REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-LAB-MOT-GEN-2021/00071

In the matter between:

NAMIBIA FOOD AND ALLIED WORKERS UNION **APPLICANT**

and

LÜDERITZ SPAR **1st RESPONDENT**

JOSEPH WINDSTAAN N.O. **2nd RESPONDENT**

Neutral citation: *Namibia Food and Allied Workers Union v Lüderitz Spar* (HC-MD-LAB-MOT-GEN-2021/00071) [2021] NALCMD 20 (30 April 2021)

Coram: Schimming-Chase J

Heard: **12 April 2021**

Delivered: **30 April 2021**

Flynote: **Labour law —** Labour Act 11 of 2007, s 76(3)(a) — Interpretation of — Meaning of "require"- to be given its ordinary grammatical meaning - does not include a prohibition on an employer permitting or allowing a non-striking employee who volunteers to do the work of a striking employee during a strike at no extra pay.

Summary: The first respondent is a retail store operating in Lüderitz. The applicant is

the recognised exclusive bargaining agent for the first respondent's employees.

On 13 March 2021, 28 of the first respondent's 61 employees engaged in a lawful strike. This included all nine of the first respondents' cashiers. When the strike commenced, some of the supervisors volunteered to operate the pay points, so that customers could continue purchasing their goods from the first respondent's store. The employees who volunteered their services were specifically informed that they were not obliged to do any of work of the striking employees and would not be compensated for such work.

The applicant sought an order interdicting the first respondent from permitting and/or allowing its non-striking employees and any other employees from performing the work of an employee on strike, for the duration of the strike.

This involved an interpretation of section 76(3)(a) of the Labour Act 11 of 2007 and a determination as to whether or not the first respondent, through the conduct of the non-striking employees, had contravened section 76(3)(a).

Held that where the words of a statute are clear, they must be given their ordinary, literal and grammatical meaning unless it is apparent that such interpretation would lead to manifest absurdity, inconsistency or hardship, or would be contrary to the intention of the legislature.

Held further that in applying the ordinary grammatical interpretation of clear and unambiguous language contained in the particular statutory provision, the court must also consider the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production.

Held further that the applicant's interpretation of the word "require" to include a blanket prohibition on all non-striking employees from volunteering, at no additional pay, from doing the work of the striking employees during a lawful strike was over broad.

The court accordingly dismissed the application.

ORDER

1. The applicant's non-compliance with the forms and service provided for in the High Court rules is condoned and the matter is heard as one of urgency as contemplated by rule 73.

2. The interdictory relief sought in paragraph 3 of the notice of motion is dismissed.

3. There shall be no order as to costs.

JUDGMENT

SCHIMMING-CHASE, J

[1] The main issue remaining for determination by the court in this matter is the interpretation of the provisions of s 76(3)(a) of the Labour Act 11 of 2007 ('the Labour Act").

[2] The matter commenced as an urgent application for a range of interdictory relief, however, at the hearing of the application, the main relief sought was amended to include an order interdicting the first respondent from permitting and/or allowing its non-striking employees and any other employee to do the work of an employee on strike, for the duration of the strike.

[3] The salient facts which are not in dispute are the following.

[4] The first respondent is a retail store trading in Lűderitz, that offers the public a wide variety of groceries, fresh produce, products from an inhouse butchery, a bakery

and take away foods from a kitchen. From a separate premises it sells alcohol under the name “Tops”.

[5] Following wage negotiations between the applicant[1] and the first respondent, a dispute of interest was referred to the Labour Commissioner’s Office on 8 June 2020. After the issue of a certificate of an unresolved dispute on 27 October 2020, the two parties entered into a memorandum of agreement of industrial action (“strike rules”) to govern and regulate the strike which lawfully commenced on 13 March 2021.

[6] The total number of employees employed by the first respondent is 61. It emanated from the papers that 40 employees voted in favour of the strike, however only 28 employees participated in the strike. Of the 61 employees, nine are employed in various top and middle management positions in charge of various functions and departments. Seven supervisors report to the managers. The supervisors have direct supervisory duties over the 45 general work employees and are required to assist them in performing various tasks throughout the business.

