as set out in s 79(1)(a). I do not agree with this approach. The respondent would be entitled to service of the application. This would not need to be spelt out in s 79(1)(a). It is however necessary to do so with reference to the Labour Commissioner seeing that the Labour Commissioner would not necessarily be a party to the proceedings. The Labour Commissioner may thus not otherwise be entitled to service of an application in the absence of s79. It was thus necessary for the legislature to specifically provide for both the notice to and service of the application upon the Labour Commissioner.

(u) It would seem to me that the legislature specifically contemplates not only service of an application upon a respondent (and the Labour Commissioner) but also that notice of an intention to bring that application in advance of that application being given. Whilst Mr Corbett may be correct in his submission that the primary mischief sought to be addressed would be to exclude applications without prior notice, the legislature decided to go much further than merely exclude ex parte applications. Not only is service of the application required but a notice of an intention to bring it beforehand is also mandatory. The advantages of this approach are self evident. Service of a notice of this kind on the Labour Commissioner would enable that office to take any steps, if appropriate, to avoid the need for the application itself, given the wide ranging powers and functions vested in the Labour Commissioner. Prior notice also places a respondent on terms that its conduct will be the subject matter of an interdict. It also in fairness affords the respondent the opportunity to prepare for such an application and to marshall its resources in doing so. The provision is thus underpinned by compelling considerations of procedural fairness as well as having the advantage of notifying the Labour Commissioner's office of an impending court application in view of the centrality of that office to the resolution of labour disputes. But importantly for this court, the section is clothed in peremptory language, precluding this court from granting any urgent interdict in the absence of compliance with each of the three requirements contained in it.

(v) Mr Corbett initially referred to the minutes of the final meeting between the applicant and the union before the application was launched. That meeting was held on 4 April 2013. At that meeting, it was recorded in the minutes that the applicant had informed the union it follow the "legal route" as a consequence of its stance. This in my view would not constitute compliance with s 79(1)(a). The subsection specifically requires a written notice of an intention to apply for an interdict. There was thus not only the absence of a written notice but it was also not specifically stated that there would be an intention to seek an interdict.

(w) Mr Corbett referred to a supplementary affidavit of his instructing legal practitioner in which it was stated that a copy of the application was provided by

that attorney to the union in advance of service of the application by the Deputy Sheriff. It would seem to me in the circumstances that this would constitute substantial compliance with s 79(1)(a). Mr Frank pointed out however that, even if this were to constitute compliance, a copy of that notice had not been forwarded to the Labour Commissioner as is required. Mr Corbett contended that there could have been no prejudice whatsoever upon either the respondents or the Labour Commissioner, given the fact that the application was postponed at the request of the respondents when it was initially set down for the purpose of filing answering affidavits. Prejudice is not however relevant to this enquiry as condonation is not possible in the event of non-compliance.

(x)

(y) In the circumstances of this specific matter the postponement of the applicant to the date of hearing would however seem to me to constitute substantial compliance with s 79(1)(b) as the Labour Commissioner would then have received notice in advance of the hearing of this application for the urgent interdict which was then postponed and heard on a subsequent date. If this point had been raised at the initial hearing, one remedy in addressing non-compliance would be to postpone it so that notice could be given to the Commissioner of the hearing so that any intervention on his part could proceed before the actual hearing of the application. That purpose would then have been served by that postponement, as had occurred.

Jurisdiction

(z) The respondents also take the point that this court would only have jurisdiction to grant a temporary interdict if a dispute in terms of Chapter 8 of the Act has been registered. The respondents point out that it is clear from the applicant's papers that no such dispute had been registered prior to the seeking of the interdict.

(aa) Section 117(1)(c) vests this court with exclusive jurisdiction:

> 'To grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8.'

(bb) Mr Frank referred to s 73 of the Act which requires in peremptory terms that collective agreements must provide for a dispute resolution procedure including an arbitration procedure to resolve any dispute about the interpretation, application or enforcement of the agreement. In the respondents' answering affidavits, there is specific reference to the provisions of the recognition agreement which provide for a dispute procedure. Chapter 8 of the Act deals with the prevention and resolution of disputes. Part B of that Chapter specifically deals with the conciliation of disputes and the role of the Labour Commissioner in designating conciliators to try to resolve disputes referred to the Labour Commissioner by means of conciliation. Part C of Chapter 8 then refers to resolving disputes by way of arbitration through the office of the Labour Commissioner. Mr Frank referred to s 86 which vests an arbitrator with the power to grant an interdict in any award made by him or her. He submitted that it was thus incumbent upon the applicant to first seek to resolve the dispute pursuant to its recognition agreement and then to proceed to resolve it under Chapter 8 before any urgent interdict could be sought from this court.

(cc) Mr Frank referred to a recent unreported decision of this court in *Titus Haimbili and Another v TransNamib Holdings Ltd and Others*[4] where this court held:

> '[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.
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> [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 LC103/2011 (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:

[4]LC22/20102, unreported.

