REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 165/2013

In the matter between:

NAMIBIA FINANCIAL INSTITUTIONS UNION (NAFINU) **PLAINTIFF**

and

METHEALTH NAMIBIA ADMINISTRATORS (PTY) LTD **DEFENDANT**

Neutral citation: *Namibia Financial Institutions Union v Methealth Namibia Administrators* (LC 165/2013) [2013] NALCMD 33 (17 October 2013)

Coram: CHEDA J
Heard: **7 October 2013**
Delivered: **17 October 2013**

Flynote: Urgent application – Ongoing Industrial action *per se* – qualifies as urgent. Agreement entered between employer and employee – Failure by employer to accede to employees' demands – Whether reasonable in the circumstances – Substantial compliance by employer – whether employees are entitled to unfettered entrance into employer's premises. Whether employer is not entitled to carry on its business during strike – Strike should not be used to the disadvantage of the other party-

Flynote: Employer substantially complied with terms of contract - Employees cannot have unreasonable access to premises – Labour Inspectors report should be respected by both parties – Application dismissed with costs.

Summary: Applicant through an urgent application sought relief as follows:

That respondent had not fulfilled the terms and conditions of an agreement they had entered into following an Industrial action.

(1) It demanded that respondent provides ablution and sanitation facilities where the Industrial action was taking place.
(2) That respondent should allow its members reasonable access to its premises for the purpose of carrying out investigations to establish whether or not respondent was complying with non-employment of scab labourers.
    - The Independent Inspectors compiled a report exonerating respondent from any wrong doing. Despite this finding applicant still insisted that they wanted an order that they be allowed access to the premises at least twice a day.
    - The court found that respondent had substantially complied with the ground rules except one regarding the provision of ablution and sanitation facilities which they could not fulfill due to the necessity of the consent of a third party, the owner of the building
    - Held that it was unreasonable for applicant to have such unfettered access to respondent's premises during the strike.
    - The strike should not be used to the disadvantage of the respondent.
    - Respondent should be allowed to continue its business with skeletal staff.
    - Application was dismissed with costs.

ORDER

(1) The application is dismissed with costs.

JUDGMENT

CHEDA J [1] This is an application made under motion proceedings whose relief is in the following terms: 1) That respondent allow applicant's representatives and/or officials reasonable access in the respondent's premises at least twice a day and the need arises; and 2) That respondent should provide ablution and sanitation facilities in the vicinity of the strike area.

[2] The relief sought is based on an agreement signed by both parties which for this purpose is referred to as ("the Ground Rules").

[3] Applicant is a registered trade union operating in Namibia, a duly registered trade union with its head office at the National Union of Namibian Workers Centre, Mugunda Street, Katutura, Windhoek, Republic of Namibia and it is respresented by its president Sylvester Kabajani hereinafter referred to as 'Mr *Kabajani*' Respondent is Methealth Namibia Administrators with its principal place of business situated at Methealth Office Park, Maerua Park, Windhoek, Republic of Namibia.

[4] It is common cause that members of applicant are currently on strike, which strike is indeed a legal action in terms of the Labour Act (Act 11 of 2007) ('*the Act*'). Such a strike is authorized by section 74 (1) and should be read with section 74 (1) (e). After negotiations between the parties, it was agreed that certain terms and conditions concerning the industrial action be reduced into writing and this resulted in the drafting of the ground rules agreement signed on the 19 September 2013 by the parties.

[5] This matter was brought as an urgent application as envisaged in Rule 6 (12) (a) and (b) of the Rules of Court. Mr Kabajani who is the president of applicant deposed to an affidavit wherein he stated the circumstances surrounding the dispute which led to the withdrawal of labour by applicant's members. This action resulted in the drafting of the ground rules agreement. Applicant seeks an order compelling respondent to comply, firstly, with paragraph 7.2 of the ground rules which reads thus: 'That the right to reasonable access to the respondent's premises by the applicant's officials upon notification to management will be maintained during the industrial action' and secondly paragraph 6.2 which reads thus:

> '*The company will arrange for mobile ablution and sanitation facilities in the vicinity of the strike area*.'

