

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

HC-MD-LAB-MOT-GEN-2018/00119

In the matter between:

TEACHERS UNION OF NAMIBIA

APPLICANT

and

NAMIBIA NATIONAL TEACHERS UNION

FIRST RESPONDENT

SIMEON KAVILA

SECOND RESPONDENT

BASILIOUS HAINGURA

THIRD RESPONDENT

Neutral Citation: *Teachers Union of Namibia v Namibia National Teacher's Union* (HC-MD-LAB-MOT-GEN-2018/00119) [2019] NALCMD 17 (11 June 2019)

Coram: **Masuku J**

Heard on: 30 October 2018

Delivered on: 11 June 2019

Flynote: Civil procedure – contempt of court – Failure to comply with court order - requirements therefor – court applying the principles laid down in *Fakkie NO v CCII (Pty) Ltd*.

Summary: The applicant and first respondent, both trade unions in the teaching sector and operating in the public service of Namibia and as such, compete for members and on a regular basis, teachers would resign from the one union to join the other.

A number of teachers resigned from first respondent and joined applicant but first respondent continued deducting membership fees from these teachers' salaries. The applicant instituted proceedings against the respondent and the parties eventually reached an out of court settlement.

The settlement agreement was made an order of court and applicant, contending that it had performed as per the terms of the settlement thereby complying with the court order but respondent has not. Respondent on the other disputing this alleged non-compliance.

The applicant instituted the present proceedings for this court to hold the respondents to be in contempt of court and, have them committed to jail for their alleged contempt.

Held: The applicant bears the onus to prove the case of contempt and once the applicant has done so, the respondent bears an evidential burden in relation to willfulness and mala fides.

Held further that: the respondent had in place requirements in its constitution to be met by any member who resigned before the deductions could stop. It was alleged that the members leaving the respondent had not complied with those requirements and hence they remained liable to pay membership fees to the first respondent.

The court accordingly finding that the respondents' non-compliance was neither willful nor mala fide in the circumstances and accordingly dismissing the application.

ORDER

- a) The Applicant's application is dismissed with costs, consequent upon the employment of one instructing and one instructed Counsel.
- b) The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J,

Introduction

[1] Serving before this court is an application wherein the applicant seeks the following relief:

'1 Wherefore Applicant may be heard for an order in the following terms:

1.1 An order convicting the 2nd and 3rd Respondents of contempt of Court for failing to comply with this Honorable Court's order of 7th December 2016;

1.2 That the above Honorable Court upon convicting the 2nd and 3rd Respondents as detailed in pray one (1) above exercise its discretion and levy an appropriate criminal sanction on the 2nd and 3rd Respondents.

2. In the alternative to prayer to above and only the event that the 2nd and 3rd Respondents fail to oppose this application, that

2.1 A rule nisi is granted calling upon the 2nd and 3rd Respondents to show cause on a date to be determined by the Registrar of the above Honorable Court why this Court should not exercise its discretion and levy an appropriate criminal sanction on the 2nd and 3rd Respondents as a natural result of their conviction of contempt of Court.

2.2 That the Deputy Sheriffs for the district of Windhoek and Oshakati respectively be ordered to arrest the 2nd and 3rd Respondents and to take any and all reasonable steps necessary to bring the 2nd and 3rd Respondents before this Honorable Court on the return date of the rule nisi.

3. An order directing the Respondents to refund all the money deducted from teachers' salaries from the date that such teachers gave notification of their resignation from 1st Respondent to from the date that such teachers gave notification of their resignation from 1st Respondent to date of actual cancellation with 20% interest per annum on any such outstanding amounts.
4. An order directing Respondents to accept resignation/cancellation notices and to process same promptly.
5. An order that the Respondents be ordered to pay the costs of this application on a scale as between Attorney and client as occasioned by the employment of one instructed and one instructing Counsel.
6. Further and alternative relief.'