> "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.
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> 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 s 117."

[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.'

(dd) This court thus concluded in the *Haimbili* matter that this court's jurisdiction to grant urgent relief would be confined to instances where a dispute had been lodged in terms of Chapter 8 in that it would be pending the resolution of that dispute. I am bound by that approach unless I am persuaded that it is clearly wrong. Having carefully considered both Mr Frank's submissions and

those of Mr Corbett, it is clear to me that the approach in the *Haimbili* matter is not clearly wrong but is in fact very sound. I in fact respectfully agree with it. This approach also accords with the ordinary grammatical meaning to be given to s 117(1)(e). Effect must be given to the ordinary grammatical and literal meaning of this provision unless it would lead to a manifest absurdity inconsistency, hardship or result contrary to the intention of the legislature[5]. As was pointed out in *Haimbili,* s 117 manifests an intention on the part of the legislature to achieve the resolution of disputes by means of alternative dispute resolution mechanisms provided for in Chapter 8 through the office of the Labour Commissioner, rather than through the courts[6]. That is the choice which has been made by the legislature and which this court is to give effect to.

(ee) Mr Corbett however submitted that s 117(1)(e) is to be read with the powers of this court under s 79(1) of the Act. He submitted that this court under s 79 is authorised to interdict strike action not in compliance with Chapter 7 of the Act as opposed to other disputes which have been referred to the Labour Commissioner in terms of Chapter 8. That is not however how I understand s 79. That section does not vest this court with powers with regard to interdicting strikes or lockouts. The jurisdiction and power to do so arise in terms of s 117(1)(e). The power to grant urgent interim relief is not limited to strikes which are not in compliance with Chapter 7. It could also include any other conduct which is unlawful or not in compliance of obligations under a recognition agreement or the Act. Section 79 merely places important procedural requirements where urgent interdicts concern strikes to ensure procedural fairness in adjudicating that type of urgent interdict in respect of which this court has discretion under s 117(1)(e). As I have already set out, s79 requires in peremptory terms that any urgent interdict in respect of strike action must meet specific requisites with regard to notice and service and procedural fairness before such an interdict can be granted. It does not vest this court with any additional power to determine issues which have not already been vested under s 117(1)(e). It

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[5]*Adampol (Pty) Ltd v Administrator*, Transvaal 1989 (3) SA 800 (A) at 804B-C, followed by this court in *Paxton v Namib Rand Desert Trails (Pty) Ltd* 1996 NR 109 (LC) at 111A-D.

[6]*Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia and Others supra* at par [24]-[25].

instead regulates how certain interdicts are to be brought.

(ff) It would follow in my view that the point taken by the respondents that this court does not have jurisdiction to grant an interdict outside the four corners of s 117(1)(e) is thus sound. That section plainly requires that urgent relief including an urgent interdict is confined to those of a temporary nature pending the resolution of a dispute in terms of Chapter 8 of the Act. It was thus not open to the applicant to apply for an urgent interdict in the absence of a dispute pending in terms of Chapter 8. When this application was brought, there was no such dispute pending. This court thus does not have jurisdiction to hear this application.

(gg)

(hh) After the filing of the respondents' answering affidavits, the applicant, in order to meet this point, applied for an amendment to the terms of its interdicts sought by adding that they would be pending the final determination of the matter in terms of a referral of a dispute for resolution in terms of Chapter 8. In the replying affidavit, it was stated that the applicant referred a dispute on 16 April 2013, the day before the extended hearing of the matter. This was after the respondents' answering affidavits had been filed. Mr Corbett indicated that the applicant had, without accepting the correctness of the point taken, referred a dispute in order to meet the point. But this application was not brought on the basis of being temporary pending the resolution of a dispute under Chapter 8. The applicant instead sought a rule *nisi* with a final interdict to follow on the return date. The application did not contemplate the referral of any dispute under Chapter 8 of the Act, except in reply where there is reference to a referral to the Labour Commissioner insofar as it would be necessary.

(ii) When this application was thus brought, this court had no jurisdiction to hear it. The approach of the applicant in bringing the application in the absence of referral in terms of Chapter 8 was thus flawed. The respondents were entitled to oppose the application on this basis, given the lack of jurisdiction of this court. 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.

(jj) It follows that this court had no jurisdiction to hear the matter when the application was brought and on the basis upon which it was brought. I do not accept that the belated attempt on the day before the extended hearing of the matter could confer jurisdiction upon this court which it had lacked beforehand. The respondents' objection based upon s 117(1)(e)is thus in my view well founded. It would follow that the application should be dismissed for this reason. In view of the provisions of s 118, no order is made as to costs.

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DF Smuts

Judge

APPEARANCES

APPLICANT:	Mr AW Corbett Instructed by LorentzAngula Inc.
RESPONDENTS	Mr TJ Frank SC with him Mr S Namandje Instructed by Sisa Namandje & Co Inc