REPUBLIC OF NAMIBIA SPECIAL INTEREST

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2021/00179

In the matter between:

FISHERIES OBSERVER AGENCY **APPLICANT**

and

WILLIE STANISLAUS EVENSON **1st RESPONDENT**
ANDRE VISSER N.O **2nd RESPONDENT**
(DEPUTY SHERIFF OF WALVIS BAY)
ELSIE SCHICKERLING N.O **3rd RESPONDENT**
(THE REGISTRAR OF THE HIGH COURT)

Neutral citation: *Fisheries Observer Agency v Evenson and Others (*HC-MD-CIV-MOT-GEN-2021-00179) [2021] NAHCMD 301 (23 June 2021)

Coram: PARKER AJ
Heard: **20 May, 3 June 2021**
Delivered: **23 June 2021**

Flynote: Labour Court – Jurisdiction – Jurisdiction of Labour Court to grant urgent relief including urgent interdict pending resolution of a dispute in terms of Chapter 8 of the Labour Act 11 of 2007, s117 (1) (e) – Upon proper interpretation of the provisions based on the general or golden rule of construction court holding that

Labour Court having exclusive jurisdiction to grant urgent relief of which interim interdict pending resolution of a dispute in terms of Chapter 8 is exemplary – Accordingly, court finding that applicant is in the wrong court – Consequently, court dismissing the application with costs.

Summary: Labour Court – Jurisdiction – Jurisdiction of Labour Court to grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8 of Act 11 of 2007 - Applicant instituting urgent application seeking interim relief pending outcome of main application – Court finding that by approaching the High Court for relief in a matter over which the Labour Court has exclusive jurisdiction applicant was in the wrong court – Court finding that applicant's counsel misreads s117 (1) (e) of Act 11 of 2007 – Court rejecting counsel's submission that if the High Court did not entertain the application applicant would have no court to turn to since the Labour Court has exclusion jurisdiction to grant urgent interdict pending resolution of a dispute in terms of Chapter 8 only to the exclusion of all forms of urgent relief known to our law – Consequently, court concluding that applicant was in the wrong court and court dismissed the application with costs.

ORDER

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1. The application is dismissed with costs, including costs occasioned by the employment of one instructing counsel and one instructed counsel.
2. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] We are in court about the instant matter for the following reasons. In a matter with Case No. HC-MD-LAB-APP-AAA-2018/00063, the Labour Court ordered as follows:

'The arbitrator's order insofar as compensation is concerned is varied to read:
The appellant is ordered to pay the respondent his monthly salary that he would have earned from the date of his dismissal to the date of this court order.'

[2] Only first respondent has moved to reject the application. Mr Jones represents the applicant, and Mr Muhongo the first respondent. On the papers, I find that, clearly and plainly, this is a labour matter in terms of the Labour Act 11 of 2007; and the case number confirms that this is a labour matter. This is the first foundational conclusion, namely, that this is labour matter in terms of the Labour Act. Next, on 17 March 2021, the first respondent obtained a writ of execution upon the award being made an order of court by its filing, pursuant to s 87 (1) (b) of the Labour Act; and so, the order that is to be executed is 'an order of the Labour Court'; simply because the case number says so indisputably. This is the second foundational conclusion.

[3] A party in whose favour such order is to be executed is only required by s 87 (1) (b) of the Labour Act to file the award in the Labour Court in order to make the award an order of the Labour Court. It is never the concern or the business of such party to instruct the registrar which court stamp to affix on the writ of execution. Any reasonable person, minded to act reasonably without self-serving interest, would agree that any process concerning the Labour Court is issued from the office of the Registrar of the High Court. In terms r 1 of the Labour Court Rules, the 'registrar' 'means the registrar of the High court or any person authorized to act in his or her place, and includes a deputy registrar and an assistant registrar'. The distinguishing feature that indicates the case type is the case number. In the instant matter, as I have found previously, the case number indicates clearly and unambiguously that the case type from which the present dispute arose is, doubtless, a labour matter. This is the third foundational conclusion.