[7] Of the total employees that went on strike, nine of the employees are permanently employed as cashiers and all nine participated in the strike, leaving no one to man the pay points. 19 of the employees who participated in the strike are permanently employed by the applicant as general work employees.

[8] When the strike commenced, some of the supervisors and general workers who were present, volunteered to perform the work of the striking employees. In particular, two cashier supervisors, the floor supervisor and the manager at Tops went to collect floats and of their own volition, without being asked, operated the pay points so that customers could purchase their groceries. As supervisors and manager they already had the necessary electronic profiles and passwords to log into the electronic system as till operators. During normal business hours the supervisors would at times assist and help the cashiers by operating the pay points.

[9] These employees were specifically advised that they were not obliged to do any work of the striking employees (the cashiers), and after having been advised that they

[1] The recognised exclusive bargaining agent for the first respondent’s permanent employees.

were not going to receive any additional remuneration for performing the tasks of the striking employees, confirmed that they were volunteering to do the work of the striking employees and continued every day, to man the pay point tills.

[10] Furthermore, the first respondent had also filled several (permanent) vacancies amongst its general workers. Apart from one employee, all vacancies were filled before the strike commenced. Two general workers had deserted and failed to return to work after their shifts ended on 27 February and on 1 March 2021 respectively. Their departure left two vacant positions.

[11] On 1 March 2021, another employee terminated her employment on written notice, leaving a further vacancy. On 3 March 2021 a further employee terminated her employment on notice, leaving yet another vacant position, and on 18 March 2021 another employee terminated his employment at the first respondent leaving another vacancy. In addition, two employees had left on maternity leave and this also caused two temporary vacancies.

[12] The first respondent appointed new employees to fill these positions. All were appointed before the strike commenced, except for one employee whose position was filled during the strike. The newly appointed employees performed their ordinary duties as general workers, however some of their ordinary duties included the duties of other employees (also general workers) who were on strike, included packing shelves, cleaning and performing duties in the bakery and butchery. Therefore, some their duties overlapped with those of the striking employees who had similar duties. Similarly, the first respondent did not require them to do the work of the striking employees, and they did so out of their own volition, without being additionally compensated.

[13] The applicant specifically took issue with the fact that these employees were doing the work of the striking employees. However of particular concern to the applicant, and the main thrust of the relief sought, was the fact that the manager and supervisors were doing the work of the striking cashiers, because all the cashiers were on strike. Thus, the applicant felt that once the manager/supervisors undertook the work of the cashiers on strike, their actions completely undermined the strike, as without the cashiers on duty, nobody should have been able to purchase groceries.

[14] The applicant communicated its displeasure by accusing the first respondent of non-compliance with the strike rules, as well as the provisions of s 76(3)(a), by requiring the non-striking employees to do the work of the striking employees. However, the applicant was specifically informed (and this is borne out by the confirmatory affidavits deposed to by the non-striking staff involved), that the non-striking employees who were doing the work of the striking employees, were doing so of their own free will, and without additional compensation. In this regard the employees were specifically advised that they were not obliged to do the work of the striking employees, and would not be compensated for doing the work.

[15] The court is to determine whether the first respondent has through the above actions, contravened s 76(3)(a) of the Labour Act.

[16] Section 76(3) of the Labour Act provides as follows:

'(3) Despite the provisions of any contract of employment or collective agreement, an employer must not-

(a) require an employee who is not participating in a strike that is in compliance with this Chapter or whom the employer has not locked-out to do the work of a striking or locked-out employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual; or

(b) hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee.' (Emphasis supplied).

