REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 185/2013

In the matter between:

NAMIBIA FOOD AND ALLIED WORKERS UNION (NAFAU) **APPLICANT**

and

MC CARTHY RETAIL (NAMIBIA) (PTY) LTD T/A GAME **RESPONDENT**

Neutral citation: *Namibia Food and Allied Workers Union v Mc Carthy Retail (Namibia) (Pty) Ltd* (LC 185/2013) [2014] NALCMD 3 (31 January 2014)

Coram: CHEDA J

Heard: 14 November 2013

Delivered: 31 January 2014

Flynote: Urgent application – Need for compliance with Rule 6 (12) (b) – Applicant should set forth explicitly the circumstances which he avers render the matter urgent – Set forth the reasons why it cannot be afforded substantive redress at hearing – A continuing offensive conduct qualifies as urgent.

Application by respondent to strike out applicant's replying and supplementary affidavits is dismissed.

Summary: Applicant and respondent entered into a recognition agreement which applicant avers respondent had breached and continued to do so. Respondent stated that the present employees employed after the agreement were not scab labourers but seasonal labourers which was a partial admission. Respondent had not accorded applicant access to its premises as per the agreement. This was a breach and applicant had reason to panic and approach the courts. The averments in the answering and supplementary affidavits are necessary in the circumstances. Application for striking out is dismissed with costs.

ORDER

The application by respondent to strike out the answering and supplementary affidavits be and is hereby dismissed with costs.

JUDGMENT

CHEDA J [1] The matter before me is an application to strike out which was filed by respondent following an urgent application by applicant filed on the 5th of November 2013. Applicant is Namibia Food and Allied Workers Union (hereinafter referred to as 'the Union") and respondent is Mc Carthy Retail (Namibia) (Pty) Ltd trading as Game (hereinafter referred to as "the company").

[2] The basis of the urgent application arises from the alleged respondent' non-compliance with the terms and conditions of a recognition agreement which recognized the applicant's role in their negotiations with respondent.

[3] Applicant's contention is that respondent should comply with the compliance order issued on 30 October 2013 by the Labour Commissioner and that respondent should remove the nine scab labourers unlawfully engaged by the respondent during the industrial action.

[4] The background of this matter is that the two parties entered into wage negotiations which failed and a dispute was then referred to the Labour Commissioner's office on the 11th September 2013 who in turn issued a certificate of an unresolved dispute. On the 10th of October 2013, the parties signed a recognition agreement which consists of rules and conditions governing and regulating the said industrial action.

[5] It is applicant's contention that almost immediately after the commencement of the strike on the 20th of October 2013, the company breached the said recognition agreement in the following manner by:

1) intimidating employees and forcing them to sign letters to accept the company's offer;
2) by denying the Union officials and other office bearers access to its premises for the purpose of peaceful communication with its members; and
3) by hiring nine scab labourers at its Oshakati branch.

[6] A compliance order was issued on the 30th of October 2013 by the Labour Commissioner. After the Labour Commissioner had awarded a compliance certificate, respondent wrote a letter indicating that it was going to appeal the Labour Commissioner's decision but to date has not done so. This was the gist of applicant's urgent application.

[7] Respondent, through its representative, Ms Bassingthwaighte argued that applicant delayed in lodging its urgent application by 49 days and such delay was of their own making. In other words they should not benefit from their own short comings. The same applies to applicant's failure to make an application for access to respondent's premises which issue arose on the 28th of October 2013 and it took 8 days for them to file its application.

[8] She further argued that respondent failed to comply with Rule 6 (12) (b) which reads:

> *In every affidavit or petition filed in support of any application under para (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.*

[9] On the other hand, applicant argued that respondent is in breach of the conditions of the recognition agreement one of which is the employment of scab labourers who are presently at work in Oshakati. The fact that these labourers continue to work qualifies the matter as urgent and there is therefore no other remedy available to them to contain this offensive activity by the respondent. I find that the requirements laid down by Rule 6 (12) (b) have been met. These courts are strict in their approach to compliance or non-compliance of this rule, see *Luna Meubelveraardigers (Edms) BPK v Makin and another (t/a Makin's Furniture Manufacturers)*[1]. This case is authority that, legal practitioners should apply their minds on matters they are handling and not pay lip service.

[1] Luna Meubelveraardigers (Edms) BPK v Makin and another (t/a Makin's Furniture Manufacturers) 1977 (4) SA (W) 134

[10] It is Ms Bassingthwaighte argument that, applicant's members were not denied access to the premises for the purposes of obtaining information they required as this could have been done telephonically and/or after working hours and during lunch break. It is further her argument that the redress sought would have been obtained through the ordinary course of business. In addition, thereto, she submitted that applicant has abused the court process and should not receive sympathy from the courts.

