

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: LCA 07/2017

In the matter between:

NAMIBIA NATIONAL TEACHERS UNION & 13 OTHERS

APPELLANTS

and

KAYEC TRUST

1ST RESPONDENT

LABOUR COMMISSIONER

2ND RESPONDENT

KYLLIKKI SIHLAHLA NO

3RD RESPONDENT

Neutral citation: *Namibia National Teachers Union v Kayec Trust* (LCA 07/2017)
[2017] NAHCMD 36 (08 December 2017)

Coram: USIKU, J

Heard on: 22 September 2017

Delivered: 08 December 2017

Flynote: Labour Law – Labour Act 11 of 2007 – Whether a dispute between the parties has become moot – Whether notice of appeal is defective in that no reasons furnished for appellants' contentions that the arbitrator erred in law in making her award – Whether an unconditional withdrawal of a strike has effect of settling the dispute between the parties – Whether failure to comply with pre-strike process set

out in a collective agreement renders the ensuing strike illegal and unprotected – Appeal dismissed.

Summary: Appellants appeal against the decision of an arbitrator, in which the arbitrator held that a strike embarked upon by the appellants was illegal and unprotected – Court on appeal holding that the arbitrator correctly found that the appellants' strike was illegal and unprotected – Appeal dismissed.

ORDER

1. The appellants' appeal is dismissed.
 2. I make no order as to costs.
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JUDGMENT

USIKU, J:

Introduction

[1] This is an appeal against an award by an arbitrator, delivered on the 18 January 2017, in which award the arbitrator found that:

(a) the appellants had failed to comply with clause 16.7 of a Recognition and Procedural Agreement entered into by and between the appellant trade union (Namibia National Teachers Union) and the first respondent, by failing to give 5 days' notice before commencing an industrial action, and that

(b) a certificate of unresolved dispute issued by a conciliator on the 21 June 2016, in terms of s82(15) of the Labour Act¹ ("the Act"), was not valid for a second notification of industrial action, as the initial industrial action in respect of which it was first utilized had been unconditionally withdrawn.

¹ Labour Act, Act No. 11 of 2007.

[2] On the basis of the above findings the arbitrator held that:

(a) the industrial action (strike) embarked upon by the appellants on the 5 July 2016 was illegal and unprotected and then,

(b) ordered the appellant-employees to return to work by the 25th January 2017.

[3] The appellants, aggrieved by the above award, noted this appeal asking this court for an order:

(a) setting aside the arbitrator's finding that the Certificate of Unreported Dispute dated the 26th April 2016 fell away/lapsed when the appellants withdrew their initial Notice of Industrial Action by letter dated the 27 June 2016;

(b) setting aside the arbitrator's finding that the Certificate of Unresolved Dispute dated the 26 June 2016 could not be utilized to underpin the second Notice of Industrial Action dated the 28 June 2016.

[4] The first respondent opposed the appeal. There is no opposition by other respondents. I shall therefore make reference to the first respondent as "the respondent" herein, except where the context indicates otherwise.

Background

[5] On the 07 February 2013 Namibia National Teachers Union ("the trade union")(first appellant in this matter) entered into a Recognition and Procedural Agreement with the respondent, regulating their relationship and setting rules and procedures, with a view to manage labour conflicts and to promote mutually satisfactory relations. Clause 16 of that Agreement deals with "Dispute Procedure". Clause 16.7 provides as follows: -

'16.7 Should the dispute not be resolved after compliance with all legal requirements, then either party may exercise its right to legal industrial action. The party exercising such a right to legal industrial action shall give the other party at least five (5) working days written notice prior to the commencement of such industrial action.'

[6] On the 24 February 2016 the appellants referred a dispute of interest to the Office of the Labour Commissioner for conciliation in accordance with the provisions of s82 of the Act. After several unsuccessful conciliation meetings, the conciliator issued a certificate of unresolved dispute on the 26 April 2016, in terms of s82(15) of the Act.

[7] On the 21 June 2016, the appellants gave 48 hours' notice to the respondent that appellants would embark upon a strike on the 23 June 2016 at 10:00 am. It is common cause between the parties that the aforesaid notice was defective in that it was not "in the prescribed form" as required by s74(1)(d) of the Act. However, the appellants did embark upon on such strike on the 23 June 2016.

[8] On the 27 June 2016 the appellants gave another notice to the respondent in which the appellants withdrew the strike notice that was given on the 21 June 2016. The aforesaid notice reads as follows:-

'27 June 2016
The Director
KAYEC
P.O.Box 5169
Ausspannplatz

Dear Mr. N. Prada

RE: WITHDRAWAL NOTIFICATION OF INDUSTRIAL ACTION

This communique serves as a formal withdrawal of the notification of industrial action issued on the 21st June 2016.

