REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 85/2015

In the matter between:

NEDBANK NAMIBIA LIMITED **APPLICANT**

And

THE NAMIBIA FINANCIAL INSTITUTIONS UNION (NAFINU) **FIRST RESPONDENT**

THE LABOUR COMMISSIONER **SECOND RESPONDENT**

Neutral citation: *Nedbank Namibia Limited v The Namibia Financial Institutions Union (*LC 85-2015) [2015] NALCMD 12 (3 June 2015)

Coram: MILLER AJ

Heard: **02 June 2015**

Delivered: **03 June 2015**

ORDER

In result I make the following orders:

(a) That the applicant's non-compliance with the forms and service as provided for by the Rules of Court is hereby condoned and this application is heard as one of urgency as contemplated in terms of the Labour Court Rules 6(24) and (25).

(b) That pending the finalisation of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent's conduct during the 2015 negotiations between the applicant and the first respondent, the first respondent and its office bearers and agents are interdicted and restrained from organising, causing, directing, inviting or encouraging any of the applicant's employees to embark on any industrial action.

(c) That pending the finalisation of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent's conduct during the 2015 wage negotiations between the applicant and the first respondents, the first respondents members employed by the applicant are interdicted from embarking on any industrial action.

(d) As far as costs are concerned I will not make any order as to costs.

JUDGMENT

MILLER, AJ:

[1] This matter comes before me sitting as a Labour Court as one of urgency. The Applicant in its notice of motion seeks the following relief.

'{1} Dispensing with the forms and service provided in the rules of court and hearing this application as one of urgency in terms of Labour Court Rules 6(24) and (25).

{2} Directing that a rule nisi issue, with a return date to be determined by the court, before which the first respondent mush show cause, why an order in these terms should not be made final.

{2.1} That, pending the finalization of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent's conduct during the 2015 wage negotiations between the applicant and the first respondent, the first respondent and its office bearers and agents are interdicted and restrained from organising, causing, directing, inviting or encouraging any of the applicant's employees to embark on any industrial action on the strength of the outcome of the complaint referred to the Labour Commissioner by the first respondent in case no CRWK 165-15;

{2.2} That, pending the finalization of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent's conduct during the 2015 wage negotiations between the applicant and the first respondent, the first respondent's members employed by the applicant are interdicted from embarking on any industrial action on the strength of the outcome of the complaint referred to the Labour Commissioner by the first respondent in case no CRWK 165/15.

{3} That the orders in 2.1 and 2.2 operate immediately pending the return date.

{4} Cost of suit in the event of opposition.

{5} Such further and/or alternative relief as the Honourable Court may deem appropriate.'

[2] I pause to indicate at this stage that Mr Jones who appears for the applicant conceded during the course of argument that a rule nisi is not the appropriate order to make in as much as the relief claimed is final relief pending the final determination of the dispute pending before the second respondent.

[3] The matter is opposed by the first respondent who was represented by Mr Marcus. The relevant facts are the following:

(a) In November 2010 the applicant and the first respondent concluded a recognition agreement in terms of which salary negotiations were conducted annually.

(b) During the cause of salary negotiations for the 2015 year a dispute arose over the issue of medical aid contributions to be paid by the applicant. That dispute remained unresolved.

(c) The first respondent on 13 March 2015 referred the matter to the second respondent as a dispute of interest requiring the second respondent to conduct conciliation proceedings. The summary of the dispute reads as follows;

‘{1} The applicant is The Namibia Financial Instritutions Union (NAFINU), a registered trade union in accordance with the applicable laws of the Republic of Namibia with its head-office at the National Union of Namibia Workers (NUNW) centre, Mungunda Street, Katutura.

{2} The respondent is Nedbank Namibia Limited.

{3} On 08 March 2008, the respondent cited herein-above recognise NAFINU as the exclusive bargaining agent and subsequently a signed recognition agreement on 25 November 2010.

{4} On 03 December 2014, applicant submitted a letter to respondent outlining the issues for discussion and negotiations during the current financial year,

{5} The partied commenced their annual wage negotiations on 19 February 2015 and held various meetings therafter.