[11] The first question which falls for determination is whether or not the matter is urgent. It is trite that these courts are reluctant to treat matters as urgent merely on applicant's say-so. The matter is urgent if it cannot wait its normal cause of day as such delay might result in irreparable harm to it. It is for that reason that urgency that is occasioned by the party's dilatoriness or lack of diligence cannot qualify as urgent as envisaged by the rules of this court. A party seeking the court to dispense with the requirements of the rules must make out in the founding affidavit to justify the particular extent of the departure from the usual provisions, see *Salt v Smith and another*[2].

[12] In *casu* a compliance agreement was entered into by the parties. This was followed by the issuance of a certificate of an unresolved dispute by the Labour Commissioner. The aim of the agreement by the parties was to ensure that no party took advantage of another during the industrial action.

[13] I should pose here and remark that members of applicant are already negotiating from a position of a weaker strength as they are economically disadvantaged in relation to the economic strength of respondent. It is for that reason that the legislature found it necessary to protect them from employers who would replace them willy-nilly in complete defiance of the terms and conditions of any

[2] Salt v Smith and another 1990 NR 87 HC

agreement they would have entered into in good faith. Applicant saw early signs of defiance on the part of respondent, namely, the employment of scab labourers which they view as disguised seasonal workers, and their denial of access into the premises in order to establish and make sure that there is compliance. There is suspicion that scab labourers are being used in contravention of s 76 (3) (a) of the Labour Act, Act 11 of 2007 ('the Act" which reads thus:

> *"6.1 Section 76(3)(a) of the Labour Act provides as follows:*
>
> *Despite the provisions of any contract of employment or collective agreement, an employer must not –*
>
> (a) *require an employee who is not participating in a strike that is in compliance with this Chapter or whom the employer has not locked-out employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual;"*

[14] There was no danger to life, personal safety or health of any individual which was pleaded by respondent. If there was, this would have justified and excused their engagement of the scab laboureres.

[15] It would have been all together folly for applicant to sit on its laurels and helplessly watch respondent breaching the terms and conditions of the agreement. Every individual, justistic persons included is entitled to act or defend itself in the face of imminent danger and/or breach of his/her legal rights.

[16] The unavoidable question is, if respondent had nothing to hide in its operations and/or conduct relating to matters directly related to compliance, why was it reluctant to allow applicant to check their premises, the finding of which would have put-paid all the suspicions applicant harbored about its industrial activities. Applicant indeed had reason to panic when they saw the first signs of a breach of the agreement and for that reason they were justified in approaching the courts on an urgent basis. In light of the circumstances surrounding this matter, I am constrained to exercise my discretion and condone their non-compliance with the rules of this court as, in my view justice demands that this be done.

[17] Respondent argued that applicant should not have taken the action they did as there are other remedies they could have resorted to in the circumstances. Respondent's conduct in these negotiations invokes suspicion as it does not in many words deny the employment of temporary (scab) labourers which step, it sought to justify as a seasonal necessity during the Christmas period.

[18] Applicant's averments must be viewed in light of the rude fact that it is fighting from outside the ring and is not privileged enough to see, evaluate and access the goings-on at respondent's premises.

[19] For that reason alone, the court is persuaded by its quest for the attainment of justice, that where transparency and clarity is called for, the courts should not turn a blind eye. This is a matter where the court should adopt a robust as opposed to an armchair approach in order to do justice between man and man.

[20] It should be borne in mind that the aim and object of the Labour Act is to strike a balance, delicate as it may be, between the employer and employees in order to achieve at least some semblance of industrial harmony. Respondent's argument is not convincing at all, if anything it demonstrates a cavalier and brazen attitude towards applicant and offends the tenets of the agreement entered into by the parties. The answering and supplementary affidavits are indeed valid and should not be excluded from the main application as it is through them that a full understanding of the circumstances of this case can be understood by the courts.

[21] I find that respondent's (applicant) response to this application was, frivolous and vexations as it sought to exclude evidence which was necessary in the proceedings. The exclusion will no doubt affect the whole recognition agreement which is improper. It is clear that respondent indeed breached the terms and conditions, but, chose to persist with a spurious opposition. I therefore find no reason why they should not be saddled with costs.

ORDER

The application by respondent to strike out the answering and supplementary affidavits be and is hereby dismissed with costs.

M Cheda

Judge

APPEARANCES

APPLICANT:	Advocate S Rukoro Instructed by Sisa Namandje & Co. Windhoek
RESPONDENT:	Advocate N Bassingthwaighte Instructed by Koep & Partners Windhoek