REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 109/2015

In the matter between:

NAMZINC (PTY) LTD **APPLICANT**

And

MINE WORKERS UNION OF NAMIBIA **1ST RESPONDENT**

EMPLOYEES OF NAMZINC (PTY) LTD AS REFLECTED IN ANNEXURE "A" TO THE FOUNDING AFFIDAVIT **2ND RESPONDENT**

Neutral citation: *Namzinc (Pty) Ltd v Mine Workers Union of Namibia* (LC 109-2015) [2015] NALCMD 17 (22 July 2015)

Coram: UNENGU AJ

Heard: **22 July 2015**

Delivered: **22 July 2015** (Ex tempore)

Judg. Made available: **28 July 2015**

ORDER

The application is dismissed.

JUDGMENT

UNENGU AJ:

[1] This is an urgent application brought by the applicant in terms of s 6(24) of the Labour Act 11 of 2007 seeking the relief set out in the notice of motion.

[2] The first respondent, the Mine Workers Union of Namibia is opposing the granting of the relief sought on the grounds:

(1) Unlawful order sought
(2) Lack of jurisdiction
(3) Non-compliance with s 79 of the Labour Act
(4) No service and
(5) Lack of urgency

[3] For purpose of my ex tempore Judgment (indistinct) to be brief and state the following starting from lack of jurisdiction: There is sufficient evidence before this Court that the applicant complied with the provisions of s 117 of the Labour Act in particular s 1(1)*(e)* thereof there is a pending resolution of dispute between the parties at the office of the Labour Commissioner, therefore, the Applicant has complied with the provisions of s 117 of the Labour Act and that this court has jurisdiction to entertain the application. So whether you got the non-compliance with s 79 of the Labour Act I also find that the Applicant has complied with that section to

and also the service. I am also satisfied that all the parties involved are then properly served with the necessary documents.

[4] In regard the urgency of the application whether it was necessary for the applicant to come before this court in terms of Rule 6(24) on urgent basis as argued before me there is nothing counter claiming the submissions by Mr Corbett and I find also that urgency has been established and the court may or can grant the application on an urgent basis if the other basis or grounds of the respondent upon which the respondent is opposing the application are not accepted. So the delay what the respondent has said that it was self-created was maybe because there were some exchanges of correspondence between the parties in attempt to try to solve the problems between themselves that cannot be said that the delay was caused by the applicant alone but it was for a good purpose to try to resolve the problem amicably between the parties themselves.

[5] However, the problem comes or the problem of the Applicant is with regard the provisions of s 17 of the Act read with s 15 of the same Act and that is what the respondent in the heads of argument are saying that the applicant is seeking an unlawful order in terms of that section. I can quote from the section, s 17(1),

‘Subject to any provision of this chapter to the contrary an employer must not require or permit an employee to work overtime except in accordance with an agreement but such an agreement must not require an employee to work more than 10 hours overtime a week and in any case not more than three hours overtime a day. There are conditions attached to what he is saying here. An employer must not require or permit not only require but the employer must not permit even if the employee is willing to work overtime for more than 10 hours a day or a week or whatever the case may be there is an obligation on the employer not to permit that particular employee to work that particular overtime except in accordance with an agreement and of course also the agreement is qualifying that such an agreement must not require an employee to work more than 10 hours overtime a week in any case not more than three hours.’

[6] It would seem as if the applicant is just doing contrary to what s 7(1) is saying here. There is an agreement between the parties. They have signed an agreement the overtime but the agreement signed between the parties here to require or to permit employees to work more than 10 hours a week and more than three hours a day. Maybe let us go first to or also to section, no before I go to s 15 I have to proceed with s 17, there must be an exemption applied for and granted by the Minister before such an agreement between the parties to work overtime more than 10 hours can be valid. Let us look at what the section is saying.

[7] My understanding of the submissions and the evidence before this court is that the applicant in this application did not get an exemption from the Minister, it has not obtained so there is no such an exemption by the Minister.

[8] I did not know why the applicant did not act in terms of s 15 you know to get, to have the shifts declared by the Minister in terms of the section because s 15 says the Minister may by notice in the Gazette declare any operation to be a continuous operation that permit the working of continuous shifts in respect of those operations. To, says it is not referred to (1) the Minister may prescribe any condition in respect of the shift provided that no more shift maybe longer than 8 hours. It would seem also that the Minister does not have Carte Blanche power to exempt but he can only permit 8 hours. The exemption must be or the operations must be declared in the gazette and published that the operation is a continuous operation like in this particular matter. I think the matter fall squarely within the provisions of Section 15, so that is why it is very much important for the Applicant to have applied in terms of not only s 17 but also s 15 that the activities of the mine should be declared in terms of that particular section gazetted and published for everybody to know that they have to work the hours but unfortunately not more than eight hours week or shift whereas in this case the Applicant is asking the Court to order the employees of the Applicant to work more than eight hours. That is contrary to the Act and agree with the submissions by Mr Akweenda that such an order will be unlawful against these statutory provisions of the Labour Act.

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[9] He referred me to two cases one, bear with me, *RoshPinah Corporation (Pty) Ltd v Deodo Dirkse* case number LC 13/2012 held on the 12 of April 2012 and 14 June. Paragraph 86 thereof reads as follow: the argument that the 1st respondent was obliged in terms of this contract of employment to be available over the weekend cannot be used as justification for the non-compliance clearly with regard to the provisions of s 17(1) and s 17(3) of the Labour Act, where there is a conflict between the conditions of employment contained in the contract of employment as it is the case in this matter and the agreement whatever the case maybe, and the statutory provision the statutory provision, must prevail.

[10] It is then in my view what was quite alarming was the fact that the chairperson despite the fact that it was so brought to his attention that the 1st respondent had worked more than the prescribed 10 hours overtime nevertheless continued not only to convict him but, thereafter, dismissed the 1st respondent. Iin this particular case, no one had been yet convicted or dismissed but an order has been sought from this court to compel them to perform overtime more than 10 hours in conflict or contrary to the provisions of s 17(1), 17(3) in absence of an exemption by the minister in terms of the provisions of s 15. So the provisions of s 17 and 15 are peremptory they are not advisory or directory so they have to be conplied with.

[11] With that I have come to the conclusion that unfortunately this court cannot grant the interdict or cannot grant the relief sought by the applicant in this matter.

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

The application is dismissed.

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E P UNENGU

Acting Judge

APPEARANCES

APPLICANT:	A Corbett Engling, Stritter & Partners, Windhoek
1ST RESPONDENT:	S Akweenda Tjitemisa & Associates

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