[6] As this matter was brought on an urgent basis the first determination, should be whether or not the matter is indeed urgent as envisaged by the Rules of court as stipulated in Rule 6 (12) (a) and (b). Sub-rule (a) empowers the court with a discretion to dispense with certain forms and service provided in the rules, while sub-rule (b) requires applicant to explicitly set out the circumstances upon which he/she relies on to prove that it is indeed urgent. Applicant is further required to furnish the court with reasons why he/she could not be afforded substantial address at the hearing in due course, failure to provide reasons may be fatal, see *Luna Meubel Vervagrdigers v Mekin and another (t/a Makin's furniture manufacturers)*[1] and *Salt and another v smith*[2].

[7] In essence applicant must show a good cause in order for the application to be heard on an urgent basis. The four requirements for urgency as envisaged by the Rules of Court are that:

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[1] Luna Meubel Vervagrdigers v Mekin and Another (t/a Makin's furniture manufacturers) 1977 (4) SA 135 (W) at 137F.

[2] Salt and Another v Smith 1990 R 87 (HC) at 88.

1) there has to be a clear right in favour of the applicant;
2) that applicant will suffer irreparable harm if he does not get the relief sought;
3) the balance of convenience favours the granting of the relief; and
4) that there is no other way to get the relief.

[8] Applicant is a party to an agreement mutually agreed to with respondent and is desirous to have its terms and conditions fulfilled. However, it is of the firm belief that respondent is in breach of some terms of the signed agreement. It is also its view that if these terms and conditions are not implemented, it will suffer irreparable harm as respondent will not have the enthusiasm of negotiating in good faith and as such the matter may necessarily drag on, much to its prejudice. It is for that reason that the balance of convenience favours the granting of the relief sought. Above all, they see no other way to get their relief other than by embarking on this application on an urgent basis. The parties remain polarized and in a warring position. Rule 6 (12) (b) requires that an applicant who seeks to utilize the urgency procedure should depose to an affidavit wherein he/she should explicitly set out the circumstances upon which he or she relies on that it is an urgent matter (see *Mweb v Telecom*[3]. In addition thereto applicant should provide reasons why he/she should not be afforded substantial address at the hearing in due course (see *IL and B Marcow caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma lnn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981*[4].

[9] This principle which is now our law has been applied in our courts, see also *Salt and another v Smith; Bergmann v Commercial Bank of Namibia Ltd and another; and Malestzky and 20 others v Standard Bank Namibia Ltd & 24 others*[5] (not reported). The rule however is to be applied under stringent circumstances. Mere lip service will not suffice, see *Luna Meubel Vervaardigers (Edms) BPK v Mekin and another* (t/a *Mekin's Furniture Manufacturers*) *supra*[6]. Applicant has clearly stated the circumstances it finds itself in and has further stated the need for it to access respondent's premises. On

[3] Mweb v Telecom.
[4] Il and B Marcow caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA 108.
[5]Salt and Another v Smith 1990 NR 87 (HC); Bergmann v Commercial Bank of Namibia Ltd and Another 2001 NR 48 (HC) at 49 (H-J); and Malestzky and 200 others v Standard Bank Namibia Ltd & 24 others A 130/2011
[6] Luna Meubel Vervaardigers (Edms) BPK v Mekin and another (t/a Mekin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F

the basis of authorities referred to (supra) applicant has therefore shown good cause for this matter to qualify as urgent. I therefore found that a good case for urgency has been made.

[10] On the 7th October 2013 before the parties finalized their submissions, respondent advised the court that paragraph 6.2 had since been complied with. In light of this development, it is no longer an issue and I will not refer to it henceforth.

[11] Respondent has submitted that in its view it has substantially complied with paragraph 7.2. It is its view that as far as it is concerned, it has done what it is reasonably expected to do. It is its argument that it acted in the spirit of the Act in particular section 82 (9) of the said Act, section 87 (17) which reads thus:

> *'82 (17) a conciliator referred to in terms of subsection (9)(a) –*
> (a) *remains seized of the dispute until it is settled; and*
> (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*'

[12] Respondent argued that apart from the fact that the conciliator is still seized with the matter, it allowed a team of labour inspectors and one Mrs A Indombe, the conciliator to enter their premises for inspection following a complaint of non-compliance of the ground rules in particular the use of the scab labour.

