Not reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 37 / 2011

In the matter between:

HOSPERSA	**First applicant**
WINSTON ANDREWS	**Second applicant**
ANTON HOCHER	**Third applicant**
and	
MEC FOR HEALTH: WESTERN CAPE	**First respondent**
DEPARTMENT OF HEALTH: WESTERN CAPE	**Second respondent**
THE PUBLIC HEALTH & WELFARE SECTORAL BARGAINING COUNCIL	**Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an urgent application for an interdict pending the resolution of a dispute between the parties at the Public Health and Welfare Sectoral Bargaining Council (the third respondent, to which I shall refer as “the bargaining council”).

[2] By agreement between the parties, the application under this case number has been consolidated with a similar application set down for today under case number C 38 / 2011. The second applicant in that matter, Anton Hocher, is now the third applicant under this case number. The second applicant is Winston Trevor Andrews. Both Andrews and Hocher are members of the Health and Other Services Personnel Union of South Africa (HOSPERSA), the first applicant, and employees of the Department of Health, Western Cape (the second respondent).

[3] The applicants seek an order pending the resolution of a dispute that has been referred to the bargaining council concerning the interpretation and application of a collective agreement concluded in the Public Service Coordinating Bargaining Council and in the Health and Welfare Sectoral Bargaining Council and embodied in its Resolution 1 of 2003, that:

3.1 The first and second respondents are interdicted and restrained from giving effect to the demand issued by them that the second and third applicants return to their workplace forthwith.

3.2 The first and second respondents are interdicted and restrained from taking any steps to treat the second and third applicants' absence from their workplace as unauthorised absence.

3.3 The first and second respondents are ordered to treat the second and third applicants in all aspects as persons who have been duly seconded by it to first applicant as full-time shop stewards for the period 1 January 2011 to 31 December 2011.

Background to the application

[4] Hospersa has nominated both Andrews and Hocher to serve as full-time shop stewards for the year 1 January 2011 to 31 December 2011. The arrangement in terms of which the employer releases an employee to serve as a full-time shop steward of the union, while the employer continues to pay him or her, is governed by a collective agreement reached in the bargaining council and embodied in resolution 1 of 2003.

[5] The relevant provisions of the resolution are the following:

"**3.1 Eligibility for appointment as a FTSS**[1]

In order to be appointed as a FTSS a person must:

3.1.1 be a permanent employee in the public health and welfare sector and have been nominated by the trade union;

3.1.2 be a member in good standing of the trade union making the nomination; and

3.1.3 not hold a critical or managerial (including junior, middle and senior management level) post at the workplace or been employed at a level higher than level 8. In determining whether a person is critical the following criteria should be considered:

3.1.3.1 the type of service provided;

3.1.3.2 the nature of work performed by the employee;

3.1.3.2 the current and expected allocation of resources; and

3.1.3.4 the non-availability of similar skills to replace the employee.

3.1.4 The limitations stipulated in clause 3.1.3 above may be lifted in exceptional circumstances by agreement of the respective trade union and the employer, represented by the head of the department. In considering whether an exception ought to be made, the parties may take into account the following:

3.1.4.1 the burden and complexity of labour relations work required to be performed by the FTSS;

3.1.4.2 the nature and type of negotiations at the FTSS will be involved in;

3.1.4.3 the nature and number of disputes that may arise."

and

"3.3 **Notification of the elected FTSS**

3.3.1 Once the trade union parties have nominated and elected their FTSS, the trade unions must notify the respective departments in writing of the names of the employees who have been elected as FTSS. A copy of this notification shall be sent to the Council.

3.3.2 the relevant department may be allowed a maximum of 30 days for the executing authority or his/her delegate to release the FTSS subject to an extension of a further 30 days by agreement of the parties."

[1] Full-time shop steward

"3.4 **Appointment of the FTSS**

3.4.1 Once the respective departments have received the notification, the appointment of the FTSS will be duly confirmed.

3.4.2 Such appointment will be by way of a secondment to their respective trade union."

"3.5 **Period of appointment**

3.5.1 The FTSS is appointed for the period of one year and may be re-elected and accordingly the FTSS's secondment may be extended.

3.5.3 The FTSS may be appointed to this position for a period of three years but will be seconded by the employer to the trade union for one calendar year reviewed annually by both parties, commencing 1 January and ending 31 December. In the event that the agreement is implemented during the course of the year, the FTSS will be released to commence with his/her activities for the remainder of the year."

[6] Both applicants – Andrews and Hocher – have been acting as full-time shop stewards during 2009 and 2010. When Hospersa notified the Department of Health (the second respondent) that it wished to extend their secondment for the 2011 calendar year, the Department refused.

[7] In the case of Andrews, Hospersa notified the MEC and the Head of the Department of Health on 1 December 2010 that, in terms of clause 3.3.1, they had nominated and elected him to serve as FTSS from 1 January to 31 December 2011 and wished him to be seconded. On 29 December 2010, the Head of the Department responded in the following terms:

"Your request for the release of Mr Andrews to serve as FTSS from 1 January 2011 to 31 December 2011, refers.