{6} The union’s demands were as follow:

(a) 15% salary increase across the board;

(b) Transport allowance of N$950.00;

(c) Rental allowance of N$950.00;

(d) 100% Medical-aid employer contribution;

(e) An increase in employer pension contribution;

(f) Housing allowance for 64 “identifies” employees.

{7} After deliberations, the union agreed to remove the pension demand from the negotiation table.

{8} The parties further reached consensus to move the housing discussions to a different platform.

{9} After various rounds of negotiations, the parties reached a deadlock on the salary increase, transport allowance, medical-aid and rental allowance.

{10} The deadlock was confirmed on 10 March 2015.

{11} On 12 March 2015, a follow-up meeting was held in an attempt to resolve the dispute.

{12} The afore-said meeting failed.

{13} The parties re-confirmed the deadlock.

{14] Wherefore applicant has no other alternative than declaring a dispute with the office of the labour commissioner, as applicant has exhausted all avenues to resolve the matter amicably with the respondent.’

[4] That process was concluded without any success in resolving the dispute. Consequently, the conciliator Ms Nicanor issued a certificate of an unresolved dispute. On 13 April 2015 further talks to determine strike rules were conducted likewise without any success. Consequently the conciliator determined the strike rules in accordance with Section 79 (2) (b) of the Labour Act of 2007 on 13 May 2015. The ballot in favour of the strike was successfully concluded on 29 May 2015 and notice was given to the applicant that the industrial action will commence on 3rd June 2015 at 07:30. That prompted the applicant to launch the present application after the previous application was perceived to be premature and was withdrawn. Central to the applicant’s case is the referral of a dispute referred to the second

respondent by the applicant in terms of Section 82 (7) of the Labour Act. That dispute was delivered to the second respondent on 28 April 2015 and is still pending. The dispute reads as follows:

"{1} The **APPLICANT** is **NEDBANK NAMIBIA LIMITED**, a public company and banking institution duly registered under the applicable Namibia legislation with its head office at 12-20 Dr Frans Indongo, Avenue, Windhoek

{2} The **RESPONDENT** is **THE NAMIBIAN FINANCIAL INSTITUTION UNIOUN (NAFINU**), an employees' trade union duly registered as such with the Labour Commissioner under the Labour Act, 44 of 2007 ('the Act") with its head office at the National Union of Namibia Workers (NUNW) Centre, Mungunda Street, Windhoek

{3} On 25 November 2010, the parties concluded an interim Recognition Agreement regulating and proving framework of the relationship between the parties. A copy of the agreement concluded in November 2010 is attached marked "**SD1**".

{4} In terms of clause 6 of the agreement, the parties shall, at no more than annual intervals or as otherwise agreed by them, negotiate an agreement for Union members in the relevant bargaining unit in respect of amendments to their salaries, following the procedure set out in clause 6.3 of the agreement.

{5} In February and March 2014 the parties, acting in terms of the agreement, negotiated in respect of amendments to the salaries of the Union members in the relevant bargaining unit. They concluded a written agreement on 1 April 2014 regarding the amendments. A copy of the agreement concluded on 1 April 2014 is attached and marked **"SD2"** ("the 2014 wage agreement")

{6} A change to medical aid contributions for the 2014 and 2015 financial years was one of the proposed amendments to the relevant employees' salaries, on which the parties negotiated and ultimately agreed on 1 April 2014. Paragraph 2 of the agreement stipulates that:

> 'Employees in the bargaining Unit (NB03-NB08) shall receive an increase in the medical aid contribution from 50/50% (employer/employee contribution to 60/40 % (Employer/Employee contribution) for the year 2014, where after the employer/employee contribution will increase to 70/30% for the financial year 2015 in closure of the matter'

{7} On 26 September 2014, the respondent referred a dispute to the Labour Commissioner. It alleged the applicant did not comply with clause 32 of the wage

agreement. A copy of the dispute referred on 26 September 2014 is attached and marked "SD3".

{8} The allegation on non-compliance is unfounded. The essence of the applicant's position appears from a letter dated 28 October 2014, attached as "SD4'. Its terms are incorporated herein.

