



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2017/00318

In the matter between:

NATIONAL UNION OF NAMIBIAN WORKERS (NUNW)

APPLICANT

and

ISMAEL KASUTO

RESPONDENT

Neutral citation: *National Union of Namibian Workers v Kasuto* (HC-MD-CIV-MOT-GEN-2017/00318) [2017] NAHCMD 306 (26 October 2017)

Coram: USIKU, J

Heard on: 26 September 2017

Delivered: 26 October 2017

Flynote: Practice – Applications and motions – Urgent application for interdict – Urgent application granted.

Summary: Applicant brought urgent application to interdict and restrain the Respondent from passing himself off as the President of the Applicant – Respondent opposing the application on the bases that Applicant lacks authority to represent the Applicant, the application is not urgent and that the Respondent is still

the President of the Applicant – Court holding that Applicant has necessary authority to bring the proceedings and that Applicant has made out a case for urgency and that Applicant has made a decision to remove the Respondent as President and such decision stands till set aside by a competent court or forum.

ORDER

- (a) The Applicant's non-compliance with the forms and service as provided for in the rules is hereby condoned and the matter is heard on urgent basis as contemplated in rule 73(4).
- (b) The Respondent is hereby interdicted and restrained from conducting himself in any manner purporting to be the President of the Applicant and/or attending any meeting or gathering under the name of the Applicant.
- (c) The Respondent is hereby interdicted and restrained from using in any manner the Applicant's letterhead, electronic device or any other communication device either electronic or otherwise, on behalf of the Applicant.
- (d) The Respondent is hereby interdicted and restrained from entering Applicant's premises situated at Erf No. 7353 Katutura, Mungunda Street, Windhoek, without prior written permission granted by the Applicant.
- (e) The Respondent is hereby interdicted and restrained from interfering with the activities of the Applicant, its employees, agents, partners and/or office bearers in whatsoever manner.
- (f) The Respondent is hereby interdicted and restrained from, in any manner, acting or purporting to act on behalf of the Applicant.
- (g) The Respondent is hereby ordered to pay the costs of the Applicant, such costs to include costs consequent upon the employment of two legal practitioners.

JUDGMENT

USIKU, J:

Introduction

[1] In this application the Applicant, the National Union of Namibian Workers, (NUNW) is a federation of trade unions, duly registered as such in terms of the Labour Act, No. 11 of 2007.

[2] It is common cause that the Respondent was elected as the President of the NUNW on the 01st May 2015, by the National Congress of NUNW for a period of four (4) years.

[3] In terms of the Constitution of NUNW¹, the President shall vacate his/her seat during his/her term of office, if he/she ceases to be a member of an affiliated union, or if a 2/3 majority of the Central Executive Committee (CEC) so decides by resolution.

[4] According to the Applicant, the Respondent was removed from office on the 19 August 2017 by resolution of a 2/3 majority of the CEC, therefore, the Respondent is no longer the President of NUNW, however, the Respondent purports to act on behalf of the NUNW, as if he were still its President. As a result, the Applicant approached this court for an order in the following terms:

- '1. That the applicant's non-compliance with the forms and service as provided for in the Rules of this Honourable Court be condoned and that the matter be heard on an urgent basis as contemplated in rule 73(4).

¹ Clause 8.4.4 of the Constitution of NUNW.

2. Directing that a rule nisi is hereby issued, with a return date to be determined by the court, before which the respondent must show cause, why an order in the following terms should not be made final:
 - 2.1 Interdicting and restraining respondent from in any manner conducting himself in a manner purporting to be the President of the applicant and/or attending any meeting and gathering under the name of the applicant.
 - 2.2 Interdicting and restraining respondent from using in any manner the applicant's letterhead, electronic device or any other communication device either electronic or otherwise on behalf of the applicant.
 - 2.3 Interdicting and restraining respondent from entering applicant's premises situated at Erf 7353, Mungunda Street, Katutura, Windhoek;
 - 2.4 Interdicting and restraining respondent from interfering with the activities of the applicant, its employees, agents, partners and/or office bearers in whatsoever manner.
 - 2.5 Interdicting and restraining respondent from in any manner act or purport to act on behalf of the applicant.
3. Ordering that paragraphs 2.1 to 2.5 shall operate as an interim order with immediate effect pending the return date of the rule nisi.
4. Ordering the respondent to pay the applicant's cost in the event of opposition.
5. Granting further and/or alternative relief to the applicant.'

[5] The Respondent opposed the application. He does so on three bases, namely that:

- (a) the Applicant has not made out a case for urgency,
- (b) the Applicant has not demonstrated a prima facie right to institute these proceedings on behalf of NUNW, as required by the Constitution and that,
- (c) the Respondent is still the President of NUNW.

