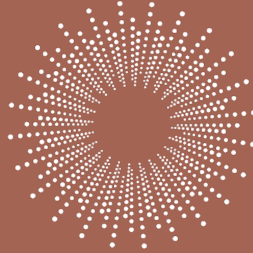


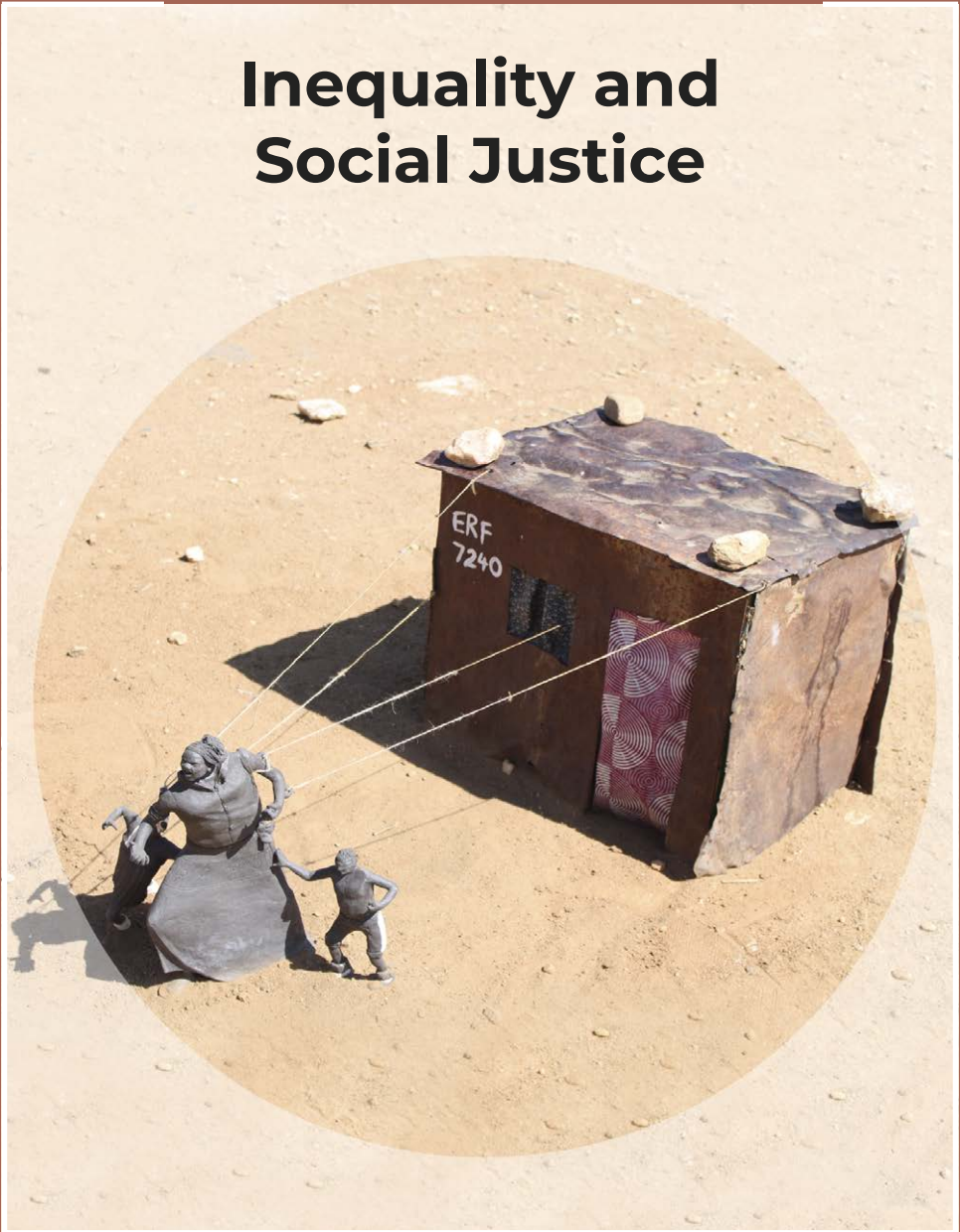
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Inequality and Social Justice



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**FRIEDRICH
EBERT** 
STIFTUNG
Namibia Office

