When Courts Destroy Workers' Rights

By Herbert Jauch, June 2021

Published in New Era, Windhoek Namibia

It is widely acknowledged that throughout the colonial period, workers in Namibia and elsewhere on the continent bore the brunt of colonial extraction which did not only target Africa's raw materials but also its people as a source of cheap labour. In the Namibian case, this was exemplified by the contract labour system and its dehumanising treatment of black workers. Their crude exploitation paved the way for the accumulation of wealth by a small minority.

With the achievement of independence, there was broad agreement that this was supposed to change as envisaged by the Namibian Constitution, Article 95, which raises the improvement of the welfare of the Namibian people as one of the principles of state policy. The achievement of a living wage is a key aspect mentioned in the article. Subsequently, Namibia's post-colonial labour legislation enshrined basic workers' and trade union rights in the first Labour Act of 1992 and again in the current Labour Act of 2007. Underpinning these laws is the notion of "tripartism" and "social partnership" where the state, business and labour are expected to find negotiated solutions. Accordingly, improved living and working conditions for workers are envisaged to be achieved through strong and representative trade unions which are expected to negotiate with employers through a process of collective bargaining.

The notion of social partnership is an ideological construct and was never based on Namibia's social realities. Low wages, huge levels of unemployment, the informalisation of work and a divided labour movement have characterised Namibia since independence and only a section of workers like those in the public sector, mining, fishing, transport, construction, and retail sectors are fairly well unionised while those in most other economic sectors are not. Even for unionised workers, it has been very difficult to achieve significant improvements of wages and most earn far below what can be considered a living wage. The United Nations' Namibia Human Development Report of 2019 noted that over 75% of employees in Namibia earn less than N$ 1,400 per month!

In light of these grim realities, organised workers have to rely on collective bargaining to achieve improvements in their living and working conditions. This, however, is impossible when employers simply refuse to grant meaningful increases even if they have the money to do so. The case of Shoprite illustrates this point. In such situations, workers are left with no option but to resort to strike action to compel employers to accommodate at least some of their demands. As was pointed out by Judge Collins Parker a strike is "a sharp economic instrument used as a last resort to propel parties to an industrial dispute to come to some agreement at the negotiating

table. It has, therefore, become an indispensable tool in labour relations". As employers already have far more economic power than workers, Judge Parker correctly noted that workers' strikes are essential to bring some equilibrium into the employer-worker relationship.

Namibia's Labour Act explicitly states that during a "protected strike" (meaning a strike which follows negotiations and conciliation and which is in adherence with numerous administrative requirements) employers may not require other employees or hire new employees to do the work of striking workers. This provision is absolutely essential to make any strike action meaningful. Striking workers already lose their pay while being on strike and if employers were allowed to continue to operate by having others do the work of striking staff, the right to strike would be rendered meaningless. It would rob workers of the last weapon they have at their disposal.

It is in this context, that the recent judgement by Judge Schimming-Chase in the case between the Namibia Food and Allied Workers Union (NAFAU) and Lüderitz Spar has to be viewed. Cashiers and other staff went on strike after failed negotiations because the company refused to meaningfully improve their very meagre salaries and benefits. During the strike, Spar supervisors and managers performed the work of striking workers and the union took the company to court for violating the Labour Act.

Based on the letter and spirit of the Labour Act and in light of the crucial importance of the right to strike, the NAFAU-Spar case should have provided the Court with an opportunity to re-affirm this fundamental workers' right. Instead Judge Schimming-Chase openly sided with the employer and basically argued that as long as other staff members do the work of striking staff "voluntarily", they are free to do so!

Courts are meant to be arbiters in labour cases that cannot be solved by workers and employers. They are tasked to uphold fundamental workers' rights in the face of the huge power imbalances stated above. Although judges are not neutral and are themselves shaped by their own world views as well as their privileged position in society, they are expected to at least respect and defend basic rights and to apply some sense of social justice when interpreting the law. In order to maintain some trust in the judiciary, courts ought to consider the rights of workers and the poor in general. This is, after all, a constitutional imperative imposed by Article 95. The judgement in the NAFAU-Spar Lüderitz case clearly failed to do so and constitutes a blatant attack on the right to strike.

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