REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 56/2015

In the matter between:

ERASTUS IPINGE NEGONGA	**1st APPLICANT**
JOSEPH S IITA	**2nd APPLICANT**
and	
THE SECRETARY TO CABINET	**1st RESPONDENT**
PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	**2nd RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**3rd RESPONDENT**
PUBLIC SERVICE COMMISSION	**4th RESPONDENT**
MARTHA MBOMBO	**5th RESPONDENT**
ABRAHAM NEHEMIA	**6th RESPONDENT**

Neutral citation: *Negonga v The Secretary to Cabinet (LC 56/2015) [2015] NALCMD10 (29 April 2015)*

Coram: Schimming-Chase AJ

Heard: 22 April 2015

Delivered: 29 April 2015

Flynote: Labour Court - Jurisdiction – Jurisdiction of Labour Court to grant urgent interdictory relief pending finalisation of review – Labour Court not having jurisdiction to grant urgent interdict in absence of pending dispute in terms of Chapter 8 of Act 11 of 2007 – S 117(1)(e) of the Labour Act, 11 of 2007.

Summary: Applicants launched urgent proceedings in the Labour Court for interim interdictory relief in the form of reinstatement in their positions as Permanent Secretaries pending finalisation of a review application launched in the normal course in terms of s 117(1)(c) of the Labour Act.

The Labour Court does not have jurisdiction to grant urgent interdictory relief on an urgent basis except when a dispute has been lodged in terms of Chapter 8, which is pending. Even if the Labour Court has jurisdiction to hear the review, that jurisdiction relates to review proceedings launched in the normal course.

The Act created a specific forum for the resolution of labour disputes for all employees, whether employed by the State or not. Parties are bound by the restrictions contained in their choice of forum.

ORDER

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1. The relief sought in Part A of this application is dismissed.

2. There shall be no order as to costs.

JUDGMENT

SCHIMMING-CHASE AJ:

[1] This is an application launched on an urgent basis, seeking an order reinstating the applicants in their positions as Permanent Secretaries in the Ministry of Gender, Equality and Child Welfare and the Ministry of Agriculture, Water and Forestry respectively, as well as an order setting aside the fifth and sixth respondents' appointments[1] as acting Permanent Secretaries in the place of the first and second applicants, pending finalisation of a review application (filed together with the application for the urgent relief in Part A of the notice of motion) to be adjudicated in the normal course.

[2] The review portion of the relief sought, contained in Part B of the notice of motion, is for an order reviewing and setting aside:

> 2.1. a notice purportedly given to the first applicant on or about 11 September 2014 and the resultant decision to terminate his employment made by the first respondent on 2 April 2015;
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> 2.2. the termination of the second applicant's employment on 2 April 2015; as well as
>
> 2.3. an order directing the first and fourth respondents to reinstate the applicants in their respective positions as on 2 April 2015.

[3] The respondents are cited in their official capacities. The first respondent is the Secretary to Cabinet. The second respondent is the Prime Minister of the Republic of Namibia. The third and fourth respondents are the Government of Namibia and the Public Service Commission respectively. I shall refer to them collectively as "the respondents" except where the context otherwise requires.

[4] Mr Frank, assisted by Mr Namandje, appears for the applicants. Mr Marcus appears for the respondents.

[5] The dispute, as contended by the applicants, relates to non-compliance

[1]The fifth and sixth respondents are a cited in this application on the basis of any interest they might have in the matter.

by certain of the respondents in the performance of their statutory and administrative duties contained in the statutory prescriptions of s 10A of the repealed Public Service Act, 2 of 1980 ("the 1980 Act") which was made applicable to the applicants (through their own election) in terms of the provisions of s 37(2)(a) of the Public Service Act, 13 of 1995 ("the Public Service Act"). At the core of the applicants' dispute are the obligations of the respondents arising from the principle of legality.