Acronyms and Initialisms

AMCU	Association of Mineworkers and Construction Union
BEPS	base-erosion profit shifting
BIEN	Basic Income Earth Network
BIG	basic income grant
CCN	Council of Churches in Namibia
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CSOs	civil society organisations
DSD	Differences of Sexual Development
ELCN	Evangelical Lutheran Church in Namibia
ELCRN	Evangelical Lutheran Church in the Republic of Namibia
ESOP	Employee Share Ownership Plan
FMS	Finnish Missionary Society
GBV	gender-based violence
GDP	gross domestic product
GEWE	gender equality and women's empowerment
GRB	gender-responsive budgeting
GRN	Government of the Republic of Namibia
HDI	Human Development Index
HTA	Hai om Traditional Authority
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	information and communication technology
IFFs	illicit financial flows
ILO	International Labour Organisation
IMF	International Monetary Fund
IMR	International Mineral Resources
IOC	International Olympic Committee

LMS	London Missionary Society
MAWLR	Ministry of Agriculture, Water and Land Reform
MGEPEWSW	Ministry of Gender Equality, Poverty Eradication and Social Welfare
MGEPEWSW	Ministry of Gender Equality, Poverty Eradication and Social Welfare
MPI	Multidimensional Poverty Index
MPUCT	Madhya Pradesh Unconditional Cash Transfer
MTEF	Medium-Term Expenditure Framework
NLF	Namibia Labour Force
NNSCH	Namibian Senior Secondary Certificate Higher-level
NPC	National Planning Commission
NSA	Namibia Statistics Agency
NSSCH	Namibian Senior Secondary Certificate Higher
OECD	Organisation for Economic Cooperation and Development
PDS	Public Distribution System
PIT	personal income tax
RMS	Rhenish Missionary Society
SADC	Southern African Development Community
SEM	structural equation modelling
SEWA	Self-Employed Women’s Association
TAA	Traditional Authorities Act (No. 25 of 2000)
TVUCT	Tribal Village Unconditional Cash Transfer
UCT	unconditional cash transfer
VAT	value added tax
WHO	World Health Organization
WMMS	Wesleyan Methodist Missionary Society
WSWB	willing-seller-willing-buyer

Opinion Piece

From Collective Bargaining to Collective Begging: Namibia’s Supreme Court Undermines the Right to Strike

Nixon Marcus

On 23 December 2020, more than 2 000 Shoprite workers went on strike, demanding better salaries and improved working conditions. Temporary workers, some of whom had been employed for more than 10 years, were paid between N\$1 200 and N\$1 600 per month. Permanent workers were paid between N\$2 000 and N\$3 000 per

month. Shoprite, which boasted a net cash position of N\$ 10 billion that year, flatly rejected the workers’ demands, saying that it is not part of its culture and practice to pay transport and housing allowances to its workers.

Shortly before the strike commenced, Shoprite recruited so-called “fixed-



Photo: Herbert Jauch

term” employees. These workers, with no job description, could be assigned to do any work in a shop whenever a need arose. The need of course arose when the strike commenced and many duty stations were left vacant by the striking workers.

After the strike commenced, it soon became clear that the Shoprite outlets continued to operate. Inspections conducted at shops in Windhoek revealed that 95% of the workers found doing the work of the striking workers were fixed-term employees recruited before the strike. The Namibia Food and Allied Workers Union, the recognised union, instituted legal action on behalf of the workers to stop Shoprite from requiring and allowing the fixed-term employees to do the work of the striking workers.

The union argued that Shoprite’s actions undermined the strike and their bargaining power. It argued that the right to strike is constitutionally protected; that the workers had by virtue of their economic position less bargaining power during negotiations; that the breach of the strike rules and the Labour Act was exacerbated by the “no work–no pay” principle; that the workers’ right to withhold labour was rendered ineffective by the breach of the strike rules; and that under the circumstances there was no hope of forcing Shoprite back to the negotiating table.

Labour court ruling

The Labour Court, in what must be one of the most progressive judgments on workers’ rights in Namibia to date, agreed with the workers. In its ruling of 8 January 2021, the court accepted that Shoprite has a duty not to prevent or undermine the strike. Most importantly, the court observed that Shoprite has a positive obligation to ensure that freedom of association is “protected and fulfilled”. The court ordered Shoprite to stop requiring or permitting non-striking workers to perform the work of the striking workers. The effect of the Labour Court’s judgment was to give substantive meaning to a constitutional right. Rights, and especially constitutional rights, are meaningless if they do not change the social and material conditions of people who have borne and continue to bear the brunt of capitalist and racist exploitation.

The Reversal by the Supreme Court

In a devastating setback for the workers, the Supreme Court reversed the judgment of the Labour Court on 26 April 2022. It did so by skilfully using the tools of legal formalism to push back on the right of workers to strike. The court consciously decided to side with the interests of capital and turned the case on its head. It framed the case as being about the “rights of employers during a strike”. This is

startling, because it was the workers who brought the case to vindicate their rights. Picture a child running to a teacher for protection against a playground bully, and the teacher in resolving the fight tells the child that the fight concerns the rights of the bully during the fight.

