



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: LC 118/2011

In the matter between:

TJATJITIRANI KANDUKIRA

APPLICANT

and

**B M SHINGUADJA (LABOUR COMMISSIONER)
NAMIBIAN PUBLIC WORKERS UNION**

**1ST RESPONDENT
2ND RESPONDENT**

Neutral citation: *Kandukira v Shinguadja* (LC 118/2011) [2012] NALCMD 8 (21 September 2012)

Coram: GEIER J

Heard: 21 September 2012

Delivered: 21 September 2012

Flynote: Application to review the decision of the Labour Commissioner to decline to accept and register the referral of a labour dispute in terms of Section 49(1)(d) of the Labour Act 2007 for conciliation and arbitration – referral was based on the ground that a trade union had committed an unfair labour practice in that it had failed to fairly represent its member in arbitration proceedings – court holding that the unfair labour practices listed in Section 49 not only applying to unfair labour practices perpetrated in the context of the collective bargaining process - provisions of Section 49(1)(d) and Chapter 5 of the Labour Act were intended to provide a remedy for a party

aggrieved by an 'employee and trade union unfair labour practice' and that it would be an absurdity – if any as such unfair labour practice perpetrated outside the collective bargaining process could not also be referred as a 'dispute' to the Labour Commissioner and would not be treated by him as such – once the requirements of Sections 51(1) and (2) had been satisfied Labour Commissioner had to act in terms of the obligations imposed on him by Section 51(3) and refer the applicants lodged dispute to an arbitrator or conciliator to resolve the dispute through arbitration or conciliation in accordance with part C of Chapter 8 of the Labour Act – decision of Labour Commissioner to refuse such referral thus reviewed and set aside.

Summary: Applicant had referred a complaint in terms of Section 49(1)(d) of the Labour Act 2007 to the Office of the Labour Commissioner based on the ground that a trade union - the 2nd respondent in this application – had committed an unfair labour practice in that it had failed to fairly, diligently and in good faith represent its member – the applicant - a member of its bargaining unit - in respect of which the particular trade union in question had been recognised - in arbitration proceedings. First respondent declined the request for referral. Applicant then launching an application for the reviewing and setting aside of such decision.

Held: Chapter 5 of the Labour Act 2007 recognises 'employee' and trade union' unfair labour practices.

Held: Section 49 defines in what circumstances a trade union can perpetrate an unfair labour practice.

Held: Although Sections 49 (1)(a)(b) and (c) seem to relate only to unfair labour practices perpetrated in the collective bargaining process not all categories of unfair labour practices listed in the section have to arise in the context of collective bargaining.

Held: On the face of it - the definition of 'dispute' contained in Section 1 – which does not encompass disputes between a member of a trade union and a trade union, clashes with the provisions of Chapter 5. To allow the definition to override the clear provisions of Chapter 5 would lead to an absurdity as quite clearly the legislature had intended a remedy for a party aggrieved by an 'employee and trade union unfair

labour practice' and it was for such purpose that the provisions of Chapter 5 of the Act were enacted.

Held: As the chapter expressly contemplates that an unfair labour practice can be perpetrated between a union and its members it would lead to further absurdity if any as such unfair labour practice could not be referred as a 'dispute' to the Labour Commissioner and would not be treated by him as such.

Held: Provisions of Section 49 (1)(d) as read with Section 51(1) accordingly affording a remedy to an aggrieved member of a trade union in accordance with the underlying purpose of the Act. The applicant's referral of a dispute relating to the non-compliance with- or a contravention by the second respondent of Section 49 (1) (d) thus competent.

Held: Once the requirements of Sections 51(1) and (2) had been satisfied – it was common cause that these pre-conditions had been met –first respondent had to act in terms of the obligations imposed on him by Section 51(3) and refer the applicants lodged dispute to an arbitrator or conciliator to resolve the dispute through arbitration or conciliation in accordance with part C of Chapter 8 of the Labour Act.

Held: A case for the review and setting aside of the first respondent's decision accordingly made out.