[6] The review is launched in terms of the provisions of s 117(1)(c) of the Labour Act, 11 of 2007 ("the Labour Act") which vests in the Labour Court exclusive jurisdiction to "review, despite any other provision of any Act, any decision of any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act".

[7] The respondents at this stage only oppose the relief sought in Part A of the notice of motion, namely the urgent interdictory relief. The deponent to the opposing papers, and Secretary to Cabinet since 22 March 2015, stated that any failure to deal with factual allegations should not be taken as an admission of the allegations, as they would be dealt with in the respondents' opposition in the review proceedings. I bear this in mind in consideration of the relevant background facts in this matter.

[8] The salient facts leading to the institution of these proceedings follow. For the purposes of the urgent relief sought in these proceedings, the facts in dispute are few.

[9]

[10] The first applicant was appointed as a Deputy Permanent Secretary in the Ministry of Defence on 5 February 1990 by the Founding President, Dr Sam Nujoma. In March 1995, he was promoted to the position of Permanent Secretary to serve for a 5 year term in the same Ministry with effect from that date by the then Prime Minister of Namibia, Dr Hage Geingob. This appointment was made in terms of s 10A[2] of the 1980 Act. The Public Service

[2]S 10A(2) of the 1980 Act provides that the term of a Permanent Secretary can be extended, at the expiry of a serving term, for a period or successive periods of at least 1 year but not

Act came into force on 1 November 1995. In terms of s 37(2)(a) of that Act the first applicant elected to have the provisions of the 1980 Act apply to him with regard to his position as Permanent Secretary and any future extensions of his appointment[3].

[11]

[12] The first applicant's term was renewed for a further 5 years on 29 January 2001 with effect from March 2000 under s 10A(2)(a) of the 1980 Act. This was confirmed in writing on 29 January 2001 when he received a letter from the then Secretary to Cabinet. The first applicant confirmed his acceptance of this extended term on 5 February 2001. As he did not receive any notice concerning a further extension of his term in March 2005, the first applicant alleges that his term was automatically renewed without any notice to that effect. For the period March 2005 to 2010, the first applicant appears never to have received the prescribed notice, however he continued working and receiving benefits for the aforesaid period.

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exceeding 5 years, subject to Cabinet approval. S 10A(2)(a) requires written notice to be given to a Permanent Secretary (not less than 6 calendar months notice before the expiry of his or her current term) as to whether or not his or her term will be extended, i.e. to retain him or her in service or not so extended. The notice must be given by Cabinet, and in either event, written notice to that effect must be provided. Before Cabinet approves a period, and before the notice referred to above can be sent to a Permanent Secretary, a recommendation must be made by the Public Service Commission.

[3]"37 Transitional provisions

(1) ...

(2)(a) The provisions of sections 10 (A) and 14 of the Public Service Act, 1980, as they applied immediately before the commencement of this Act in relation to the term of office, extension of the term of office and rights on retirement of a chief executive officer, shall, in respect of an officer who on the date immediately before the date of commencement of this Act occupied the office of chief executive officer, continue to apply to such officer as if such officer has retained such office and as if this Act had not come into operation: Provided that such officer shall be reclassified as a staff member and redesignated as a permanent secretary in terms of this Act and that, at the expiry of his or her term of office, such officer shall be afforded the opportunity to elect whether the provisions of the said sections 10 (A) and 14 should further apply to him or her or whether the provisions of this Act should be applicable to him or her."

[13] On 2 December 2009, the first applicant (then the Permanent Secretary in the Ministry of Regional and Local Government, Housing and Rural Development), received a letter from the erstwhile Secretary to Cabinet, Mr Frans Kapofi, informing him that his term of contract of employment would come to an end on 31 May 2010. The first applicant responded to this letter on 29 December 2009 informing the Secretary to Cabinet that the letter of notification to end his contract in terms of s 10A of the 1980 Act did not comply with that section, because the notice not to retain him as Permanent Secretary was not transmitted within the prescribed 6 month period contemplated in s 10A(2)(a) or (b), or any previously extended term contemplated in s 10A(1)(c).

