NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 19/2005

In the matter between:

THE NAMIBIAN PUBLIC WORKERS UNION **APPLICANT**

and

THE NAMIBIAN BROADCASTING CORPORATION **RESPONDENT**

Neutral citation: *NAPWU v NBC* (LC 19/2005) [2013] NALCMD 35 (30 October 2013)

Coram: **VAN NIEKERK, P**

Heard: 19 January 2006

Delivered: 30 October 2013

ORDER

The result is as follows:

1. The respondent's first point *in limine* is upheld.
2. The application is dismissed.
3. There shall be no order as to costs.

JUDGMENT

VAN NIEKERK, P:

[1] This is an application brought by the Namibian Public Workers Union (hereafter 'the applicant') as a registered trade union and the recognised as the exclusive bargaining agent of a certain group of the respondent's employees.

[2] The applicant seeks an order directing the respondent to effect a salary increment of 9% (nine percent) in respect of all its employees in the peromnes levels 08 to 18 as required in terms of a wage agreement signed between the parties on 17th December 2004, plus costs.

[3] On 3 February 1995 the applicant and respondent entered into a recognition agreement and the applicant was recognised as the exclusive bargaining agent as

contemplated by section 57 of the Labour Act, 1992 (Act 6 of 1992), (hereafter 'the Labour Act').

[4] Prior to December 2004 the applicant and respondent were involved in negotiations pertaining to the substantive wage agreement for the year 2004/2005. Agreement on increments was reached and signed. In terms of clause 4.2 of the agreement the parties agreed to a 16% increment to take place by payment of a 7% increment on 1 October 2004 and then a further 9% increment on 1 April 2005, in terms of clause 4.2 thereof which states:

[5] The wage agreement was made part of the employees' employment contracts by virtue of the provisions of clause 6 of the agreement, which states:

> '6.3 Upon the date of signature of this agreement, the provisions of the agreement shall become part of the employment contracts and conditions of employment of members, whether those contracts of employment are written or verbal or both written and verbal.'

[6] The respondent gave effect to the increment of 7% in terms of the wage agreement.

[7] The increment of 9% that had to take effect on 1 April 2005 did not take place and the respondent consequently breached clause 4.2 of the wage agreement. The reason advanced by the respondent for its failure to implement the second increment is that it did not receive its expected budget allocation from Government.

[8] On 1 April 2005 the respondent forwarded a letter to the applicant wherein the following is stated:

> 'This serves to request for a consultative meeting in terms of Section 5.2.4 of the 2004 Substantive Wage Agreement.
>
> Kindly be informed that in terms of the above quoted clause, Management would like to consult with the shop stewards at a meeting scheduled for the 12th April 2005 at 15H00 in the Boardroom.'

[9] Clause 5.2.4 of the wage agreement states:

> '5.2 No substantive issue may be negotiated during this period except:
>
> 5.2.4 Where the parties agree mutually to negotiate an issue, although it is recorded expressly that this clause is intended to provide only for unforeseen, urgent or compelling circumstances of a very serious nature;'

[10] On 12 April 2005 the meeting was held and attended inter alia by representatives of management, the labour relations department and the applicant. At the meeting the financial position of the respondent as well as the implications thereof, to wit that the 9% increment would probably not be implemented, was discussed.

[11] On 11 May 2005 another meeting was held and attended *inter alia* by representatives of management, the labour relations department and the applicant. At the meeting the financial position of the respondent as well as the way forward was discussed and a budgeting committee was formed. The applicant nominated four members to sit on the budgeting committee. The purpose of the committee was to jointly draw up a revised budget based on the reduced allocation of funds. In principle it was agreed that if the revised budget could accommodate the 9% increase, same would be effective from 1 April 2005. This committee met on 12, 14, 19 and 24 May 2005.