ORDER

1. The decision of first respondent taken on 14 September 2011 to decline to accept to register the applicant's referral of a dispute is hereby reviewed and set aside.
2. The dispute is hereby referred back to the office of the first respondent and the first respondent is directed to refer the dispute between the applicant and the second respondent in terms of Section 51(3) of the Labour Act to an arbitrator

to resolve such dispute through arbitration in accordance with Part C of Chapter 8 of the Labour Act 11 of 2007, and the applicable rules promulgated thereunder.

JUDGMENT

GEIER J:

[1] The applicant seeks to review the decision of the Labour Commissioner, the first respondent herein, to decline to accept and register the referral of a labour dispute for conciliation and arbitration.

[2] More particularly the sought referral was based on the ground that a trade union - the second respondent in this application – had committed an unfair labour practice in that it had failed to fairly represent its member – the applicant - a member of its bargaining unit - in respect of which the particular trade union in question had been recognised - in arbitration proceedings.

[3] The complaint was based on the provisions of section 49 (1)(d)¹ of the Labour Act 2007 – Act No 11 of 2007 - (hereinafter referred to as the 'Act').

[4] The first respondent had - upon the referral of such complaint to it – initially raised a technical objection in regard to the form on which such complaint had been referred to him – and - upon re-submission thereof had responded as follows.

'Dear Mr Kandukira

Re-referral of dispute NAPWU-yourself.

¹ 49(1) It is an unfair labour practice for a registered trade union - ... (d) not to fairly represent an employee in any bargaining unit in respect of which the trade union is recognised as the exclusive bargaining agent.

1. I have studied your referral of dispute against the Namibia Public Worker's Union (NAPWU) which you have referred to me on 28 July 2011.

2. It has come clear that you were not an **employer of NAPWU** and as such you have **no legal standing** in referring your preserved dispute against NAPWU. Labour disputes are anchored in an employer's/in an **employee/employer relationship** which I am afraid does not exist in your case.

3. As a consequence I decline to accept and register your referral for the reasons given herein above.

Yours Sincerely

Shinguandja BM
Labour Commissioner'

THE SUBMISSIONS ON BEHALF OF APPLICANT

[5] It is now contented on behalf of the applicant that this decision is reviewable and liable to be set aside as the first respondent in terms of Section 51(3)² of the Labour Act would have been obliged to refer such dispute to arbitration in terms of part C of Chapter 8 of the Act.

[6] Further reliance was placed on Section 121(1) of the Labour Act which sets out the functions of the first respondent to, *inter alia*, to register disputes from employees and employers relating to contraventions of the Labour Act and to take appropriate action³.

² Section 51 (3) The Labour Commissioner must refer the dispute to an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of this Act.

³ Section 121 Powers and functions of the Labour Commissioner

(1) The functions of the Labour Commissioner are-

(a) to register disputes from employees and employers over contraventions, the application, interpretation or enforcement of this Act and to take appropriate action;

(b) to attempt, through conciliation or by giving advice, to prevent disputes from arising;

(c) to attempt, through conciliation, to resolve disputes referred to the Labour Commissioner in terms of this Act or any other law;

(d) to arbitrate a dispute that has been referred to the Labour Commissioner if the dispute remains unresolved after conciliation, and-

(i) this Act requires arbitration; or

(ii) the parties to the dispute have agreed to have the dispute resolved through arbitration; and

(e) to compile and publish information and statistics of the Labour Commissioner's activities and report to the Minister.

[7] Once the prerequisites set by section 51 are met, so it was contended further, the first respondent must refer such dispute to an arbitrator in terms of Section 86(4)⁴. This would have to be so once the referral was sought in writing⁵, on the prescribed form, and once the first respondent has satisfied himself that a copy of the referral was also served⁶ on the respondents in the complaint.

[8] The referral would also have to be made within the prescribed period of 6 or 12 months⁷.

[9] Any referral to arbitration would have to be made as the Act was prescriptive in this regard and as it did not confer any discretion on the first respondent not to do so once the prerequisites of the Act had been met.

[10] When the first respondent exercises any of these statutory functions, so it was submitted, he does so in an administrative capacity rendering any decision made in this regard liable to review.

[11] Should the first respondent therefore reject or decline a referral once the prerequisites had been met, such declination was ultra vires the Act and therefore also reviewable on such basis.