[14] He also appealed to the then Prime Minister on 18 January 2010. As the matter was not resolved, the first applicant approached this court on an urgent basis for an order declaring that the "purported" notice of termination his services is invalid and of no force and effect, and declaring him to be extended in his employment position. The Labour Court granted an order limited to a declaration that the notice of 2 December 2009 (terminating the first applicant's services as of 31 May 2010) is invalid and of no force and effect. I say this on the basis of the undisputed facts, the order itself not having been provided. The first applicant returned to work.

[15] The first applicant moved to the Ministry of Gender, Equality and Child Welfare and continued to work as a Permanent Secretary there until 23 July 2014, when he was summoned by Mr Kapofi and apparently informed that the Government does not like them, that their contracts would not be renewed after 20 March 2015 and that written notice would be sent to the first applicant in due course. After the first respondent requested reasons for the decision, Mr Kapofi apparently told the first applicant that he should wait for Cabinet to deliberate on the matter and assured the first applicant that all procedural requirements would be complied with, and also that he would be provided with an opportunity to be heard.

[16] On 11 September 2014 the first applicant received correspondence from Mr Kapofi informing him that his contract of employment would expire on 20 March 2015 in terms of s 10A of the 1980 Act. It is clear that, *ex facie* this

letter, there was no reference to a Cabinet decision having been taken. This was pointed out in a letter emanating from the first applicant's legal practitioner of record dated 9 October 2014 addressed to Mr Kapofi. It was pointed out *inter alia* that Cabinet, and not the Secretary to Cabinet, was the repository of the power to give notice not to extend a term. The Secretary to Cabinet was given 10 days to respond to this letter in view of the urgent legal steps being contemplated on behalf of the first applicant. There was no response to this letter.

[17] On 8 December 2014, follow up correspondence seeking clarity on the aforesaid Cabinet decision was transmitted to the then Attorney-General, reiterating a request for a date, month and year of the Cabinet decision. The letter further stated that the first applicant had been advised that the first respondent's silence amounted to an admission that there was no Cabinet decision, hence the notice was unlawful, and that the first applicant had also been advised to ignore the purported notice, to arrange his affairs on the basis that there was no notice to him, and that he was entitled to remain in the office beyond the date set out in the notice. Finally the first respondent was advised that the notice would be considered by the first applicant as withdrawn. There was no response to this letter.

[18] In the result, the first applicant arranged his affairs on the basis that his contract had been extended beyond 21 March 2015. He reasonably assumed that the first respondent had withdrawn the unlawful notice. In this regard, the first applicant states that he never needed to take any action.

[19] Post 20 March 2015, the first applicant continued to receive instructions from his Minister, which continued uninterrupted until 2 April 2015, when he received an instruction to meet with the first respondent. At the meeting he was provided with a letter informing him that his contract of employment expired on 20 March 2015 in terms of s 10A of the 1980 Act.

[20] With regard to the second applicant, he has been a Permanent Secretary in the Public Service since 1995, and at 2 April 2015 was a Permanent Secretary in the Ministry of Agriculture, Water and Forestry. He states that

between 1995 and 2010 his contract was continuously extended for a period of 5 years.

[21] On 23 July 2014 Mr Kapofi informed him that “we are not wanted, myself included, so the Government will serve us with notices as required in terms of the law at least 6 months before the ordinary end of employment contracts”. At the time, the second applicant states that as he was led to believe that Government does not want to work with him. He accordingly decided to write a letter in anticipation of the 6 months notice, notifying Mr Kapofi that he was not seeking an extension of his contract beyond 22 March 2015. This letter was sent on 12 August 2014.

[22] After writing the letter, the second applicant waited for an indication from Cabinet whether or not his letter was accepted, which had been promised to be delivered 6 months before 22 March 2015. However no such letter was forthcoming. After 22 September 2014 (the 6 month period), the second applicant realised that there may not have been a Cabinet decision to the effect that it did not intend to extend his contract beyond 21 March 2015 as he was apparently made to understand, and that he was “effectively made” to write the letter of 12 August 2014 on the basis of wrong information.