Having framed the dispute as being about the rights of the employer, there could only be one outcome. The Supreme Court said that the restriction on the employer to recruit scab labour in section 76(3) of the Labour Act³⁹ goes “considerably” further than the right to strike and freedom of association. It said that the proscription on hiring scab labour is not part and parcel of these constitutionally entrenched rights. The court never explained the basis for this statement.

Having skilfully dissected s 76(3) from its constitutional roots, the road was clear to limit the section’s operation in favour of business rights. The court said the section must be strictly interpreted, because it restricts the employer’s freedom of contract and its right to carry on a trade or business protected by Art 21(1)(j) of the Constitution.

The court also applied a restrictive interpretation to the word “require” used in s 76(3). It did so by limiting it only to situations where the employer “compels”, “insists” or “instructs” employees to do the work of the striking employees. The court said that the word “require” does not include “permit” and “allow” as the Labour Court had found. In other words, an employer’s duty does not extend to ensuring that the right to strike is “protected and fulfilled”.

The Supreme Court then effectively put the nail in the coffin as far as the right to strike is concerned. It said that, given the absence of an obligation on the part of the employer to ensure that the right to strike is realised, s 76(3) allows non-striking employees to “volunteer” to do the work of the striking workers.

Ignoring Power Imbalances

The Supreme Court posits workers as autonomous individuals, who are free to consent or decline to perform the work of the striking workers. This is of course fictitious: it was done to cement the power of capital during collective bargaining. The court chose to ignore that the relationship between the workers and Shoprite is characterised by a huge power imbalance. Against the backdrop of the huge levels of unemployment and poverty in the country, workers are compelled to

³⁹ The section states that during a protected strike, an employer must not require a non-striking employee to do the work of striking employee and that an employer must not hire any individual to do the work of striking workers.

accept any conditions set by Shoprite. How many of the fixed term employees could really decline to perform the work of the striking workers without risking dismissal by Shoprite?

By introducing the notion of ‘consent’ in the context of a strike, the court adopted a standard that, in criminal law, is wholly inapposite in the context of the crime of rape and the rights of complainants. The criminal law has undergone a fundamental shift, replacing ‘absence of consent’ with ‘presence of coercive circumstances’ in the definition of rape. In so doing, the law acknowledges that, in situations where there is a power imbalance, the conditions for meaningful consent do not exist. The law permits the circumstances of the alleged rape to be examined within the existing power inequities. It recognises that “consent can only have meaning within a context where dissent and refusal are real possibilities” (Du Toit, 2012).

By recognising ‘consent’ on the part of workers, the court did a lot of harm to their rights. In any litigation the attention will shift from the actions of the employer in undermining the strike, to examining the existence or absence of consent by the workers. Silence might be interpreted as consent. The onus to clearly voice dissent will be put on the non-striking workers. Striking

workers will be required to prove the absence of consent, something which is very difficult to prove once the employer submits claims to that effect.

Nothing stops the employers from overtly or covertly enticing non-striking workers to “volunteer” to do the work of the striking workers. Not only will this cause further divisions between the workers, but importantly, the effectiveness of strike action will be reduced or obliterated. This was already the case in *Namibia Food and Allied Workers Union vs Lüderitz Spar* (2021), where the employer argued that the employees volunteered to do the work of the striking workers. In that case the strike was ineffective, because the “volunteering” employees did the work of the striking workers. The Supreme Court has now entrenched this position, effectively destroying the right to strike as the last economic tool available to workers in their struggle against far more powerful employers.

More Exploitation and Poverty

The prospects for organised workers to improve their living and working conditions through collective bargaining are dim, and we can expect more and more workers to fall into the abyss of poverty. In the shadow of the Supreme Court’s judgment, collective begging for a better life will be the order

of the day for the impoverished masses, with no realistic chance of improving their living conditions.

The Supreme Court's decision to side with capital was a conscious one. The court did this in the face of the exploitation of the workers, despite being reminded that this exploitation has its roots in the shameful colonial and racist history of the country. The court gave no consideration to the poverty of the workers, brought about by the slave-like wages paid by Shoprite. There was no consideration of the existing power relations, or whether 'consent' and 'dissent' are viable options. The court's insensitivity to the plight of the workers exhibits an anaemic sense of social and restorative justice (for a general discussion, see Modiri (2012)).

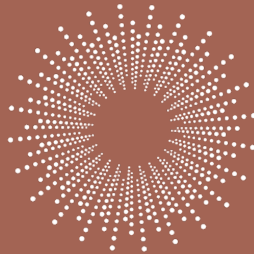
The Supreme Court chose to protect and maintain existing power relations. In so doing it perpetuates the historically derived mistreatment and exploitation of black workers, the majority of whom in many cases are women.

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