The Department did consider your request, as well as the service delivery needs of the department. After careful consideration, the Department of Health cannot approve your request to release Mr Andrews for another term due to the following reasons:

- The Occupational Therapy Unit is working with one less member for the past two years. The strain an extra workload on the Department is negatively influencing service delivery.
- The Occupational Therapy Unit is expanding its services due to the needs of patients and we need Mr Andrews back to assist the Department to reach its objectives.

> Given the reasons above is it [*sic*] not possible to release Mr Andrews for another year and we appreciate your understanding in this regard. You come to make another nomination to the department for consideration.
>
> Mr Andrews must return to his post he occupied prior to his release as FTSS at Alexandra Hospital by not later than 3 January 2011."

[8] In the case of Mr Hocher, Hospersa sent a similar letter to the MEC and the Head of Department on 1 December 2010. In an undated response and received on 29 December 2010, the head of Department also refused to release him due to the additional workload on other staff members. The head of department notified Hospersa that Hocher had to return to this post at Groote Schuur Hospital by 1 January 2011 and that, if he did not do so, his absenteeism "will be regarded as unauthorised absenteeism which will result in no work no pay. If absenteeism continues, the relevant prescripts will apply."

[9] Hospersa referred a dispute to the bargaining council about the interpretation and application of the collective agreement embodied in Resolution 1 of 2003 as long ago as 1 February 2010. The dispute concerns the parties' different views as to whether the Department has a discretion whether or not to release a full-time shop steward who has been duly nominated and elected by the trade union. The question of a discretion arises on two levels: firstly, whether the Department has a discretion to refuse such a nomination; and secondly, whether it can do so unilaterally based on the criteria set out in clause 3.1.3.

[10] Although that dispute was conciliated in April 2010, it has not been arbitrated. It was set down for arbitration in June 2010, but the Department raised a point *in limine* that was dismissed. It was set down again in November 2010, but it was postponed by agreement between the parties, and subsequent events have now intervened.

[11] Pending the resolution of that dispute, the applicants seek an order enabling the two full-time shop stewards to remain in their seconded positions rather than returning to their workplaces at Alexandria and Groote Schuur hospitals respectively.

Urgency

[12] Ms *Golden*, who appeared for the first and second respondents, submitted that the application is not urgent.

[13] This court has, in the past, reminded litigants that urgency is not that there for the taking. Rule 8 of the Rules of the Labour Court expressly states that a party that applies for urgent relief must file an application that complies with the requirements of rule 7(1), 7(2), 7(3) and, if applicable, 7(7). And rule 7(2) expressly requires that the affidavit in support of the application must contain the following:

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case; and

(c) if a party brings an application in a shorter period than that provided for in terms of section 68 (2) of the LRA, the party must provide reasons why a shorter period of notice should be permitted.

[14] In *NUM v Black Mountain,*[2] Basson J stated that urgency in itself does not relieve a party from this obligation and the applicant should, in as much detail as possible, placed such facts that are necessary before the court and which will enable this court to decide whether the forms of service provided for in the rules should be dispensed with.

[15] In the present case, the deponents to the founding affidavits dealt fairly comprehensively with the requirements for an interim interdict. The same cannot be said for the requirement of urgency. That is dealt with in a rather cursory fashion. However, the reasons for urgency are addressed. The applicants explained that the Department only made its stance – i.e. that the employees to return to their workplaces despite the ending dispute - clear in January 2011, when it stated that the Department could not agree to the union's request. Until such time as the applicants launched this

[2] (2007) 28 *ILJ* 2796 (LC) para [13]

application on 20 January 2011, they believed that an interim arrangement could be reached by agreement.

[16] The explanation is far from comprehensive and is open to criticism, but I am satisfied that the applicants have, at a minimum, explained the reasons for urgency and why urgent relief is necessary. I will therefore proceed to deal with the merits of the application.

The nature of the relief sought

[17] The applicants do not seek a rule *nisi*. Ms *Golden* has argued that the relief they seek is final in nature. But although it is not couched in the form of a rule *nisi*, the relief sought is still interim in nature. What they seek is, in essence, an interdict *pendent lite.* They seek interim relief pending, not a dispute before this court, but before the bargaining council. The requirements for an interim interdict are therefore still applicable.[3]

Prima facie right?

[18] Have the applicants made out a *prima facie* right, though open to some doubt? This depends to a large extent upon the interpretation of clause 3 of the collective agreement – the dispute that the bargaining council has to pronounce on. The applicants say that they qualify for appointment as full-time shop stewards and have been duly elected. The respondents say that the Department is vested with a discretion whether or not to release the applicants; and that they occupy critical posts.