[13] It is applicant's assertion that respondent is not negotiating in good faith as shown by its breach of paragraph 7.2 of their agreement. It is a fact that respondent had up to the 7th October 2013 not provided ablution facilities and sanitation at its premises as agreed. It, however, explained its failure on the basis that its fulfillment of the agreement depended on third parties, to wit, the owners of the building, Merueau Mall who have since permitted then to install the said facilities. In view of this development it cannot be said that their failure was willful as it depended on the consent of the owners of the building in which their business is situated. Without their consent, the fulfillment remained a physical impossibility.

[14] The crucial question, therefore, then is, has respondent breached paragraph 7.2 of the agreement? In his founding affidavit upon whom its case is grounded, applicant through its president Mr Kabajani in paragraph 16, stated "16. The strike commenced on 25 September 2013. As soon as the strike had started it became apparent that the respondent was not complying with the ground rules: The respondent refused applicant's representatives who wanted to make sure that respondent complied with its obligations, i.e access to its premises. Ablution and sanitary facilities were not provided by the respondent at the strike area. Access to respondent's facilities by applicant's officials was generally denied".

[15] Applicant remain suspicious and a report was made to the Ministry of Labour who dispatched three labour inspectors to respondent's premises the conciliator and two representatives.

[16] The aim and object of sending their officials to respondent's premises was to verify applicant's suspicion that respondent was not violating paragraph 4.1 which deals with the employment of scab labour, the paragraph states in '*4.1 The Company shall adhere to the Namibian laws and no scab labourers shall be engaged to perform the work ordinarily performed by striking employees during the strike action, which includes recruiting temporary staff to perform the duties of employees who are on strike'*. After their visit to respondent's premises, they compiled a report on the 25 September 2013 which reads:

(17) '***MINISTRY OF LABOUR AND SOCIAL WELFARE***

Private Bag 19005
32 Mercedes Street
Khomasdal
WINDHOEK

ATTENTION: MR. ANDRIES SMIT

27 September 2013

RE: INVESTIGATION REPORT ON THE STRIKING EMPLOYEES OF METHEALTH NAMIBIA

A team of Labour Inspectors and Mrs Alina Indombo Conciliator from the DLC were instructed to investigate a strike at Methealth Namibia, A medical administrator.

The purpose of our investigation was to ascent allegations made by NAFINU. The institution (Methealth Namibia) failed to comply with the ground rules regulating the conduct of industrial action by engaging labourers to perform the work ordinarily performed by striking workers.

"It was discovered after interviews were done with some employees who were found working that they were not labourers, but employees of Methealth from other departments who were placed to do the work of the striking employees. The employees who were interviewed stated to us that they do not want to take part in the strike." (Emphasis is added)

This report is compiled by:

Penda L Ya Otto
Aldrin Munembo
Uarongera Ngarangombe
(signed)'

[18] These inspectors were dispatched by the labour Commissioner. They are rightful emissaries as they were acting under the Act. They are independent from this dispute. Their neutrality is therefore beyond reproach. It is, however, clear that applicant is not happy with their findings. Applicant however, did not adduce any reason why it does not seem to receive and accept their report. The only irresistible conclusion I can come to is that they do not accept the report as it is not in their favour. However, applicant should know that a report should be accepted as it is and until one produces proof of its inaccuracy, bias and/or the impropriety of the

composition of its members. In the absence of such proof, all parties are expected to accept the report irrespective of its favourable outcome to the other party. The report clearly and categorically states that, there were no scab labourers. The matter ends there.

[19] The issue of applicant's representatives' failure to enter the premises is debatable as both parties gave different versions of what took place. In my view applicant's failure to enter under those circumstances is of less significance as the inspection was ultimately carried out by three Labour Inspectors which officials, in my view are properly trained and placed to handle labour disputes. The contents of their report puts paid the suspicion of the use of scab labourers by respondent which is the main thrust of applicant's complaint.

[20] Applicant forcefully demands that its representatives should be allowed to enter respondent's premises not less than twice a day and when the need arises. It is further its submission that if they are not allowed to do so, their strike demands will not be met.

