



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: LC 151/2016

In the matter between:

**THE PRIME MINISTER**

**1<sup>ST</sup> APPLICANT**

**THE PUBLIC SERVICE COMMISSION**

**2<sup>ND</sup> APPLICANT**

**THE MINISTER OF EDUCATION**

**3<sup>RD</sup> APPLICANT**

and

**NAMIBIA NATIONAL TEACHERS' UNION**

**1<sup>ST</sup> RESPONDENT**

**THE LABOUR COMMISSIONER**

**2<sup>ND</sup> RESPONDENT**

**BESTER MAIBA N.O.**

**3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR-GENERAL**

**4<sup>TH</sup> RESPONDENT**

*Neutral citation: The Prime Minister & Others v Namibia National Teachers Union & Others (LC 151/2015) [2016] NAHCMD 41 (24 October 2016)*

**CORAM: MASUKU J**

Heard: 12 October 2016

Delivered: 24 October 2016

**FLYNOTE : RULES OF COURT** – Rule 73 – Urgent application – **LABOUR LAW** – What constitutes a dispute in terms of chapter 8 of the Labour Act (the ‘Act’) - Interdicting of a lawful strike – Notice period for industrial action, i.e. a strike – reasonableness of picketing distance. Power of Court to review conciliator’s decision in setting of strike rules – **SECTION 117 OF LABOUR ACT** – Role of the Inspector General in pending industrial action. **LEGISLATION** – S 2 of The Public Gatherings Proclamation – whether employees engaged in a lawful strike are bound to follow the provisions of this Act and the Proclamation as well.

**SUMMARY** : The applicants filed an urgent application firstly, to interdict the 1<sup>st</sup> respondent’s members from engaging in an industrial action and secondly, to have the decision of the conciliator set aside, in relation to strike rules pertaining to a seven day notice period of the said industrial action and the distance at which picketing in support of the industrial action was scheduled. The 4<sup>th</sup> respondent was joined as a party to the proceedings, who purportedly had a security interest in the envisaged industrial action. His role in terms of his filed affidavits was to conduct a situation assessment of the security issue related to the strike and to advise accordingly.

*Held* - that the applicants have made the relevant allegations to have the matter enrolled as one of urgency, namely, the circumstances which render the matter urgent and secondly, why they claim they cannot be afforded substantial redress in due course.

*Held* – that a dispute for the purposes of Section 117 (1) (c) of the Act means any disagreement between an employer and an employers’ organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter. Such dispute can either be one of interest or of right.

*Held further* – that the dispute regarding the interpretation and application of strike rules by the parties does not constitute a dispute of interest as envisaged in the Act, in that it is not one

between the employer and the employee and neither does it concern new or changed conditions of employment within the meaning of chapter 8 of the Act.

*Held further* - that there is no basis in law for the court to interdict a lawful strike.

*Held* - that the law-giver prescribed a forty eight hour period as condign notice for any strike or lockout. The period stipulated by the 3<sup>rd</sup> respondent was seven days, which was about two and a half times longer than the statutory period. On this basis, any argument to the effect that the set period was unreasonable and irrational was in the court's view unfair and indefensible.

*Held further* - that Section 76 (2) of the Act requires picketers to picket at or near the place of employment in order to communicate information and to persuade any individual not to work. The distance prescribed by the conciliator was 500 metres. The court held that the applicants failed in this regard to show that the decision by the conciliator regarding the picketing distance was unreasonable or irrational. His decision was in this regard unassailable and must stand.

*Held* – that a strike is like a boxing match in which once the weigh-in procedures are completed, there can be no complaint by either party when the blows begin to land, as long as they are delivered in terms of the set rules and are not below the belt. *Held further* – that when the court sits as a Labour Court, it does not sit as an Upper Guardian of minors but to decide issues between employers and employees. Its sympathies with the effect of the strike or lockout on other persons not directly involved in the strike or lockout, count for very little.

*Held further* – in terms of the Act, the court does not ordinarily award an order for costs unless the prosecution of a matter or the defence thereof was frivolous or vexatious.

In conclusion the court held that Section 117 (2) (b) grants this court at its election, to request the Inspector General to give a situation report on any danger to life, health or

safety of persons arising from any strike or lock-out and this must be based on facts or information suggesting that that action is necessary. What is clear, is that the party with the right to do so is the court and not any other party. The role of the police is to facilitate rather than stifle the exercise of that right to strike. The applicant's application was dismissed and no costs order was made.

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## REASONS FOR ORDER

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### MASUKU J:

#### Introduction

[1] On 12 October 2016, after a full day of intensive and engrossing legal argument, I issued an order dismissing an application filed by the applicants in which they sought an order interdicting a strike scheduled to commence on 13 October 2016 by the members of the 1<sup>st</sup> respondent. I intimated at the time of the delivery of the order that reasons for the order would be delivered in due course. Following below are those reasons.

#### *Dramatis personae*

[2] The parties, who appear as applicants in these proceedings are the Prime Minister of the Republic of Namibia (1<sup>st</sup> applicant); the Public Service Commission (2<sup>nd</sup> applicant) and the Minister of Education (3<sup>rd</sup> respondent). On the other side of the lectern, as it were, are the respondents, being the Namibia National Teachers' Association (1<sup>st</sup> respondent); the Labour Commissioner (2<sup>nd</sup> respondent); Mr. Bester Maiba (3<sup>rd</sup> respondent) and the Inspector-General of the Namibian Police as the 4<sup>th</sup> respondent. The latter was cited, it was contended, for the reason that he might have an interest in the subject matter as well as the relief sought by the applicants. No relief was thus sought against him or his office.

## Background

[3] The background to this matter is fairly straightforward and is not the subject of much contention and it acuminates to this: the Government of the Republic of Namibia (GRN) employs teachers populating the width and breadth of this Republic. These teachers are represented, in respect of their conditions of service and related matters by an entity known as the Namibia National Teachers' Union (NANTU), and as stated above, cited as the 1<sup>st</sup> respondent in these proceedings.

[4] It would appear that the GRN and NANTU engaged in wage negotiations, which were apparently deadlocked, as the parties failed to reach common ground. It would appear that GRN offered the maximum of 5% wage increase whilst NANTU gunned for an 8% increment. The matter was reported as an unresolved dispute in terms of the Labour Act<sup>1</sup> and a certificate that it could not be resolved was issued. The deadlock culminated in NANTU giving notice that its members would embark on a strike. The parties attended before the 3<sup>rd</sup> respondent, who was a conciliator, appointed by the 2<sup>nd</sup> respondent. The conciliator ultimately drafted and published the strike rules, which were signed by both parties. It is unnecessary, at this juncture, to refer to these. I shall do so later in the judgment as may be rendered necessary and appropriate.