Applicant's position

[6] On the 19 August 2017 the Central Executive Committee (CEC) of the NUNW resolved by a two-third majority to remove the Respondent as President of NUNW with immediate effect.² The decision was brought to the attention of the Respondent on the 21st August 2017.

[7] On the 22 August 2017 the Respondent issued a press release to the public, stating that he still remains the President of NUNW. On the same day, the Respondent addressed a letter to the Secretary-General of SWAPO, on a letterhead of NUNW, presenting himself as the President of NUNW.

[8] The Applicant's legal practitioners addressed a letter to the Respondent on the 22 August 2017 notifying him that he has no right to represent to anyone that he is still the President of NUNW. No response was received from the Respondent by the Applicant.

[9] The Respondent has not challenged the decision of the CEC at any forum, but rather has adopted an attitude that the Applicant must challenge his stance, in court.

[10] The Applicant contends that:

(a) The public statements by the Respondent passing himself off as the President of NUNW, encourages lawlessness in the conduct of the affairs of NUNW and cause irreparable reputational damage to the good name of NUNW.

(b) The Respondent's continuous posing as the President of NUNW causes immense confusion among the associates of NUNW, member of the public and all other bodies to which NUNW is affiliated. Furthermore, the Respondent is in possession NUNW's letterheads which he uses without NUNW consent.

² See resolution to that effect, marked JM3 annexed to the Founding Affidavit of the Applicant.

(c) If the Respondent is not restrained from purporting to act or to represent the NUNW, he will continue to so masquerade, thereby causing irreparable harm and prejudice to the administration of the affairs of NUNW.

[11] The Applicant, therefore, contends that it cannot be afforded substantial redress at a hearing in due course and that it has no other remedy than the relief it seeks.

Respondent's position

[12] In response to the Applicant's application, the Respondent filed a counter-application, accompanied by an answering affidavit, which also serves as founding affidavit in respect of the Respondent's counter-application. The counter-application requires the Applicant to inform the Respondent of its opposition on or before the 4 November 2017 and to file its answering affidavit on or before the 26 November 2017. Save to state that the Respondent challenges the legality of the decision taken by the Applicant on the 19 August 2017 that removed him from office as President, I would not refer to this counter-application herein, as other papers relating thereto are still to be filed.

[13] The Respondent contends that:

(a) The meeting of the CEC of the 19 August 2017 was not properly constituted, in that the members of the Applicant that attended the meeting acted in breach of the provisions of the Constitution of NUNW, and as such the decision to remove him as President, is a nullity;

(b) during the CEC meeting of 19 August 2017, an impasse arose on whether affiliated unions who were in arrears in payment of affiliated fees had a right to take part and vote at that meeting. Due to that impasse, Mineworkers Union of Namibia (MUN) walked out of the meeting. The Respondent, considering the meeting as not being properly constituted, also walked out of the meeting. The meeting proceeded in the absence of MUN members and the Respondent, and the resolution removing the Respondent as President of NUNW was taken thereafter.

[14] The Respondent further contends that the resolution taken by the Applicant to initiate the present proceedings was taken by way of a round robin resolution. In terms of the provisions of the Constitution of NUNW, a decision may be taken by way of round robin only when the CEC is prevented from meeting, by circumstances beyond its control. According to the Respondent, there is no evidence before court that the resolution in question was duly passed by the Applicant in terms of its Constitution. In addition, the Respondent argues, there is no evidence that the affiliated unions who signed the resolution are in good standing in respect of payment of their affiliation fees.

[15] The Respondent relates further that there is presently a dispute before the office of the Labour Commissioner between the MUN and NUNW, relating to the outcome of the meeting of 19 August 2017, which includes the question of the removal of the Respondent as President of NUNW. The Respondent further argues that the office of the Labour Commissioner is more suited to hear and dispose of the dispute related the interpretation of the Constitution of NUNW. The Respondent contends that the Labour Court is the appropriate forum to hear the present application, because the Respondent is an office bearer of NUNW, a trade union. This court should decline jurisdiction, on that basis. I should add there that the Respondent did not cite authority for this proposition.

[16] In respect of urgency of the application, the Respondent contends that he considers himself as the President of NUNW, on account that no valid resolution has been taken to remove him from that position. However, he argues, his actions cannot be considered to create a ground for urgency

Analysis

[17] The first issue I should deal with, is the authority of the Applicant to bring these proceedings. The Applicant has annexed a copy of the round robin resolution passed by the CEC authorizing it to bring the present application.

[18] It is trite that an applicant need no more than allege in its founding papers that it has been duly authorised to bring the relevant proceedings. When the

challenge to the authority is a weak one, a minimum of evidence would suffice to establish such authority.³

[19] I am satisfied that the round robin resolution furnished by the Applicant meet the minimum evidence requirement, and that the Respondent's challenge regarding the validity of the round robin resolution, is a weak challenge and I therefore reject it.