[17] The oft quoted golden rule of interpretation of statutory provisions was recently reaffirmed in the Supreme Court, namely that where the words of a statute are clear, they must be given their ordinary, literal and grammatical meaning unless it is apparent that such interpretation would lead to manifest absurdity, inconsistency or hardship, or would be contrary to the intention of the legislature.[2]

[18] This approach to interpretation was reformulated in the South African Supreme

[2] Per Hoff AJA in *Torbitt v International University of Management* 2017 (2) NR 323 (SC) para 25.

Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used.' [4]

[19] This reformulation was adopted with approval by the Namibian Supreme Court and is now well established.[5]

[20] Thus, in considering the interpretation of statutory provisions, contracts or other instruments, contextual interpretation (within the parameters of an ordinary grammatical interpretation) is to be preferred. Both context and text are relevant to construing the statutory provisions.

[21] Mr Marcus, appearing for the applicant, argued that the word “require” in s 76(3)(a), should be interpreted to include “permit”, and thus create a blanket prohibition on any non-striking employee to do the work of a striking employee during a lawful strike. Mr Marcus contended, in support of this argument, that a strict grammatical interpretation of the word “require” within the context of the provisions of s 76(3)(a), and the mischief the section sought to prevent, would undermine the whole purpose of the right to strike.

[22] Mr Marcus, submitted further, that permitting the non-striking employees to

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[4] *Natal Joint Municipal Pension Fund* para 18.

[5] See inter alia *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors* 2018(3) NR 733 para 8; *Torbitt* (*supra*) paras 25 and 26.

perform the work of the striking employees, even if they volunteer to do so at no extra pay, undermines the effectiveness of the right to strike. It was submitted that as all nine cashiers had laid down tools, any employee manning the pay points during the strike allowed the first respondent to continue with a business as usual attitude, and interfered with the efficacy of the strike, and the ability of the striking employees to compel the employer to accept demand.

[23] In support of his arguments, Mr Marcus relied on the constitutionally entrenched right to strike contained in Article 21(1)(f) of the Namibian Constitution, which provides that 'All persons shall have the right to withhold their labour without being exposed to criminal penalties.'

[24] Reliance was also placed on the principles of state policy contained in Article 95, which the courts are entitled to have regard do. These principles oblige the State to actively promote and maintain the welfare of the people by adopting policies aimed inter alia at

> (a) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices; and
>
> (b) ensure that workers are paid a living wage adequate for maintenance of a decent standard of living of the Namibian people and to improve public health.

[25] Mr Marcus submitted that these principles, as well as the interpretation contended for by the applicant were affirmed by the recent judgment of Ueitele J in *Namibia Food and Allied Workers Union (Nafau) v Shoprite Namibia (Pty) Ltd,*[6] where he stressed the importance of the right to strike as follows:

'[1] Employees' right to strike is an essential component of the right to freedom of association, and one of the weapons wielded by trade unions when collective bargaining fails. Strike action is thus the most visible form of collective action during labour disputes, and is often

[6] *Namibia Food and Allied Workers Union (Nafau) v Shoprite Namibia (Pty) Ltd* HC-MD-LAB-MOT-GEN-2021/00001 [2021] NALCMD 1 (8 January 2021).

seen as the last resort of workers' organisation in pursuit of their demands. Without the protection of the right to strike, employees cannot freely exercise the right to freedom of association. If the right to bargain collectively and to strike were not well recognised the right to freedom of association would remain hollow. Sachs opines as follows:

> "The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights comprise the first group of rights. This group of rights consist of three rights namely the right to establish and join trade unions, the right to collective bargaining and the right to strike. These are the three pillars of the working people, of their capacity to defend all their other rights."