## The dispute

[5] Shorn of all frills and stripped to the bare bones, it would appear that it is two aspects of the strike rules that have largely led to this matter serving before this court at this juncture. One of the orders made by the conciliator, was that the GRN should be afforded seven days' notice of the strike. The GRN cries foul, arguing that the strike notice period is too short and does not allow or take into account that the GRN has to make logistical and other arrangements for the striking workers e.g. ablution facilities

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<sup>1</sup> Act No. 11 of 2007.

and other amenities. It was also argued that the time period of seven days, critically, does not take sufficient regard for the fact that many learners, particularly those engaged in external examinations, stand to suffer as the safety of the examination papers and the integrity of the entire examination process will be compromised as there would be no invigilators. In essence that GRN applied to the court to interdict the strike with a view to affording it more time to put all the above contingencies in place and in the process, save the future of the learners which appears, on present indications, to be tottering on the brink of collapse. The plight of the learners, graphically put, can be described as that of innocent collateral damage in the battle of giants, being the GRN and their teachers.

[6] The second bone of contention is that in deciding on the picketing distance from the various places of employment, the conciliator ruled that a distance of 500 metres was condign. This distance, according to the GRN, is insufficient as it may lead to disruption of examinations, intimidation and may also negatively affect those teachers who voted not to go on strike. The court was thus approached and asked to declare a distance of about 1000 metres to be the proper distance in the circumstances, and one which will take into account the purpose of the strike and also balance it evenly with those other persons who are not part of the strike but who have to be able to go about their normal business in relative peace and tranquility as it were.

#### The notice of motion and prayers

[7] As a result of what were perceived by the GRN as oppressive, irrational or unreasonable decisions by the conciliator, they approached the court on two different fronts. First, they purported to lodge a dispute with the 2<sup>nd</sup> respondent over the very issues I have pointed out above. This dispute, it would appear, was lodged on 4 October 2016. With the dispute in mind, they then approached the court on urgency seeking an order interdicting and restraining NANTU from engaging the strike scheduled, as pointed out, to commence on 13 October 2016. They also applied for an order interdicting NANTU and her members from carrying out any act or activity in

furtherance of the said strike, pending the determination of the aforesaid 'dispute' lodged as aforesaid with the 2<sup>nd</sup> respondent.

[8] In the alternative, and in case the court reached an adverse finding on the first prayer, the applicants sought an order interdicting the aforesaid strike pending the finalization of a review application lodged simultaneously with the court, against the decision of the conciliator. The grounds for the review, it would seem are essentially those foreshadowed above, in respect of the decisions regarding the length of the notice period of the strike and the picketing distance. It was in this regard argued that the said decisions by the conciliator were unreasonable, irrational and amounted to an improper use of the discretion vested in him.

[9] From the foregoing, it is therefore plain that the order sought to interdict the strike, was launched at two levels, namely that a dispute in terms of the Act had been lodged and was due for determination by the 2<sup>nd</sup> respondent. The other basis was review in which case the applicants sought to attack the reasonableness and rationality of the decisions of the conciliator in the manners stated above and these issues were raised, as stated above, in the alternative.

[10] Late in the day, a further alternative prayer was included in the notice of motion. This was a prayer for the court to interdict the strike pending the filing of a situation report by the 4<sup>th</sup> respondent in terms of the provisions of s. 117 (2) (b) of the Act. This provision grants this court the power to request the Inspector-General to give a situation report on any danger to life, health or safety of person arising from any strike or lockout.

#### The position of the 4<sup>th</sup> respondent

[11] The 4<sup>th</sup> respondent, although no order was being sought from him, decided to enter the fray and filed two sets of affidavits. Stripped to the bare bones, the 4<sup>th</sup> respondent appears to have made common cause with the applicants in that he sought an interdict (without saying so in so many words). He applied that the court distrains the strike in order to enable his office to undertake a security assessment of all the areas of

picketing considering, so it was submitted on his behalf, that strikes were ‘inherently violent’ and may result in the loss of life and limb, together with destruction of property. He also stated that the court should not allow the strike to proceed for the reason that NANTU had not complied with provisions of s. 2 of the Public Gatherings Proclamation.<sup>2</sup>

[12] It was submitted in argument, that a period of 5 days was sufficient to enable him to undertake the exercise and to advise on the suitability or otherwise of the 1<sup>st</sup> respondent engaging in the strike. He made a lot of play about the lack of financial and human resources and how these would impact negatively on the ability of his charges to deal with the ‘inherent dangers’ of a strike.

#### The 1<sup>st</sup> respondent’s position (NANTU)

[13] The 1<sup>st</sup> respondent opposed the application. The main argument it raised was that the strike was lawful and that for that reason, there is no basis in law for the court to interdict what was otherwise a lawful action as the applicants themselves conceded both in their papers and in argument. Dealing with the legal issues, the 1<sup>st</sup> respondent took the position that the alleged dispute that the applicants lodged with the 2<sup>nd</sup> respondent was not one envisaged in Chapter 8 of the Act. For that reason, they argued that the application should be dismissed.

[14] Regarding the prayers sought for the review of the 3<sup>rd</sup> respondent’s decisions as alluded to above, the 1<sup>st</sup> respondent argued that the court does not have power to review the said decisions and also proceeded to argue that in any event, the 2<sup>nd</sup> respondent cannot review a decision made in its office as they were officers, of co-ordinate jurisdiction. Last, it was argued that if all the above points fail, what is clear is that the 3<sup>rd</sup> respondent did not act in any manner that is reviewable. The decisions he made were correctly made and in terms of the law.

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<sup>2</sup> Act No. A.G. 23 of 1989.



[15] I must also point out that the 1<sup>st</sup> respondent attacked this application on the basis that it was not urgent to warrant the abridged stringent time limits imposed on it. It was also 1<sup>st</sup> respondent's contention that if any urgency exists, it is of the applicants' own making. For that reason, the court was moved, in exercise of its discretion, to refuse to enroll the matter as an urgent one.

[16] I shall now proceed to deal with the issues raised by the 1<sup>st</sup> respondent and will, in the process, also consider the contrary argument raised by both the applicants and the 4<sup>th</sup> respondent, whose positions were by and large similar. In recognition of the commonness of their respective positions, I ordered, during argument, that the applicants should take the floor first and followed by the 4<sup>th</sup> respondent's legal representative so that when the 1<sup>st</sup> respondent's counsel argued, he would deal comprehensively and in one shot, with all the opposing arguments.

### Urgency

[17] The pith and marrow of the 1<sup>st</sup> respondent's argument in this regard was that the issue of the strike had long been in the offing and that the applicants were aware of the possibility, if not probability of NANTU engaging in a strike action. That notwithstanding, they rested on their laurels, as it were and waited until the last minute to launch the interdictory application and in a knee-jerk reaction as it were, thus seeking to upset the applecart as it were.

[18] I am of the view that regardless of when the imminence of the strike can be reckoned to have been apparent, the trigger for the application came on 30 September 2016, when the 3<sup>rd</sup> respondent issued the strike rules. Whether the court ultimately finds that the applicants' argument in that regard fails or succeeds is in my view of no moment at this juncture. The applicants, rightly or wrongly felt they were aggrieved and took steps to try and vindicate what they perceived to be rights in serious jeopardy as a result of the strike. They lodged their dispute on 3 October 2016, and later lodged this application on 5 October as an urgent matter.

[19] I am of the view that having regard to the event that triggered the application and the launching of same, does not admit of the position that the applicants took an inordinately long period to launch the application thus falling to be regarded as having created the urgency themselves. Such a decision would, in my view be perverse in the circumstances.