[4] From the foregoing foundational conclusions, I make the overall crucial and relevant conclusion that the instant matter is a labour matter through and through; and it falls squarely within the exclusive jurisdiction of the Labour Court, within the meaning of s 117 (1) of the Labour Act. Any contrary interpretation would undoubtedly defeat the purpose of the Labour Act that can be gathered from the long

title (see GC Thornton QC *Legislative Drafting* (1987) at 150); and 'the intention of the Legislature can be gathered from the words of the particular legislation only' (*Wildlife Ranching Namibia v Minister of Environment and Tourism* (A86/2016 [2016] NAHCMD 110 (13 April 2016) para 7)

[5] Doubtless, the determination of the issue of jurisdiction in the present matter turns squarely on the interpretation and application of s 117 (1) (e) of the Labour Act 11 of 2007; and as I said in *Haidongo Shikwetepo v Khomas Regional Council and Others* Case No. A364/2008 when a challenge of jurisdiction is raised, it stands to reason and common sense to consider such challenge first before all else, if that becomes necessary. It is, therefore to the interpretation and application of s 117 (1) (e) of the Labour Act that I now direct the enquiry.

[6] As statute law has it, the interpretation of statutory provisions should perforce take into account the purpose or objects of the Act under consideration. Thus, the textual provisions should be interpreted contextually with the objects of the Act which is found in the long title of the Act in question. It follows irrefragably that s 117 (1) should be interpreted – as I do – with the objects of the Labour Act in view. These objects are apposite for our present purposes: to consolidate and amend the labour law; to establish a comprehensive labour law for all employers and employees; to regulate collective labour relations and to establish the Labour Court. And when one goes to s 117 one finds that the jurisdiction provisions open with the following categorical, unambiguous chapeu:

'The Labour Court has exclusive jurisdiction to …'

[7] And the rest of subsec (1) of s 117 adumbrates a list of matters that the Labour Court may adjudicate upon. Thus, the chapeu of s 117 (1) says what it means; and it exudes in no uncertain terms the intention of the Legislature, namely, that the determination of the matters contained in para (a) to (i) is restricted to the Labour Court. In the English language, the adjective 'exclusive' means 'restricted to the person, group or an area'. (*Concise Oxford English Dictionary* 12ed) (2012)

[8] The Labour Act, except s 128 thereof, came into operation on 1 November 2008, that is, over a decade ago; and there has not been any decision of a

competent court declaring s 117 (1) unconstitutional. Section 117 (1) is, therefore, law and it is the duty of the court to implement it.

[9] The omnibus provision in s 117 (1) (i) give the Labour Court the power to deal with disputes concerning matters within the scope of the Labour Act, including Chapter 3 of the Namibian Constitution. And since the Labour Court is a division of the High Court, any inherent jurisdiction that the High Court has in terms of any Act or any law can be exercised by the Labour Court. For these reasons, it follows that the exclusive jurisdiction provision in s 117 (1) is not harsh and cannot wreak hardship to parties who rightly appear before the Labour Court. I am, therefore, surprised, in the face of the plenidudinal powers of the Labour Court, that Mr Jones, counsel for the applicant, argued that the Labour Court has no power to grant an interim interdict where there is no dispute pending resolution in terms of Chapter 8 of the Labour Act. And the talisman on which Mr Jones hangs the fate of the applicant is *Meatco v Namibia Food and Allied Workers Union and Others* 2013 (3) NR 777 (LC). I demonstrate that like all talismans, this talisman, too is an illusion: Mr Jones's zealous reliance on *Meatco* is, with respect, absolutely misplaced.