{9} The rights disputed referred on 26 September 2014 is pending before Mr Shikomba, as Mr Nangombe, originally appointed to arbitrate, recused himself. It is set down for 09h00 on 6 May 2015.

{10} In February and March 2015, the parties conducted the annual wage negotiations under clause 6 of the interim recognition agreement, for amendments to the salaries of union members within the relevant bargaining unit.

{11} On 13 March 2015 the respondent referred an interest dispute to the Labour Commissioner. A copy of the interest dispute is attaches as **"SD5"**. It is set to continue on 28 April 2015.

{12} The respondent's conduct and demands at the 2015 wage negotiations were contrary to the Interim Recognition Agreement. They were also contrary to the Union's contractual and statutory duty to negotiate in good faith and to avoid any conduct subversive of orderly collective bargain, and therefore an unfair labour practice in terms of section 49 of Labour Act:

{13} At the negotiation meetings between the parties, the respondent insisted on including a demand for increased medical aid contributions by the applicant for the 2015 financial year starting on 1 March 2015 and ending on 28 February 2016, as one of the bargaining topic. The applicant objected because this topic, for the 2015 financial year especially, was already negotiated and concluded in 2014 and captured in the 2014 wage agreement. The topic was not a permissible bargaining topic in the 2015 negotiations unless the partied agreed thereto. The applicant did not agree to it.

{14} By insisting on re-negotiating a term of the 2014 wage agreement, prior to the agree-upon expiry of the term, the respondent conducted itself in a manner that is subversive of orderly collecting bargaining. This conduct also amounts to bad faith negotiation.

{15} In addition, by demanding that this topic form part of the formal collective bargaining process for 2015, while it had referred a dispute of right to the Labour Commissioner on the same issue and while the dispute remained unresolved, the respondent negotiated in bad faith.

{16} The following conduct on the part of the respondent during the 2015 wage negotiations also amounted to bad faith bargaining, and/or conducts subversive of orderly collective bargaining, and therefore an unfair labour practice in terms of section 49 of the Act:

{16.1} The respondent linked its willingness to diverge at all from its demands for a 9% salary increase for all members in the bargaining unit and certain other demands, and thus its willingness to negotiate on any of these issues, to agreement by the applicant to re-open discussions on the medical aid agreement reached in 2014 with respect to the applicant's 2015 financial year.

{16.2} The respondents failed to substantiate its demands during the 2015 wage negotiations by providing rational bases for the demands or formal calculations to justify the demands.

{16.3} The respondent made predictably unacceptable demands with respect to, and then deliberately adopted an inflexible postion on, issues central to the 2015 wage negotiation.

{17} The applicant accordingly claims the following orders against the respondent:

{17.1} Declaring that the respondent's conduct, in demanding that amendments to the salaries of Union members within the relevant bargaining unit with respect to medical aid for the 2015 financial year should be a bargaining topic during the 2015 annual wage negotiations conducted between the parties under clause 6.3 of their interim recognition agreement, amounted to a breach of the interim recognition agreement, amounted to a breach of the interim recognition agreement concluded on 25 November 2010 and the wage agreement concluded on 1 April 2014, and to an unfair favour practice in terms of section 49 of the Labour Act.

{17.2} Declaring that the respondent committed an unfair labour practice by its conduct stipulated in paragraphs 16.1, 16.2 and 16.3 of this summary of dispute.

{17.3} Directing the respondent to return to the bargaining forum and negotiate proposed amendments to the salaries of union members in the relevant bargaining unit, without including, as a bargaining topic, directly, changes to the relevant salaries with respect to medical aid contributions for the applicant's 2015 financial year.

{17.4} Interdicting the respondent and its members employed by the applicant, from proceeding on any industrial action on the basis of the outcome of the 2015 wage negotiations, until such time that the respondent has returned to the bargaining forum for

wage negotiations with the applicant as per paragraph 17.3 above, and at which the respondent has refrained from the conduct stipulated in paragraphs 16.1, 16.2 and 16.3 of this summary dispute."