[20] Mr. Heathcote argued, without much conviction from my assessment, that the application ought not to be enrolled on an urgent basis. I am of the considered view that the applicants have made the relevant allegations regarding the twin requirements to be met in an application for a matter to be enrolled as one of urgency, namely the circumstances which render the matter urgent and why the applicants claim they cannot be afforded substantial redress in due course. See *Stefanus Nande Nghiimbwasha and Another v Minister of Justice and Others*<sup>3</sup> and *Lindequest Investment Number Fifteen CC v Bank Windhoek Ltd and Another*.<sup>4</sup>

[21] If there are any procedural defects or issues not attended to, to the letter, I am of the view that they are minor in nature and effect and should not, in any way serve to justify the court exercising its discretion against the applicants, resulting in the enrolment of the matter as urgent being refused. It was for the foregoing reasons that I issued an order enrolling the matter as one of urgency.

#### Interdict as a result of the applicants launching a dispute with the Labour Commissioner

[22] As indicated above, the first prong of the 1<sup>st</sup> respondent's attack was that the dispute purportedly lodged by the applicants was incompetent for the reason that it was not one under Chapter 8 of the Act. In order to properly decide this point, it is important to look at the letter by which the dispute was lodged and to consider the relevant legislative provisions and to then decide whether the 1<sup>st</sup> respondent's opposition was tenable in law.

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<sup>3</sup> (A38/2015) [2015] NAHCMD 67 (20 March 2015)

<sup>4</sup> (A 80/2015) [2015] NAHCMD 100 (27 April 2015)

[23] At para 40 of the founding affidavit, the 1<sup>st</sup> applicant states that having been dissatisfied by the decisions of the 3<sup>rd</sup> respondent relating to the strike rules, the GRN on 3 October 2016 referred a dispute to the 2<sup>nd</sup> respondent. This dispute is to be found in a letter dated 3 October 2016 marked annexure 'SKA7 A-C' to the founding affidavit of the Prime Minister. Annexure 'A' thereof, under nature of dispute, states as follows in para 9 of the prescribed form LC 21, 'Interpretation and application of the Strike Rules issued by the Conciliator Mr. Bester Maiba on 30 September 2016 – See attached summary of dispute.' It is further alleged therein that the dispute arose on 30 September 2016.

[24] Annexure 'SKA 7 B' contains the summary of the dispute. In the said summary, the issues raised for determination are stated under different headings, namely the notice period to commence with the strike action; where the strike shall be conducted; engagement of volunteers during the strike; the Conciliator did not embrace the proper construction of s. 76 (3) of the Labour Act and the defective notice of the Industrial Action. I can mention, in regard to the latter that the bone of contention was that the places where the industrial action would be carried out are not mentioned with specificity so as to enable, among other things, the GRN to provide amenities to the employees engaged in the industrial action. The other issues raised in the notice of the dispute have been dealt with elsewhere above.

[25] The interpretation section of the Act defines the word 'dispute' as follows:- 'means any disagreement between an employer or an employer's organization on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter.' Specifically, s. 117 (1) (e), upon which the applicants relied for relief in this regard, grants the court powers to 'grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8'.

[26] The question requiring an answer, in the circumstances, is whether the dispute that was lodged by the GRN in this matter, after the decision of the 3<sup>rd</sup> respondent, is a

dispute within the meaning of Chapter 8 of the Act. There, a special meaning to be ascribed to the word dispute is provided in s. 81 and it states the following:

'For the purposes of this Part, "dispute" means any of the following:

- (a) a dispute of interest;
- (b) a dispute referred to the Labour Commissioner in terms of section 45 of the Affirmative Action (Employment Act, 1988 (Act No. 29 of 1988));
- (c) a dispute referred to conciliation by –
  - (i) the Minister in terms of section 80 (1) (a): or
  - (ii) the Labour Court in terms of section 117 (2) (a).'

[27] It would seem to me that there is no contest that the dispute in issue in the instant matter is not one referred to in (b) or (c) above. I say so for the reason that it is plain that the dispute in question was referred by the GRN to the Labour Commissioner and could not, for that reason, have been referred by the Labour Commissioner in terms of (b) above. For starters, this is not a dispute about affirmative action in terms of s. 45 of the Affirmative Action Act. Furthermore, although the dispute is lodged by the GRN, it is not one lodged by the Minister in terms of s. 80 or by this court, in terms of s. 117 (2) (a). This process of elimination undertaken above, leaves us with only one question, viz, is this dispute one of interest as envisaged in s. 81 (a)? The 1<sup>st</sup> respondent contends that it is not. In order to provide an answer to this question, it is necessary to determine what a dispute of interest is and I proceed to do so below.

[28] This term 'dispute of interest' is defined by the Act in s. 1 as 'any dispute concerning a proposal for new or changed conditions of employment but does not include a dispute that this Act or any other Act requires to be resolved by –

- (a) adjudication in the Labour Court or any other court of law; or
- (b) arbitration;'

[29] The question falling for determination, in view of the foregoing is this: does a disparate interpretation and application of strike rules or matters arising therefrom

concern new or changed conditions of employment within the meaning of dispute as envisaged in this Part? If it does, then this is a dispute of interest within the meaning of the Chapter in question and it can therefor trigger and consequently grant this court power to issue an urgent injunctive relief in terms of s. 117 (1) (e). If it does not, then it means that the 1<sup>st</sup> respondent is eminently correct and its argument has to be upheld in the circumstances.

[30] In *Luckoff v The Municipality of Gobabis*,<sup>5</sup> this court dealt with the meaning of a dispute of interest in the following terms, quoting from the work of Dr. C Parker:

‘They are therefore disputes as to new and “wished for” terms. Consequently, they are not justiciable: their resolution is left to the parties to exercise their economic and industrial power. This is where employees want new employment terms to be created, they should bargain for them; they cannot refer a dispute in this regard to a court for determination.’<sup>6</sup>

[31] It may well be true that the initial dispute, which eventually gave birth to the newly lodged dispute, was one of interest as it related to the NANTU seeking to change the terms and conditions of their employment and thus being a dispute of interest. That fact does not render every dispute between the parties, even if it arises from one which initially was one of interest. It does not mean that every dispute between the parties will be coloured by the nature of the initial dispute. As much as children may bear the D.N.A. of their parents, they still have distinguishing features, characters, personality and an identity of their own. They cannot always be viewed from their parentage but should be seen as individuals in their own right. So is it, with the current dispute. It is one of a separate nature from the one that can be said to be the parent dispute. The two should not be forever be regarded as one type in spite of the uniqueness that is evident.

[32] I am of the considered view that since the dispute in issue in the current matter related to the application and interpretation of strike rules loosely put, by the parties,

<sup>5</sup> (LCA 46/2014) [2016] NAHCMD 2 (2 March 2016).

<sup>6</sup> Parker C, *Labour Law in Namibia*, UNAM Press at pp 171-172

and I say so for reasons I shall advert to later, it is accordingly plain that the dispute is not one of interest which triggers the court's power to issue urgent injunctive relief.

[33] In the circumstances, I come to what I consider to be the ineluctable conclusion that the jurisdictional facts that serve to bring this matter within the court's power to issue an urgent interdict have not been established by the applicants. In this regard, it follows that the argument by the 1<sup>st</sup> respondent is sound and must be upheld.