[23] After this considerable time of silence, and upon proper reflection, the second applicant decided to withdraw the letter of 12 August 2014 on 9 December 2014, setting out what occurred between him and Mr Kapofi on 23 July 2014. He confirmed that it was never his intention to write the letter had he not been summoned, and he pointed out that 6 months notification of the intention to terminate his contract was an obligation. He also confirmed his readiness for renewal of his contract after 22 March 2015 for another 5 year term. He specifically stated that “the fact is that my contract is now renewed for another 5 year period”. This letter was followed up with another letter dated 11 December 2014 containing a correction relating to the relevant dates. Similarly, no response was forthcoming.

[24] Like the first applicant, the second applicant was reasonably certain that, not having been provided with the requisite notice pursuant to a Cabinet decision, Cabinet had decided that the second applicant's contract would be extended beyond 22 March 2015. He similarly continued working and receiving instructions past 22 March 2015.

[25] On 2 April 2015, the second applicant was summoned to a meeting with the first respondent and was provided with a letter identical to that of the first applicant.

[26] The second applicant approached the legal practitioner of record of the first applicant, and the applicants provided joint instructions resulting in a letter addressed to the respondents on 8 April 2015. In that letter the first respondent was informed *inter alia* of the intention to bring an urgent application on the basis of the failure to comply with the provisions of s 10A of the 1980 Act, unless the letters were withdrawn. This was not done and this application was then launched.

[27] As previously mentioned, the respondents in their answering papers only oppose the urgent interdictory relief sought, and have reserved their rights in respect of the review application.

[28] The respondents' opposition is based on 3 grounds. The first ground of opposition is that this court does not have jurisdiction to grant the urgent interdictory relief sought in Part A of the notice of motion, outside the ambit of s 117(1)(e) of the Act. This section provides that the Labour Court has exclusive jurisdiction "to grant urgent relief, including an urgent interdict pending resolution of a dispute in terms of Chapter 8".

[29]

[30] The second and third grounds are raised in the event that it is found that the Labour Court has jurisdiction to grant the urgent relief, and are:

> 30.1. the application is not urgent, and the applicants have not shown that they cannot be afforded substantial redress in due course; and

30.2. the applicants do not have a *prima facie* right to be reinstated to their positions and to have the acting appointments of the fifth and sixth respondents set aside, pending the finalisation of the review application.

[31] For obvious reasons, I deal with the jurisdictional point first.

[32] Mr Marcus submitted that in terms of s 117(1)(e) of the Act, this court's power to grant the particular form of relief sought, is limited to those instances where a dispute has been lodged in terms of Chapter 8 with the Labour Commissioner and is pending. He further submitted that although the applicants may approach the court to review a decision of a body or an official in terms of s 117(1)(c), the court is only vested with jurisdiction to hear and adjudicate on the urgent relief sought in this matter, once a dispute to the Labour Commissioner has been lodged in terms of Chapter 8. In addition, Mr Marcus submitted that this matter, though brought via review, concerns the termination of the applicants' employment. It was thus a matter falling in the purview of Chapter 8.

[33] In support of his submission, Mr Marcus relied on the case of Meatco v Namibia Food and Allied Workers Union and Others[4] where Smuts J (as he then was) held[5] that this court's jurisdiction to grant urgent relief is confined to instances where a dispute had been lodged in terms of Chapter 8. The Meatco case concerned a refusal by the employees of the Meat Corporation of Namibia to work overtime. Meatco took issue with the refusal to work overtime and contended that the refusal constituted industrial action as defined in the recognition agreement between the parties, as well as a strike as defined in the Act. Meatco thus approached this court on an urgent basis for an order declaring the industrial action to be in contravention of the employment agreements. Meatco also applied for an interdict restraining the respondents from continuing with this overtime ban, interdicting the employees from obstructing its operations and from intimidating, harassing or interfering with other employees. At the outset, the point was raised that in terms of s 117(1)(d)

[4]2013 (3) NR 777 (LC)

[5]At paragraph [25]

of the Act, the Labour Court's jurisdiction to grant declaratory relief was limited to that form of relief only. The relief was later abandoned and Meatco only confined itself to the interdictory relief sought.