Therefore, we are informing your esteemed office that employees should return to work without further delay. Members will be informed accordingly.

Yours sincerely,

(signed)

BGM Haingura
Secretary General
NANTU

cc The Labour Commissioner
Members'

[4] On the same day, the respondent acknowledged receipt of the strike withdrawal notification, in the following terms:-

'27 June 2016

BGM Haingura

Secretary General

NANTU

RE: ACKNOWLEDGEMENT OF KAYEC STRIKE WITHDRAWAL

Dear Mr Haingura

KAYEC respectfully acknowledges the withdrawal notification of the NANTU industrial action at KAYEC, sent this morning.

We have opened our centre gates and welcome the instructors back to work.

Please inform us if NANTU members have accepted the last proposal from KAYEC, from the time of ward of the certificate of unresolved dispute on 26 April 2016.

Sincerely.

(signed)

Nelson Prada

KAYEC Director'

[10] It appears there was no specific response to the enquiry contained in the last sentence of the above letter, however, on the 28 June 2016 the appellants addressed a letter to the respondent in the following terms:

'Enquiries: M.H. Kahara

June 28, 2016

The Director

KAYEC Trust

P.O.Box 5167

Ausspannplatz

Dear Mr. N. Prada

RE: NOTIFICATION OF INDUSTRIAL ACTION

This letter serves as notice to the management that all the employees of KAYEC Trust at both centres (Windhoek and Ondangwa) will take industrial action due to the unresolved dispute on salary increment and fringe benefits that was not concluded on April, 26, 2016. We are giving the employer 5 days to adhere to our demands.

The industrial action is scheduled Tuesday, July 5, 2016 Time: 12:00 Section 76 of the Labour Act (Act No. 11 of 2007) applies.

.....

Attached, please find herewith copy of the agreed strike rules in the Recognition and Procedural Agreement between NANTU and KAYEC Trust.

We hope and trust that you will find this in order.

Thanking you in advance

Yours truly,

(signed)

B.G.M Haingura

Secretary General

Cc: The Labour Commissioner

: Inspector-General of the Namibian Police'

[11] It is common cause between the parties that the strike notice given by the appellants on the 28 June 2016, (as appears above) only gives four (4) working days prior to the strike and was thus not in compliance with the provisions of clause 16.7 of the Recognition Agreement.²

[12] On the 5th July 2016 the appellant embarked upon the strike.

[13] On the 3rd August 2016 the respondent referred a dispute of unfair labour practice to the Office of the Labour Commissioner, against the appellants. After an unsuccessful conciliation meeting the dispute was set down for arbitration. The issues for determination before the arbitrator were:

(a) whether the appellants were in breach of clause 16.7 of the Recognition Agreement;

(b) whether the strike embarked upon by the appellants on the 5th July 2016 was illegal and unprotected;

(c) whether the appellants committed an unfair labour practice.

² Clause 4 of the Recognition Agreement defines "day" as follows:

' "DAY" shall mean any normal working day of the Trust in other words any day other than Saturdays, Sundays and public holidays.'

[14] The arbitration proceedings were concluded on the 19 December 2016.

[15] On the 18 January 2017 the arbitrator found that:-

(a) the certificate of unresolved dispute issued by the conciliator on the 26 April 2016 which was used by the appellants as the basis to embark upon the initial strike on the 23 June 2016 to the 27 June 2016, was not valid for use as basis for the notification of the second strike of the 5th July 2016, since such certificate “fell away” when the appellants abandoned the initial strike;

(b) the appellants failed to comply with the provisions of clause 16.7 of the Recognition Agreement as they gave the respondent only four (4) days’ notice, instead of the required five(5) days’ notice. The strike notified by the appellants on the 28 June 2016 and embarked upon on the 5th July 2016 was therefore illegal and unprotected; and

(c) the actions of the appellants amounted to unfair labour practice.

[16] The arbitrator then ordered the appellants (striking employees) to return to work on 25 January 2017 at 8h00.

[17] On the 01st February 2017 the appellants launched the present appeal asking the court to grant an order as set out in paragraph 3 above.

Appellants’ contentions

[18] The appellants contend that a certificate of unresolved dispute simply denotes that there is a dispute existing between the parties which does not seem to have prospects of being resolved at that time. The certificate is not linked to any subsequent steps, except the complete settlement or resolution of the dispute.