[34] During argument, I directed a poser to Mr. Corbett in this regard to the dispute. I asked who the applicants' dispute in question in this regard was with. I asked this question pertinently for the reason that the dispute should normally be between the protagonists, i.e. the employer and the employee in order for the court's power to grant an urgent interdict to be activated. Mr. Corbett, in my view failed to answer that question at all or at least to my satisfaction and I understand and sympathise with him in his difficulty.

[35] This difficulty, in my view, stems from the undisputed fact that the dispute was not with NANTU but it was largely a mark of dissatisfaction by the GRN over some of the strike conditions prescribed by the 3<sup>rd</sup> respondents. For the most part, this is the true position and had nothing to do with NANTU as they were ready to proceed with the strike on the terms determined and set by the 3<sup>rd</sup> respondent who in law, was mandated. In any case, as a matter of law, a conciliator cannot be disputant in a matter that he or she conciliates in. A careful reading of s. 74 (2) shows clearly that the dispute that a conciliator is called upon to conciliate is a dispute of interest.

[36] In any case, as a matter of law, a conciliator cannot be disputant in a matter that he or she conciliates in. A careful reading of s. 74 (2) shows clearly that the dispute that a conciliator is called upon to conciliate is a dispute of interest. It is only when such a dispute cannot be resolved that the conciliator is enjoined by s. 74 (2) to make an attempt to assist the parties to agree on rules to regulate the conduct of the strike or lockout. If the parties do not agree, he or she determines the rules, but does so guided

by the guidelines or code of good practice published by the Minister in terms of s. 137. It is important to state emphatically that the right of the 1<sup>st</sup> respondent's members to embark on a strike guaranteed to them by s. 74 (1) remains intact, particularly when the strike is in conformity with the provisions of the Act.

[37] To this extent, I am of the considered view that there was, in reality, no real dispute between the two protagonists and this serving to constitute a further reason for the dismissal of the application under this part.

[38] There is, however, one issue that I need to address at this juncture and it relates to the dispute lodged by the applicants to the 2<sup>nd</sup> respondent. It will be recalled that the applicants wrote a letter dated 3 October 2016, which has been referred to above and in which they wrongly, as found by the court, apprehended that there was a dispute properly so-called. NANTU, who were skeptical about what they consistently referred to their response as 'the so-called' dispute, wrote a letter in response thereto dated 4 October 2016.<sup>7</sup> The letter is authored by NANTU's legal practitioners of record, Messrs. Metcalfe Attorneys and it responds to the issues raised by 1<sup>st</sup> applicant in her letter dated 3 October and in which the dispute was lodged. I will not address the rest of the issues raised therein for present purposes.

[39] Of particular interest are the contents of last but one paragraph, where the author states the following:<sup>8</sup>

'As the strike is to commence on Thursday, 13 October 2016, we can obviously not determine this matter in the ordinary course and request that you set the purported dispute for hearing of the issue of jurisdiction to be argued on **Thursday, 6 October 2016 at 10h00**'.

It is a matter of record that faced with the contents of this letter, that sought to expedite the hearing of the dispute lodged by the applicants, the applicants did not respond to

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<sup>7</sup> Page 274 of the Bound book of pleadings.

<sup>8</sup> Page 276 of the bound book of pleadings

this letter. I asked Mr. Corbett about this and his answer was that he had no instructions from his clients regarding the response to this letter. Importantly, there was no allegation by the applicants that this letter was not received by them.

[40] The deafening silence by the GRN is, in my view telling and lends credence to NANTU's criticism that the lodging of the dispute was nothing but a ploy by the applicants to try and avert the strike, which they otherwise have accepted was lawful. The inference that, that was the case, is in my view inescapable, particularly in the absence of an answer, let alone a convincing one. This is to be deprecated and it must be poignantly stated that avenues supplied by the law must be used for the correct purposes and not applied to dilatory tactics or to obtain an undue advantage, considering that the right to withhold labour is protected under Art. 21 of the Namibian Constitution. The criticism to the applicants' approach is in my view condign.

[41] In view of the foregoing, I am of the considered view that there was no proper dispute pending between the parties envisaged in terms of the Act which was reported and which could ground the jurisdictional facts that bring the provisions of s. 117 (1) (e) of the Act into play. The disparate interpretation and application to be accorded the strike rules do not, with respect, properly construed, constitute a dispute that would enable the court to grant injunctive relief as provided for in the said provision of the Act.

[42] One must not lose sight of the fact that the court's power of review under s. 117 (1) (c) concerns any decision of any body or official provided in terms of any other Act, i.e. any other Act than the Labour Act. No such other Act has been cited in this matter and the said section does not apply either. Be that as it may, the applicants rely on s. 117 (b) of the Act in the review they seek. I deal with that issue below.

[43] I should also mention, for what it is worth, that the very strike rules, provide a mechanism and route for pursuing any contentions about the interpretation and application of strike rules by any of the parties. At para 13 titled, 'GENERAL', the following is recorded:



'Any dispute relating to the interpretation and/or application of these Rules, or alleged breach thereof, the party may lodge an urgent application with the Labour Court.'<sup>9</sup>

[44] It is clear that the strike rules, as recorded above, provided the route to be followed if any of the parties raised a dispute about the interpretation of the said rules. The prescribed route was not to lodge a dispute with the Labour Commissioner and then to approach the court on the basis that a dispute had been lodged and awaiting determination at the office of the Labour Commissioner and on that basis, seek an urgent interdict pending determination of the said dispute. The approach of the applicants to the matter for that reason does not find support either in the Act or in the strike rules themselves. This point, as raised by the 1<sup>st</sup> respondent accordingly succeeds.

[45] Still in this connection, NANTU issued another line of assault and it is based on the provisions of s.79 (1) (a) of the Act. That provision has the following rendering:

'A 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'.

[46] The 1<sup>st</sup> respondent, it must be said in fairness, referred to this provision with a disclaimer, namely, in case it is applicable. I am of the view that it is not applicable to the instant case for the reason that there is no allegation by any of the parties, including the applicants, that the strike and picket were in any way in contravention of the

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<sup>9</sup> Page 261 of the record.

provisions of Chapter 7 of the Act. It would appear to me that the jurisdictional fact that brings a strike or picket or lockout within the rubric of this section, is when it is alleged that same is not in compliance with the Act. If it is, then the court cannot grant an order interdicting same, in my considered view.

[47] My attention was pertinently drawn to a judgment of this court in *Dr. Tjipangandjara v Namibia Water Corporation (Pty) Ltd.*<sup>10</sup> That case deals with the interpretation of the section quoted above. For the reason that I incline to the view that the said section is inapplicable to the instant matter, I am of the considered opinion that the case cannot be of any assistance in cutting the proverbial Gordian Knot in this case. I shall, for that reason, say no more of this issue.