[34] In the Meatco case, Mr Frank, assisted by Mr Namandje, raised the question of the limits of the Labour Court's jurisdiction to grant urgent interdictory relief. They successfully argued that the question of the jurisdiction of this court to grant an interim urgent interdict arises only in instances where a dispute was lodged in terms of Chapter 8[6]. In this regard Mr Frank referred to s 86 of the Act which vests an arbitrator with *inter alia* the power to grant an interdict[7], and also referred to the decision of Miller AJ in Titus Haimbili and Another v TransNamib Holdings and Others[8] where he also held[9] that the court's jurisdiction to grant urgent relief is confined to those instances where a dispute was lodged in terms of Chapter 8 and is awaiting resolution[10]. Smuts J approved the conclusion reached in the Haimbili matter as well as the interpretation by Miller J of the provisions of s 117(1)(e)[11].

[35] It is not in dispute that the applicants have not lodged a dispute in terms of Chapter 8. In fact it was submitted in the heads of argument of the applicants that the applicants have not and do not intend filing a complaint pursuant to Chapter 8 of the Act.

[36] In this matter, Mr Frank, and Mr Namandje in reply, argued that the present facts are distinguishable from the Meatco case because Meatco was not faced with a review application falling squarely within this court's review jurisdiction in terms of s 117(1)(c), involving non-compliance with a provision of an Act, and further, that in light of this court's review jurisdiction in terms of that section, it was entitled to grant ancillary and incidental urgent relief in terms of s 117(1)(c) read with s 117(1)(h) and/or (i). As authority for this proportion,

[6] At paragraph [27]

[7] At paragraph [23]; See also s 86(15)

[8] 2013 (1) NR 101 (HC)

[9] At paragraph [12]

[10] At paragraph [14]

[11] Meatco case at paragraphs [24] and [25]

reliance was placed on the case of Safcor Forwarding (Pty) Ltd v National Transport Commission[12] where it was held that interim relief is accepted as part of procedural law. In this regard, the following was *inter alia* stated in the Safcor case:

> "The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law ..."[13]

And further:

> "The decisions of public bodies or officialdom sometimes bear hard on the individual. The impact thereof may be sudden and devastating. Therefore, as in the case of other types of litigation, applications for the review of such decisions may require urgent handling and, in proper circumstances, the grant of interim relief. In my opinion, it would be unfortunate if our review procedures did not admit of this. Happily I think they do."[14]

[37] This principle was also accepted in Nakanyala v Inspector-General of the Namibian Police[15] where it was held[16] that it is well established that the grant of interim relief can be utilised in review proceedings.

[38] S 117(1)(h) and (i) provide that the Labour Court has exclusive jurisdiction to:

> "(h) make an order which the circumstances may require in order to give effect to the objects of this Act;
>
> (i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law."

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[12] 1982 (3) SA 654 (A)

[13] Per Corbett JA at 674H

[14] At 675C-D

[15] 2012 (1) NR 200 (HC)

[16] At paragraph [37]

[39] As the argument goes, this court has the exclusive jurisdiction to grant urgent interdictory relief as ancillary relief by virtue of the Safcor case in terms of s 117(1)(c) read with s 117(1)(h) and/or (i) of the Act.

[40] If the argument on behalf of the applicants is correct, it would effectively mean that the decision in the Haimbili case was wrong, because the relief sought in that case was for urgent interdictory relief pending finalisation of a review application (although that application does not appear to contain the same "illegality" contended for in this application). It would also result in two decisions of this court specifically finding that the jurisdiction of this court to grant urgent relief is limited to cases where a Chapter 8 dispute is also pending, being wrong. I therefore consider the provisions of s 117(1)(e) again.

