REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: LC 60/2015

DR KUIRI F TJIPANGANDJARA **APPLICANT**

And

NAMIBIA WATER CORPORATION (PTY) LTD **RESPONDENT**

Neutral citation: *Dr Tjipangandjara v Namibia Water Corporation (Pty) Ltd (LC 60/2015) [2015] NALCMD 11 (15 May 2015)*

CORAM: MASUKU, AJ.

Heard: 24, 30 April 2015

Delivered: 15 May 2015

Flynote: Practice – Urgent application – requirements for urgency. Financial hardship not a ground for urgency and illegal action by an employer does no *per se* constitute a ground for urgency. Labour law – provisions of section 79 (1) of the Labour Act discussed.

Summary: The applicant was employed by the respondent and had his position changed after a structural change. He refused to take up the new position, citing that he was not consulted and challenged the respondent's competence to effect the change. This ultimately resulted in the employer locking him out. He applied for an urgent interdictory relief. Held that commercial urgency and personal financial hardship are not synonymous and that an illegal action by an employer does not automatically result in urgent interdictory relief being granted.

Held further that the requirements of section 79 (1) of the Labour Act are peremptory and the court cannot grant urgent interdictory relief unless all of them have been satisfied. Held further that there are no exceptions to the application of section 79 where interdictory relief is sought. Held further that an applicant should ensure that there is sufficient time lapse between the adoption of all the requirements to enable the parties to engage before the launch of court proceedings.

Held that the applicant failed to comply with urgency requirements and the provisions of section 79 (1). Application not enrolled as one of urgency and no order was made as to costs.

ORDER

I accordingly refuse to enroll the matter as an urgent application. In view of the provisions of section, 118 of the Labour Act, there is no order as to costs

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RULING ON POINTS OF LAW *IN LIMINE*

MASUKU, AJ:

[1] By application brought on urgency dated 17 April 2015, the above-named applicant approached this court seeking the following relief, as recorded in the notice of motion:

(a) Condoning the applicant's non-compliance with the rules and practice directives of this Honourable Court as far as it is necessary, including the time periods and manner of service prescribed therein in so far as these have not been complied with and directing that this matter be heard as one of urgency as envisaged in rule 6 (24) of the rules of this Honourable Court.

(b) That a rule *nisi* be issued calling upon the respondent to show cause, if any, on a date and time to be determined by this Honourable Court, why an order in the following terms should not be made final:

(i) An order interdicting and restraining the respondent from 'Locking out' the applicant and or continuing to 'Locking out' the applicant from any premises of the respondent, in any manner or as set out in the notice of Industrial action dated 9 April 2015, pending the finalization of this matter;

(ii) An order interdicting and restraining the respondent from implementing the principle of no work no pay on those days that the respondent had locked the applicant out pending the finalization of the matter;

(iii) An order suspending the implementation of the decision of the Chief Executive Officer of the respondent or the respondent dated 7 July 2014, pending finalization of this matter

(c) Ordering that prayers 2.1-2.3 hereof shall operate as an interim interdict with immediate effect pending the return date determined by the Honourable Court.

[2] It is important to mention that the relief sought by the applicant is strenuously opposed by the respondent and to that end, a full set of affidavits was filed by the parties before the eventual hearing of the matter. I say the eventual hearing of the matter for the reason that the respondent applied for a postponement of the matter on the date scheduled for hearing, to enable it to file its answering affidavit, to which the applicant, as he was entitled to, replied. For present purposes, however, the ruling is in respect of certain points of law raised by the respondent *in limine.* Those points relate to

urgency, it being alleged that the matter is not urgent to warrant an order dispensing with the application of the normal rules; that the applicant failed to comply with the provisions of section 79 of the Labour Act;[1] hereafter called 'the Act' and lastly, that the relief sought by the applicant is vague.

[3] Before dealing with the issues falling for determination, I should point out one procedural issue and it is that the applicant appears to be caught in the relic of the past. I say so for the reason that when one has regard to prayer (a) above, it is clear that the applicant claims redress in terms of the provisions of rule 6 (24) of this court's rules. It is common cause that the said rules were repealed and that although the rule relating to urgency was for the most part retained, the numbering of the said rule has changed and is no longer under rule 6 but under rule 73.

[4] Practitioners should move along with the latest developments and should avoid clinging on to the repealed rules, notwithstanding how used they were to them. On a fastidious interpretation, the respondent could have argued, with good reason, that the application should be dismissed because the rule cited is inapplicable to the relevant relief sought. Especial care and attention should therefore be taken to ensure the proper citation of the rules in terms of which relief is sought in the papers. I shall, for present purposes, however, overlook the citation of the wrong rule and pay regard to the correct rule. The court may not always adopt this position as the new rules would be expected to have taken root in the minds of all practitioners in this jurisdiction by now. I made similar comments on this very issue in the *Stefanus Nande Nghiimbwasha and Another v The Minister of Justice and Two Others* case[2], where I took a benevolent view of the wrong citation of the rules, noting that in that case, the applicants were lay persons who are unlettered in law. Legal practitioners would be expected to do much better in this regard.