#### The review of the Conciliator's decision

[48] At this stage, I proceed to address the issue of the review of the 3<sup>rd</sup> respondent's decision, which the applicants argued, should have served as a basis to interdict the strike. It will be recalled that the basis for arguing that the court should exercise its review powers was premised on the argument that the 3<sup>rd</sup> respondent, in issuing the strike rules, acted unreasonably and failed to take important matters into account, particularly the deleterious impact the commencement of the strike on schedule could herald for the learners. In this regard, it was argued that the seven (7) day period stipulated for notice was in the circumstances unreasonable and should not have been allowed to stand.

#### *Section 117 (1) (b)*

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<sup>10</sup> (LC 60/2015) NAHCMD 11 (15 May 2015)

[49] The applicants argued that this court has the jurisdiction to review the 3<sup>rd</sup> respondent's decisions based on the above provision. The said provision states the following:

'The Labour Court has exclusive jurisdiction to –

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(b) review –

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(ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of –

(aa) this Act; or

(bb) any other Act relating to labour or employment for which the Minister is responsible.'

[50] The 1<sup>st</sup> respondent argued, quite strenuously that the above provision is not applicable. In the first place, it was argued in that regard, that the court's jurisdiction in this section cannot be invoked for the reason that the Labour Commissioner was being required by the applicants to review a decision of the conciliator and that the 2<sup>nd</sup> respondent, being in an office of co-ordinate jurisdiction, cannot properly review the decision of the 3<sup>rd</sup> respondent. In this regard, Judges of the High Court were cited as an example, namely that one judge cannot overturn the decision of another even if they hold a firm view that the said decision is wrong.

[51] Another issue that confronts one is whether a conciliator as the 3<sup>rd</sup> respondent, can be said to be an 'official' within the meaning of s. 117 (1) (b). The answer probably requires more attention for a firm view on same to be expressed. What is plain is that there are conciliators and arbitrators within the office of the 2<sup>nd</sup> respondent and they perform different duties, with the conciliators at the first port of call, followed ordinarily

by arbitrators. The argument by Mr. Heathcote may not be correct in this regard but I express no firm opinion thereon.

[52] In both respects, I shall proceed, without deciding the issue with any degree of finality, on the basis that this court does have jurisdiction to review the decision of the 3<sup>rd</sup> respondent as alleged by the applicants. I should, however, mention that the correctness of the applicants' argument of the court's jurisdiction in this regard may be open for future determination. Having said this, I now proceed to deal with the issue, assuming that I have jurisdiction to review the 3<sup>rd</sup> respondent's aforesaid decisions.

[53] I intend to deal with this point first. In this regard, I will assume that the strike rules constitute a 'decision' within the meaning of the provision in question. The issue of the alleged unreasonableness or otherwise of the decision of the 3<sup>rd</sup> respondent, it would seem to me, must be viewed, not from the parochial predilections, preferences or conveniences of a party, particularly one at the receiving end of the retributive stick of the strike. There must, in my view, be a reasonable standard against which to judge the decision. There is no need, in my view, to move the heavens in order to invent or fashion a standard against which to judge the reasonableness of the decision. Parliament has already done that and it is against that standard that the reasonableness of the 3<sup>rd</sup> respondent's decisions must be assessed and gauged. I proceed to examine that below.

[54] Section 74 (1) (d), reads as follows:

'Subject to section 75, every party to a dispute of interest has the right to strike or lockout if –

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(d) after the end of the applicable period contemplated in paragraph (c), the party has given 48 hours' notice, in the prescribed form, of the commencement of the strike or lockout to the Labour Commissioner and the other parties to the dispute;'

[55] What is particularly noteworthy, is that the period prescribed in the section above does not admit of any exceptions. In particular, it does not exempt the GRN or any other employer or institution for that matter, from the operation of the prescribed notice. That, in my view, is an indication that the GRN, whatever concerns, discomforts or disagreements it may legitimately hold regarding the length of the notice period, do not pass muster if regard is had to the provisions of the Act. I am of the view that it was within the powers of Parliament to have made an exception to this period of notice in so far as it related to the GRN but that it did not do so is a pointer that the GRN is, for purposes of the Act, to be treated like any other ordinary employer.

[56] It is to be noted in this regard, that whereas the law-giver prescribed 48 hours as a condign period of notice for any strike or lockout, the period stipulated by the 3<sup>rd</sup> respondent was actually longer than the 48 hours prescribed in the Act. One does not need divination powers to conclude that the 3<sup>rd</sup> respondent, in prescribing the period of 7 days, which is about two and a half times longer than the statutory period, took into account the GRN's peculiar position. To criticize him for having been indulgent and accommodating is the high watermark of ingratitude. He ought to be applauded in my view and not criticised for affording the GRN a longer period than that stipulated by the Legislature. Any argument to the effect that the period set was unreasonable and irrational is in my view unfair and indefensible.

[57] In *Swameat Corporation v Namibia Wholesale and Retail Workers*,<sup>11</sup> a full Bench of this court stated the following regarding the issue of a strike notice, per Silungwe J:<sup>12</sup>

'The statutory requirement of notice serves to warn the employee of the imminent strike so that he may take appropriate measures, if any, to deal with that situation. It is common knowledge that strikes (in the context of industrial strikes) are glaringly disruptive, not only to the employer who bears the brunt, but also to the employees, to the national economy and, sometimes to the public at large. As we have seen, the specific purpose of warning the

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<sup>11</sup> Case No. FA 7/99

<sup>12</sup> *Ibid* at p. 13 second para.

employer of an approaching strike may have at least two consequences for the employer: (1) he may decide to avert the strike by giving in to the employees' demands; or he may decide to stick to his guns but take whatever measures he deems necessary to safeguard the interests of the business when the strike starts, in an effort to mitigate potential losses. For instance, such measures may particularly be crucial where the mainstay of the business entails perishable commodities such as carcasses, as in the present case; or where the business involves underground mining operations with an ever present danger of flooding in the event of a protracted stoppage; or a hospital where the proposed strike involves medical personnel such as doctors and/or nurses.'

[58] These remarks are apposite in the instant case and the peculiarities of the impact the strike may have had on learners is not, in and of itself a reason, however deleterious it is on learners, to allow the GRN the time it wanted or thought reasonable in the circumstances. What is sauce for the goose, it would seem, must be sauce for the gander as well.

[59] A lot of play was made on the conscience of the court about the disruptive and possibly damaging effects the strike might have had on the learners and it was urged upon this court, as the Upper Guardian of all minors, to intervene and place the future of the learners ahead of industrial disputes and squabbles. It must be acknowledged that sitting as I do in this court, I sit, not as the Upper Guardian of minors, which I do when sitting as a High Court judge. In this court, I sit as a Labour Court judge in order to deal with disputes between or among employers and employees. If the letter of the law has been followed in reaching the Rubicon of a strike, this court ordinarily has no basis to interfere, regardless of the consequences to parties who are not directly involved in the dispute. That, regrettably is the position, which I cannot change, regardless of any sympathy I may admittedly feel for the learners.

[60] It may well be that the GRN was concerned about the future of the learners, which is of course an issue of general concern, but it must be mentioned that teachers were not placed under the essential services category. They are allowed by the laws of this Republic to engage in strike action. Furthermore, no season is prescribed as strike

season by the Act or any other law for that matter. In this regard, it may be said that the law cannot give one a right with the right hand and then take it away with the left hand without lawful justification.