[41] I agree with the general principle that when administrative action, or the lack thereof, is called into question, that action can be set aside on review in the High Court. I am also in respectful agreement with the principles that in review applications launched in the High Court as a court of first instance, the procedure to obtain incidental interim relief can be utilised.

[42]

[43] In this instance, however, the Labour Court's review jurisdiction is contained in s 117 of the Labour Act, which established the Labour Court as a division of the High Court subject to *inter alia* s 117. The above sections must be considered in light of this court's interpretation of s 117(1)(e) in the Meatco and Haimbili cases.

[44] As a creature of statute, the Labour Court's jurisdiction as a court of first instance is expressly circumscribed by the Act.

[45] A number of provisions contained in the Act are not a model of clarity. However I respectfully agree with the golden rule of interpretation relied on by Smuts J in the Meatco case. The proper approach to legislative interpretation is to give effect to the ordinary grammatical and literal meaning of the provision unless it would lead to a manifest absurdity, inconsistency, or a result contrary to

the intention of the legislature[17].

[46] This would therefore involve interpreting s 117(1)(e) in the context of the Labour Act as a whole, and specifically in the context of the dispute resolution mechanisms provided for by the Act itself.

[47] I think it is quite clear, that the Act was introduced to bring about *inter alia* a different regime for the resolution of labour disputes by specialised tribunals under the auspices of the Labour Commissioner. This is apparent from the clear dispute resolution mechanisms and procedures provided for in Chapter 8 when it comes to labour disputes. In terms of s 84 of the Act, a dispute is defined *inter alia* as a complaint relating to a breach of contract of employment. In terms of s 85, arbitration tribunals have been established to "hear and determine any dispute or other matter arising from the interpretation / implementation or application of the Act" and to "make any order that they are empowered to make in terms of the provision of this Act"[18]. The powers of an arbitrator under s 86(15) are the following:

> "(15) The arbitrator may make any appropriate arbitration award including-
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> (a) an interdict;
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> (b) an order directing the performance of any act that will remedy a wrong;
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> (c) a declaratory order;
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> (d) an order of reinstatement of an employee;
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> (e) an award of compensation; and
>
> (f) subject to subsection (16), an order for costs."
>
> (emphasis supplied)

[17] At 785 paragraph [25] and the authorities collected at footnote 5

[18] S 84(a) and 85(1) and (2)

[48] I am also in respectful agreement with the statements made in Namdeb Diamond Corporation v Mineworkers Union of Namibia and all its members currently on strike in the Bongelfels dispute[19] in interpreting s 117(1)(d) of the Act (as it relates to the granting of declaratory orders) approved by Miller J in Haimbili[20] as follows:

> ""'But the Act did away with district labour courts. It placed greater emphasis on conciliation and, of importance in this context, it brought about a new regime of arbitration of disputes by specialised arbitration tribunals operating under the auspices of the Labour Commissioner. The provisions dealing with these tribunals in Part C of the Act place emphasis upon expediting the finalisation of disputes and upon the informality of those proceedings. The restriction of participation of legal practitioners and the range of time limits for bringing and completing proceedings demonstrate this. Arbitrators are enjoined to determine matters fairly and quickly and deal with the substantial merits of disputes with a minimum of legal formalities.
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> The overriding intention of the legislature concerning the resolution of disputes is that this should be achieved with a minimum of legal formality and with due speed. This is not only laudable but particularly appropriate to labour issues. I stress that it is within this context that the Act places greater emphasis on alternative dispute resolution and confines the issues to be adjudicated upon by this court s 117."

[49] The above remarks are also apposite to the interpretation of s 117(1)(e) as well. I also hold the view, stated earlier, that the intention of the Act was to create an environment where all employees are treated equally with regard to the resolution of labour disputes, whether they are employed by the State, or not.

