REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-ACO-2022/00046

In the matter between:

CHINA HENAN INTERNATIONAL COOPERATION

GROUP (PTY) LTD **APPELLANT**

and

MICHAEL TJIPEPA **1 ST RESPONDENT**

METAL AND ALLIED NAMIBIA WORKERS UNION **2 ND RESPONDENT**

Neutral Citation: *China Henan International Cooperation Group (Pty) Ltd v Tjipepa* (HC-MD-LAB-APP-ACO-2022/00046) [2022] NALCMD 63 (21 October 2022)

CORAM: CHRISTIAAN AJ

Heard: **21 October 2022**

Delivered: **21 October 2022** *(Ex tempore)*

Reasons: **22 November 2022**

Flynote: Labour Law - Compliance Order set aside - Collective Agreement regulates any disputes which might arise between the parties - Collective Agreement provides that any dispute must be settled through conciliation or arbitration.

Summary: The appellant operates a road construction business and is currently undertaking a rehabilitation and construction of the road between Keetmanshoop and Mariental. The construction site is situated in remote areas, making it impractical for employees to travel to and from work on a daily basis, thus it is a requirement of the occupation that employees work and stay on-site from Monday to Friday. Employees travel to their place of residence later Friday, or Saturday afternoon and return to site on Sunday evenings. As per the collective agreement, normal working hours are from 07h30 to 12h00 and 13h00 to 17h30, with a lunch interval of one hour from 12h00 to 13h00, every Monday to Friday. There is an exception to this working schedule of nine hours per day and five days per week.

It was agreed on the request of the employees and after consultation that employees would work nine ordinary hours for two (2) Saturdays every month at a normal wage rate, in exchange for which the employees would receive both the Friday and Monday off during a pay week.

The first respondent conducted a site visit and issued a compliance order, which is the bone of contention.

The first respondent concluded that the employees were required to work 6 days per week, and thereby exceed the 45 ordinary hours per week limit, when he issued the compliance order.

Held that: the order issued by the first respondent would mean that all employees who did not receive 0.5 percent of their salary for work done on a Saturday, were to receive back pay. This would mean that employees would receive wages that they did not work for.

Held that: the first respondent misinterpreted the provisions of section 16 (1)*(a)* of the Act and provisions of the agreement relating to maximum number of hours of work and the compliance order stands to be set aside on this ground.

Held that: that the appellant and the second respondent concluded a Recognition and Procedural Agreement to regulate any disputes which might arise between the parties.

Held that: the first Respondent assumed jurisdiction over issues which are regulated through contract between the appellant, the second respondent, and its employees under a collective agreement.

The appellant's application succeeds.

ORDER

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1. The compliance order (dated **20 June 2022** under part 2(*b*) and 3 (*b*) and (*c*) issued by the first respondent is hereby set aside.

2. The matter is finalized and removed from the roll: Ex Temporae Judgment Delivered.

JUDGMENT

CHRISTIAAN AJ:

Introduction

[1] This is an appeal against a compliance order (dated 20 June 2022)[1] granted in terms of section 126(1) of the Labour Act, 11 of 2007 ("the Act"), by the first respondent, the labour inspector, against the appellant to the effect that the appellant must pay 0.5 of an hourly rate overtime to all employees working from Monday to Friday, for any work performed on a Saturday, for which they did not receive 1.5 of their basic wage for each hour worked on such Saturday. The appeal is unopposed.

Parties

[1] See attachment "CY1" to the founding affidavit in support of the application.

[2] The appellant in this matter is China Henan International Cooperation Group (Pty) Ltd, a company established in terms of the company laws of the Republic of Namibia with its principal place of business situated at No.1 Ahrens Street, Ludwigsdorf, Windhoek, Republic of Namibia.

[3] The first respondent is Michael Tjipepa N.O, an adult male Labour Inspector, appointed as such in terms of section 124 of the Act, by the Ministry of Labour, Industrial Relations and Employment Creation.

[4] The second respondent is the Metal and Allied Namibian Workers Union, duly constituted and registered trade union in terms of the Act, and has a recognition agreement[2] with the Appellant as contemplated under section 64(1) of the Act. It is the exclusive bargaining agent of the employees that are relevant to this appeal.

Background

[5] I am confident that this judgment will be better appreciated when the background is revealed to the reader, which I dutifully proceed to do.

[6] The appellant operates a road construction business and is currently undertaking a rehabilitation and construction of the road between Keetmanshoop and Mariental. The construction site is situated in remote areas, making it impractical for employees to travel to and from work on a daily basis, thus it is a requirement of the occupation that employees work and stay on-site from Monday to Friday. Employees travel to their place of residence later Friday, or Saturday afternoon and return to site on Sunday evenings. As per the collective agreement, normal working hours are from 07h30 to 12h00 and 13h00 to 17h30, with a lunch interval of one hour from 12h00 to 13h00, every Monday to Friday. There is an exception to this working schedule of nine hours per day and five days per week.

