NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

NO D336/2000

2000/06/29

In the matter between:

HORSPERSA & OTHERS Applicants

and

THE MEMBERS OF THE EXECUTIVE COUNCIL
Respondents

***EX TEMPORE* JUDGMENT DELIVERED BY**
THE HONOURABLE MR ACTING JUSTICE VAN NIEKERK
ON 29 JUNE 2000

ON BEHALF OF APPLICANTS MR SEGGIE

ON BEHALF OF RESPONDENTS MR MKHIZE

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

VAN NIEKERK J

1] This is an application for urgent relief in terms of Prayers A, B, C and D of the Notice of Motion at pages 1 and 2 of the papers in front of me. The background to the dispute between the applicants, who are X-ray clerks at King Edward VIII Hospital and the management of that hospital, is set out in paragraph 5 of the founding affidavit. It is briefly this.

2] It appears that there has been a policy dating back some time that X-ray clerks commencing work with the hospital perform rotational shift duties and progress to non-rotational shift duties on a seniority basis as and when vacancies occur. These clerks who reach seniority are referred to as non-rotational clerks.

3] Although the background to this dispute has been disputed in paragraph 14 of the answering affidavit, I have concluded that there is no real or material dispute between the parties as there is ample evidence that such a practice previously existed. In regard to what constitutes a real or material dispute see *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155(T).

4] Mr **Seggie**, who represented the applicants, referred me to two documents in support of his contention that there was no real dispute, those being pages 33 and 34 to the application, which do seem to indicate that there was a change in the regime regarding X-ray clerks.

5] A decision was taken by the management of the hospital to require all X-ray clerks, including non-rotational clerks, to perform rotational duties, that is to include all of them in night-shift duties. A dispute regarding this decision was declared on 15 March 1999. In this regard I refer to paragraphs 5.7 and 5.8 of the founding

affidavit.

6] Matters were brought to a head in June 1999 when disciplinary proceedings were instituted against the applicants. These disciplinary proceedings have been protracted and were due to continue on 24 March 2000, but did not because of this application which was launched on 22 March 2000. The dispute has persisted and management of the hospital has threatened to implement a new roster system, making it compulsory for all X-ray clerks to perform rotational duties. It has threatened to send the applicants on leave without pay. It has threatened to suspend the applicants without pay and it has threatened to deprive the applicants of remuneration due to them. It has also threatened to press further charges against the applicants. All of this in an attempt to enforce the new rotational programme and enforce the night-shift duties which the applicants, I understand, refuse to do.

7] It is for these reasons that the applicants have sought the relief set out in the Notice of Motion.

8] It is common cause that the applicants are employed in an essential service as defined in section 213 of the Labour Relations Act. That much was conceded by Mr **Mkhize**, who represented the first and second respondents. There can, in my view, be little doubt that the change in the working system implementing night-shift duties is a unilateral change in the conditions of service, falling well outside of the so-called managerial prerogative.

9] The dispute must therefore, be dealt with in terms of section 74 of the Labour Relations Act 1995. That this is correct is borne out by the first and second respondents' own conduct which is reflected in paragraph 5.9 of the founding affidavit:

"Ultimately the matter was raised by our employer as a collective issue and debated in the Health Chamber."

10] I understand from counsel representing the parties that the Health Chamber is considered to be a Bargaining Council. It is important to note that the above quoted sentence is not disputed in the answering affidavit.

11] The first and second respondents therefore themselves considered the matter to constitute a collective issue and considered it necessary to be dealt with in accordance with the provisions of section 74.

12] Mr **Mkhize** argued that section 74 is not applicable to this case because it is applicable to collective disputes only. He also argued that in any event the referral of the dispute to the Health Chamber has been abandoned.

13] Mr **Mkhize**'s first submission is not borne out by the first and second respondents' conduct which I have referred to and quoted in my judgment above. He could also not refer me to any authority for the proposition that section 74 is not applicable to disputes other than collective disputes. On my reading of section 74, it is not exclusive to collective disputes and is inclusive of individual disputes. I point out, however, that if this dispute can be categorised as anything, it is rather a collective than an individual dispute.

14] As to Mr **Mkhize**'s second contention, there is also no evidence before me, as he rightly had to concede, that the proceedings have been abandoned in the Health Chamber. Even if they have not been dealt with for a period of some eighteen months, that does

not mean that the proceedings have been abandoned.

15] I am therefore satisfied that a proper case has been made out for the relief sought. I should point out that the relief that is sought in the Notice of Motion also includes an order interdicting the first and second respondents from taking disciplinary measures against the applicants. Mr **Mkhize** pointed out that this Court is loathe to interfere with disciplinary proceedings instituted by employers. That of course is correct. See *University of the Western Cape Academic Staff Union v University of the Western Cape* (1999) 20 ILJ 1300 (LC). That does not mean, however, that in suitable cases the Court should not intervene to prevent prejudice or unfairness occurring. It appears to me that the disciplinary proceedings have so far been used to pressurise the applicants into complying with the demands of the first and second respondents. I therefore consider this to be an exceptional case in which the Court will be willing to make an order intervening pending the outcome of section 74 proceedings.

16] I therefore make the following order:

1. Declaring that the first respondent may not unilaterally change the terms and conditions of the employment of the second to seventh applicants by requiring them to work according to a roster system until the dispute has been determined in terms of section 74 of the Labour Relations Act 1995;

2. Interdicting the first and second respondents from either suspending the applicants without pay or requiring them to take unpaid leave because of their refusal to work according to the roster system pending the outcome of the proceedings in terms of section 74;

3. Interdicting the first and second respondents from taking disciplinary measures against the applicants for their refusal to work according to the roster system until the dispute has been disposed of in terms of section 74;

4. Interdicting the first and second respondents from making any deductions from the applicants' salaries due to their refusal to work according to the roster system pending the outcome of the proceedings in terms of section 74;

5. Ordering the first respondent to pay the costs of this application.

G.O. VAN NIEKERK S.C.
Acting Judge