[5] I am of the view that it is important, at this stage, to briefly outline the facts that give rise to this application, as appears from the founding affidavit. I do so in order to

[1] Act No. 11 of 2007.
[2] Case No. A 38/2015.

place all the issues that arise and may form a basis of the ruling, in proper perspective so as to conduce to a full and proper understanding of the court's decision in the final analysis.

[6] The applicant was employed by the respondent as General Manager for Operations. He served in this position from 1998. In 2006, a lateral transfer was effected, which saw the applicant occupy the position of General Manager: Engineering and Scientific Services. In July 2014, the applicant alleges, the respondent informed him he had been appointed to a new position of Bulk Water Services, in a new structure of the respondent. It is this new position that has sparked the present litigation. The feud resulting from this new appointment, which the applicant appears unwilling to take up on grounds he has stated, has culminated in a serious misunderstanding that has attracted the intervention of the Labour Commissioner. Ultimately, the respondent resorted to locking out the applicant on a no work no pay principle. It is this action that gives birth to the application before currently serving before court.

[7] The respondent, in its papers, has raised certain points *in limine,* which for present purposes, have obviated the need to deal with the matter on the merits. I proceed hereunder, to deal with the points of law.

Urgency

[8] I propose to start with the issue of urgency. The respondent's main gripe with the urgency alleged by the applicant is predicated on the grounds that the applicant does not, in his papers fully comply with the mandatory provisions of the relevant rule, being rule 73 of this court's rules. In this regard, it was strenuously argued that the applicant, in particular, did not allege grounds on which he claims he cannot be afforded substantial redress at a hearing in due course. It was the respondent's contention that in urging the court to find that urgency exists in this matter, the applicant has placed reliance on a lock out that was effected on him by the respondent and that he is not earning a salary as the no-work-no-pay principle accompanied the lock out. The respondent also argued strenuously that the applicant was not candid to the court

regarding his means i.e. how much he and his wife earn, so that in considering any financial hardship that the applicant may allege, the court is placed in a position where it can make judgment based on a full compendium of relevant information. In short, the respondent alleged that the affidavit filed, in so far as it related to urgency, was ‘bald and sketchy’.

[9] The respondent further argued that the applicant was, despite the lock out and the application of the no-work-no pay principle, offered certain benefits during the subsistence of the lock out but he did not take advantage of this offer and in fact rejected the offer. It was therefore argued that the financial hardship or the extent or the intensity it has reached, as deposed to by the applicant in his affidavit, could have been ameliorated had the applicant not spurned the efforts of the respondent to lighten the financial hardship that the applicant stood to suffer. The respondent further argued that the applicant has not shown that he cannot be afforded substantial redress in due course. This argument was premised on the allegation that the applicant has already lodged a dispute with the relevant dispute resolution institution. It was also submitted in this regard that the applicant had also challenged the legality of the lock-out, thus suggesting that the applicant does in fact have other avenues that can afford him substantial redress in respect of the matters he complains about and seeks to invoke the urgency procedures. Do the respondent’s contentions in this regard hold any water?

[10] On a close reading of the founding affidavit, it is apparent that the main, if not the major basis for the allegation of the urgency, is the invocation of a lock out by the respondent. In this regard, the applicant stated the following at paragraph 71 of the founding affidavit:

> ‘I submit that, by its nature and effect, a lock out warrants immediate and urgent intervention and relief. I submit that the mere deployment of an industrial action of lock-out by an employer is a ground that establishes urgency’.

And at paragraph 78, the applicant states the following, ‘I submit that the mere fact that the respondent has embarked upon on an industrial action which on the face of it is

illegal warrants the hearing of this matter on urgent basis. The lock out will be carried out on a principle of no work no pay and if this court does not intervene on an urgent basis, I will suffer irreparable damages and loss as I will loose (*sic*) income emanating from my usual monthly remuneration. I survive on that remuneration to fend for myself and my family.'

[11] Rule 73 (4) provides the following:

> 'In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –
> (a) the circumstances which he or she avers render the matter urgent; and
> (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course'.

It is fitting to note that the subrule quoted above has been couched in peremptory terms, meaning that an applicant can depart from its mandatory prescriptions to his or her detriment. That the provisions are peremptory, can be seen from the use of the word 'must', suggesting therefor that where an applicant fails to explicitly provide the circumstances in the affidavit that render the matter urgent or fails to explicitly state why he or she claims he or she cannot be afforded substantial redress at a hearing in due course, the court would be well within its powers the refuse to enroll the matter as one of urgency. It must be mentioned in this regard that both elements in (a) and (b) above must be satisfied in the affidavit.[3] The urgency procedures are discretionary and may be resorted to when the court is satisfied that the imperatives of Rule 73(4) have been met.