The Parties

[2] The applicant is the Teacher's Union of Namibia 'TUN' a trade union duly registered in terms of the relevant laws of Namibia with its registered office at Dollar Street at 4551 Khomasdal, Windhoek.

[3] The first respondent is the Namibian National Teachers' Union a union duly registered in terms of the relevant laws, recognised as the exclusive bargaining agent for teachers' in the Public Service, with its registered office at Mungunda Street, Katutura, Windhoek.

[4] The second respondent is Simeon Kavila a major male person with full legal capacity and the President of the first respondent.

[5] The third respondent is Basilius Haingura, a major male person with full legal capacity and the General Secretary of the first respondent.

The facts giving rise to the dispute

[6] The applicant and first respondent are trade unions in the teaching sector operating in the public service of Namibia and as such, compete for members and on a regular basis, teachers would resign from the one union to join the other.

[7] The applicant alleges that a number of its members, whose cancellation forms are attached to the founding affidavit but not pleaded, resigned from the first respondent and joined it. The applicant further alleges that despite the resignation from first respondent, the latter continues to deduct membership fees from these teachers' salaries.

[8] The respondents on the other hand contend that the deductions persist as the said members have yet to terminate their membership by virtue of the provisions of the first respondent's constitution which provides that membership in the first respondent is obtained through the completion of an application form and terminated through written notice to the first respondent, and that until that is done, deductions will continue.

[9] It was owing to these continued deductions that the applicant initiated court proceedings and an out of court settlement was reached between the parties with the following terms:

'1. Each union will stop making deductions from the salaries of teachers who resigned within two months from receiving such notification; 2. Each union will compile a list of resignations and membership applications and deliver same to the other union at the end of each month; 3. Each union will cause a copy of the list received from the other union to be date stamped and returned which copy shall then serve as proof of delivery; 4. Each union shall act in good faith and shall not unduly delay the cancellation of membership deductions once notified; 5. This agreement shall be made an order of court and shall be binding upon the parties; 6. That all parties shall be responsible for their respective legal costs.'

[10] The settlement agreement was made an order of court on 7 December 2016. The applicant contends that it has performed its part of the bargain as per the agreement but the same cannot be said for the first respondent.

[11] According to the applicant, the respondents have failed to perform in that they have continued to deduct membership fees from a number of teachers' salaries despite them having tendered their resignation from first respondent and joined applicant, the effect of which is double deductions from the said members' salaries for membership to both the applicant and the first respondent.

[12] It is due to the respondents' alleged failure to cancel the membership and continued deductions from the various teachers' salaries, despite the settlement agreement as alluded to above, that has brought about the present proceedings.

[13] The applicant now seeks an order in terms of which the second and third respondents are held to be in contempt of court for failure to comply with the court order of 7 December 2016 and therefor convicted.

The Law and the points of law raised in limine

[14] The respondents raised a number of points of law in limine but for purposes of this judgment, the court finds it fitting to only deal with that relating to the order that is sought by applicant and that is, whether the applicant has made out a case for the relief which it seeks. I answer this question immediately below.

[15] Applications for contempt of court are dealt with under rule 74 of the High Court rules. The rule, particularly sub rule 3 thereof provides that 'the applicant must, in a founding affidavit distinctly set out the grounds and facts of the complaint on which the applicant relies for relief in his or her application for contempt of court.'

[16] In order to succeed in civil contempt proceedings the applicant has to prove certain requirements namely:¹

¹ *Namibia Financial Institutions Supervisory Authority v Christian and Another* (A244/2010) [2011] NAHC 141 (27 May 2011).

- a) the existence of a court order;
- b) service or notice thereof;
- c) non-compliance with the terms of the order; and
- d) willfulness and mala fides, which must be proved beyond reasonable doubt.

[17] The respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that the non-compliance complained of was not willful and mala fide.²

[18] From a reading of the papers, there can be no doubt that requisites a) to c) above are common cause. The question for determination in the circumstances is whether; the respondents have adduced evidence to rebut the inference that their non-compliance with the court order of 7 December 2016 was not willful and mala fide?