[61] In further support of the contention about the nature and effect of a strike action, Mr. Heathcote, helpfully referred the court to a judgment that graphically illustrates the nature and effect of a strike. This is the case of *Metal and Electrical Workers Union of South Africa v Panasonic CO (Parow) Factory*.<sup>13</sup> There, the learned Judge says the following:

‘A strike or lock-out is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The Court is the referee. It does not intervene simply because one of the opponents is being hurt – that is the idea of the contest. The referee may intervene if one of them is struck below the belt, but he would be astounded while the bout is in progress to receive a complaint that something had gone wrong at the weigh-in. Parties to an industrial contest take time and trouble to shape up for the fight. There are all kinds of things which they are expected to do before they are permitted to enter the ring. Some of these things may be done carelessly or maybe not at all; but if the opponent has not taken the point before he has entered the ring, I do not think he should lightly be permitted to do so once the blows have started landing.’

[62] Mr. Heathcote argued that the parties are already in the ring and in full battle regalia, having gone through the weigh-in procedures. It would be foul, he so contended, if the court, without any indication that his clients were not acting in terms of the rules, suddenly stops the contest before it begins and for no other reason than that the blows due to be landed on the opponent by his client may constitute a knock-out blow and have devastating consequences on the opponent and other parties at the collateral level. That, he argued, is the real intention and purpose of the strike, namely, to hurt the other so as to bring it into submission and on its knees - for it, if possible, to throw in the towel for the contest to be declared in favour of the one pummeling the other with devastating blows in the circumstances.

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<sup>13</sup> 1991 (2) SA 527 (C) at 530, per Conradie J

[63] Mr. Heathcote begged the court not to interfere or intervene in the looming battle and thereby come to the applicants' rescue, regardless of how badly and repeatedly the blows would land on the adversary, as long as they were executed within the rules. His contention was that his clients' blows were not aimed anywhere below the belt. I agree.

[64] In further argument and in a bid to drive the point home in a powerful manner, Mr. Heathcote put a conscience-pricking but rhetorical question, namely, 'Who put the children on the altar of sacrifice?' Although he did not posit an answer, it could be deduced by the discerning that he pointed an accusing finger at the applicants in this regard. In his client's view, it was clear that the GRN had put the children on the altar by not rewarding his clients appropriately, risking in the process, the teachers being a disgruntled, despondent and an uncaring lot, obviously to the detriment of the innocent learners. The strike, he argued, was a weapon geared to change his clients' fortunes, namely to reward his clients properly and serve the learners' interests in the process.

[65] In the case of *Botswana Public Employees Union and Three Others v The Minister of Labour and Home Affairs and Another*,<sup>14</sup> Dingake J, in dealing with a strike action said the following (although in relation to the need to consult by the parties during a strike):

'Strike action is a legitimate tool in collective bargaining between employees and employers. Naturally, tension is inevitable and inherent in a strike situation – and things do get out of control.'

In this regard, it is clear that whatever the tensions, difficulties and disagreements are encountered in a strike, it is a legitimate tool that should be accepted and not viewed with skepticism, suspicion and askance, if reached in terms of the law.

[66] The importance of the court staying clear and not getting itself entangled and caught in the dust of the conflict and to allow market forces to determine the winner,

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<sup>14</sup> MAHLB-000674-11 at para 159



must be paramount. In this regard, Conradie J. (*op cit*), referred to the words that fell from the lips of Cameron J *et al* saying the following:<sup>15</sup>

‘On monetary matters, the Court should adopt a hands-off policy. Power is brought to bear in the collective bargaining through strikes on the one hand and a lock-outs or unilateral action on the other. If the court interferes with the legitimate exercise of power, it threatens the very logic of bargaining. It is therefore of paramount importance that the Court should acknowledge the co-ordinates which map out the area of autonomous collective bargaining. Here, there should be one guiding principle; a recourse to industrial action will be legitimate when the parties have bargained in good faith to *impasse*. Before that point, economic action is premature and the Court should therefore not intervene to safeguard the negotiating process; thereafter, such action is often part of the resolute process and the Court should be conspicuous by its absence.’

I agree wholeheartedly with these remarks.

[67] In closing on this point, I wish to deal with one other argument by Mr. Heathcote, which is tied in to the above authorities in so far as what we referred to as collateral damage is concerned. He started with a mundane and common sense statement, namely, ‘Teachers teach children’. In essence, he was driving the point home that when Parliament passed the Act and did not include teachers under essential services, it knew that when bargaining failed, a resort to strikes by the teachers may be an option. In that case, he further argued, Parliament knew that learners write examinations at some stage in the year. With that knowledge abounding, still Parliament did not place an embargo on the period allowed for teachers’ strikes, including during time of examinations. By extension, teachers embarking on a strike action during examinations was accepted as a reality and to which no blameworthiness attaches was accepted by the lawgiver.

[68] I am consequently of the view that regardless of the collateral damage that may be occasioned by teachers’ strikes, one cold reality is that both the Constitution and the

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<sup>15</sup> Cameron, Cheadle and Thompson, The New Labour Relations Act.

Labour Act of Namibia protect the right of teachers to go on strike if they have followed all the laid down channels and procedures. The argument by Mr. Corbett, sensible, persuasive and seductive as it was, falls to the grounds and pales into insignificance when regard is had to the Constitutional and legislative architecture of the laws of this Republic. I accordingly find on this point that the review route was not open to the court in the circumstances as the 3<sup>rd</sup> respondent acted reasonably, properly and in terms of the law of the land.

[69] The other leg of the review related to the distance for picketing. It is a historical fact that the GRN contended for a distance twice longer than that ruled upon by the 3<sup>rd</sup> respondent. It was accordingly contended that the 'short' distance prescribed by the 3<sup>rd</sup> respondent was unreasonable and may hamper the interests of the learners and other persons not involved in the strike. The court was thus moved to review this aspect of the strike rules.

[70] In coming to an answer on this issue, I must again go back to the legislation in order to work out the reasonableness or otherwise of the decision of the 3<sup>rd</sup> respondent. S. 76 (2) of the Act provides the following:

'Despite any other law, an employee or member or official of a registered trade union, may, in furtherance of a strike in compliance with this Chapter, hold a picket at or near the place not of employment for the purpose of peacefully –

- (a) communicating information;
- (b) persuading any individual not to work.' (Emphasis added)

[71] I am of the considered view that the reasonableness or otherwise of the 3<sup>rd</sup> respondent's decision in this regard, must be considered, not only in relation to the provision in question but also as to the very purpose of picketing, as captured in this subsection. The purpose is to picket at or near the place of employment in order to communicate information and to persuade any individual not to work. (Emphasis added).

[72] In order for an employee on strike to be able to persuade others who are working not to continue with work, the former must be only be visible but audible as well to the latter. A kilometre is a very long distance for a striking employee to be able to fully and beneficially apply the persuasion intended by the Legislature. The starting point is that the striking employee must picket at and if not there, for any good reason, at the worst, near the premises. The distance of the picket from the place of employment must be determined in recognition of the right to picket on the one hand, and where other interests are at stake, those other interests as well. In this regard, it must be stated that the distance prescribed for picketing, if not at the place of employment, must be such that it is fixed near the premises in question, without rendering the right to picket hollow by prescribing a distance that places the picketing into oblivion, if not insignificance.