[12] It would appear to me that the applicant claims that the first reason why the matter is urgent, is because the respondent has embarked on a lock-out, which in the applicant's submission, is illegal. The question demanding an answer in the circumstances, is the following, does the fact that a respondent has embarked on an alleged illegal escapade, *per se* render a matter urgent? The applicant did not cite any authority that supports that contention. I must point out however, that in posing the

[3] *AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia [2011] NAHC 184 (1 July 2011; Lindequest Investments Number Fifteen v Bank Windhoek and Another Case No. A 80/2015).*

question in the manner I have, I have not made any determination at the moment, that the lock-out is, as contended by the applicant, illegal. I will, for the express purpose of answering the present question, assume that it is, without deciding that question at this juncture.

[13] I am of the view that the fact that a litigant, a respondent, in particular, has embarked on an illegal crusade, does not of its own render a matter urgent. There must be something more than just illegality that warrants the invocation of the urgency regime. As it is, each matter, it must be pointed out, will turn on its own facts. My general view is that illegality of an action does not, without more, render the matter urgent. There may well be circumstances where an illegal action, coupled with other considerations, may render the matter urgent and there may be other circumstances where the same result does not eventuate. To however equate illegality to urgency, is in my considered view not a correct approach.

[14] It may, in my view, be that the effects of the lock-out that could, be considered in the issue of urgency. In the founding affidavit[4] the applicant posits that if the lock-out continues, it will result in irreparable harm eventuating in that he may be unable to provide for himself and his family. This paragraph must be read together with paragraph 79 of the founding affidavit where the applicant again states that the lock-out will have deleterious consequences for himself and his family as it appears it is to continue indefinitely. Is financial hardship on an applicant a ground for urgency? In support of the contention that it does, the applicant referred the court to *Twentieth Century Fox Films Corporation And Another v Anthony Black Films*[5]. That case is authority for the proposition that commercial interests may be a ground for urgency, even where there is no threat to life or liberty.

[15] Properly applied, I have no qualms whatsoever, with the correctness of the court's view in that case. I am of the opinion, however, that there is a marked difference between what can be termed the commercial interests of a firm and what may be

[4] Paragraph 59.
[5] 1982 (3) SA 582 (WLD) at 586.

legitimate financial interests of an individual. According to the Oxford Advanced Learner's Dictionary, the word 'commercial' is said to derive from the word 'commerce', which is connected to 'trade, especially between countries; the buying and selling of goods and services'. In dealing directly with the word 'commercial,' the dictionary provides it is 'connected with buying and selling and selling of goods and services'. Viewed in the proper context, it appears to me that the term commercial normally refers to interests in business concerning the large scale of voluntary exchange of products and services to the market. It is to that field that the case cited by the applicant must be properly consigned.

[16] It would be wrong, in my considered opinion, to then equate individual financial interests to commercial ones, the latter normally being on a large scale and dealing with financial interests of a country or an entity. In the *Twentieth Century* case, it is clear that the issues at stake, although not pertaining to life, limb and liberty, had to do with the interests of large international companies and issues of copyright, which the court said were liable to be protected by invoking the urgency procedures. I am of the view that the *Twentieth Century* case is clearly distinguishable and has no application to a case relating to a labour dispute which involves an individual and his employer, a company.

[17] Even if I may be wrong in my classification of commercial interests, my attention has been drawn to a recent decision of this court in *Erastus Ipinge Negonga and Another v The Secretary to Cabinet and 5 Others*[6], where the court expressed itself on the issue of financial hardship in the following terms:[7]

> '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 the 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*[8]where this court held that the fact that an employee who alleges that he has been retrenched or dismissed unfairly,

[6] Case No. LC 56/2015 (per Schimming-Chase AJ).
[7] *Ibid* at paragraph [58].
[8] [2007] (1) NR 142 (LC).

> 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'.

I would incline myself to the latter authority for the reason that it is one from our jurisdiction and one which is on point regarding the issue under discussion, as opposed to the issue of commercial interest generally speaking, which was the subject of the *Twentieth Century Fox Films* case. I should point out however, that though the circumstances differ in this case from those which were under consideration in the cases referred to above, namely dismissal or retrenchment, the principle regarding financial hardship is not coloured by the act complained of, and would, in my view, apply fully in a case such as the present, where the applicant complains, not that he has been unfairly dismissed or retrenched, but that he has been locked out and is subjected to the application of the principle of no work no pay. There is no indication, that the sky is falling and will descend on the applicant, as it were and with irretrievable damage being occasioned to him, which is when urgency procedures are normally invoked.