[20] I turn to the issue of the effect of the decision of the Applicant taken on the 19 August 2017 removing the Respondent from the office of President of NUNW. The effect of a decision of that type was considered in the case of *Cathcart Residents Association v The Municipal Manager for the Amahlathi Municipality*⁴ in which Plasket J quoted with approval remarks by Rall AJ in *Shunmugam & Others v The Newcastle Local Municipality & Others*⁵, saying:

'I therefore approached the matter on the basis that the expulsion of the councillors was no different from the expulsion of a member of any other voluntary association. In my opinion, a member a voluntary association or organization such as a political party who has been expelled and who both contends that the expulsion was unlawful and wishes to enforce his or her membership rights, must, if the organization does not concede the unlawfulness of the expulsion, take steps to have the expulsion reviewed and set aside. Such a person is put to an election. If the person, notwithstanding the contention that the expulsion was unlawful decides not to challenge it, he or she is taken to have accepted the expulsion, and the expulsion will stand notwithstanding the fact that it may not have been lawful. In my opinion the situation is analogous to the one described in the *Oudekraal* case (supra), although not on all fours with it.'

[21] I am in agreement with the statement of law expressed above. In the present matter the Respondent has not challenged the lawfulness of his removal as President of NUNW, but has rather opted to defy such decision. The decision taken on the 19 August 2017 must therefore be accepted as having legally binding consequences until set aside. It would indeed create chaotic conditions in

³ *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011(1) NR 298 at 313 B.

⁴ Unreported judgment of the High Court of South Africa Eastern Cape Division – Grahamstown, Case No. 3667/2013, delivered on 03.04.2014; at paragraph 14.

⁵ [2008] 2 All SA 106 (N).

organizations such as trade unions, church bodies or cultural clubs, if the default setting was otherwise.

[22] The result of my holding that the decision of the 19 August 2017 has legally binding consequences until set aside, is that the Respondent was removed from office of President of NUNW as from 21 August 2017 when he was notified of the decision, and therefore has no legal right to insist that he is still the President.

[23] I now turn to the issue of urgency of the application. The actions of the Respondent passing himself off as President of NUNW in the circumstances, are tantamount to self-help acts or the taking the law into own hands. Such actions are in themselves inherently urgent matters.⁶

[24] Many reported cases point in the direction that courts are inclined to discourage conduct that is likely to undermine respect for orderly conduct.⁷ The conduct of the Respondent as described in the founding papers of the Applicant, has a tendency to undermine respect for orderly conduct in the affairs of organisations, such as the Applicant. Each case must, of course depend on its own circumstances. However, I am satisfied that in the present matter the Applicant has set out circumstances that justify the invocation of urgency procedure, and I hold that the matter be heard on urgent basis.

[25] Insofar as the merits of the matter are concerned, it is clear that the parties have addressed both the application for interim and final relief, and it would not serve any purpose to proceed with a two-phase hearing in the circumstances. Indeed the Applicant in argument, indicated that it is seeking a final interdict as there will be no purpose to be served by a rule nisi.

[26] On the evidence given, I am satisfied that the Applicant has made out a case for a final interdict, and it therefore entitled to the relief it seeks.

[27] As far as issue of costs are concerned, the costs must follow the event and I am satisfied that the complex nature of the application warrants the employment of two legal practitioners, and I would give an order to that effect.

⁶ *Namibia Airports Company Ltd v SE Duty Free Trading (Pty) Ltd* (NAHCMD Case No. A332/2007) [Unreported] delivered on 19 December 2007, reasons released on 12 April 2017, at para 20.

⁷ *Supra*: para 21.

[28] In the result I make the following order:

- (a) The Applicant's non-compliance with the forms and service as provided for in the rules is hereby condoned and the matter is heard on urgent basis as contemplated in rule 73(4).
- (b) The Respondent is hereby interdicted and restrained from conducting himself in any manner purporting to be the President of the Applicant and/or attending any meeting or gathering under the name of the Applicant.
- (c) The Respondent is hereby interdicted and restrained from using in any manner the Applicant's letterhead, electronic device or any other communication device either electronic or otherwise, on behalf of the Applicant.
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- (f) The Respondent is hereby interdicted and restrained from in any manner acting or purporting to act on behalf of the Applicant.
- (g) The Respondent is hereby ordered to pay the costs of the Applicant, such costs to include costs consequent upon the employment of two legal practitioners.

B Usiku

Judge

APPEARANCES

APPLICANT

S. Namandje (together with E Nekwaya)
Instructed by Sisa Namadje & Co, Inc.
Legal Practitioners
Windhoek

RESPONDENT:

G.Narib
Instructed by KL !
Naruses and Associates Legal
Practitioners
Windhoek