[7] It was agreed on the request of the employees and after consultation that employees would work nine ordinary hours for two (2) Saturdays every month at a

[2] See attachment “CY5” to the founding affidavit in support of the application.

normal wage rate, in exchange for which the employees would receive both the Friday and Monday off during a pay week.

[8] The first respondent conducted a site visit and issued a compliance order, which is the bone of contention.

Grounds of appeal

[9] The grounds of appeal were raised in the notice of appeal.

[10] The first ground is that the first respondent erred in law and/or on the facts and/or misdirected himself in finding and ordering that all employees working Monday to Friday must be paid overtime or any work performed on a Saturday, and ordering that the appellant must pay all employees a 0.5 of an hourly rate back to its employees who worked on Saturdays and did not receive 1.5 of their basic wages for each hour worked on a Saturday.[3]

[11] The second ground of appeal is that the respondent erred in law and/or on the facts and/or misdirected himself in that he ignored and/or failed to take into consideration paragraph 16.1, 16.2, 16.4, 16.6 and 16.7 of the collective agreement, which states that any dispute must be settled through conciliation or arbitration.[4]

[12] Section 126(1) of the Labour Act 11 of 2007 reads as follows:

> '(1) An inspector who has reasonable grounds to believe that an employee has not complied with a provision of the Act may issue a compliance order in the prescribed form.
> (2) An employer must comply with an order issued in terms of subsection (1) unless the employer appeals to the Labour Court in terms of subsection (3).
> (3) An employer may appeal against a compliance order to the Labour Court within 30 days after receiving it.'

[13] In terms of section 117(1)(*a*)(*iii*) of the Act, the Labour Court has exclusive jurisdiction to determine appeals from a compliance order issued in terms of section 126.

[3] Paragraph 1,1.1- 1.2.3 of the Notice of Appeal.
[4] Paragraph 2,3.1- 3.2 of the Notice of Appeal.

[14] It was submitted on behalf of the appellant that section 126(1) empowers an inspector to issue a compliance order where an employer has failed to comply with any provision of the Act in contradistinction to non-compliance with a collective agreement. I am in agreement with this submission. It was held by Hoff J in the matter of *Springbok Patrols (Pty) Ltd ta/Namibia Protection Services v L Ntelamo No and Another*[5] that:

> 'The provisions of section 126(1) are clear and unambiguous – it refers to provisions of the Labour Act. The collective agreement is binding on the parties in as much as the terms thereof should be regarded as terms and conditions of employment. The provisions of the Labour Act do not elevate the contents of a collective agreement equal to that of provisions of the Act.'

[15] The above interpretation is endorsed by this court.

<u>Discussion</u>

[16] Mr Yunke in his founding affidavit explained the circumstances surrounding the agreement which the appellant concluded with its employees about their normal working hours, and the information possessed by the first respondent when he issued the compliance order. The agreement was based on a proposal made by the employees and reads as follows:

> '14.1 Employees working hours would be limited to 45 hours per week, totalling to nine (9) hours per day Monday to Friday,
>
> 14.2 Employees will work a full month cycle of 195 hours per month.
>
> 14.3 Employees are entitled to overtime payment for the hours worked beyond the normal 45 hours per week.
>
> 14.4 Employees will work two (2) Saturdays in a month to compensate for the two (2) working days allowed for a pay weekend each month, in that these two (2) Saturdays will be paid as normal hours.'

[17] It was submitted by the appellant that part of the compliance order appealed against references section 16(*a*)(*i*) of the Act, and it cites the relevant facts as being:

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[5] *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Ntelamo NO and Another* (LCA 85 of 2011) [2012] NALC 18 (01 June 2012).

'Employees are contracted to work five (5) days a week, Monday to Friday and are ask [sic] to work two (2) Saturdays every month on a normal rate.'

[18] Section 16(1)(*a*) of the Act deals with the ordinary hours of work of an employee. It provides that:

'An employer must not require or permit an employee to work more than 45 ordinary hours in any week, and in any case, not more than 9 hours on any day if the employee works for 5 days or fewer in a week.'

[19] It was submitted on behalf of the appellant that section 16 is clear and unambiguous, it aims to limit the number of working hours that an employee can be permitted or be required to work in any given week. The limitation has two primary components, firstly in terms of the number of hours per day and, secondly, in terms of the number of hours per week.

[20] Mr Yunke further stated that the appellant's employees are required to remain on site when they work on the construction and rehabilitation project for the road between Keetmanshoop and Mariental. The employees typically travel to and from their home and place of residence late on a Friday or Saturday afternoon and return to site on Sunday evenings. At their request, the employees are granted a Friday and Monday off during their pay week. This allows them to take a "long weekend" so that they can have more time to visit their families.