[18] I cannot close my eyes also to the fact that the respondent claims that the applicant's spouse is gainfully employed and can, in the prevailing circumstances, make some contribution to the common household. The applicant in essence stated flippantly in reply that his wife has her own obligations to meet from her salary and makes her own contribution to the household needs. Surely, in a situation such as the present, where the applicant finds himself in a bind, as it were, some adjustments would be required to meet or ameliorate the harshness of the situation. There is also another issue and it relates to the fact that the respondent made an offer to pay some of the applicant's benefits during the subsistence of the lock-out. This was conveyed to the applicant vide a letter dated 16 April 2015[9]. The benefits included the employer paying the applicant's contributions to his medical aid, his pension fund and social security. The applicant failed or neglected to deal with this aspect directly or at all in his reply. To this extent, I am of the view that some action has been taken by the applicant to cushion the applicant somehow and to ensure that he does not fall into arrears with to some of his

[9] Annexure VS4 to the Answering Affidavit p 519 of the record.

obligations, which touch upon his health and future and that of his family. This is not to say that had such efforts not been made by the respondent then urgency would have thereby been established.

[19] In view of the foregoing, I am of the view that the applicant has failed to show that this matter is so urgent as to require the invocation of the urgency procedures. From the case law of this country, from which I cannot depart without reason, regardless of what compunctions one may feel for a litigant, it is my finding that the requirements for urgency as stated in rule 73 (4) and expounded in case law have not been met. I accordingly exercise my discretion and refuse to have the matter enrolled as one of urgency. It will be clear that the application falls at the first hurdle, namely that the applicant has failed to explicitly state circumstances which render the matter urgent. I need not make any finding regarding the avenues open to grant the applicant substantial redress in due course as argued by the respondent.

Implications of section 79[10]

[20] Section 79 of the Act is titled 'Urgent interdicts'. I hereunder quote its provisions as they appear to be central to the decision of this aspect of the matter. I must, before quoting the same point out that the respondent's contention is that the application must fail for the reason that the applicant did not comply at all with the requirements of the said section. Section 79 (1) reads as follows:

> 'Any Labour Court must not grant an urgent order interdicting a strike, picket or lockout that is not in compliance with this Chapter, unless –
> (a) the applicant has given to the respondent written notice of its intention to apply for an interdict, and copies of all relevant documents;
> (b) the applicant has served a copy of the notice and the application on the Labour Commissioner; and
> (c) the respondent has been given a reasonable opportunity to be heard before a decision is made.'

[10] Act No. 11 of 2007.

As indicated above, it is the respondent's contention that the applicant failed to comply with the above requirements. The respondent, for that reason, urged the court to dismiss the application for the alleged non-compliance. I will deal with the applicant's contentions in this regard in due course.

[21] Before I can examine the contentions of the respondent closely, it is necessary that I first consider the implications of the provisions of the sub-section. The first thing to note is that the section makes reference to matters in which urgent interdicts are sought from the court. There is no gainsaying that the present case is one in which an urgent interdict is being sought by the applicant. That this is the case can be seen from paragraph 1 (a) (i) and (ii) of this judgment. Second, the section applies to urgent interdicts relating to three categories of cases, namely strikes, pickets and lockouts. This is the second jurisdictional factor. Third, and most importantly, it is clear that the court has no discretion to allow or to grant an interdict in circumstances where the imperatives mentioned in sub-section (1) (a) to (c) have not been met. That the said provisions are peremptory in nature can be seen from the nomenclature chosen by the law giver. Pertinently, the lawgiver employed the words, 'The Labour Court must not grant an urgent order interdicting . . .' This will mean that if an applicant for an interdict, related to any of the matters set out in (a) to (c) has not met the requirements set out above, then the court has a duty not to grant an interdict. In this regard, I must point out that all the three requirements must be fulfilled. It is not a case where the applicant can fulfill one or two of the requirements and be declared to have complied. That the Legislature intended all three requirements to be met can be seen from the fact that the word "or" has not been used but at the end of (b) the word 'and' has been employed. This means that the requirements must be read conjunctively and not otherwise.

[22] In the instant case, the applicant contends that the lockout applied to him by the respondent is not in accordance with the Chapter 7, which deals with strikes and lockouts. What is key, in my view, is not only for the applicant to show that the said strike, picket or lockout is not in line with the chapter, but to also show that he or she has duly complied with the provisions of section 79 (1) quoted above. I shall now deal seriatim with the requirements set out in the sub-section, in order to determine whether

the applicant has complied with all these. First, the applicant must have given the respondent written notice of its intention to apply for an interdict, together with copies of all relevant documents. Has the applicant in the instant case complied with this requirement?