[12] On 13 May 2005 the applicant sent a letter to the respondent wherein the following is stated:

> 1. 'It is with grave concern to have learnt that the Agreement reached between the Corporation and the Union was not fully honoured.
> 2. In the substantive wage Agreement entered into and duly signed by the two parties, clause 4.2 paragraph 3 reads as follows, and a further 9% that will come into effect on the 1st April 2005 with the commencement of the 2005/2006 financial year.
> 3. Therefore we are urging the Corporation to implement and honour the agreement as agreed.

4. Against this background you are reminded that the agreement entered into by the two parties is legally binding.
5. Lastly you are requested to explain to this office as to what had happened in the process.
6. Be informed that this is likely to be legally challenged if not fully honoured as agreed.
7. Hope this will be useful to your office and we are looking forward to your response on or not later than 17th May 2005.'

[13] On 17 May 2005 the respondent replied by way of letter. Therein the following is stated:

'Management wishes, at the outset, to confirm sharing your concern with regard to the impossibility of implementing a 9% wage increase on 1 April 2005.

As indicated to the Union representatives at the wage negotiations committee meeting held on 11 May this year, the Corporation's subsidy from Government has been reduced from N$ 86 000 000-00 to 59 000 000-00. You will agree that this is a very substantial decrease and one that was not foreseeable at all.

As far as the legally binding nature of the Substantive Wage Agreement is concerned, management agrees that the entire agreement is binding, however does not share your views that a legal challenge, as per paragraph 6 of your letter, will be in the interests of any of the parties hereto. Kindly be referred to Clauses 5 and 7 of the agreement, especially clauses 5.2.2, 5.2.4. and 7.1. We furthermore refer you to clause 11.4 of the Recognition Agreement signed on 3 February 1995.

Finally, management wishes to re-iterate that after the budgeting process is finalized, which should be within 2-3 weeks, details as to the possibility and mechanics of the implementation of an increase will be provided. Should an increase as per the agreement be possible, it shall be backdated to the initial implementation date.'

[14] The letter refers to clause 7.1 of the wage agreement which states:

‘7.1 Any dispute arising between the parties concerning the application or interpretation of this agreement shall be dealt with in accordance with the Recognition Agreement between the parties.’

[15] The letter also refers to clause 11 of the Recognition Agreement, which provides:

’11. DISPUTE PROCEDURE

11.1 In the event of the parties failing to reach an agreement arising out of negotiations conducted in terms of this Agreement, or any other issues not resolved through procedures provided for in this Agreement, a dispute may be declared by either party.

11.2 Either party may declare a dispute by giving the other party written notice of the dispute within seven (7) working days in the event of the parties failing to reach an Agreement through the negotiation meetings provided for by clause 10. Such notice to the other party will include the nature and content of the dispute as well as the settlement or remedy proposed.

11.3 The negotiating committees of the Union and NBC respectively shall cause a meeting to be held within five days, or otherwise agreed upon receipt of such notice to try and resolve the dispute.

11.4 If the dispute is a dispute of rights, the parties shall refer the dispute to a Conciliation Board for resolution in terms of the Labour Act of 1992 (Act 6 of 1992). If the dispute is not resolved within 30 days upon the appointment of the Conciliation Board, the parties agree that the dispute be referred to arbitration in terms of the Labour Act of 1992 (Act 6 of 1992) and subject to the provisions of the Arbitration Act of 1965 (Act 42 of 1965). In the event of the parties failing to reach an Agreement of the appointment of a neutral arbitrator within five working days, the Union and the Corporation will each appoint an arbitrator who will

jointly appoint a third arbitrator, who will act as chairman of the Arbitration procedures in terms of the Arbitration Act of 1965 (Act 42 of 1965).

11.5 Unless the parties agree otherwise, the liability for the cost of arbitration shall be determined by the arbitrator concerned.

