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IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPETOWN

C 472/08
REPORTABLE

In the matter between:

South African Municipal Workers Union	Applicant
And	
City of Cape Town	First Respondent
S.A Local Government, Bargaining Council	Second Respondent
Hilary Mofsowitz (N.O)	Third Respondent

JUDGMENT

CELE J

INTRODUCTION

[1] No work, no pay, no benefits leads to a leave of absence without pay. What then is the impact, if any, of this principle to the employer portion of the payments to medical aid, pension fund, housing subsidy and group life insurance pro rata to the number of days of such absence?

Background facts

[2] As part of their terms and conditions of employment, the employees of the first respondent and therefore members of the applicant are entitled to receive the employer contributions to various benefits such as medical aid, pension fund, housing subsidy and group life insurance. This entitlement is specifically provided for in the framework agreement on conditions of service and service benefits for employees in the City of Cape Town, which was a valid and operative collective agreement of the parties in 2005.

[3] The Corporate Systems and Support Services within the Human Resources Directorate of the first respondent prepared a report dated 20 May 2004 pertaining to the creation of a standard and uniform unpaid leave policy for presentation to the City Manager. At that time, management of the third respondent did not have a consistent practice on how to handle cases of employees who went on unpaid leave. In some cases payments towards benefit schemes were pro rated according to the days of absence while in others, full contributions by the employer were paid.

[4] Under background and discussion the report then reads:

"In considering this matter the general rule and benchmark practice to be followed is: "No work, no pay and no benefits". As the employee on unpaid leave will be paid pro rata relative to the time worked, the same should apply to contributions to benefit schemes and allowances. This means that pro rating should in principle apply to all benefits and benefit schemes during a period of unpaid leave. Current policies and conditions provide for different periods regarding pro rating of benefits. Pro rating is in terms of the current policies and conditions not applied from day one but start after 14 consecutive days for the Cape Town administration, 30 days for the CMC and 15 days for the other administrations.

The view is that pro rata payment should commence from day one. There is no substantive reason why council should continue to pay benefits for an initial period of unpaid leave. In addition to this cognizance should also be taken of the fact that the SAP system has s standard way for managing unpaid periods namely that earnings and deductions can be set to pro rate or not to pro rate. Standardization of unpaid leave policies and conditions will thus also benefit the SAP system and reduce administrative costs"

[5] Continuous engagement took place between the first respondent and the Municipal Trade Unions operating in its workplace over the policy "no work, no pay, and no benefits." In July 2005 a number of employees belonging to the applicant embarked on a protected strike for three days. The first respondent opted not to pay the employer portion of the payments to the medical aid scheme, pension fund, housing subsidy and group life insurance pro rated to the number of days that the employees were on strike. It regarded such three

days strikes as unpaid leave and it required the striking employees to pay both the employer and the employee contributions in respect of such benefits.

[6] During or about August 2005 there developed a dispute between the first respondent and the applicant regarding the implementation of the policy "no work, no pay, no benefits". The applicant referred the dispute to the second respondent for conciliation. It described the dispute as one of unfair labour practice pertaining to benefits as envisaged in section 186 (2) (a) of the Labour Relations Act 66 of 1995 ("the Act"). It sought an order compelling the first respondent to pay to the affected employees, the monetary value of the benefit contributions they had lost. In October 2005 the first respondent decided to suspend the implementation of its policy. It then issued a letter dated 5 October 2005 which it addressed to the second respondent. The portion of the letter which deals with deductions when an employee is on unpaid leave reads:

> "After thorough consideration of challenges faced by the parties in the implementation of the aforementioned policy, the city has taken a decision to suspend the policy with effect from 1 October 2005. The provisions of the BCEA shall be used to regulate the unpaid leave dispensation until a policy is put in place."

[7] The concerns expressed by the applicant were three-fold, that:

- the contributions to the benefits were not appropriately to be regarded as renumination for purposes of "no work, no pay",
- the policy would adversely affect the right of its members to take part in a strike,
- the withholding of contributions could lead to policies being cancelled or other adverse actions in respect of individual employees.