[23] Before one can deal with the question whether the applicant has complied with the said requirements, there is an argument that relates to the jurisdictional requirements that the applicant raises regarding the applicability of the provisions of the sub-section. At page 7 of his heads of argument, the applicant's counsel states the following:

> '2.13 It is submitted that, since the provisions of section 75 and 79 regulates (*sic*) procedural aspects of enforcing the right or the conditions applicable to a lock out, those procedural aspects are only applicable if indeed lock out as defined in the Act has been established.
>
> 2.14 If the conduct embarked upon by the employer does not pass the definition of a lock out, the procedural aspects prescribed in section 75 and 79 are not applicable as in that case, there is no lock out to which those procedures can be made applicable to. The jurisdictional prerequisites prescribed in section 75 and 79 relates (*sic*) to a lock out as defined in the Act, if the conduct in question does not establish a lock out, the procedural aspects set out in those sections are not applicable'

[24] My understanding of the applicant's contention is that what the court must first do is to establish whether the strike, picket or lock out sought to be distrained by an urgent interdict, as the case may be, is in accordance with the provisions of the Act. If it is, then the requirements listed in the provisions of section 79 (1) may apply. If, on the other hand, the court is of the opinion that the strike, picket or lockout is not in accordance with the provisions of the Chapter, then the provisions of the section 79 (1) do not apply. The import of this reasoning is that an applicant may approach the court and apply for the grant of an urgent interdict without having to follow the prerequisites set out in section 79 (1) if the strike, picket or lockout are in contravention of Chapter 7. Is this

interpretation tenable? More importantly, is it consistent with the language employed by the Lawgiver?

[25] I am of the considered view that a word about the approach to interpreting legislation is in order, so as to approach the interpretation of the section in a correct manner. The learned author E.A. Kellaway[11] states the following fundamental position:

> 'In the case of *Parow Municipality v Joyce & McGregor (Pty) Ltd*[12] Van Winsen AJP (as he then was) said that rules of interpretation of statutes are intended " . . . as aids in resolving any doubts as to the legislature's true intention. Where the intention is proclaimed in terms clear either expressly or by necessary implication the assistance of these rules need not be sought . . ." A basic principle of construction generally accepted up to a point (as will be explained later) by South African courts (as well as English courts) is that "the language of the legislature should be read in its ordinary sense", and where it is clear, a court should not depart from the natural and ordinary meaning of the words".

I am of the considered view that the words chosen by the legislature in the present case are clear and no assistance should be sought from the application of the canons of interpretation. We must, for that reason, take them at face value for they are clear, containing no obscurities or nuances.

[26] I am of the considered opinion that the interpretation advocated for by the applicant does not seem to be in line with the words the lawgiver chose to use in the section in question. In my view, what the legislature sought to do, was to prevent the court from granting any urgent interdictory relief on the grounds that a strike, picket or lockout is not compliant with the provisions of the Chapter 7 without following the imperatives set out in sub-section 1 (a) to (c). The section does not say that the court can only grant urgent interdictory relief in relation to strikes, pickets and lockouts which are in compliance with the provisions of the Chapter and that where those actions are compliant, the three requisites must be observed and by implication that where a strike, picket or lockout is not compliant to the Chapter, then an applicant can approach the

[11] Principles of Legal Interpretation: Statutes, Contracts and Wills, Butterworths, 1995 at page 16-17.
[12] 1974 (1) SA 161 (C) 165-166.

court without meeting the three-pronged requirements and the court would be at large to grant the interdict. In my view, such an interpretation would put the cart before the horse because it would mean that the applicant would have arrogated upon him or herself the power to decide whether the said strike, picket or lockout is compliant or not without seeking any decision or invoking the court's processes in making that decision. This cannot be said to have been intended by Parliament in my view. It would, in a sense enable a party to decide issues of legality of conduct complained of and then benefit from its own interpretation to the prejudice of the opponent, the Labour Commissioner and the interests of justice and fairness.

[27] I say so for the reason that properly applied, the intention of the Legislature, in enacting the said section, was to give the court power to regulate the granting of interdicts in these matters in a responsible, reasonable, fair and even-handed manner. In my view, one of the reasons that would have had to be canvassed by an applicant and which if upheld, would result in the granting of urgent interdictory relief, would be the alleged unlawfulness or non-compliance of the strike, picket or lockout with Chapter 7 and it would be on that basis that the court would grant the urgent interdictory relief, amongst other issues. The interpretation advocated by the applicant would mean that there are circumstances in which the court would be at large to grant urgent interdictory relief without having followed the imperatives mentioned above, which as I have said, conduce to fairness, reasonableness and orderly grant of urgent interdictory relief.