[50]

[51] The Act defines an employee as an individual, who works for another person and who receives or is entitled to receive remuneration for that work, or

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[19]Case number LC 103/2011 (unreported) delivered on 13 April 2012

[20]At paragraph [13]

who in any manner assists in carrying on or conducting the business of an employer. An "employer" is defined as any person including the State who employs or provides work for an individual and who remunerates that individual, or permits an individual to assist that person in any manner in the carrying or conducting that person's business. (emphasis supplied)

[52] It also appears not to be in dispute that the respondents failed to comply with the procedural requirements contained in the 1980 Act.

[53] The Labour Act has set out very specified areas in which the Labour Court has exclusive jurisdiction. It contemplates different kinds of possible relief that can be obtained under s 117. One of the areas of possible relief, specifically mentioned and legislated for, is that of urgent relief, which is contained in s 117(1)(e). It provides that the urgent relief that can be granted includes urgent interdictory relief pending finalisation of a dispute lodged in terms of Chapter 8. That urgent relief is specifically mentioned in s 117 is telling. An arbitrator cannot grant review relief under Chapter 8.

[54] To my mind, the Labour Court can therefore grant urgent relief, including urgent interdictory relief only when a dispute has been lodged in terms of Chapter 8. Once lodged, the Labour Court has the powers to grant the ancillary relief in terms of the Safcor and Nakanyala cases. Therefore, if the court is approached as a court of first instance for review relief in term of s 117(1)(c), it can, in the normal course, and as part of the relief granted in the review, "make an order which the circumstances require in order to give effect to the objects of the Act"[21], or "generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act or any other law"[22]. This could then include an order for reinstatement, and maybe even compensation.

[55] Thus, as Mr Frank correctly submitted, the applicants, who are employees, have a choice of which forum to approach to resolve their specific

[21] S 117(1)(h)

[22] S 117(1)(i)

specie of a labour dispute. The applicants did not proceed in terms of Chapter 8, they approached this court as a court of first instance, not only for review (which they are entitled to do) but on an urgent basis for reinstatement pending finalisation for review.

[56] In my view s 117(1)(e) created a clear provision that urgent including urgent interim relief can only be granted once a Chapter 8 dispute is lodged. Thus, the legislature specifically intended for all labour disputes to be registered in terms of Chapter 8 first, so that the conciliation and arbitration procedures can be set in motion for all employees. Had the legislature intended for some employees to be able to obtain urgent reinstatement in the interim in instances where the labour dispute involves procedural irregularities or non-compliance with legislation, it would have done so either by providing specifically for this relief in s 117(1)(c), or expanding the scope of s 117(1)(e). The Act did not do so. In fact, s 117(2)(a) allows this court to refer, amongst others, disputes falling within its exclusive jurisdiction to review in terms of s 117(1)(c), to the Labour Commissioner for conciliation in terms of Part C of Chapter 8.

[57] I pause to mention that this specific section was also dealt with subsequent to the Haimbili and Meatco cases by Van Niekerk J in Kamati v Namibia Rights and Responsibilities Inc[23]. This case also dealt with the question whether the court had jurisdiction to adjudicate disputes relating to non-compliance with basic conditions of employment[24]. She held[25] that the jurisdiction of this court as determined by s 117 of the Act does not expressly extend to include the power to hear disputes relating to non-compliance with Chapter 3. She further remarked, when dealing with s 117(1)(e)[26], that it was significant that provision was expressly made for this court to grant an urgent interdict pending the resolution of a dispute in terms of Chapter 8. In this regard, the following was stated:

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[23] 2013 (2) NR 452 (LC)

[24] Chapter 3 of the Labour Act

[25] At paragraph [12]

[26] At paragraph [18]

> "In my view, this is done precisely because the resolution of a dispute in terms of Chapter 8 does not fall within the jurisdiction of the Labour Court. It seems to me that the urgent relief referred to in the first part of para (e) must resolve to a matter which falls within the jurisdiction of the Labour Court."[27]

[58] As regards the last sentence of this quotation, firstly, the arguments presented to me were not before Van Niekerk J in the Kamati case. The applicant in that case was unrepresented and no notice of opposition was filed on behalf of the respondent. Thus no direct argument on the actual meaning of s 117(1)(e), nor the Haimbili or Meatco cases were placed before Van Niekerk J for consideration.