[19] The appellants argue further that the issuing of a certificate has several consequences, one of them being, to signal that conciliation has been attempted. It also serves as a green light for a party who otherwise has a right to strike, to

proceed to the next step in the process that culminates in a strike. The certificate is not itself a licence for industrial action. Its validity does not depend on the subsequent steps taken except insofar as the settlement of the dispute is concerned.

[20] According to the appellants, what breathes life into the validity of the certificate is the existence of the dispute which remains unresolved. Its validity does not derive from whether or not a party decides to go on a strike. Therefore the limitation placed on the certificate by the reasoning of the arbitrator does not do justice to the provisions of s82 (15) and s82(16)³ of the Act.

[21] The appellants argue further that, from the reading of the appellants' letter dated the 27 June 2016 withdrawing the notification of industrial action issued on the 21 June 2016, there is no communication that the underlying dispute had been resolved. It is only when the dispute has been settled that the validity of the certificate of unresolved dispute could come to an end.

[22] Insofar as the arbitrator ruled that the strike is illegal, the appellants argue that a strike can only be illegal if it does not comply with the provisions of s74 and s75⁴ of

³ ss. 82(15) and (16) provides as follows:

'(15) Subject to section 83, a conciliator must issue a certificate that a dispute is unresolved if –

- (a) the conciliator believes that there is no prospect of settlement at that stage of the dispute; or
- (b) the period contemplated in subsection (10) has expired.

(16) When issuing a certificate under subsection (15) the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration in terms of Part C of this Chapter.'

⁴ The relevant parts of ss.74 and 75 read as follows:-

'Rights to strike or lockout

74. (1) Subject to section 75, every party to a dispute of interest has the right to strike or lockout if-

- (a) the dispute has been referred in the prescribed form to the Labour Commissioner for conciliation in accordance with section 82;
- (b) the party has attended the conciliation meeting convened by the conciliator;
- (c) the dispute remains unresolved at the end of-
 - (i) a period of 30 days from the date of the referral;
- (d) after the end of the applicable period contemplated in paragraph (c), the party has given 48 hours notice, in the prescribed form, of the commencement of the strike or lockout to the Labour Commissioner and the other parties to the dispute; and
- (e) the strike or lockout conforms to-
 - (i) any agreed rules regulating the conduct of the strike or lockout; or
 - (ii) any rules determined by the conciliator in terms of subsection (2)'

'Prohibition of certain strikes and lockouts

75. A person must not take part in a strike or a lockout if-

- (a) section 74 as not been complied with;

the Act. That is the source of illegality. The illegality arises as a matter of violation of law. The provisions of s74 and s75 have not been violated and, therefore, there is no illegality. The strike notice complies with the provisions of s74(1) (d) and therefore the notice can never be said to be illegal.

[23] The appellants further contend that there is no provision in the Act that non-compliance with pre-strike procedures contained in a collective agreement renders a strike illegal.

Respondent's contention

[24] The respondent raised two points in limine, namely that: -

- (a) the present appeal has become moot, in that:-
 - (i) appellant-employees had been charged with misconduct and were subsequently dismissed on the 13 February 2017, and that,
 - (ii) notice of the termination of the Recognition Agreement between the appellant-trade union and the respondent had been given on 25 January 2017; and that,
- (b) the notice of appeal is defective in that it contains no grounds upon which the appellants rely with regard to the purported questions of law raised and therefore, the said notice of appeal constitutes a nullity.

[25] The appellant responded to the above points in limine, arguing that the burning issues in this appeal are:

- (a) whether the appellant-trade union had engaged in an illegal strike, and therefore not worthy of recognition and,

(b) the dispute is one that a party has the right to refer to arbitration or to adjudication in terms of this Act;

(c) the parties to the dispute have agreed to refer the dispute to arbitration;

(d) the issue in dispute is governed by an arbitration award or a court order; or

(e) the dispute is between parties engaged in an essential service designated in terms of section 77.'

(b) whether non-compliance with a recognition agreement translates into an unlawful activity.

[26] According to the appellants, the determination of the abovementioned issues and the questions of law raised are important to the parties as well to the labour industry in Namibia. Furthermore the issues raised present interpretation of statutory provisions and cannot be moot.

[27] Insofar as the notice of appeal is concerned, the appellants argue that appellants have filed the relevant Form 11 and Form LC41 and have set out the relief they seek from the court. The court is called upon to determine questions of law as opposed to the determination of factual questions.