[8] The dispute was not capable of a resolution at conciliation, whereafter it was referred to arbitration. The third respondent was appointed to arbitrate it. The first respondent raised two points *in limine*, namely,

- the second respondent lacked jurisdiction to hear the matter as the amounts withheld constituted remuneration and not benefits as defined. It contended that it was entitled to withhold the amounts in question by virtue of the provision of the BCEA which defines remuneration to include the amounts subjected to the applicant's complaint.

- the first respondent was under no legal obligation to provide these amounts during the strike action or unpaid leave.

[9] The third respondent found that the second respondent (Bargaining Council) had jurisdiction to hear the matter. She however found that there was no unfair labour practice committed by the first respondent in relation to benefits.

The review application

[10] The applicant felt aggrieved by the finding that no unfair labour practice had been committed by the first respondent. It then initiated the present application in which it seeks to be granted an order in the following terms:

1. That the arbitration award made by the third respondent on 5 June 2005 under case number WCM 020703 be reviewed and set aside.
2. That the aforesaid award be corrected, alternatively substituted to cure the defects alleged by the applicant.
3. In the alternative to paragraph 2 above, that the dispute be remitted to the second respondent to be heard by an arbitrator other than the third respondent.
4. That such respondent (s) who opposed the application be ordered to pay the costs of this application.

The arbitration hearing

[11] The matter was referred to arbitration as an unfair labour practice in terms of section 186 (2) (a), as an act or omission that arose between an employer and employees involving an unfair conduct by the employer relating to the provision of benefits to its employees. The relief sought was that employees should receive unpaid leave benefits while they were on unpaid leave, in terms of the conditions of service, which the first respondent was said to have changed unilaterally.

[12] By agreement of the parties no oral evidence was adduced by either party. A bundle of documents was handed in by the first respondent and some documents were handed in by the applicant which included a pay slip of one of its members, a Mr Rabie. Parties then presented their oral and written submissions.

[13] It remained common cause between the parties that employees of the first respondent, including members of the applicant, qualified for benefits in terms of either national and/or local conditions of service to which the first respondent was contributing, being:

(a) The two National Conditions of Service Collective Agreements in operation since 1 January 2004 providing for:

- housing subsidies/ home owners allowance;
- medical and benefits;
- retirement / pension fund (subject to collective bargaining at national level only)

(b) The Local Conditions of Service being:

- group life insurance and
- post retirement medical aid subsidy.

[14] Mr Rabie's pay slip showed that the first respondent had withheld a three day pay and had withheld its pro rata contribution, also for the three days to the benefits which he was at the time receiving, due to his participation in a three days strike of July 2005.

The chief findings by the third respondent

[15] The third respondent made the following findings:

> "I have considered the parties submissions on jurisdiction. While the dispute appears to have elements of both remuneration and benefits, I am persuaded that it is more a dispute around employee benefits (in the traditional meaning of the term benefits), as it goes further than mere remuneration.

Therefore I find that the SALGBC has jurisdiction to arbitrate the dispute as the dispute concerns an allegation of unfair labour practice in relation to benefits.

With regard to fairness, Applicant bears the onus to show that the conduct of the employer was unreasonable, capricious and unfair.

I have considered that the "no work, no pay, no benefits" principle is reasonable and that the employer's obligation to pay benefits (during any period of unpaid leave) may be suspended. While in certain circumstances this may be fair, in other circumstances, it may not be.

There appears to be a wide disparity between the different benefits that form part of this dispute. Some linked to savings, while others to insurance and therefore the nature (and character) of the dispute will differ.

I therefore am unable to make a decision on a group basis as each individual case may differ.

Unfairness must be grounded on a factual basis. There was no objective evidence to show how an individual applicant would be adversely affected by the City's conduct. While there may be a subjective perception of unfairness, I am of the opinion that the onus to show unfair conduct (in terms of the unfair labour practice provision) has not been discharged. Applicant has not discharged the subjective test to show unfairness.

Accordingly, I have not found the City's conduct to be unfair or that the City committed an unfair labour practice."

Grounds for review

[16] The applicant submitted at arbitration that the non payment of pro rata share by the first respondent would have prejudicial effects in that it would:

(a) result in the interruption of medical aid;

(b) also result in employees receiving disproportionately less pension benefits on retirement as non payment of contribution would only be magnified by the growth that those contributions would have over time.

