IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J2386/08

In the matter between:

DEMOCRATIC NURSING	
ORGANIZATION OF SOUTH AFRICA	1ST APPLICANT
HEALTH AND OTHER SERVICE	
PERSONNEL TRADE UNION	
OF SOUTH AFRICA	2ND APPLICANT
AND	
THE DIRECTOR GENERAL	
DEPARTMENT OF HEALTH	1ST RESPONDENT
THE MEC FOR HEALTH	
NORTH WEST PROVINCE	2ND RESPONDENT
THE MEC FOR HEALTH	
NORTHERN CAPE PROVINCE	3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an urgent application in terms of which the applicants seek an order placing the respondents in contempt for their non-compliance with the Order of Court, granted by the Honourable Judge Ngalwana on the 15 November 2008.

The applicants further pray that the respondents be ordered to pay a fine in an amount deemed appropriate by this Court, or be committed to prison.

[2] The relevant parts of the Court order referred to above reads as follows:

> *"1. Pending the finalisation of the dispute currently pending at the PHWSBC (sic) and which was referred on 15 October 2008, the following order is made:*
>
> *1.1 This Court dispensed with the requirements and time periods provided for in Rule 8 of the Labour Court Rules and this application is heard in an urgent basis;*
>
> *1.2 The Respondents are interdicted and restrained from deducting any amounts from the remuneration of the Applicants' members in respect of alleged overpayments arising from an allegedly erroneous implementation of the Occupational Specific Dispensation for Nurses ("OSD") agreement;*
>
> *1.3 The Respondents are ordered further to repay any amounts deducted from the remuneration of the Applicants' members in respect of alleged OSD over payments."*

[3] The issue that led the applicants to approach the Court to obtain the above order arose from the dispute regarding the implementation of the Occupational Specific Dispensation (OSD) for nurses recorded in resolution 3 of 2000, of the PHSDSBC. The purpose of the OSD agreement was to give effect to the determination of the directive issued by the Minister for the Public Service and

Administration issued in terms of section 3(3) of the Public Service Act 103 of 1994 read with the Public Service Regulations of 2001.

[4] In terms of paragraph 6 of the OSD agreement any dispute about interpretation or application of the agreement should be dealt with according the dispute procedure of the PHSDSBC. Schedule 2 of the Dispute Procedures, gives the PHSDSBC the power and authority to deal with interpretation and application of any collective bargaining agreement concluded by the parties to the PHSDSBC.

[5] It is common cause that the OSD was implemented on 1 July 2007, and soon thereafter a dispute arose between the parties regarding its implementation. The dispute arose due to an alleged error on the part of the respondents in the translation in that certain categories of nurses were over paid. The respondents demanded that those nurses who were overpaid should either repay in lump sum or by monthly instalments. It would appear that attempts to resolve the issue having failed the respondents proceeded to deduct the overpayment from the affected nurses' bonuses.

[6] Arising from the above, the applicants referred the dispute to the PHSDSBC concerning the application and interpretation of the OSD and also sought an urgent interdict restraining the respondents from continuing with the deductions and repaying those nurses from whose salaries deductions had already been effected. I have already referred to and quoted in full the order which the Court made arising from the said urgent application by the applicants.

[7] Subsequent to the Court order, the state attorney addressed a letter to the applicant in which it would appear the respondent intended to challenge the order. The letter reads as follows:

> *"1.…*
>
> *2. Kindly take notice that the respondents intent to apply for the reconsideration of the matter.*
>
> *3. This letter does not serve as a notice.*
>
> *4. A proper notice will be served on you. " (Sic)*

[8] The first applicant contacted the second respondent on the 24th November 2008, because of the number of telephone queries it had received from its members indicating that they had not received any payment in terms of the Court order. It became apparent during the telephone conversation that the second respondent was not aware of the Court order. The applicant then addressed a letter to the second respondent and attached thereto the Court order.

[9] The first applicant further contended that despite forwarding the Court order to the second respondent it received no indication of the intention on the part of the respondent to implement the Court order. It was for this reason that the first applicant enquired from the State Attorney via an email as to what the intention of the first respondent was in relation to implementing the Court order. The State Attorney responded by indicating that the applicant's enquiry had been forwarded to the first respondent for instructions.