[28] As regards merits of the appeal, the respondent argue that the appellants had issued a strike notice on 21 June 2016 and embarked upon an indefinite strike on the 23 June 2016. When the appellants unreservedly called off the strike on the 27 June 2016 and unconditionally returned to work, their abandonment of the strike settled the dispute.

[29] For the appellants to embark upon a subsequent lawful strike, they had to:

- (a) refer a fresh dispute of interest to the Office of the Labour Commissioner,
- (b) then follow the prescribed conciliation process;
- (c) obtain a certificate of unresolved dispute;
- (d) give fresh strike notice and proceed accordingly with the strike.

[30] The respondent argue further that the appellants had a duty to comply with any agreed rules, regulating the conduct of the strike as provided for by s74 (1)(e)(i) of the Act. The Recognition Agreement is a collective agreement contemplated under s70 of the Act and is binding on the parties as envisaged in s70(1) and s74(1) (e)(i) of the Act. Failure on the part of the appellants to give notice of the industrial section in accordance with the agreed strike rules, renders the strike illegal.

Analysis

- [31] The respondent argued that the present appeal has become moot because:-
- (a) appellant-employees have been dismissed from employment on the 13 February 2017, on account of misconduct, and that,
 - (b) notice of the termination of the Recognition and Procedural Agreement entered between the parties had been given on 25 January 2017.

[32] In *Van Rensburg v Wilderness Air Namibia (Pty) Ltd*⁵ the Supreme Court declined to consider whether a matter was indeed moot or not because : -

- (a) the fact that the matter is moot between the parties, does not constitute an absolute bar to the determination of an appeal, and that
- (b) the court may exercise its discretion and decide an appeal even if it is moot, if it is in the public interest to do so.

[33] The Supreme Court, for the above reasons, decided to exercise its discretion and determined the appeal even though it could be moot.

[34] For similar reasons, I do not consider it necessary to determine whether the present matter is moot or not, and do exercise my discretion to hear the matter on the basis that this matter raises important questions of statutory construction about:

- (a) whether an unconditional withdrawal of a strike constitutes settlement of a dispute that gave rise to the strike, and
- (b) whether failure to follow the process set out in a collective agreement before embarking upon a strike, would render the strike illegal and unprotected.

[35] Even if the dispute between the parties may be moot, I am of the opinion that it is appropriate to determine the appeal, in the circumstances, and I decline to consider the argument on mootness, and proceed to determine the appeal.

⁵ 2016(2) NR 554 at 560 to 561.

[36] The respondent also argued that the notice of appeal is defective as it does not contain grounds of appeal.

[37] In their notice of appeal the appellants have identified ten “grounds” of appeal, all of which began by asserting that the “arbitrator had erred in law” in finding or ruling as she did in her award. The basis of the respondent’s complaint is that the appellants did not state the reasons underlying their contention that the arbitrator “erred in law”.

[38] Even though the underlying reasons for the contention do not immediately follow soon after each assertion that the arbitrator “erred”, I am able to distill the relevant reasons from the totality of the notice of appeal. In the *Van Rensburg*⁶ matter, it was emphasized that where grounds of appeal are raised that are not questions of law, the Labour Court should simply dismiss them as improperly raised, but any ground of appeal that does raise a question of law should be addressed on the merits.

[39] Arguing by analogy, I am of the opinion that where, on the totality of the grounds raised in the notice of appeal, the reasons underlying an appellant’s contention that an arbitrator erred in law, are apparent then the Labour Court should address those grounds. For this reasons, the respondent’s *point in limine* stands to be rejected.

[40] I now turn to consider the merits of the appeal. The present appeal turns on two key questions, namely:-

(a) whether an unconditional withdrawal of a strike constitutes settlement of the dispute that gave rise to the strike, and

(b) whether the failure to follow the process set out in a collective agreement before embarking upon a strike would render the strike illegal and unprotected.

Effect of unconditional withdrawal of a strike

⁶ *Van Rensburg v Wilderness Air Namibia (Pty) Ltd*, supra, at p.572.

[41] It is common cause that a certificate of unresolved dispute remains valid until the dispute between the parties is settled. The issue for determination is, whether the arbitrator erred in law when she found that the withdrawal of the industrial action dated the 27 June 2016, and the appellants' return to work, unconditionally, had the effect of settling the unresolved dispute between the parties.

[42] In making any award, an arbitrator is obliged to take into account any code of good practice or guidelines that have been issued by the Minister in terms of s137 of the Act.⁷ In terms of clause 1 of the Code of Good Practice on Industrial Actions (Strikes and Lockouts)⁸ ("the Code"), the Code applies to all employees, employers, trade unions and employer's organizations. Furthermore, it stipulates that the Code must be taken into account in any proceedings by conciliators, arbitrators and judges. The code must be followed and may only be departed from where there is good reason for doing so.