[2] Without protection of the right to strike, trade unions become pathetic, powerless bodies and the rule of management becomes absolute . As far as employees are concerned, the right to strike is an integral part to sound industrial relations and the collective bargaining system. Thus without the right to strike, the right to bargain collectively is compromised. Similarly, without the right to strike, there cannot be genuine collective bargaining and collective bargaining will be nothing other than collective begging.'[7]

[26] At paragraph 51 of the *Shoprite* judgment, the purpose of section 76(3) was dealt with as follows

'[51] In my view s 76(3) of the Act is plain and clear and leaves little room (if any at all), for ambiguity, absurdity, or inconsistency. I have demonstrated in this judgement that the legislative purpose of the Act is to ensure full enjoyment by the employees of the right to freedom of association which includes the right to strike. Section 76(3) thus makes is clear that irrespective (despite the term used in the Act) of what a contract of employment or collective agreement states, an employer must not require an employee who is not participating in a 'protected strike' to do the work of a striking unless the work is necessary to prevent any danger to the life, personal safety or health of any individual.'

[27] Mr Marcus further relied on the definition of a strike in the Labour Act, namely that a strike 'means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, or retardation is to compel their employer, any other employer or an employers' organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest.'

---

[7] *Shoprite* paras 1 and 2.

[28] In this regard, Mr Justice Collins Parker in his work *Labour Law in Namibia*[8] correctly opined as follows:

'A strike, is therefore a sharp economic instrument used as a last resort to propel parties to an industrial dispute to come to some agreement at the negotiating table. It has, therefore, become an indispensable tool in labour relations. Considering the huge economic power employers wield over employees, there must be a corresponding leverage at the disposal of employees, to enable them to take on the massive power of employers in negotiations, so as to bring about some equilibrium in the employer-and-employee relationship. However, there cannot be such a balance in labour or employment relations, in general, and collective bargaining, in particular, unless employees acting collectively and in concert have the right to strike. Herein, it is submitted, lies the *raison d'etre* of the right of employees to strike.'

[29] In support of the interpretation that the word "require" contained in s 76(3)(a) should be interpreted to include the word "permit", Mr Marcus also relied on an unreported judgment of the Labour Court of South Africa in *National Union of Metal Workers of South Africa (NUMSA) obo members v Element Six Production (Pty) Ltd*[9] where some of the difficulties that arise when non-striking employees volunteer to perform the functions performed by the striking employees were pointed out. In this regard, that court pointed out inter alia that:

'When non-striking employees perform the tasks of striking employees, it means employers can continue with the business as usual attitude. Such practices can be used as a strategy by employers to negate and dilute the intended effects of the protected strike action embarked upon by employees. This undoubtedly degrades the status of collective bargaining as a constitutional tool to resolve disputes; it defeats the purpose of the LRA as identified in its section 1; and undermines the rights of employees to freely associate and take part in the lawful activities of their unions.'[10]

[30] Mr Van Zyl, appearing for the first respondent, argued that s 76(3)(a), and in particular the word 'require' should be interpreted in its ordinary grammatical meaning, and that this would include an instruction or some form of direct request, essentially

[8] Parker C *Labour Law in Namibia* (2012) Unam Press.

[9] *National Union of Metal Workers of South Africa (NUMSA) obo members v Element Six Production (Pty) Ltd* 2017 ZALC JHB 35 (7 February 2017).

[10] *NUMSA* para 18.6.

compelling the non-striking employee to do the work of the striking employee. He argued that the word 'permit' or 'allow' was specifically not included anywhere in s 76(3), and that if it was intended to include the word 'permit' or 'allow' in the provision, the legislature would have included it.

[31] He relied for his submission on the decision in *CDM (Pty) Ltd v Mineworkers Union of Namibia.*[11]

[32] In *CDM case*, the applicant sought an order inter alia 'declaring that the applicant's conduct in permitting non-striking employees to do the work of striking employees and/or other work not normally undertaken by such non-striking employees, where the non-striking employees have consented to doing such work, is lawful and complies with the terms of s 81(6) of the Labour Act . . .' (Emphasis supplied")

[33] Section 81(6) provided as follows:

'(6) Notwithstanding any provisions contained in any term and condition of a contract of employment or a collective agreement to the contrary, an employee who is not participating in any strike referred to in ss (1) shall not be required to perform any duties, functions or work which he or she would not have been required to perform had any other employee not participated in such strike, unless the performance of such duties, functions or work is necessary to prevent the life, health or safety of any person being endangered.'