[28] There is a further value, in my view, to be derived from following the provisions of the section and it is this – by giving notice, the applicant would alert the respondent of the proposed application, together with the grounds therefor. This would evidently enable the respondent to consider the contents of the notice and possibly reconsider the action giving rise to the intimated application. The notice may even serve to persuade the respondent to call the parties to negotiate and avoid the litigation route which is very costly, emotion-draining and time consuming as well. At the same time, adherence to the notice route may even enable the Labour Commissioner, who is to be served with the notice as well, to engage the parties one last time before the one party launches the formal application in court for the injunctive relief.

[29] I therefore do not agree that there are certain cases in which the provisions of section 79 do not apply. If that had been the Legislature's intention, it would have said so in clear and unambiguous terms. The plain reading of the section does not, in my opinion, support the applicant's contention. The need to follow the notice procedure has a very good purpose and value. To subvert that purpose by interposing an interpretation that excludes the notice would, in my view run counter to the fair, orderly and reasonable grant of urgent interdictory relief, thus resulting in chaos and abuse of urgent interdicts as some litigants may be trigger happy, so to speak, and would rush to court at the slightest dissatisfaction, without exploring other avenues that are effective but less costly. What appears plain, is that interdictory relief, granted by the court, must be the last port of call and therefore employed as a weapon of last resort.

[30] I am comforted in the fact that my views and observations above, find support in the judgment of this court in *Meatco v Namibia Food And Allied Workers Union And 19 Others*,[13] where the court said the following regarding the application of the section in question:

> 'It would seem to me that the legislature specifically contemplates not only service of an application upon a respondent (and the Labour Commissioner) but also that notice of an intention to bring that application in advance of that application being given. Whilst Mr. Corbett may be correct in his submission that the primary mischief sought to be addressed would be to exclude applications without prior notice, the legislature decided to go much further than merely to exclude ex parte applications. Not only is service of the application required but a notice of this kind is also mandatory. Service of a notice of this kind on the Labour Commissioner would enable that office to take any steps, if appropriate, to avoid the need for the application itself, given the wide ranging powers and functions vested in the Labour Commissioner. Prior notice also places a respondent on terms that its conduct will be the subject matter of an interdict. It also in fairness affords the respondent the opportunity to prepare for such an application and to marshal its resources in doing so. The provision is thus underpinned by compelling considerations of procedural fairness as well as having the advantage of notifying the

[13] Case No. LC 61/2013 at par [17].

> Labour Commissioner's office of an impending court application in view of the centrality of that office to the resolution of labour disputes.'

I am in full agreement with these observations which coincide with my own expressed in the immediately preceding paragraphs.

Compliance with section 79

[31] The last issue to determine, is whether the applicant did, in fact comply with the provisions of section 79. As indicated above, the applicant's first position was that he did not have to comply with the said section, for reasons canvassed and discussed above. The alternative position, was that he complied with the requirements of the section, and further alternatively, if the court finds that he did not so comply, that he, at the least, substantially complied with the said provisions. It is to the latter aspect that I must now turn. It is however, fitting that I should start this leg of the enquiry with a quotation from the *Meatco* judgment, where the court said:

> 'More importantly for this court, the section is clothed in peremptory language, precluding this court from granting any urgent interdict in the absence of compliance with each of the three requirements contained in it'.

It must be recalled that the requirements are (a) the applicant having given written notice of its intention to apply for an interdict, and copies of all relevant documents; (b) service of the copy of the notice to the Labour Commissioner; and (c) affording the respondent reasonable opportunity to be heard before a decision is made. Did the applicant comply with these peremptory requirements?

[32] Is there a written notice that the applicant issued of its intention to apply for an interdict, accompanied by all the relevant documents? It was submitted on the applicant's behalf that letters attached to the founding affidavit, marked KFT 3, KFT 18, KFT 24 and KFT 26 constitute compliance with the requirement in question. In order to arrive at a conclusion on this issue, it is necessary to have regard to these letters and to scrutinize their contents. KTF 3 is a letter dated 13 April 2015, by the applicant's

attorneys of record, addressed to the respondent's Chief Executive Officer (CEO), in reference to the applicant being locked out by the respondent. In the last paragraph, the following is recorded:

> 'Furthermore, please be advised that, in the light of your notice of lock out against our client dated 9 April 2015, we have received instructions from our client to lodge an urgent application in the appropriate Court for urgent relief. In the light of this, please take notice, that we are currently preparing an urgent application in which we shall be seeking urgent and appropriate relief on behalf of our client and we will be serving papers of this application on you as soon as the papers are ready.'