[21] Mr Yunke stated that the result of the aforementioned is that the employees work 4 days during the work week when they go on "long weekend". As compensation for this, the employees work during the following Saturday, which concludes the fifth day during the week that they work their ordinary hours. They do not exceed the maximum number of hours permitted under section 16(1)*(a)* of the Act, being 45 hours.

[22] Mr Yunke further stated that the first respondent concluded that the employees are required to work 6 days per week, and thereby exceed the 45 ordinary hours per week limit, when he issued the compliance order. The order issued by the first respondent would mean that all employees who did not receive 0.5 percent of their salary for work done on a Saturday, were to receive back pay. This would mean that employees would

receive wages that they did not work for. In my view the first respondent misinterpreted the provisions of section 16 (1)*(a)* of the Act and provisions of the agreement relating to maximum number of hours of work and the compliance order stands to be set aside on this ground.

[23] The second ground of appeal relates to paragraph 16.1, 16.2, 16.4, 16.6 and 16.7 of the collective agreement which reads as follows:

> '16.1 The parties agree that wherever an issue has failed to be resolved after any relevant procedure in this agreement has been exhausted, a dispute exists between them, and shall follow the procedures as per the provisions of the Act; in order to resolve the dispute.
> 16.2 The declaration of the dispute that shall explain the nature and details of the dispute and the proposed terms of settlement shall be served on the Project manager…
> 16.4 in the event of a dispute being declared both parties shall meet within fourteen (14) working days of the notice of dispute being served on either party. The purpose of the meeting shall be to resolve the dispute or to attempt to agree on how the dispute to be processed.
> 16.6 The parties may at any stage agree to refer the dispute to mediation at the Labour Commissioner. Such mediator shall only be appointed by mutual consent of both parties, confirmed in writing. Such mediator shall be entitled to take such steps as he/she considers necessary in order to resolve the dispute. The costs of mediation shall be borne equally between the parties.
> 16.7 The parties may also consider other alternatives in attempting to resolve the dispute. Should the dispute not be resolved after compliance with all legal requirements, then either party may exercise its right to legal industrial action.'

[24] Mr Yunke stated that the appellant and the second respondent concluded a Recognition and Procedural Agreement to regulate any disputes which might arise between the parties. He stated that the second respondent failed and or refuses to comply with the Recognition and Procedural Agreement, in so far as it failed to declare a dispute and inform the appellant of the nature and details of the dispute, as required by the abovementioned provisions of the agreement.

[25] It was submitted on behalf of the appellant that the first respondent assumed jurisdiction over issues which are regulated through contract between the appellant, the second respondent and its employees under a collective agreement. Relying on the

Springbok matter, counsel for the appellant submitted that parties intend for any and all disputes relating to the content and effect of the collective agreement to be resolved by the conciliation and/or arbitration procedure provided for in the Act and that the wording of paragraph 16 does not lend itself to disputes being resolved by way of labour inspectors.

[26] The counsel for the appellant submitted to the court an interpretation of section 73 of the Act, as laid down in the matter of *Springbok Patrols (Pty) Ltd ta/Namibia Protection Services v L Ntelamo No and Another*[6]*, where Hoff J, remarked:*

'[12] Section 73 of Act 11 of 2007 provides as follows:

"(1) Every collective agreement must provide for a dispute resolution procedure including an arbitration procedure to resolve any dispute about the interpretation, application or enforcement of the agreement in accordance with Chapter 8 Part C or D unless provisions is made in another collective agreement for the resolution of that dispute.
(2) If there is a dispute contemplated in subsection (1), any party to the dispute may refer the dispute to the Labour Commissioner if –

(a) the collective agreement does not provide for procedure as required by subsection (1); or (b) the procedure is not operative."

[27] In my view the first respondent misinterpreted the provisions of paragraph 16 the collective agreement relating to the dispute resolution mechanisms and the compliance order stands to be set aside on this ground. I therefore concur with the submission by counsel for the appellant that the first respondent assumed jurisdiction over issues which are regulated through contract between the appellant, the second respondent, and its employees under a collective agreement.

[28] In the light of the view I have taken with regard to the appellant's interpretation, I am further of the considered view that the recognition and procedural agreement which the appellant concluded with the second respondent provides for a dispute resolution mechanism and the first respondent could not interfere with this. He did not have the jurisdiction to do so.

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[6] Supra at paragraph 12.

[29] In the result the following order is made:

1. The compliance order (dated **20 June 2022** under part 2(b) and 3 (b) and (c) issued by the first respondent is hereby set aside.

2. The matter is finalized and removed from the roll: *Ex Temporae* Judgment Delivered.

P CHRISTIAAN

Judge, Acting

APPEARANCE

APPELLANT:	L. Van Der Smit of Koep & Partners, Windhoek
RESPONDENT:	No appearance