[73] I am of the considered view that there was nothing wrong with the distance prescribed by the 3<sup>rd</sup> respondent in so far as the applicants were concerned. If anything, I am of the view that the distance prescribed was detrimental to the interests of the 1<sup>st</sup> respondent as they may not see or be seen by and not be heard by their target audience, which fact would render the picket nugatory. A kilometre away from the place of employment runs the risk, in my view, of other employers' employees being disrupted and a reasonable observer being persuaded to think the picket is in relation to premises close by when the 'culprit' is a kilometre away and cannot, in some cases see the picketing or the working employees and perchance hearing the 'gospel' of the striking workers and stop working.

[74] I am accordingly of the view that the applicants have failed in this regard to show that the decision by the 3<sup>rd</sup> respondent regarding the picketing distance was unreasonable or irrational or indeed reviewable in terms of s. 117 (1) (b). If anything, the decision regarding the picketing distance may be faulted for leaning in favour of the applicants and contemporaneously militating against the 1<sup>st</sup> respondent effectively realising the right and benefit of picketing. The decision in this regard is in my view unassailable and must stand.

[75] In the circumstances of the current case, I am of the view that the distance that the applicants wanted to be designated is unreasonable and actually removes and renders hollow the very purpose of a picket. If anything, and I say this *en passant*, even the distance prescribed by the conciliator, although the 1<sup>st</sup> respondent did not complain about it, is in my view rather huge and does not fully embrace and allow the 1<sup>st</sup> respondent's members to fulfill the benefit granted them to effectively picket in the Act. I will, not, however, disturb the decision made in this regard as there has been no complaint by the 1<sup>st</sup> respondent.

[76] Above all, and this was not argued by the applicants, the point must be made that a conciliator is not an arbitrator and conciliation is not arbitration. For that reason, the grounds of review in s. 89 (5) are not applicable in the instant case. The conciliator does not take administrative action when he or she determines the strike rules in terms of s. 74 (2) (b) of the Act. For that reason, the provisions of Art. 18 of the Namibian Constitution are not applicable. The applicant can only rely on common law grounds of review. See *Sikunda v Government of the Republic of Namibia*<sup>16</sup> and *Johannesburg Consolidated Investment Co. v Johannesburg Town Council*.<sup>17</sup> It does not appear to me that these grounds have been pleaded, let alone proved by the applicants in this case and they sought no relief thereunder.

[77] I am accordingly of the considered view that there is no merit in the application for review regarding this leg of the 3<sup>rd</sup> respondent's decision. Whatever misgivings I might have expressed about the distance for picketing the 3<sup>rd</sup> respondent prescribed, I am of the view that the distance the court is asked by the applicants to endorse is out of all proportions with the purpose and particularly the effectiveness of the right to picket. For that reason, the application for review on this ground is refused.

#### Postponement versus interdict

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<sup>16</sup> 2001 NR 181

<sup>17</sup> 1903 TS 111 at 114

[78] I must also express my difficulty with the relief sought by the applicant. When one has regard to the papers as filed, and this applies also to the 4<sup>th</sup> respondent, it is clear that they accept that the strike was a lawful one. Furthermore, it is apparent that all that they needed, because the strike was lawful, was more time to be afforded them to put the logistical arrangements in place. In that context, I am of the view that to seek to interdict a lawful strike is heavy-handed and clearly a wrong relief in the circumstances.

[79] The applicants should rather have sought a postponement of the strike in the circumstances because that is what all parties ordinarily do when they seek more time. Whether or not the court would have granted such an order is not a matter for debate at this point. To interdict a lawful strike because you require more time to prepare yourself to deal with the effect of a strike, is in my view wrong and out of all proportion with the real issues at play. A level of calmness and levelheadedness from the applicants' legal practitioners was required in spite of the weight and enormity of the issues and their consequences.

[80] The other issue raised by the applicants related to the areas of picketing and the specificity required. In my view, that is a matter that must be the subject of communication between the parties. Mr. Heathcote argued that some of the places in Namibia, particularly in the rural areas, do not have street names or other means to identify them with precision and this common cause. It was argued that where there was no street name and a tree or other point was named, the persons who reside in the area would readily know where the place is. I agree. It would be unconscionable to interdict a strike that is lawful (and not a picket) simply because there is no street name or road mentioned as where exactly the picket will take place. The 1<sup>st</sup> respondent cannot be expected to unilaterally name areas just to be able to proceed with a strike.

[81] In this regard, it must be mentioned that contact numbers of the conveners were supplied and in the few cases where these were not supplied, I am of the view that this information could have been sought without being legalistic and fastidious about it to the extent of seeking to interdict the strike because of a few matters of detail that can be

obtained by enquiring from the relevant officers of the 1<sup>st</sup> respondent. It also beats reason as to why the strike all over the country could be stopped just because one or two picketing areas in far-flung areas are not clear to the applicants and their charges.

General observations regarding the 4<sup>th</sup> respondent's position

[82] As indicated elsewhere in this judgment, the 4<sup>th</sup> respondent joined the bandwagon and generally made common cause with the applicants. He sought what was in essence the postponement of the strike pending what he thought were security concerns his office had. His first affidavit, read in proper context, seems to communicate a misunderstanding of the role of the police during legal strikes. He complained about not having sufficient resources, both human and financial at his disposal to cover the strike, including riot police because, so he contended, strikes are inherently violent.

[83] I am of the view that the pessimism that appears to inform the Inspector-General's affidavits is not based on any concrete information. There was no indication whatsoever, what basis there was for the time he requested. It must be recalled that legal strikes are protected by the Constitution and the laws of Namibia and where parties have followed all the channels laid down in law, the role of the police is to facilitate rather than stifle the exercise of that right. The court got a distinct impression that the 4<sup>th</sup> respondent, from his affidavits and the argument made on his behalf in court, took a contrary stance, which if allowed to take root, would leave the right to strike in serious jeopardy and in a sense, at the mercy and whim of the 4<sup>th</sup> respondent.

[84] I mention the latter statement in view of the argument relating to judicial deference that was strenuously advanced by Mr. Amoomo on behalf of the Inspector-General. He contended that when it came to matters of security, the courts must defer to the views and opinions of the Inspector-General because the courts are manned by 'civilians', who are not *au fait* with security matters. It would be a sad day if the situation will be such that lawful strikes, protected as they are by the Constitution and the laws of this Republic, can be aborted merely because officers in the security cluster are of the

view that it is unsafe to proceed with them, thus leaving the court's arms folded in helplessness and unable to vindicate, guarantee and enforce those rights. The police are there to ensure that strikes proceed peacefully and smoothly and that any rogue elements and unlawful behaviour are dealt with in terms of the law.

[85] The Labour Act, it must be said, protects a lawful strike and not criminal behaviour. It is in that regard that the issue of the extent of police involvement was made part of the strike rules under para 12 by the conciliator. Furthermore, the rules indicated that matters not provided for therein, the Act and the Code of Good Practice on Industrial Actions and Picketing, published in the Government Gazette of 19 October, 2009, shall apply. The latter document, it must be stated, clearly stipulates the extent and nature of the involvement of the police.