[10] As Mr Muhongo, counsel for first respondent submitted, Mr Jones misreads s 117 (1) (e) of the Labour Act. Mr Jones's misreading of that paragraph gravely clouded his interpretation of that paragraph. Section 117 provides:

'(1) The Labour Court has exclusive jurisdiction to-

…

(e) (to) grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8;'

[11] On statutory interpretation, I had the following to say in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2002 (2) NR 793:

'[7] The rule is firmly established in the practice of this court that in interpreting statutes recourse should first be had to the golden rule of construction because the plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional

cases in which it will be permissible for a court of law to depart from such a literal construction, for example, where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent: see *Jacob Alexander v The Minister of Justice and Others* case No A210/2007 (Judgment on 2 July 2008) (unreported) at 18-19 where the relevant authorities are approved and relied on. In *Tinkham v Perry* [1951] 1 All ER 249 at 250E, which Hannah J cited with approval in *Engels v Allied Chemical Manufactures (Pty) Ltd and Another* 1992 NR 372 (HC) at 380F-G, Evershed MR stated succinctly,

"plainly, words should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context".'

[12] In English grammar, the word 'including' is a non-restrictive preposition, and when used in the mentioning of a list of things or a thing; it implies that the list or thing is only partial: The specified list or named thing is only illustrative, not exhaustive, that is, the list or named thing is merely exemplary not exhaustive. (Bryan A Garner *A Dictionary of Modern Legal Usage* 2nd ed (1995)). Furthermore, the word 'including' as a non-restrictive preposition implies that there are other things not mentioned that are part of the same category. (*Concise Oxford English Dictionary* 12 ed)

[13] Thus, going by the ordinary, literal or grammatical meaning by context of s 117 (1) (e) of the Labour Act (see *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2009 (2) NR 793 (HC) para 7), this interpretation emerges inevitably. After mentioning 'urgent relief', the provisions say, 'including an urgent interdict pending resolution of a dispute in terms of Chapter 8'. The mentioning of 'urgent relief' followed immediately by the non-restrictive preposition 'including', which in turn introduces the grammatical clause 'an urgent interdict pending resolution of a dispute in terms of Chapter 8', indicates indubitably that 'urgent interdict pending resolution of a dispute in terms of chapter 8' 'is merely exemplary not exhaustive' of 'urgent relief'. (Bryan A Garner *Dictionary of Modern Legal Usage);* that is, exemplary of 'urgent relief'. It follows, as a matter of law, language and logic, that 'an urgent interdict pending resolution of a dispute in terms of Chapter 8' cannot be the only form or kind of 'urgent relief' that the Labour Court has exclusive jurisdiction to grant. The *ipssima verba* of s 117 (1) (e) impel this irrefragable conclusion. Any contrary interpretation of s 117 (1) (e) is *per incuriam*

and, therefore, wrong, if regard is had also to the fact that the non-restrictive preposition ‘including’ is not synonymous with the adverb ‘namely’, which means ‘that is to say’. (*Concise Oxford English Dictionary*) [14] Indeed, I have not departed from the literal construction because the literal construction cannot lead to a manifest absurdity, inconsistency and hardship; on the contrary, the literal construction affords a party a wide range of urgent relief. Besides it will not lead to a result contrary to the legislative intent. (*Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* loc cit) I reiterate the point that the ordinary, grammatical or literal meaning of the words in s 117 (1) (e) undoubtedly support the interpretation I have put forth.

[14] Thus, the interpretation peddled by Mr Jones can only be correct ifone replaced the non-restrictive preposition ‘ including’ with the adverb ‘namely’, which is generally preferable to ‘viz.’ or ‘to wit’. (Brayan A Garner *A Dictionary of Modern English Usage)*

[15] Accordingly, I accept Mr Muhongo’s submission that s 117 (1) (e) does not restrict the Labour Court’s exclusive jurisdiction to grant ‘an urgent interdict pending resolution of a dispute in terms of Chapter 8’ only to the exclusion of all other kinds or forms of ‘urgent relief’ known to our law. I hold that the Labour Court has exclusive jurisdiction to grant any form of urgent relief of which ‘an urgent interdict pending resolution of a dispute in terms of Chapter 8’ is merely exemplary not exhaustive. (Bryan A Garner *A Dictionary of Modern Legal Usage*)

[16] It follows inevitably that in terms of s 117 (1) (e), the Labour Court has exclusive jurisdiction in any case ‘concerning any labour matter, whether or not governed by the provisions of the Labour Act, any other law or the common law’ (see s 117 (1) (i)), to grant urgent relief, *for example*, an urgent interdict pending resolution of a dispute in terms of Chapter 8 of the Labour Act. (Italicized for emphasis)

