

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
RULING  
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

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| <b>Case Title:</b><br><br>SALATIEL MWANYENGA NTINDA<br><br>and<br><br>AUGUST 26 LOGISTICS (PTY) LTD<br>BOARD OF DIRECTORS:<br>AUGUST 26 LOGISTICS (PTY) LTD<br>CHAIRPERSON OF THE DISCIPLINARY<br>HEARING: AUGUST 26 LOGISTICS<br>(PTY) LTD                                   | APPLICANT<br><br><br><br>1 <sup>st</sup> RESPONDENT<br><br>2 <sup>nd</sup> RESPONDENT<br><br>3 <sup>rd</sup> RESPONDENT | <b>Case No:</b><br>HC-MD-CIV-MOT-GEN-<br>2023/00404<br><br><b>Division of Court:</b><br>HIGH COURT (MAIN DIVISION) |
| <b>Heard before:</b><br>HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-<br>PRESIDENT  | <b>Date of hearing:</b><br>13 February 2024<br><br><b>Delivered on:</b><br>19 March 2024                                |  |
| <b>Neutral citation:</b> <i>Ntinda v August 26 Logistics (PTY) LTD</i> (HC-MD-CIV-MOT-GEN-2023/00404)<br>[2024] NAHCMD 122 (19 March 2024)  |   |  |
| <b>IT IS ORDERED THAT:</b><br><br>1. The respondents' point <i>in limine</i> that this court lacks jurisdiction to adjudicate the matter is dismissed with costs.<br><br>2. The matter is postponed to 26 March 2024 at 08h30 for allocation of a hearing date on the merits. |   |  |
| <b>Reasons for the order:</b>   |   |  |

## Introduction

[1] The applicant seeks orders declaring certain decisions taken at the board meetings of the director of the first respondent as unlawful for the reasons that the decisions *inter alia* sought to terminated the applicant's employment as managing director of the first respondent as well as to charge him with misconduct and to subject him to disciplinary hearing. The applicant contends that the decisions were taken in contravention of the provisions of the Companies Act, 2004 as well the Shareholders' Agreement of the first respondent.

[2] In opposing the relief sought, the respondents raised a point *in limine* that this court lacks jurisdiction, the dispute between the applicant and the respondents is essentially a labour dispute which should have been instituted in the Labour Court. The applicant, for his part contends, that this court has jurisdiction to hear the matter.

## The parties

[3] The applicant is Salatial Mwanyenga Ntinda, a former managing director of the first respondent and a former shareholder of the second respondent.

[4] The first respondent is August 23 Logistics (Pty) Ltd, a company duly registered in terms of the Namibian law, with its place of business at No. 215 Industria Street, Southern Industrial Area, Windhoek, Republic of Namibia. The Board of Directors ('the Board') of August 26 Logistics (Pty) Ltd, has been wrongly described as a juristic person and should not have been cited apart from the company which it represents.

[5] The third respondent is the Chairperson of the disciplinary hearing set in motion by the first and second respondents. The Chairperson is Mr Clement Daniels of Clement Daniel Labour Consultants, with business address at erf 66, Acacia Park, Rehoboth, Namibia. No relief is that sought against the third respondent.

[6] The parties above are as referred to in the main application and will be similarly referred to in the present application. Mr Shimakeleni appears on behalf of the applicant, whereas Mr Boesak appears on behalf of the respondents on the instructions of Sisa Namandje & Co Inc.

Factual background

[7] The applicant was appointed on 30 August 2018 by the Board of the first respondent as its Managing Director. On 5 June 2023, at its meeting the Board adopted a resolution which suspended the applicant. It is common cause that when the said resolution was adopted only four directors were present, whereas according to the shareholder agreement the prescribed quorum is that five directors be present. Accordingly, the applicant argues that there was no quorum when the decision to suspend him was made.