[12] The decision of the first respondent in this case, as communicated under cover of the letter quoted above, was thus reviewable and liable to be set aside.

[13] In spite of what seem to be the clear provisions of the Act, and despite the the fact that it emerged expressly from Annexure TK4⁸ that the complaint of the applicant was lodged in terms of Section 49(1)(d) of the Act, the first respondent deemed it fit to oppose the review.

⁴ Section 86(4) The Labour Commissioner must-

- (a) refer the dispute to an arbitrator to attempt to resolve the dispute through arbitration;
- (b) determine the place, date and time of the arbitration hearing; and
- (c) inform the parties to the dispute of the details contemplated in paragraphs (a) and (b).

⁵ See Section 86(1)

⁶ See Section 86(3)

⁷ See Sections 86(2)(a) and (b)

⁸ Form LC 21

THE SUBMISSIONS ON BEHALF OF FIRST RESPONDENT

[14] It was firstly submitted on the first respondent's behalf that Section 49 (1)(d) was not applicable.

[15] In this regard the first respondent took the position that the applicant should have appealed the original decision of the arbitrator - (in the proceedings which gave rise to this further complaint) - and that Section 49, read as a whole, only relates to a trade union's representation of its members at the collective bargaining process and that Section 49 (1)(d) was therefore not applicable to the applicants so-called dispute.

[16] Accordingly it was further submitted that when the first respondent considered the particulars of claim for purposes of accepting and or referring the complaint he had to ask himself:

'1. Whether the dispute was one that was based on an employer-employee relationship taking into account the definition contained in the Act, in Section 1 of the Act.

2. Whether it was a dispute in terms of Section 49(1)(d) of the Act?'

[17] Thus when the first respondent considered the complaint and concluded that it was not based on an employer-employee relationship and that Section 49 (1)(d) was not applicable to applicants dispute, he correctly refused to refer the applicants complaint.

[18] It was submitted also that the definition of 'dispute'⁹ as contained in Section 1 of the Act further underscored the correctness of the first respondents decision as such definition confined this concept to disagreements between an 'employer' or an 'employer's organisation', on the one hand, and an 'employee' or a 'trade union' on the other hand, which disagreement also had to relate to a labour matter.

⁹ "dispute" means any disagreement between an employer or an employers' organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter;

[19] Further argument was addressed in respect of the correct interpretation of Section 49 (1)(d), that such Section should be read in context, and that it actually only refers, relates and applies to unfair labour practices emanating from the collective bargaining process.

[20] Interestingly enough it was also submitted in the written Heads of Argument that:

“If it were the intention of the legislature to provide a specific remedy in terms of the Act to a member of a registered trade union who was aggrieved by the manner in which he/she was represented by a registered trade union in any proceedings brought in terms of the Act, it would have been expressly provided for under Section 59 of the Act which provides for the rights of registered Trade Unions and registered employers organisations”.

The applicant states that “the function of the first respondent is to register disputes from employers and employees and not disputes between employers and employees ... In terms of Section 121 (1)(a) of the Act, one of the Labour Commissioners functions are (is) to register disputes from employees and employers over contraventions, the application, interpretation or enforcement of the Act. It was already stated that at paragraph 5.4 hereof (*of the heads*) what the meaning of a dispute is in terms of Section 1 of the Act.

Accordingly the Applicants so-called dispute does not fit the description of a dispute in terms of Section 1 of the Act”.¹⁰

SHOULD THE FIRST RESPONDENT’S DECISION BE REVIEWED AND SET ASIDE?

[21] All these submissions must, in the first instance, be measured against the express provisions of Chapter 5 of the Labour Act which in my view clearly and unambiguously recognise ‘employee’ and trade union’ unfair labour practices.

[22] Section 49 defines in what circumstances a trade union can perpetrate an unfair labour practice.

¹⁰ See Heads of Argument paras 6.4 to 6.6

[23] Although Sections 49 (1)(a)(b) and (c) relate only to unfair labour practices perpetrated in the collective bargaining process, it seems indeed so that not all categories of unfair labour practices listed in the section and Chapter 5 have to arise in the context of collective bargaining, as was correctly submitted by Mr Daniels¹¹.