[86] At para 5, the Code records the role of the police and states that, 'As a general rule, the Police should not be seen in an area where a picket is held. Police should only come in where there is a breach of peace, law and order particularly where there is violence.' It also provides that the police should not take any view of the merits in disputes but should uphold the law and order and may take reasonable measures to keep the peace in picket lines or elsewhere.<sup>18</sup> If the provisions of this Code regarding the level of involvement of the police were followed, it would then become plain that the fears of the 4<sup>th</sup> respondent are not justified.

[87] Mr. Amoomo argued that the court must have no regard to the Code, as it is not binding on the parties and presumably the police. It must be pointed out that in terms of the introductory paragraph thereof, it is stated that the Code must be taken into account in any proceedings by conciliators, arbitrators and judges. It is also clear that the police should also take it into account in considering the nature and level of their involvement in strike or lockout situations, including picketing.

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<sup>18</sup> Para 5 (b) of the Code of Good Practice

[88] I consider the argument by Mr. Amoomo to be quite startling and unfortunate. I accordingly implore and hope that the Inspector-General is not persuaded to follow it. If anything, s. 74 (2) (b) of the Act enjoins the conciliator to take the said Code into account in setting the strike rules. It would therefore be odious for one to say no regard must be had to the Code when the issue touches on strike rules, their interpretation and application.

[89] To remove the courts from the driving seat, which enables them to adroitly balance the competing rights, freedoms and interests and for them to abdicate the seat of judgment in matters that touch upon of human rights, leaving such important issues in the hands of personnel in the security sector as Mr. Amoomo argued, would leave the propagation, exercise and enjoyment of human rights and freedoms in serious jeopardy. This is a situation this great country can ill-afford.

[90] Another issue worth mentioning is with regard to the Inspector-General's argument that the 1<sup>st</sup> respondent had not complied with the Public Gatherings Proclamation in embarking on the current strike. I am of the view that if the 1<sup>st</sup> respondent has complied fully with the provisions of the Act, there is absolutely no need to further apply in terms of the Proclamation.

[91] If it was Parliament's intention that parties who have complied with the Act in relation to a strike should in addition also follow provisions of the Proclamation, that would have been stated in very clear and unambiguous terms. Parliament must be assumed to have known that when they promulgated the Act, the Proclamation was in existence, particularly the possibly deleterious effects of subjecting the 1<sup>st</sup> respondent to the Proclamation may have on their constitutionally protected right to strike.

[92] I must also comment on the provisions of s. 117 (2) (b) of the Act, which grant this court the right at its election to 'request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.' What is clear from the foregoing, is that the party with the right to do so is the



court and not any other party. In any event, I must point out that none of the parties in this matter applied (if they legitimately could) for the court to exercise its powers under this section. It is also implicit in the provision that there must be some reasonable basis for the court to apprehend the danger that may be posed to life, limb or property for it to call upon the Inspector-General to give the situational report. Ordinarily, it must also be mentioned, a report of this nature is required in respect of a grave situation that is unfolding or has already played out.

[93] The approach of the 4<sup>th</sup> respondent appears to have been that he is entitled as of right to intervene in strike matters using the provision quoted above. I do not agree. In my view, if it had been the lawgiver's intention to have the Inspector-General participate in the process of preparing the modalities for a strike or lockout, Parliament would have said so in very clear terms. It was for the foregoing reason that a further alternative draft order presented by the applicants which sought an order for the strike to be interdicted pending a report to be filed by the 4<sup>th</sup> respondent in terms of the above cited provision was rejected by the court.

[94] The fact that the role and involvement of the Inspector-General in those terms is not spelt out at the level of engaging in processes leading up to and including the strike or lockout, is indicative of the need to leave the parties to deal with all the logistics and to allow the police to conduct their normal policing duties during strike, clearly absencing the possibility of the police influencing and possibly having the decisive say as to whether or when a strike ought to proceed because of the fears they may hold about any dangers. To do so might negate and render the right to withhold labour not only hollow but also nugatory.

### Conclusion

[95] It was for the foregoing reasons that I granted the order dismissing the applicants' application for the grant of an urgent interdict stopping the 1<sup>st</sup> respondent' members from engaging in the strike scheduled to take place on 13 October 2016.

## Costs

[96] The outstanding issue relates to the issue of costs. The applicants indicated, during argument, that they would not insist on any order as to costs, whereas the 1<sup>st</sup> respondent took the view that the applicants' application was frivolous. For that reason, the 1<sup>st</sup> respondent urged the court to grant costs in their favour, consequent upon the instruction of one instructing and one instructed Counsel.

[97] S. 118 of the Act provides the following:

'Despite any other law in any proceedings before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.'

There is no basis advanced by the 1<sup>st</sup> respondent why the institution of these proceedings by the applicants was said to have been vexatious so as to warrant the applicants being mulcted in an adverse order for costs.

[98] The Black's Law Dictionary, defines the word vexatious as, '(Of conduct) without reasonable or probable cause or excuse; harassing; annoying.' Can it be said in good conscience that in instituting these proceedings, the applicants were geared to harass or annoy the 1<sup>st</sup> respondent? Or can it be said that there was no reasonable or probable cause in so instituting the proceedings save abusing the processes of the court?

[99] In this regard, it must be stated that the result of the proceedings does not matter. The fact that a party, which institutes or defends a matter and loses in its bid to do so does not enter the equation at this juncture. The question is whether there was, in all the circumstances, no reasonable basis for instituting the proceedings other than to harass or annoy the 1<sup>st</sup> respondent?

[100] I am of the view that such a conclusion cannot, in all honesty be detected as having been a motive from the applicants' actions. The applicants were understandably in a panic mode, with the future of learners, in particular, at stake. They found it their business and duty to try and avert the situation as a responsible Government would. They may have lost the case but they should not be faulted in my view, for having done so as they had, in the centre of their concern, thinking and actions, the future of Namibia's learners.

[101] One may take an understandable view, from the reasons and conclusion of law, above, that the applicants' application was ill advised and doomed to fail from inception. That notwithstanding, I do not find that their failed bid and motives were base and calculated to harass, annoy or oppress the 1<sup>st</sup> respondent. In my considered view, the intention to move the application was in good faith albeit ill advised. In exercise of my discretion, and in recognition of the need to maintain a healthy and enduring industrial relationship between the parties, I am of the view that no order as to costs is appropriate in the circumstances. The costs order must have a touch of a conciliatory rather than a divisive note and effect on the parties' future relations, which do not end today.

[102] In the premises, I am not persuaded that an order for costs in favour of the 1<sup>st</sup> respondent is condign in the circumstances. I indicated, on handing down the order that a decision on costs would be delivered together with this ruling and I accordingly do so. There is no order as to costs.

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TS Masuku

Judge



APPEARANCE:

APPLICANTS:

A. Corbett (with him T. Phatela)  
Instructed by Government Attorney

1<sup>ST</sup> RESPONDENT:

R. Heathcote (with him Y. Campbell)  
Instructed by Metcalfe Attorney

4<sup>TH</sup> RESPONDENT:

K. Amoomo  
Instructed by Government Attorney