[8] According to the respondents the reason why the applicant was suspended is because he concluded a joint venture agreement on behalf of the first respondent with an entity called Penda Enterprises CC and based on that agreement, paid a sum of N\$2.5 million to Penda Enterprises CC. The respondents contend that the Board had not resolved to enter such joint venture agreement. Furthermore, the applicant did not have authority to conclude the joint venture agreement with Penda Enterprises CC. Accordingly, the Board resolved to suspend the applicant while they were investigating the alleged misconduct relating to the alleged financial irregularities.

[9] On 8 August 2023, the applicant was served with a letter and a notice of the disciplinary proceedings, together with a charge sheet. The third respondent was appointed as the chairperson of the disciplinary proceedings.

[10] The applicant then instituted the present application seeking the following relief :

1. That the decision taken by the Second Respondent on 05 June 2023 suspending the Applicant from his employment as Managing Director of the First Respondent be declared unlawful and set aside.

2. That the decision taken by the Second Respondent and communicated to the Applicant on 22 August 2023 to charge the Applicant with misconduct be declared unlawful and set aside.

3. That the decision made by the Second Respondent on an unknown date to appoint the Third Respondent as the Chairperson responsible for chairing a disciplinary hearing against the Applicant be declared unlawful and set aside.

4. That all the decisions and resolutions taken by the Second Respondents in contravention of the Companies Act and Shareholders Agreement in board meetings held on 11 July 2023, 3 August 2023, 19

August 2023 and 30 August 2023, be declared unlawful and set aside.

5. That any steps, and charges prepared for the disciplinary hearing against the Applicant be declared unlawful and set aside.

5.1. In the alternative: In the event that the First, Second and Third Respondents proceed with the disciplinary proceedings pending the finalization of this matter, that the said disciplinary proceedings be declared unlawful and set aside.

6. An order in terms whereof the Respondents electing to oppose this application are (jointly and severally, the one paying the others to be absolved) directed to pay the costs of this application, such costs being the costs of two legal practitioners.'

[11] Based on the relief sought by the applicant, the respondents raised a point *in limine* contenting that this court lacks jurisdiction to adjudicate the matter because the dispute between the parties is labour related falling within the jurisdiction of the Labour Court. This court is called upon to first determine the point *in limine* before the merits are considered.

#### Submissions on behalf of the parties

#### *Submissions on behalf of the respondents*

[12] Mr. Boesak for the respondents submitted that the applicant chose the wrong forum as the relief sought is based on the employment agreement and he has remedies in terms of the Labour Act 11 of 2007 ('the Labour Act'). That the applicant should have approached the Labour Division of the High Court. He submitted that the legislature intended that all labour disputes are to be dealt with in terms of Chapter 8 of the Labour Act, which is applicable to the relief sought by the applicant.

[13] Counsel further submitted that the provisions of section 117(1)(c) of the Labour Act is applicable, which vests in the Labour Court exclusive jurisdiction to 'review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act'.

[14] Mr Boesak pointed out that the respondents accept that the Labour Court is a division of the High Court and that the Judges of the High Court are also Judges of the Labour Court.

### *Submissions on behalf of the applicants*

[15] Mr Shimakeleni, for the applicant submitted that the relief sought by the applicant is not based on the Labour Act, but rather on the provisions of the Companies Act, 28 of 2004 and common law. Counsel submitted further that even if the court were to find that the application is one contemplated by s 117(1)(c) as submitted by the respondents, the court will still have jurisdiction to hear the application as Judges of the High Court are assigned to the Labour Court.

### Issue for determination

[16] The crispy issue for determination is whether the relief sought by the applicant is competent under the Labour Act? If it is not then it is justiciable by this court.