[34] The mineworker's union argued that s 81(6) prevented non-striking employees from doing work which they ordinarily would not do, and particularly that it prevented them from doing the work of striking employees. CDM, on the other hand, argued that the subsection permitted employees who are not participating in a strike to undertake work not normally done by them, provided their consent had been obtained.[12]

[35] The court, in interpreting s 81(6), viewed s 81 as a whole, and concluded that while the section provided that lawfully striking employees retained their positions while

---

[11] *CDM (Pty) Ltd v Mineworkers Union of Namibia* 1994 NR 360 (HC), This case dealt essentially declared the provision of scab labour to be permissible, through its interpretation of section 81(6) of the repealed Labour Act 6 of 1992.

[12] *CDM* at 362E-F.

on strike, and had the right to return to their employment after the strike had ended, it was also clear that an employer may continue operating its business during a strike.[13]

[36] Thus, so the court held, it followed that an employer is entitled to engage employees on a temporary basis to perform the work of striking employees during the strike, subject to the condition that any employees temporarily engaged to do the work of striking employees 'must make way for the rights of those employees lawfully on strike on strike to return to work at the end of such a strike.'[14]

[37] At 364A-365E, Teek J (as he then was), held as follows:

'It is clear from the wording of s 81(6) that it expressly provides that non-striking employees may not be compelled to do the work of striking employees unless such work is necessary to prevent the life, health or safety of any person being endangered. It follows that in accordance with s 81(6) such employees have the right to refuse to undertake work not normally done by them (unless 'life, health or safety of any person is endangered'), but it does not preclude them from undertaking such work when they consent to do so. They cannot be compelled to do that work but may elect to do so, just as temporary employees may be engaged to do such work.

The interpretation attributed to this subsection by the respondent and its members is too restrictive and inhibitory of an employer's and non-striking employees' rights. Such interpretation would lead to the absurd and anomalous position that non-striking workers are prohibited from doing work which temporary ('scab') labourers may perform. Such a situation could not have been intended by the Legislature. Steyn *Die Uitleg van Wette* 5th ed at 118-119.

Furthermore, had the Legislature intended to prohibit non-striking workers from doing the work of striking workers, such a prohibition would have followed the manner of the wording of the express prohibitions contained in Part V of the Act regulating basic conditions of employment. It is clear from the wording of this Part that where such a prohibition is intended and has been provided for, the Legislature had made use of the expression 'no employer (or) person shall require or permit' as for instance contained in ss 26, 27, 28, 30, 31, 32(2), 33, 34, 37 and elsewhere in the Act. Section 81(6) expressly only states that such employees 'shall not be required' and does not state that they shall also 'not be permitted' to do such work. If an absolute prohibition was intended except where 'life, health or safety of any person is endangered', the

[13] *CDM* at 363F.

[14] *CDM* at 364.

phrase 'shall not be required or permitted' would have been used. In the premises, it follows that s 81(6) does not contain a prohibition upon such workers or upon the employer from permitting the performing of such work provided such workers' consent.'

[38] Mr Van Zyl submitted that when the legislature enacted the provisions in s 76 of the Labour Act, and in particular s 76(3)(a), it would have considered the judgment in *CDM* dealing with the repealed s 81(6). Yet, when s 76(3) was enacted, the legislature, despite the judgment, did not see fit to include the words "permit" in the amended section. Therefore, it could not be argued that the section should be interpreted to mean that a non-striking employee cannot volunteer to do the work of a striking employee, especially when, given the facts of this case, the non-striking employees were advised that they were not obligated to perform the work of the striking employees, and where they were advised that they would not be additionally compensated for performing the work of the striking employees during the strike.