The law and the facts

[19] It is common cause that an out of court settlement agreement was reached between the parties in proceedings before the Labour Court in 2016 and that same was made an order of court on 7 December 2016.

[20] The applicant contends that to date, the respondents have failed to comply with the aforementioned order despite knowing of its existence and having notice thereof, have failed to comply with it and that failure to comply with the said court order is willful and mala fide.

[21] According to the respondents, the applicant did not plead any resignations from the first respondent in terms of the former's constitution and thereby requiring the respondents to cease making deductions and thereby mandating compliance with the balance of the terms of the court order.

² *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35.

[22] The respondents aver that their non-compliance with the court order is not willful let alone mala fide as their reasonable interpretation of the court order was that their obligation only arose upon the resignation of the members' membership in terms of the first respondent's constitution.

[23] In its papers, the respondents deposed that for administrative and authentication purposes, the first respondent requires the member terminating his or her membership from it, to furnish it with; a) certified copy of his or her identity document; b) a certified copy of the pay slip and; c) a sworn statement evincing an intention to terminate his or her membership. It is the first respondent's case that the imperatives of following this procedure, was communicated to the applicant. That notwithstanding, these procedures have not been complied with by the concerned members, who are intent on terminating their membership with the respondent, and crossing the proverbial floor, as it were, to the applicant's camp.

[24] It goes without saying that the concerned teachers, being members of the first respondent, are bound by the constitution of the first respondent as well as its terms. The constitution regulates the affairs of the first respondent and that of its members and it is clearly stated therein that should any member wish to terminate his or her membership, such member should do so in writing and provide the relevant documents referred to in para 23 above.

[25] In *Fakkie NO v CCII (Pty) Ltd*³, cited with approval by Ueitele J in *Ndemuweda v The Government of the Republic of Namibia (Ministry of Health and Social Services)*⁴ it was held thus, 'But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and mala fides. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond reasonable doubt.'

³ 2006 (4) SA 326 (SCA).

⁴ (HC-MD-CIV-MOT-GEN-2017/00336) [2018] NACHMD 67 (23 March 2018).

[26] In the premises, it is clear that although the elements mentioned in *Fakkie* have been met by and large by the applicant, namely, the fact of the making of the order; the notice thereof to the first respondent; and the non-compliance, it is, however, plain that the non-compliance alleged by the applicant, is a result of the resigning members themselves not complying with the constitutional requirements of the first respondent's constitution.

[27] To this extent, it becomes as clear as noonday that the first respondent's explanation for the alleged non-compliance, negatives willfulness and mala fides. In this connection, I am fortified in the conclusion that the applicant, on whom the overall onus rests, has failed to prove these two elements beyond a reasonable doubt. It is, for that reason, a wholesome conclusion that the first respondent cannot properly be held to be in contempt of the court order in the circumstances.

Conclusion

[28] For the foregoing reasons, the court finds that the respondents' non-compliance, if it is non-compliance at all, is neither willful nor mala fide. It is the resigning members' action in compliance with the first respondent's constitution that can enable the first respondent to comply with the court order. For that reason, it is the court's view that the application cannot, in the circumstances succeed. It is accordingly dismissed.

Costs

[29] It is clear, in the instant case that the applicant has not succeeded in the relief it seeks. In the premises, it is trite that the unsuccessful party must bear the costs. There is no reason advanced by the applicant as to why that general rule should be departed from in casu. Costs will accordingly follow the event.

Order:

[30] In the premises the following order is condign:

- a) The Applicant's application is dismissed with costs, consequent upon the employment of one instructing and one instructed Counsel.
- b) The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: Mr. S. Rukoro

On Instructions of Kangueehi & Kavendjii Inc, Windhoek.

RESPONDENTS: Mr. T. Muhongo

On Instructions of ENS Africa, Windhoek.