[43] Clause 2 of the Code deals with the Role of Strikes and Lockouts in Collective Bargaining. Clause 2 (c) provides as follows:-

'The objective of an industrial action is to settle a dispute. Accordingly a strike or a lockout comes to an end if the dispute that gave rise to it is settled. It may be settled by an agreed compromise or a return to work. If an employer withdraws a lockout, the employees return on the employer's terms. If employees abandon the strike or the strike is called off by the trade union, the employees return on the employer's terms. Either way, the dispute is settled.'

[44] As appears from the above quotation, in the event where a party to a dispute embarks upon a strike, the dispute between the parties may be settled by:-

- (a) an agreed compromise, or
- (b) a return to work.

Thus, if the employees unconditionally withdraw the strike (or if the strike is called off by the trade union) and return to work, the dispute is settled.

⁷ See s86(17) of the Act.

⁸ Code of Good practice on Industrial Actions, issued by the Minister under Government Notice No. 208 of 2009, Government Gazette No. 4361 of 19 October 2009.

[45] In the instant matter, the appellants withdrew the strike on the 27 June 2016. Such withdrawal was unconditional. To “*withdraw*” means “*to retract or to recall (a statement or promise etc.)*”.⁹ In terms of the relevant provisions of the Code, the withdrawal of the strike and the unconditional return to work have the effect of settling the dispute between the parties. If the appellants wished to embark upon a lawful strike, they would have to follow the relevant procedures *de novo*. The finding made by the arbitrator on this aspect is not contrary to the provisions of the Act and is, in my opinion, in accordance with the intention of the legislature. The reasoning by the appellants to the contrary, therefore, stands to be rejected.

Failure to follow pre-strike process set out in the collective agreement

[46] The preamble to the Act states that, the object of the Act is to give effect to the constitutional commitment to promote and maintain the welfare of the Namibian people in Chapter 11 of the Constitution and to further a policy of labour relations conducive to economic growth, stability and productivity by, among other things, promoting an orderly system of free collective bargaining.

[47] In the present matter, it is common cause that there was a valid and binding “Recognition and Procedural Agreement” between the appellants and the respondent. Among other things, that agreement provided that a party wishing to exercise its right to industrial action must give the other party at least five (5) days’ notice prior to the commencement of the industrial action. It is also common cause that the appellants did not give notice conforming to the aforesaid requirement.

[48] In terms of s70 (1) of the Act, a collective agreement binds the parties thereto, as well as the members of any registered trade union that is a party to the agreement.

[49] From the provisions of s75(1)(d) of the Act, it is apparent that in determining whether the appropriate notice has been given, the rule is that 48 hours’ notice must be given, unless there are compelling reasons for not doing so. The compelling reasons for departing from the 48 hours’ notice rule include situations where the parties have agreed to a different, longer, time-period in order to give better effect to

⁹ *Collins Dictionary of the English Language*, Second Edition, 1986, Collins; London & Glasgow.

their rights under the Act. In my opinion, such agreed, different, longer notice time, binds the parties in terms of the provisions of s70(1) of the Act.

[50] In my opinion, it is open to the parties to agree to a longer notice period, however, the period may not be less than 48 hours.

[51] Since a collective agreement is valid and binding on the parties thereto, as contemplated by sections 68 and 70 of the Act, the provisions of a collective agreement must be considered whenever a court (or an arbitration tribunal) is called upon to consider the lawfulness or otherwise, of an act by a party, which is covered in the collective agreement.

[52] Where, as in the instant matter, a party embarks upon a strike without complying with the requirement to give five (5) days' notice, to the other, as required by a collective agreement, the ensuing industrial action would be illegal and unprotected.

[53] The argument advanced by the appellants on this aspect if adopted, would be subversive of the objectives of promoting collective bargaining.¹⁰ Such argument, therefore, stands to be rejected.

[54] For reasons foregoing the present appeal stands to be dismissed.

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

- (1) The appellants' appeal is dismissed.
- (2) I make no order as to costs.

B Usiku

¹⁰ See *ADT Security (Pty) Ltd v the South Africa Transport and Allied Workers Union and 2 others* (Unreported) Labour Court of South Africa; Johannesburg : Case No. J2939/2011 delivered on 28 February 2012; para [25].

APPEARANCES

APPELLANT

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