[39] In support of this submission Mr van Zyl also pointed out certain provisions in the Labour Act that specifically use the words "require or permit." In this regard, reliance was placed on ss 16 and 17.[15] Reliance was also placed on the judgment of Masuku J in the case of *Namibia Food and Allied Workers Union v Novanam Limited*[16] where Masuku J interpreted those words as (as they applied to fishers) as follows:

'It is, in this regard, important, in my view, to note that two scenarios arise which meet a prohibition, namely that a fisher may not be requested or ordered to work in excess of the hours or days stipulated. On the other hand, even if the fisher volunteers to work overtime, the employer should not permit him to work in excess of the hours stipulated in the variation of the named sections of the Act.' [17] (Emphasis supplied)

[40] Mr Marcus on the other hand, argued that the lacuna created in the *CDM* case

---

[15] Dealing with ordinary hours of work and overtime respectively, the sections provide as follows:

"16(1)(a) Subject to any provision of this Chapter to the contrary, an employer must not require or permit an employee, other than an employee contemplated in subsection (3), to work more that. . ."

"17(1) Subject to any provision of this Chapter to the contrary, an employer must not require or permit an employee to work overtime…" (Underlining supplied)

[16] *Food and Allied Workers Union v Novanam Limited* HC-MD-LAB-APP-AAA-2017/00015) NAHCMD 24 (5 October 2018).

[17] *Novanam* para 30.

was closed when the legislature enacted s 76(3)(b) of the Labour Act. He submitted further that this section prohibited an employer from hiring any individual, for the purpose, in whole or in part, of performing the work of a striking or locked out employee. Therefore, it was submitted that the mischief created by scab labour was addressed when s 76(3)(b) prohibited the hiring of temporary employees, who agree to do the work of striking employees, and an employer could no longer hire persons to do the work of striking employees, whether by agreement or instruction.

[41] It was submitted in the result, that there was no rational basis for the legislature on the one hand to prohibit the hiring of persons to perform the work of the striking employees (who would do the work voluntarily upon hiring) while permitting same in regard to non-striking employees on the establishment. Such an interpretation, it was submitted, is not only illogical, but also does not advance the legislative purpose of giving teeth to the right to strike. Effectively the interpretation contended for on behalf of the first respondent resulted in the first respondent attempting to indirectly achieve what the Labour Act prohibits directly, namely the replacement of striking employees' labour.

[42] I have considered the well-presented arguments of both counsel appearing in the matter. The recent judgments on interpretation of statutory provisions cited above require that in applying the ordinary grammatical interpretation of clear and unambiguous language contained in the particular statutory provision, the court must also consider the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production.

[43] In *Van As and Another v Prosecutor General,*[18] a full bench of this court held as follows:

'It is true that a Court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by giving the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislator or authors of document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that intention. As was said by Innes CJ in *Venter v R* 1907 TS 910 at 913:

"By far the most important rule to guide courts in arriving at that intention is to take the

[18] *Van As and Another v Prosecutor General* 2000 NR 271 (HC) at 271.

language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.'"[19]

[44] There can be no doubt, that, apart from the fact that a lawful strike is constitutionally protected, downing tools, as it were, it is a very important strategic tool to enable those without economic power, to compel powerful economically advantaged employers who refuse to consider their legitimate demands – to come to the negotiating table – and to meaningfully listen to their demands. The remarks of Parker J in his body of work, to the effect that a strike enables the bringing about of some equilibrium in the employer-and-employee relationship are entirely apposite.

[45] At the same time, I do not understand the intention of the legislature to have made it part of our law that in the event of a strike, an employer is not permitted to trade at all, even without skeleton staff. I also do not understand the legislature to have intended to prevent any staff member who has chosen not to participate in a strike for whatever reason, to be prohibited from exercising her free will to volunteer to assist during this time.

[46] Similar remarks were expressed in the context of the setting of parameters relating to the frequency of access visits by a union during a lawful strike in *Namibia Financial Institutions Union v Methealth Namibia Administrators*[20] as follows:

'While it is accepted that the 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 that borders on chaos. It is pertinent to disabuse the 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 the applicant who have elected not to withdraw their labour, should have access to the respondent's premises who is also entitled to maintain skeleton 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.'[21] (Emphasis supplied).