[33] I am of the view that the contents of this letter do not comply with the provisions of the section. I say so for the reason that the letter is not a notice in terms of the section and does not purport to be. I am of the view that if a letter is purported to be notice in terms of this section, it should say so on its face. This one does not. Even if I may be wrong on this score, this letter does not inform the respondent that the applicant contemplates approaching the court for an urgent interdict. The applicant threatened to 'seek urgent and appropriate relief'. I am of the view that the respondent must be left in no doubt what relief is sought to be applied for on an urgent basis. It is my view that the bases for seeking same would preferably be stated, albeit briefly in the notice, unless the reasons are evident from the documents that accompany the notice. I say so, as indicated earlier, that the respondent and the Labour Commissioner must be fully apprised as to what action the applicant contemplates taking so that they may be able to take preventative steps, if possible, that may even seek to settle the matter amicably. In this case, it is clear that the respondent was not given any documents as contemplated by the sub-section (1) (a). This letter is inadequate as a notice and does not purport, as I have said to be a notice in terms of the said sub-section. The fact that the letter was copied to the Labour Commissioner adds nothing towards compliance with the first requirement. KFT 18 is another letter in almost similar terms with KTF3 and in my view, it takes the applicant's case, in so far as complying with the said section no further. The observations made in relation to KFT 3 apply *mutatis mutandis.*

[34] Annexure KTF 24 also does not comply with the said provisions. Although it contains more information regarding the alleged wrongfulness of the lockout, it does not, however serve as a notice to the respondent that the applicant intends to approach the court for injunctive relief on an urgent basis. Furthermore, it makes no reference to the other relevant documents referred to in the said sub-section and it cannot be inferred that there are no such documents only by reason of the applicant demurring in respect thereof. Sadly, the letter marked annexure KFT 26 also suffers from the same defects and does not comply with the requirements of the said sub-section. The nature of the urgent application and the relief to be sought is not disclosed, and more importantly, no mention is made of injunctive relief being sought.

[35] It must be noted that the applicant in this case has made reference to at least four letters as constituting notice in terms of the said section. I am of the view that the cumulative weight of these letters does not in any way meet the requirements. It is my considered opinion that the Legislature appears to have required one letter which complies with the said subsection, giving notice of the applicant's intention to approach the court for injunctive relief. That the applicant has had to point to a number of letters to try and persuade the court that notice required by the sub-section was given and which should ordinarily be found in one letter, is a sign that applicant is skating on thin ice in this regard.

[36] The second leg of the requirements relates to service of the notice and the application on the respondent and the Labour Commissioner. It is not clear which notice is being referred to in this sub-section but it cannot, in my view, be the notice already served in terms of sub-section (1) (a). I say so for the reason that in the ordinary sequence of events, the notice contemplated in sub-section (1) (a) would already have been served. I am of the view that notice in this regard refers to the notice of motion, which would also be accompanied by an affidavit, which is to serve before court for purposes of obtaining interdictory relief. Probably the words 'notice' and 'application' are inelegant in this connection. It is my firm view that the said sub-section refers to the actual urgent application that was threatened to be served in terms of sub-section (1) (a). There is no gainsaying that the applicant did comply with this requirement as the

notice of application, together with the affidavit were served on both the respondent and the Labour Commissioner as required by sub-section (1) (b).

[37] Regarding the last requirement, the question is whether the applicant, in this case afforded the respondent a reasonable opportunity to be heard before a decision in this matter was rendered. In this regard, a decision on the reasonableness of the time period allowed is not a one size fits all. It depends on many considerations and may differ from case to case as I endeavour to show below. The present application, dated 17 April 2015 was served on the respondent on the same day. The respondent was afforded about three days within which to file its notice to oppose and was to then file its answering affidavits the following day i.e. on 21 April 2015. Was this sufficient time for the respondent to be heard before a decision was made? In my view, this sub-section must not, properly interpreted, be viewed in respect of a hearing before the making of the decision. The crucial issue is whether the applicant has afforded the respondent sufficient time to file its papers and to canvass its case appropriately. In this regard, the nature and history of the matter plays a pivotal role in determining the sufficiency or otherwise of the time afforded. The more complex and long drawn a matter is, a longer period may be necessary. Furthermore, the bigger the respondent entity, the longer the period that may be required as necessary consultations and other internal requirements, not to mention collecting and collating relevant documents. Appointment of legal practitioners, including counsel, drafting and settling of relevant papers must also be adequately catered for.

[38] In the instant case, it is evident that the dispute had been gathering momentum for some time. Furthermore, the matter appears quite complex and not very easy to resolve as the parties seem to have been at opposite ends for a considerable period. Furthermore, a lot of documentation had exchanged hands and this is evident from the record which runs to over 600 pages. What must be considered as well is the applicant's failure to comply with the requirement is sub-section (1) (a). Had the respondent been advised in the purported notice what relief was being sought and why, that would have served to place the respondent on the *qui vive* and it would have been

able to marshal its resources much easier and more speedily. The failure to comply with the first requirement appears to return to haunt the applicant once again.