[5] The applicant contends that the industrial action should be held in abeyance pending the final determination of the dispute by the second respondent. The applicant contends that the first respondent negotiated in bad faith during the salary negotiations for the 2015 year and as such, is guilty of an unfair labour practice. Its case is that the balance of convenience favours it, in as much as the issues pending before the second respondent should be finalised before any industrial action can commence. The first respondent argues firstly that the application lacks urgency. As to the merits, it argues that the industrial action is in compliance with the requirements of the Labour Act and that consequently, the court does not have the power to prevent the members of the first respondent from participating in their anticipated industrial action. Mr Marcus argues that the requirement for trade unions to negotiate in good faith is not a prerequisite as far as industrial action is concerned. He submits that the first respondent complied with all the requirements in Chapter 7 of the Labour Act and could therefore embark on industrial action as a matter of right. Mr Marcus submits that although section 49 (1) (b) of the Labour Act enjoins trade unions not to bargain in bad faith, Section 49 (3) is to the effect that industrial action can take place despite that.

[6] I am persuaded that the applicant has established the case for urgency. The applicant was only advised in 29 May 2015 after the conclusion of the successful ballot that industrial action will commence on 3 June 2015. It would have been fruitless for the applicant to launch any application earlier whilst the issue of the industrial action to be taken was still in the balance. The issues raised on the merits is as I had indicated previously the subject of proceedings pending before the second respondent which requires the second respondent's determination. Section 117 (1) (E) of the Labour Act specifically empowers this court to grant urgent relief including an interdict pending the resolution of disputes in terms of Chapter 8 which the dispute in question is. It is in my view in conformity with the overriding provisions of the Labour Act that disputes in terms of Chapter 8 should be determined as a forum of first instance by the second respondent. See *Namdeb Diamonds*

Corporation vs Bogenfels Namibia and all its members currently on strike in the bogenfels dispute (case no.LC103/2011) which is a judgement by my Brother Mr Justice Smuts. See also the decision in *Haimbili and Another vs Transnamib Holdings Limited and Others*, (case no.LC22/2012) a judgement I had written. It follows as a necessary consequence that this court is now required to express itself on issues which are the subject of proceedings pending before the second respondent, I would therefore refrain from expressing any view on the issues. To do so will entail that I will be assuming the functions of the second respondent who is presently seized with the very same issues.

[7] The only issue which requires my decision is whether the planned industrial action should commence and be allowed to continue while the dispute between the parties before the second respondent remains unresolved. For that purpose it is proper to determine where the balance of convenience lies. As part of the factors taken into consideration in the exercise of my discretion, I conclude that the balance of convenience favours the applicant in as much as the first respondent should not be allowed to now commence industrial action. Conceivably the second respondent may resolve the dispute in favour of the applicant. Such a resolution of the dispute if it so transpires will ring hollow if by that time the industrial action had already commenced and continued. On the other hand, if the dispute is resolved in favour of the first respondent it will be at liberty to commence industrial action, the only real difference being that it will commence at a later date.

[8] In result I make the following orders:

(a) That the applicant's non-compliance with the forms and service as provided for by the Rules of Court is hereby condoned and this application is had as one of urgency as contemplated in terms of the Labour Court Rules 6(24) and (25).

(b) That pending the finalisation of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent's conduct during the 2015 negotiations between the applicant and the first respondent, the first respondent and its office bearers and agents are interdicted and restrained from organising, causing, directing, inviting or

encouraging any of the applicant's employees to embark on any industrial action.

(c) That pending the finalisation of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent's conduct during the 2015 wage negotiations between the applicant and the first respondents, the first respondents members employed by the applicant are interdicted from embarking on any industrial action.

(d) As far as costs are concerned I will not make any order as to costs.

P J MILLER

Acting Judge

APPEARANCES

APPLICANT:	Mr John-Paul Ravenscroft Jones Instructed by Gabriel Francois Kopplinger. Windhoek
RESPONDENT: FIRST RESPONDENT	Mr Nixon Marcus Instructed by The Namibia Financial Institutions Union, Windhoek