[17] The effect of the prejudice on the general or group level is that it would unduly limit the right of SAMWU'S members to take part in strikes as they would be dissuaded from exercising this right. On the individual level there was the unchallenged evidence of the profound effect the deduction of contributions had on Mr Rabie as an individual employee. There was thus a very real distinction between "no work, no pay" and "no work, no benefits" The only submission made by the first respondent was that the contributions were part of "remuneration" and were thus not subject to the jurisdiction conferred by section 186 (2) (a) of the Act when read with section 21 of the Basic Conditions

of Employment Act and regulations 691 dated 23 May 2003. There was accordingly no rebuttal tendered by the first respondent as to why its conduct was not unfair as alleged by the applicant. In the light thereof, the only reasonable conclusions that the third respondent could have reached were that:

(1) The deductions, not forming part of remuneration, were benefits.

(2) There was no basis in law for the first respondent to unilaterally withhold these, either due to a strike or otherwise, so long as the employees' absence from work was lawful.

(3) There was prejudice generally as well as specifically.

(4) That the first respondent's conduct was accordingly unfair.

[18] The third respondent's findings to the contrary are not only unreasonable, but are also legally indefensible. It must simple follow that if the first respondent had no basis in law to withhold the benefit contributions, it acted unfairly and unlawfully with the consequence that the award stands to be set aside on review.

Submissions by parties

Applicant's submissions

[19] It is common cause that all of the first respondent's employees must belong to a medical aid and pension fund. Further, the employees were entitled to the benefits as of right in terms of their conditions of service. Therefore when taking into account the general and specific prejudice to be suffered by applicant's members, it was not required that direct evidence be led.

[20] It must equally be common cause that any failure to make contributions to those benefits would result, at the very least to a diminution in the benefits to those employees. That much is inherent in the nature of the benefits themselves. This aside from the fact that an employee engaged in a strike would potentially receive no medical aid cover due to non-payment of premiums.

[21] On the individual level the applicant tendered into evidence the pay slip of Mr Rabie, from this pay slip it would have been readily apparent that Mr Rabie would have received a substantial loss of benefits during the course of the strike and unpaid leave. In contrast, no evidence was presented by the first respondent to rebut the version that the policy of "no work, no pay, and no benefits" was fair or operationally justifiable. There was thus no basis for the third respondent to have

concluded that the policy or conduct of the first respondent was reasonable.

[22] In the context of the above and the rules of evidence, the only reasonable conclusion that the third respondent could have arrived at, was that the conduct of the first respondent was unfair, she having already concluded that the dispute was one pertaining to benefits. Put differently, given that the absence of the employees was lawful (either because of a protected strike or authorized unpaid leave) there was no basis for the first respondent to refuse to provide the benefits.

The first respondent's submissions

[23] During 2004 the first respondent drafted a policy to standardise the regulation of unfair leave as it did not have a uniform policy and the collective agreements did not regulate the issue. First the respondent informed the applicant in writing on 5 October 2005 that with effect from 1 October 2005 the proposed policy of no work, no pay, no benefits, would be suspended and that the provisions of the Basic Conditions of Employment Act would be used to regulate the unpaid leave dispensation until a policy was in place. As a consequence, the first respondent dealt with the applicant's members and the rest of its employees in terms of the provisions of the Basic Conditions of Employment Act and not in terms of the proposed policy in relation to unpaid leave. The third respondent correctly considered that the first

respondent applied the legislative requirements to determine the value of leave for the purpose of unpaid leave.

[24] The applicant contended that the first respondent's conduct was unfair at a general and an individual level, resulting in the interruption of medical aid cover and the applicant's members receiving disproportionately less pension benefits. This contention was not supported by any evidence and moreover the applicant failed to demonstrate why the first respondent's practice of "no work, no pay, and no benefits" was unlawful or unfair.

[25] The applicant handed into evidence the pay slip of Mr Rabie. This pay slip showed that the first respondent did not withhold any benefits from him and that, all that happened was that he was required to pay the first respondent's benefit contribution on a pro rata basis for the days that he participated in the strike. The third respondent's finding that there was no objective evidence to show how an individual applicant would be adversely affected by the first respondent's conduct was accordingly correct.