[17] It follows inevitably that *Meatco*, with which Mr Jones is so much enamoured, is, with respect, wrong, if it purports to propound, as Mr Jones appears to submit, that the Labour Court has exclusive jurisdiction in terms of s 117 (1) (e) of the Labour

Act ‘to grant urgent interdict pending resolution of a dispute in terms of Chapter 8’ only to the exclusion of other forms of urgent relief known to our law. That being the case, with respect, I hold myself not bound to follow *Meatco*. (See *Chombo v Minister of Safety and Security* (I3883/2013) [2018] NAHCMD 37 (20 February 2018) para 66.) Accordingly, it is with confidence that I reject Mr Jones’s submission on the point.

[18] I have considered the true meaning of s 117 (1) (e) of the Labour Act by looking at the ordinary, grammatical or literal meaning of the words ‘exclusive jurisdiction’ and their intertextual connection with the objects of the Act, and I find that they indicate the intention of the Legislature when they enacted s 117 (1) of the Labour Act. Section 117 (1) confers exclusive jurisdiction on the Labour Court as respects the matters set out in that provision.

[19] The coupe de grâce to Mr Jones’s argument on jurisdiction is this. ‘For the High Court not to entertain a matter’, stated Damaseb JP in *Katjuanjo and Others v Municipal council of Windhoek* Case No.(I 2987/2013) [2014] NAHCMD 311 (21 October 2014) para 7, ‘it must be clear that the original and unlimited jurisdiction it enjoys under Article 80 of the (Namibian) Constitution and section 16 of the High Court has been excluded by the legislature in clearest terms.’

[20] I undertook the interpretation of s 117 (1) of the Labour Court to conclude that it is ‘clear that the original and unlimited jurisdiction it (ie the High Court) enjoys under Article 80 of the Namibian Constitution and section 16 of the High Court Act 16 of 1990 has been excluded by the Legislature in the clearest of terms’ (see *Katjuanjo and Others* para 7). And it should be remembered, no competent court has found s 117 (1) to be unconstitutional, as aforesaid.

[21] In peroration, I note that the ‘legislature intended to exclude the High Court’s jurisdiction in the kind of dispute now before the court’. (See *Katjuanjo* loc cit.) Indeed, applicant’s untenable contention seeks to amend s 117 (1) (e) of the Labour Act. This court cannot join the applicant in such enterprise.

[22] Doubtless, the foregoing analysis and conclusions respecting the true and proper interpretation and application of s 117 (1) (e) of the Labour Act debunk Mr Jones's strenuous assertion. Counsel urged on the court that if this court, sitting as the High Court, turned away applicant from the court's seat of judgment, applicant would have no court to turn to in order to vindicate its right to have its dispute adjudicated by a court, since the Labour Court's exclusive jurisdiction under s 117 (1) (e) is restricted to the granting of 'urgent interdict pending the resolution of a dispute in terms of Chapter 8' only to the exclusion of other forms of urgent relief; and there is no such dispute pending.

[23] In sum, based on these reasons, I hold that this court, sitting as the High Court cannot entertain the present application without offending s 117 (1) of the Labour Act. In words of one syllable, applicant has chosen the wrong court, to applicant's detriment.

[24] As respects costs, I hold that costs should follow the event. Applicant has dragged first respondent to the wrong court, much to the prejudice of first respondent, resulting in the first respondent incurring legal expenses unnecessarily. I hasten to add in parentheses that if the applicant had approached the Labour Court, s 118 of the Labour Court would have applied.

[25] In the result, the application stands to be dismissed, and it is dismissed; whereupon, I order as follows:

1. The application is dismissed with costs, including costs occasioned by the employment of one instructing counsel and one instructed counsel.
2. The matter is considered finalized and is removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

APPLICANT:	R-S JONES Instructed by Koep & Partners
1st RESPONDENT:	T MUHONGO Instructed by Tjitemisa & Associates