[39] In the instant case, the time afforded the respondent, in view of the long and bitter history of the matter, coupled with the voluminous amount of the paperwork, required more time than the applicant afforded the respondent. As shown above, there was only one day afforded the respondent between the filing of the notice to oppose and the filing of the answering affidavit. This must be viewed from the perspective that the applicant's founding affidavit runs into 40 pages and its annexures run into over 300 pages. For instance, and by way of example, in paragraphs 72 and 73 of the founding affidavit, the applicant states the following:

> 'On the 9th of April 2015, I again received another notice of lock out late in the afternoon. I then met my legal practitioners of record on the 10th of April 2015 and gave instructions that this urgent application be launched. In giving effect to my instructions, I was extensively consulted as from the 10th of April right through the week and though at short notice, I also provided documents that were required to support my application to my legal practitioners of record and counsel for their perusal. I point out that the documents I provided were voluminous and required more time for perusal. I am advised by my legal practitioners of record that, after furnishing my instructions to lodge this application on an urgent basis, my instructed counsels (*sic*) had to peruse the documents, conduct research on several complex matters of law that relates to this matter. All this required time and resources to draft and settle all the necessary papers.'

[40] It is clear that the applicant needed more than a week to consult and have his instructions to launch the application carried out. By his own admission, as recorded above, the matter was complex. That notwithstanding, he found it fit to afford the respondent not more than a day to file answering papers. In this regard, the time limits afforded the respondent were in my view oppressive, regard had to the nature, complexity and history of the matter. In this regard, the applicant afforded himself ample time but was not willing to consider affording his opponent a comparable period of preparation time. It must be said in this regard that what is sauce for the goose must be

sauce for the gander. The applicant cannot lavish himself a lot of time to bring his complex application and then push very stringent time lines down the respondent's throat as it were. The time lines adopted must be reasonable, fair and just and should take account of the true nature of the matter, not from the jaundiced perspective of the applicant and his parochial interests. The court must not be left with the disquieting feeling that the applicant is litigating oppressively by affording himself a lot of time but giving the respondent very little time to properly and fully canvass his or her case. That is unfortunately the distinct impression I gather in this matter.

[41] I find it unnecessary, in view of the conclusion to which I have arrived, to decide upon the lasst point *in limine* namely, that the relief sought by the applicant herein is vague.

[42] In the premises, I am of the considered opinion that the applicant did not comply with this requirement as well. The respondent actually had to come to court and request the matter to be postponed and stated that the CEO, who is *au fait* with the matter was not available. From the papers that were eventually filed, considered *in tandem* with the issues raised, and some of which have had to be decided, I am of the view that the applicant failed to comply with the last requirement and it follows that a case of substantial compliance cannot be successfully pleaded.

[43] I need to make one point on the provisions of section 79 though and it is this: it appears that there must be a reasonable time lapse between the first step i.e. the notice of intention to launch the urgent interdictory application and the actual service of the application. This is to enable the respondent a change of mind, if possible and as stated, the Labour Commissioner an opportunity to intervene if so predisposed. Secondly, this notice, if detailed, will assist the respondent in knowing the case it faces in advance and may, if the matter persists, assist it putting its ducks in a row, resulting in it being able to respond more speedily to the application once launched. In this case, the notice did not fully inform the respondent of the nature of the urgent application, the relief sought, together with the grounds thereof. Lastly, once the application is served, sufficient time, depending on the nature of the case, as discussed above, must be

afforded the respondent so that he or she can put his or her case fully to the court and know that all that they could say has been said and that unreasonable time constraints cannot be pointed to have been a stumbling block in their quest for justice.

[44] I must mention that I have some sympathy for the applicant regarding the lawfulness of the lock out. I am of the view that the applicant has made a good case on that issue from the authorities cited but I have not, on account of the manner in which the judgment has developed, had to decide that point fully. I mention this issue as a pointer to the parties regarding the further conduct of this matter, including possible negotiation of same.

[45] In the premises, I am of the view that the application cannot be enrolled on an urgent basis and no injunctive relief can in the circumstances, be granted due to the applicant's failure to comply with the provisions of rule 73 of the rules of this court, as read with the provisions of section 79 (1) of the Labour Act.

[46] I accordingly refuse to enroll the matter as an urgent application. In view of the provisions of section, 118 of the Labour Act, there is no order as to costs.

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TS Masuku, AJ

APPEARANCES

APPLICANT:	GS Hinda (with him DM Khama) Instructed by Dr Weder, Kauta & Hoveka Inc.
RESPONDENT:	C. Van de Westhuizein Instructed by ENSAfrica (Incorporated as LorentzAngula Inc.)