[26] The first respondent stated in its closing argument during the arbitration hearing that its conduct was not unfair. It motivated its contention by submitting that it had applied the provisions of the Basic Conditions of Employment Act due to the fact that the

collective agreements operating between the parties did not deal with unpaid leave.

[27] During the period when the applicant's members embarked on a protected strike, there is no legal obligation to remunerate striking employees which by implication includes all employer payments in relation to benefit contributions.

[28] The third respondent's finding that the first respondent did not commit an unfair labour practice is not one that a reasonable decision maker could not reach. Further, the award does not stand to be substituted as the applicant has not made out a proper case in that the applicant has not placed sufficient evidence before court meriting such substitution with the court's own decision.

Analysis

[29] The record of the arbitration hearing shows that parties deliberated only on whether or not the second respondent had jurisdiction to entertain the dispute between them. The first respondent took a lead in presenting its case because it is the one that raised the jurisdictional issue. The third respondent pointed out to the parties that once the jurisdictional issue was dealt with, the applicant would take a lead in presenting its case on the alleged unfair labour practice issue. However, at the end of the arbitration hearing, the third respondent placed it on

record that the parties had agreed to submit arguments on the merits of the dispute, in writing. It is difficult to understand why the parties, and more so, the applicant, adopted this procedure. The applicant had referred an unfair labour practice dispute for arbitration, which entailed the leading of evidence, instead, the applicant was a party to a procedure which denied it the very hearing for which the dispute was referred. The consequence is that no evidence was led on how the first respondent committed an unfair labour practice against its members. Recourse can only then be had to the written closing submissions they made together with those documents which the parties presented during their opening addresses and the arguments they made in relation to the issue of jurisdiction.

[30] While different cases will possibly require different procedures when a litigant has raised the question of whether the bargaining council or the commission has or does not have jurisdiction to hear a dispute, in this matter it was expedient for the third respondent to have first considered the jurisdictional issue before inviting the parties to be heard on the main issue. She chose not to follow that route. The parties agreed with the manner that she considered appropriate in order to determine the dispute fairly and quickly.

[31] Where employees embark on a protected strike and the first respondent reciprocates with a policy "no work, no pay", the applicant has no problem. A weekly paid employee, who

participates in a protected strike which takes, say 3 to 5 weeks, will then be without a pay for 3 to five weeks. Surely, having no salary for 3 to 5 weeks would have prejudicial effects on the livelihood of such an employee. When the strike is finally over, the employee might not even have money to come to work, to tender his or her services. Surely, the effect of the prejudice on the general or group level is that it would unduly limit the right of union members to take part in strikes and the members may be dissuaded thereby, from exercising a right to strike.

[32] I have found it difficult to construe a rationale for the prejudicial effect if the employer withholds the pro rata share contributions in respect of benefits, which is different to the withholding of remuneration. Mr Rabie's pay slip shows no more than the reality of the none contribution of the employer's pro rata share to benefits in the same manner as would be shown when remuneration is withheld.

[33] I am accordingly in agreement with the third respondent that the applicant has not shown how the first respondent committed an unfair labour practice. It has always been common cause between the parties that no collective agreement existed between them to regulate whether the first respondent is entitled to withhold its share of contribution to the benefits of its employees during their unpaid leave. The applicant has not shown anything which made it an unfair labour practice for the first respondent to rely on the provisions of the Basic Conditions

of Employment Act. Therefore the impact of the policy "no work, no pay, no benefits" has no bearing on the alleged commission of the unfair labour practice in this matter. The award issued by the third respondent is accordingly reasonable.

[35] The following order consequently falls to be made:

1. The application to review, set aside and/or correct an arbitration award dated 5 June 2005, issued by the third respondent, in this matter is dismissed.

2. No costs order is made.

Cele J

Appearances

For the Applicant: Jason Whyte- Cheadle Thompson & Haysom Inc.

For the respondent: Herman Nieuwoudt – Deneys Reitz Inc.

Date of hearing: 12 March 2009

Date of judgment: 27 August 2009