[10] It was on the basis of the above that the applicants felt the need to approach the Court on an urgent basis to seek the relief set out in the notice of motion. In its founding affidavit the applicant set out the grounds for urgency as follows:

> *"13 Due to the fact that the Respondents were represented at the proceedings on the 15th of November 2008 and their attorney of record was present when the Order was granted,* **… .**
>
> *14. On the 17th of November 2008, the Respondents' representative indicated that they are not satisfied with the said Court Order, and they intended to apply for "reconsideration", and that a proper notice would be served.*
>
> *15. We thus awaited proper notice from the Respondents' representative with regards to the process they intended to follow, but none was forthcoming."*

[11] It is further stated in the founding affidavit and as concerning urgency that:

> *"20. The next payment date will be the 15th of December 2008, and thus the members of the Applicant will be severely prejudiced if the necessary relief is not granted, as further deductions will probably be made, and their financial detriment will increase radically."*

[12] It would also seem that from the applicant's perspective the urgency arose because of failure by the first respondent to respond to its letter dated 5th December 2008, the contents of which read as follow:

> "*In the light of the above, as well as the fact that the next payment-run is scheduled for the 15 December 2008, we herewith urgently* ***and before***

10h00 on even date *request you to inform our office* ***in writing*** *of your client's intention to comply with the order or not."*

[13] It is common cause that the dispute referred to in the Court order was scheduled for conciliation by the PHSDSBC on 5th December 2008. At the conciliation the respondents raised a point in limine concerning the jurisdiction of the PHSDSBC to entertain the dispute. The commissioner ruled after considering the point in limine that the PHSDSBC did not have jurisdiction to entertain the disputes because the applicant had failed to comply with rules of the PHSDSBC.

Analysis

[14] In contempt proceedings the applicant must show that both the Court order and the contempt application have been served on the individual who is responsible for the implementation of the Court order. This is important because the consequences of the contempt proceedings are that an individual's liberty maybe restricted. It is for this reason that I find this application to be fatally defective in that the applicants have failed to show that the application was served on individuals responsible for the implementation of the Court order in their personal capacity for the purposes of the contempt proceedings.

[15] The application further stands to fail on the ground that the applicant has failed demonstrate the existence of urgency. In *Hultzer v Standard Bank of South Africa (Pty) Ltd [1999] 8 BLLR 809 (LC), at para [13],* the Court held that financial hardship or loss of income is not regarded as a ground for urgency. The Court arrived at this conclusion following the earlier decision in *University of*

the Western Cape Academic Staff & others v University of the Western Cape (1999) 20 ILJ 1300 (LC) at para [17] where the Court in that case held that:

> "*17 With regard to the notion of irreparable harm it needs to be mentioned that loss of income as a result of dismissal is the inevitable consequence and as such provides no good ground for the granting of urgent interim relief. Special circumstances must be advanced to persuade a court to oblige* **…** *In considering the issue of irreparable harm the court will also consider the adequacy or not of any alternative remedy that may be available."*

[16] The Court in *Malatji v University of the North [2003] ZALC 32 (LC)* and following the decision in *National Sorghjum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO & Ander (1990) 11 ILJ 971 (T)*, held that in general, financial hardship and loss of income are not considered to be grounds for urgent relief. In order to succeed when reliance is based on financial hardship, *exceptional* circumstances must be shown before urgent interim relief can be granted.

[17] The grounds of urgency as formulated by the applicant in the *Malatji's* case are instructive, regard also being had to the reason for the dismissal of the application. In that case the applicant's case rested upon the financial need of the applicant related to the termination of medical aid cover because the respondent had stopped paying her salary. At the time of the termination of her salary the applicant required constant medical treatment. The applicant is quoted in that case as having said:

"In view of the fact that the Respondent unilaterally stopped my salary, I depleted all the reserves that I had together with those of my husband. I am now unable to meet all these requirements in view of the period in which the Respondent had stopped my salary."

[18] In my view the fact that the respondents were present in Court when the order was made and the indication by the respondents that they intended to apply to have the order "*reconsidered*" can not constitute a ground for urgency. During argument counsel for the applicant argued that the matter was urgent because if the respondents were allowed to continue with the deductions, the affected nurses would be faced with financial hardships in that they would not be able to cope with their financial obligations including the ability to pay for their transport. This will according to the applicant affect service delivery.