[21] It is essential to broaden the scope and object of the strike in order to determine this issue. It is also essential to delve into the purpose of negotiations in industrial disputes. A dispute is defined under the Act as follows " *S 1 (1)* "*dispute*" *means any disagreement between an employer or an employee's organization on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter*."

[22] In *casu*, an industrial dispute was indeed declared in terms of the Act. Parties failed to reach a settlement and hence the appointment of a conciliator.
The said section is aimed at helping the parties in a labour dispute to find each other, hence the need for an umpire, as it were. The relationship between them is a personal one and is indeed very delicate and therefore should be handled with care as there is generally, no love lost between the parties. It is for that reason that a

conciliator and/or arbitrator is often brought in to mediate the temporally strained relations. This process is carried out with a view of reaching a settlement bearing in mind that parties are likely to reconcile, thereby burying the hatched, as it were.

[23] During the negotiations the parties are expected to observe certain legal requirements amongst which is the need to negotiate in good faith, *bona fide*. In *casu* the parties contracted to submit themselves for conciliation and during that period, both undertook to abide by the terms and conditions contained in their ground rules.

[24] These courts respect agreements entered into by the parties and are therefore slow to interfere unless it is proved that there is a material breach which goes to the root of the contract, which consequently makes performance impossible.

[25] The question then is, is there a need for applicant to access respondent's premises in order to monitor the goings-on in such frequency as prayed. I find that this condition is indeed crucial for the on-going negotiations. The question is the extent of the frequency coupled with that is the question of whether or not respondent failed to comply with one of the terms of the ground rules. A complaint was raised and a decision was made by the labour commissioner that applicant and the Labour inspectors visit the premises with a clear mandate to check whether respondent was complying with paragraph 4.1. The three Labour Inspectors who in my view were totally independent and neutral compiled a report wherein they totally exonerated respondent from the perceived breach.

[26] A labour agreement should be implemented on the basis of good faith. It must not appear that it is tipped in favour of one party. The negotiating period should not be used to frustrate the other party to an extent of making the otherwise running of an enterprise ungovernable. It is for that reason that the words "*notice*" and

"*reasonable access*" were used. Applicant wants to access respondent's premises at least twice a day or more depending on the need to do so. To my mind the frequency of such visits is not justifiable. It then becomes an *albatross* on respondent's neck and is tantamount to policing respondent's business. This in my view can never have been the intention of the legislature. In fact it will be unreasonable to do so. While it is accepted that applicant's members have withdrawn their labour through an industrial action which is their right, they cannot be allowed to go further and conduct themselves in a manner which borders on chaos. It is pertinent to disabuse applicant's belief that having withdrawn their labour, which is legal, respondent automatically loses its right to operate even with skeletal staff. This was not the intention of the legislature, hence the provision that some members of applicant who have elected not to withdraw their labour, should have access to respondent's premises who is also entitled to maintain skeletal staff. Applicant's visits indeed should be minimal and be kept at reasonable levels. There is no company which can economically operate under such circumstances.

[27] In the interest of the national economy and indeed of other employees of respondent, respondent is entitled to at least, a residue of its proprietary rights which it should retain in order to carry out its businesses even at a minimal level. Respondent is as such, entitled to some autonomy as long as its operations do not breach the terms and conditions of the ground rules agreement which is not the case in *casu*. In fact there will be no legal basis for these frequent and unfettered visits bearing in mind that the labour inspectors have already established that there is no breach of the ground rules by respondent.

[28] Applicant has argued that the court should intervene in this matter in order to ensure that they are not prejudiced in the negotiations. In light of the submissions made and documentary proof submitted, I conclude that respondent has substantially complied with the ground rules to an extent that it cannot be faulted.

[29] Above all this matter is currently in the hands of the conciliator and as such it should be allowed to run its course. A conciliator is seized with the matter and is by law empowered to make all efforts to resolve the dispute through any guidelines or code of good practice issued by the Minister of Labour under section 137 of the act (see *C parker, Labour Law in Namibia, Unam Press 2012*).

[30] The application is accordingly dismissed with costs.

M Cheda

Judge

APPEARANCES

PLAINTIFF :	N Marcus Of Nixon Marcus Public Law Office Windhoek
STATE:	P J De Beer Of De Beer's Law Chamber Windhoek