11.6 If the dispute is a dispute of interests, the dispute shall, unless the parties agree otherwise, be referred to a Conciliation Board in terms of the Labour Act, 1992 (Act 6 of 1992). In the event of non-resolution of any dispute which follows the steps as contemplated above, either party will be free to take whatever lawful action it deems to be most appropriate in the circumstances prevailing at that time and subject to the provisions of the Labour Act, 1992 (Act 6 of 1992).

11.7 Should the parties disagree on the nature of the dispute (whether the dispute is a dispute of rights or interests), the disagreement shall be referred to the Labour Court or by mutual agreement to arbitration for clarification, whereafter the steps as contemplated in sub-clause 11.4 or 11.6 will apply.'

[16] On 30 May 2005 the applicant in writing agreed to a three week 'grace period' counted from 18 May 2005 to implement the 9% increment with effect from 1 April 2005.

[17] On 8 June 2005 another meeting was held and attended *inter alia* by representatives from management, the labour relations department and the applicant. The meeting was informed that the respondent is still not in a financial position to implement the increment, but that the proposed budget would be presented to representatives of the applicant as part of a consultative process. They requested to be provided with the documents well in advance.

[18] On 14 June 2005 and 4 July 2004 the applicant's lawyers sent letters of demand requiring the respondent to effect the increment, failing which it would approach the Labour Court. The respondent's reply indicated that it was unable to perform in terms of the wage agreement on the basis of Government' severe cut in its budget allocation,

that this constitutes a ‘supervening impossibility of performance’ and that it is therefore excused from performance in terms of the agreement.

[19] On 29 July 2005 the applicant filed its application with this Honourable Court.

Respondent’s first point in limine

[20] The respondent raised a point *in limine* that the applicant has not followed the dispute resolution procedure provided for in clause 11 of the Recognition Agreement. Counsel contended that the applicant should have declared a dispute in terms of clause 11.2 and, regardless of whether the dispute is a dispute of rights or a dispute of interests, the dispute should first have been referred to a conciliation board for resolution in terms of the Labour Act. If the dispute remained unresolved and if it is a dispute of rights, the matter shall be referred to arbitration. Alternatively, if the dispute is a dispute of interests, the further provisions of the Labour Act would apply. He further submitted that, as the applicant failed to follow these steps, the application is premature and misconceived at this stage and should be dismissed.

[21] Counsel for the applicant countered these submissions by contending that the dispute resolution procedure provided for in clause 11 is aimed at situations where the parties have failed to reach agreement through negotiations which are aimed at arriving at an agreement on wages and conditions of employment during the annual wage negotiation meetings contemplated in clause 10 of the Recognition Agreement. He submitted that clause 11 is not applicable where, as here, the annual wage agreement has already been reached which creates rights enforceable by the Labour Court. He submitted that the applicant was entitled to approach the Court for relief as the parties cannot oust the Court’s jurisdiction.

[22] In my view this argument overlooks clause 7 of the wage agreement. I agree with respondent’s counsel that it applies in the circumstances and that it requires that the procedure provided for by the Recognition Agreement be followed. These procedures, in any event, are in harmony with Part IX of the Labour Act which provides for the

procedures to be followed in case of disputes between employers and registered trade unions. The respondent's point is therefore good.

Costs

[23] The respondent's counsel requested this Court to grant an order for costs in terms of section 20 against the applicant based thereon that the applicant (i) did not disclose certain material facts in its founding papers; and (ii) failed to abide by the dispute resolution provisions.

[24] I am not persuaded that the applicant acted frivolously or vexatiously in the manner that it presented its case. I am satisfied that it approached this Court in good faith. I therefor decline to make an order of costs.

[25] The result is as follows:

The respondent's first point *in limine* is upheld.
The application is dismissed.
There shall be no order as to costs.

___signed on original_____

Van Niekerk, P

APPEARANCE

For the applicant: Mr S Namandje

of Sisa Namandje & Co.

For the respondent: Adv R D Cohrssen

Instr. by Ellis & Partners