[19] It is clear from the above discussion that as a general principle financial hardship or loss of income cannot be regarded as grounds for an urgent relief. For the applicant to succeed when relying on financial hardship or loss of income he or she must show the existence of exceptional circumstances justifying the granting of an order on the urgent basis and on the ground of financial hardship. In the present instance the applicants have not shown that there are special circumstances for granting the relief sought. In any case the issue of financial hardship was pleaded in the application which was before Judge Ngalwana for which an interim order was granted. In the present instance the urgency as pleaded by the applicants is based on the fact that the respondents were aware of

the Court order and that they were still *"reconsidering"* the order made by Judge Ngalwana.

[20] The applicants' counsel argued that it was imperative that the order prayed for be granted otherwise the applicants would be forced to refer the same dispute (or in fact may have already referred) to the PHSDSBC and thereafter be compelled to approach this Court again on an urgent basis. The applicants would bring that application despite having acknowledged in their papers in the first application before Judge Ngalwana that they had an alterative remedy in the form of declaring a dispute of interpretation and application of the OSD agreement which falls under the jurisdiction of the PHSDSBC. In my view, granting the relief on an urgent basis by the Court, in the absence of special circumstances, amount in a sense to undermining the role of the PHSDSBC as provided for in terms of section 24 of the Labour Relations Act.66 of 1995(the Act). Section 24 of the Act provides a procedure that must be followed to attempt to resolve a dispute concerning interpretation and application of a collective agreement. The parties are in terms of this section required to firstly attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration. In fact in terms of section 157(5) of the Labour Relations Act 56 of 1995 (the LRA), this Court does not have jurisdiction to entertain disputes related to the interpretation and application of a collective agreement as they are to be resolved through arbitration. Section 157(5) of the LRA provides:

"5. Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration."

[21] It would seem to me that what Judge Ngalwana in the first application sought to avoid, by granting an interim relief pending the resolution of the dispute by PHSDSBC, was to ensure that the role given to bargaining councils and the CCMA in terms section 24 of the Act was not undermined. I need to mention in passing, that it would seem to me that had the Court in the first application considered the provisions of section 157(5) of the LRA, the applicants would not have succeeded in their application because the jurisdiction of the Court was ousted by the fact that the dispute was arbitrated in terms of section 24(5) of the LRA.

[22] The approach that the Court should not readily grant an interim relief whilst a dispute is still pending before a dispute resolution body was followed in *Nchabeleng v University of Venda & Others (2003) 24 ILJ 585(LC),at paras [7] and [12]*.

[23] The other ground upon which this application stands to be dismissed is based on the fact that the terms of the Court order have fallen away. This was an interim order pending the finalization of the dispute which was currently before the PHSDSBC at that time. I do not agree with counsel for the applicants that the word "*finalization"* in the Court Order envisaged finalization of the disputes on its merits. The dispute which the Court had in mind when it made the order is the one which the commissioner of the PHSDSBC dismissed for lack of

jurisdiction. In this regard I agree with counsel for the respondents that the effect of the ruling is that the PHSDSBC did not have jurisdiction had the effect of finalizing the paragraphs 1.1, 1.2 and 1.3 of the order and thus resulting in the Court order falling away. The fact that the dispute remains unresolved on its merits does not in my view detract from the fact that the dispute which was before the Court when the order was made is no longer before the PHSDSBC, it having been dismissed for lack of jurisdiction, as indicated earlier. This conclusion stands notwithstanding the fact that the applicants may indeed be entitled to refer the matter again to the PHSDSBC.

[24] The dismissal of a matter for lack jurisdiction by a bargaining council or the CCMA, means that that matter is disposed off and it can no longer be scheduled for a hearing. This means that if an applicant, as is the case in the present instance, wishes to proceed with the dispute he or she would have to start the matter *de novo*.

[25] In the light of the above discussion, my view is that the applicants' application stands to be dismissed. As concerning the issue of costs it is my view that the conduct of applicants in bringing this application was unreasonable and the application itself was ill conceived. It is for this reason that in my view the dictates both law and fairness requires that the costs should follow the results.

[26] In the premises I make the following order:

(i) The application is dismissed.

(ii) The applicants are to pay the costs of the respondents the one paying other to be absolved.

Molahlehi J

Date of Hearing : 10th December 2008

Date of Judgment : 5th January 2009

Appearances

For the Applicants : Adv C.H. Van Bergen

Instructed by : Greyvenstein & Grundlingh Attorneys

For the Respondents: Adv Afzal Mosam

Instructed by : The State Attorney (Pretoria)