### The law

[17] Both parties referred the court to Supreme Court judgment of *Masule v Prime Minister of the Republic of Namibia*<sup>1</sup>. In that matter, the Supreme Court had to decide on an appeal in which the High Court refused to entertain an urgent application in which the appellant challenged a decision by the Prime Minister for cancelling Mr Masule's promotion appointment directing an investigation into the process that led to that promotion. The Supreme Court held as follows:

'The Labour Court is not a court separate from the High Court. It is merely a division established by art 78(1)(b), read with art 80 of the Constitution. It would therefore be a misdirection for a judge of the High Court to decline to hear a matter that came before him or her on the ground that it fell within the jurisdiction of Labour Court, for if by that it is intended that the Labour Court is a forum of adjudication other than the High Court, it is a constitutional anomaly. The matter is more properly not one of jurisdiction but of remedy.'

[18] Keeping those wise words in mind I proceed to consider whether there is merit in the respondents point *in limine*.

### Discussion

[19] As indicated earlier, the applicant's cause of action is founded on the Board of the first respondent's contravention or non-compliance with the provisions of the Companies Act, the

<sup>1</sup> *Masule v Prime Minister of the Republic of Namibia and Others* 2022 (1) NR 10 (SC).

Shareholders Agreement and the common law related to companies. Put differently, the basis upon which the Board's resolutions sought to be impugned is due to the Board's non-compliance with the provisions of the Companies Act, the Shareholders Agreement and the common law. The dispute between the parties is whether the impugned resolutions passed by the Board are valid in the sense that they were procedurally adopted and a duly constituted and quorated meeting of the Board. The applicant asserts that the resolutions were adopted at an inquorated meeting. The first respondent, through the Board, while conceding that the resolutions were passed at an inquorated meeting, justifies the validity of the resolution on the basis that because two directors were conflicted in respect of the items on the agenda therefore they could not be allowed to attend the meeting. In a nutshell, the dispute between the parties is whether the resolutions were valid or not. It follows thus, in my judgment that the dispute between the parties is not labour related. The dispute is rather corporate law related which is not justiciable in the labour court.

[20] On the authority of *Masule*, properly considered, the relief sought by the applicant, in the form of declarators, are based on the alleged contravention or non-compliance by the Board of the first respondent with the provisions of the Companies Act, the Shareholders Agreement and the common law relating to companies. The applicant's cause of action is not founded in labour related conduct or dispute.

[21] In my considered view the mere fact that the implementation of the impugned resolutions have the effect of causing a labour related dispute between the applicant and the first respondent does detract from the fact that the primary dispute between the parties is whether the resolutions are unlawful or not. To hold otherwise is to conflate cause and effect. In my judgment, the resultant disciplinary proceedings instituted against the applicant are secondary to the primary dispute whether the resolutions are lawful or not. Furthermore, on the papers before this court, the issue relating to the suspension and the applicant being subjected to disciplinary proceedings are not issues that this court is called upon to adjudicate.

[22] It is clear to me that, in the likely event that the point *in limine* is not upheld, and the court proceeds to consider the merits, the single issue for decision by the court will be whether the impugned resolutions were lawful or not in the sense that it had been passed procedurally at a duly convened, constituted and quorated meeting. It is further clear that the relief sought is not labour related. In other words, the applicant does not ask his suspension to be declared unlawful, instead he is asking for the decision to suspend and subject him to disciplinary proceedings be declared unlawful for the reasons that the decisions were passed at an inquorated meeting.

Conclusion

[23] It thus follows from the considerations, findings and conclusions made herein before, that the respondents' point in limine that this court lacks jurisdiction is misplaced and stands to be dismissed.

Costs

[24] The general rule is that costs must follow the result. The respondents failed with their point *in limine* and are liable to pay the applicant's costs related to the opposition of the point *in limine*.

[25] Those are my reasons for the order made above.

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| <b>Judge's signature:</b>                                    | <b>Note to the parties:</b>  |
|  | Not applicable.  |
| <b>Counsel:</b>  |  |
| <b>APPLICANTS</b>  | <b>RESPONDENTS</b>   |
| A Shimakeleni<br>Of<br>Appolos Shimakeleni Lawyers, Windhoek | AW Boesak<br>Of<br>Instructed by Sisa Namandje & Co Inc,<br>Windhoek |