[19] *Van As* at 278 C-D.

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

[21] *Methealth* para 26.

[47] To my mind, in light of the historical context, the reason why the provisions of s 76(3) were enacted – namely to regulate lawful strikes – was to balance two extreme positions that are taken when a strike takes place. In this manner, the legislature positively prohibited hire of scab labour. By using the word "require" the legislature also prohibited an employer from instructing or requesting or otherwise positively engaging non-striking employees to perform the work of a striking employee. This would fall within the meaning of the word "require."

[48] To permit or allow has a clearly different meaning, and these two words do not appear in s 76(3). In spite of the judgment in the *CDM* case, the legislature chose not to include these words in the section, although it clearly had this material before it at the time. If an absolute prohibition had been intended, the legislature would have purposely included those words.

[49] It is to be noted, that although there may be difficulties that arise in rare instances when non-striking employees volunteer to do the work of striking employees as expressed in *Numsa* [22] it is important to highlight that this case concerned the contesting of a decision by an employer to pay a 'token' to some of its employees who had performed additional tasks during the course of a protected strike. It was contended that the payment of a token was discriminatory within the meaning of section 5 of the South African Labour Act 66 of 1995. The "token" was apparently a token of appreciation to those employees who had worked and performed additional tasks during the strike action. At paras 16 and 17, the South African Labour Court also remarked as follows:

'[16] The starting point here is that the right to strike is a fundamental right enshrined in the constitution and regulated by the LRA. It is accepted that not all employees may be willing to join a protected strike even if they belong to a trade union that had called for that strike. There is nothing in the LRA or any other statutory provision that prohibits an employer from utilising the services of its non-striking employees to perform work ordinarily performed by striking employees and rewarding them for going the 'extra mile'.

[17] The provisions of section 187 (1)(a) and (b) of the LRA specifically prohibit the employer from *compelling* (sic) non-striking employees to do the work normally done by striking

[22] *NUMSA* para 18.

employees. Francis J in *NUM v Namakwa Sands* held that these provisions placed an indirect prohibition on an employer to ask non striking employees to do the work of striking employees during a protected strike. In the same token however, no consequences are visited upon an employer that has politely asked non-strikers to volunteer to perform work ordinarily performed by striking employees.' (emphasis supplied)

[50] The facts are entirely different here, it being common cause that the cashier supervisors and manager who volunteered to man the tills, were specifically advised that apart from the fact that they were not obliged to, they would not receive any additional remuneration. They were not even politely asked to volunteer.

[51] Also, in the *Shoprite* case, the facts were that the company recruited employees classified as season staff or "fixed term" employees, and required them to perform the duties of the employees participating in the lawful strike. This was the main mischief resulting in the judgment of the labour court in that case.

[52] The court is accordingly persuaded by the arguments proffered on behalf of the first respondent. The applicant's interpretation of the word "require" to include a blanket prohibition on all non-striking employees from volunteering, at no additional pay, from doing the work of the striking employees during a lawful strike is overbroad. This is not the clear and unambiguous meaning of the word within the section. If the legislation intended to do so, the section would have been worded altogether differently.

[53] In light of the foregoing, the applicant's application to interdict the respondent from permitting or allowing its non-striking employees, and any other employee, to do the work of an employee on strike as of 13 March 2021 is dismissed.

[54] The following order is made:

1. The applicant's non-compliance with the forms and service provided for in the High Court rules is condoned and the matter is heard as one of urgency as contemplated by rule 73.

2. The interdictory relief sought in paragraph 3 of the notice of motion is dismissed.

3. There shall be no order as to costs.

_____

EM SCHIMMING-CHASE, J

APPEARANCES

APPLICANT:	Mr Nixon Marcus Instructed by Ray Silungwe Legal Practitioners
RESPONDENT:	Mr Christie Van Zyl Instructed by Engling, Stritter & Partners.