[24] Section 51(1) in turn prescribes how a dispute concerning Chapter 5 is to be dealt with. It does so in the following terms.

“(1) If there is a dispute about the non-compliance with contravention application or interpretation of this Chapter, any party to the dispute may refer the dispute in writing to the Labour Commissioner. The person who refers the dispute must satisfy the Labour Commissioner that a copy of the Notice of a Dispute has been served on all other parties to the dispute. ...

(3) The Labour Commissioner must refer the dispute to an arbitrator to resolve dispute through arbitration in accordance with part C of Chapter 8 of the Act”.

[25] If one then turns to the applicants complaint it immediately becomes clear - as this is expressly alleged in paragraph 9 of the particulars of the complaint accompanying form LC21 - that this is indeed a referral of a dispute relating to the non-compliance with- or a contravention by the second respondent of Section 49 (1) (d).

[26] Put differently - it appears from these documents that the applicant did lodge a complaint relating to an alleged unfair labour practice - as contemplated by Chapter 5 of the Act - in terms of the sections contained in the chapter - with the first respondent.

[27] The first respondent clearly - and once the requirements of Sections 51(1) and (2) had been satisfied - which in my view the applicant had done on the facts¹² – had to act in terms of the obligations imposed on him by Section 51(3). In other

¹¹ He submitted that a dispute can arise between an employee in a bargaining unit and a trade union if a union fails to fairly represent it's member on a literal interpretation of section 49(1)(d) and that the first respondent's contention that these Chapter 5 unfair labour practices could only occur within the context of collective bargaining was misdirected as Section 50(1)(e), for example, states that an employer commits an unfair labour practice by unilaterally changing a term or condition of employment, which unfair labour practice would not occur within the collective bargaining context.

¹² it was also common cause that this was had been done

words he had become obliged to do so - given the peremptory wording of Section 51(3). He thus had to refer the applicants lodged dispute to an arbitrator or conciliator to resolve the dispute through arbitration or conciliation in accordance with part C of Chapter 8 of the Labour Act.

[28] It was indeed correctly pointed out by Mrs Frederick on behalf of first Respondent that - on the face of it - the definition of 'dispute' clashes with the provisions of Chapter 5.¹³

[29] If one would however, allow the definition of the word 'dispute' override the clear provisions of Chapter 5 this would lead to an absurdity. Quite clearly the legislature intended a remedy for a party aggrieved by an 'employee and trade union unfair labour practice' and it was for such purpose that, in my view, the provisions of Chapter 5 of the Act were enacted.

[30] This chapter expressly contemplates that an unfair labour practice can be perpetrated between a union and its members. Quite clearly - if this was the intention - which, in my view, has been expressed in the statute - it would lead to further absurdity - if any as such unfair labour practice could not be referred as a 'dispute' to the Labour Commissioner and would not be treated by him as such, ie. as one which has emanated from an employee as contemplated by Section 121(1)(a).

[31] That to me seems to be the underlying intention of the legislature and I therefore deem it fit to impose a purposive interpretation on the provisions of Section 49 (1)(d) as read with Sections 51(1) and 121(1)(a) which will afford a remedy to an aggrieved member of a trade union in accordance with what I perceive to be the underlying purpose of the Act.

[32] In such premises I find that the applicant has made out a case for review and accordingly the relief set out in Prayers 1 and 2 of the Notice of Motion is hereby granted.

COSTS

¹³ As the definition does not encompass disputes between a member of a trade union and a trade union

[33] Some argument was also directed on the issue of costs.

[34] It is clear that the Court does indeed have a discretion to award costs in a labour matter if the requirements of Section 118 of the Act have been met.

[35] In my view these requirements have not been met as the first respondent's defence in this matter was neither frivolous nor vexatious and I therefore decline to exercise my discretion in this regard.

[36] No order of costs is therefore made.

H GEIER
Judge

APPEARANCES

APPLICANT:

C Daniels
Clement Daniels Labour Law Consultants,
Windhoek.

RESPONDENTS:

LD Frederick
Government Attorney, Windhoek