[59] In the result, I remain in respectful agreement with, and approve the Haimbili and Meatco cases as the correct interpretation of s 117(1)(e). Considering the objects of the Labour Act and the express provisions regarding jurisdiction, the legislator did not intend for urgent relief to be granted outside the ambit of s 117(1)(e), and the applicants' argument regarding the ancillary relief this court can grant in terms of s 117(1)(i) in particular, is unpersuasive, because it calls for the granting of additional jurisdiction not legislated for or specifically addressed in the Act. I also believe that this court's interpretation of s 117(1)(e) is not inconsistent with or contrary to the intention of the legislature.

[60] In my view, if an applicant chooses this forum as one of first instance for urgent relief ancillary to its review proceedings launched in the normal course, it is bound by the restrictions contained in s 117(1)(e) with regard to the urgent interim relief. This is because an applicant can eventually obtain reinstatement, as well as compensation as a result of the failure to comply with the relevant legislation via the arbitrator in terms of s 86(15)(d) and (e) of the Act. The applicant can even obtain an interdict, an order directing the performance of any Act that will remedy a wrong and an order for costs (in the appropriate circumstances) in terms of s 86(15)(a), (b) and (f) of the Act.

[61] In the circumstances, I consider Mr Marcus' argument as sound and find

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[27] At paragraph [18]

that this court does not have jurisdiction to entertain the urgent interdictory relief contained in Part A of the applicants' notice of motion.

[62] In the event that I am wrong in the interpretation of the provisions of s 117(1)(e), I also hold the view that this application is not urgent specifically when one considers the applicants' responsibility to set forth explicitly, as part of their urgency, the circumstances which they aver render the matter urgent, and the reasons why they cannot be afforded substantial redress at a hearing in due course. The substantial redress that the applicants may be able to obtain (if successful) in an arbitration in terms of Part C of Chapter 8, is reinstatement, and compensation, alternatively compensation. Thus the applicants will be afforded substantial redress at a hearing in due course in terms of Chapter 8 of the Act. (emphasis supplied)

[63] I am also inclined, considering the well established principles relating to the grounds for urgency, to accept Mr Marcus' submission, that the applicants' fears regarding their livelihood as a result of the termination of their employment and resultant financial hardship, is akin to that of every other employee in a similar position. I am guided in this regard by the case of Beukes v National Housing Enterprises[28] where this court held[29] that the fact that an employee who alleges that he has been retrenched or dismissed unfairly, either substantively or procedurally, is suffering, or would suffer financial loss or other consequential hardships if he were not reinstated immediately, does not per se constitute a ground of urgency.

[64] Even if I am wrong on the aspect of urgency, I similarly hold the view that the applicants also did not succeed in proving on a balance of probabilities, one of the requirements for the grant of interim interdictory relief. In this regard, it is well established that one of the requirements for an interim interdict is that there is no other satisfactory alternative remedy available to the applicants.[30] The satisfactory alternative remedy available to the applicants, is to register a

[28] 2007 (1) NR 142 (LC)

[29] At paragraph [12]

[30] See Mudge v Ulrich N.O. and Others 2006 (2) NR 616 (HC) at paragraph [5]

dispute in terms of Chapter 8 of the Act and seek the relief contained in s 86(15).

[65] In light of the foregoing the following order is made:

1. The relief sought in Part A of this application is dismissed.

2. There shall be no order as to costs.

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SCHIMMING-CHASE AJ

APPEARANCES

APPLICANTS:	Mr Frank assisted by Mr Namandje Instructed by Sisa Namandje & Co Inc
RESPONDENTS:	Mr Marcus Instructed by Government Attorney