[19] The dispute about the interpretation of clause 3.1.3 is an abject lesson in the dangers of drafting agreements in the passive voice. It states that, "in determining whether a person is critical the following criteria should be considered", and then the criteria are listed. What it does not say, is who should consider those criteria. Had it been drafted in the active voice, this problem of interpretation would not have arisen.

[3] As set out, for example, in *Setlogelo v Setlogelo* 1914 AD 221 at 227 and followed in countless cases thereafter.

[20] Be that as it may, this is a dispute that the bargaining council will have to grapple with. In the interim, the question before me is whether the applicants have established at least a *prima facie* right to remain in their seconded positions as full-time shop stewards pending the resolution of the main dispute.

[21] It is common cause that the two applicants qualify with regard to three criteria – that is, they are permanent employees in the public health and welfare sector and have been nominated by the union; they are members in good standing of the union; and they are not employed at a level higher than post level 8. What is in dispute, is whether they occupy critical posts.

[22] Andrews is employed as an occupational therapy assistant. It is disputed whether this at post level 4 or 5, but it is in any event a low-ranking post. The Department states that it has been working without him for the past two years. The strain and extra workload on the Department is negatively influencing service delivery. The occupational therapy unit is also expanding its services and Andrews is required to assist it.

[23] These statements do not, in my view, establish that Andrews fulfils a critical post. The mere fact that the OT Unit has managed without him for two years, points to the contrary. There can be no doubt that his absence does lead to an extra workload for the remaining personnel in that unit; but they have managed to cope and should be able to do so for another relatively short while, pending the resolution of the dispute before the bargaining council.

[24] In the case of Hocher, he is employed as a "senior administration officer" in the support services department of Groote Schuur hospital. He works in the component of environment and hygiene services. The other SAO in that component retired recently. The component is responsible for waste management, portering, hospital transport, the external environment – comprising the hospital grounds, gardens and buildings – and what is euphemistically known as "death management".

[25] Hocher is, despite the impressive sounding title, a relatively low-level employee. As is the case with Andrews, the Department has managed without him for more than a year. This has, no doubt, led to inconvenience and will continue to do so pending the resolution of the main dispute. In my view, though, the Department has not shown that it is a critical post and I am satisfied that the applicants have established at least a *prima facie* right.

Apprehension of irreparable harm

[26] Should the employees be forced to return to their workplaces pending the resolution of the main dispute, the trade union will be deprived of the expertise that they have built up over the past two years. If the arbitrator at the bargaining council decides the dispute in their favour, they may take up the secondment again; but by that time, the harm would have been done. They have set out in the founding affidavits that they are dealing with a number of current disputes and that it would lead to delays and the absence of competent representation for their members.

Balance of convenience

[27] If I were to grant the interim relief sought, the Department will be inconvenienced. Should I not do so, the trade union will be inconvenienced.

[28] In my view, the inconvenience to the trade union outweighs that of the Department. The two full-time shop stewards have been operating as such for some time and have acquired valuable expertise and experience. Hospersa represents some 80 000 members, and the Western Cape has the third highest number of its members employed in the public sector. The union will be severely hamstrung by the loss of two of its full-time shop stewards in circumstances where their appointment is in dispute.

[29] There is no doubt that the Department is suffering great inconvenience. It cannot be easy for any employer to do without the services of an employee that it is paying while that employee provides services to its

collective bargaining partner. In the case of state hospitals that face daily budgetary constraints this must be even more so. But as I have pointed out, the Department has managed without these two employees for more than a year; it is not inconceivable that they can do so for a further period of time.

[30] In any event, there is no reason why the underlying dispute cannot be resolved speedily. That is the very aim of the dispute resolution system set up by the Labour Relations Act and administered by the CCMA and bargaining councils. The council is a party to these proceedings. I intend to make an order that will compel it to deal with the underlying dispute expeditiously.

Alternative remedy

[31] The only other remedy for the applicants is the one that there are already pursuing, i.e. the referral of a dispute about the interpretation and application of the collective agreement to the bargaining council. Pending the resolution of that dispute, they have no other remedy.

CONCLUSION

[32] I am satisfied that the applicants have made out a case for the interim relief sought. The inconvenience to the respondents can be addressed by the proper and expeditious resolution of the underlying dispute by the bargaining council, provided the parties to the dispute assist it by proceeding to argue the merits of the dispute without further delay.

[33] With regard to costs, I take into account that Hospersa and the Department of Health have an ongoing relationship. Furthermore, both the individual applicants are still employed by the Department. The parties have to resolve the underlying dispute as soon as possible. An adverse costs order could have a chilling effect on that process.

ORDER

[34] Pending the resolution of a dispute that has been referred to the Bargaining Council concerning the interpretation and application of the collective agreements concluded in the Public Service Coordinating Bargaining Council and in the Health and Welfare Sectoral Bargaining Council recorded in its Resolution 1 of 2003:

34.1 The first and second respondents are interdicted and restrained from giving effect to the demand issued by them that the second and third applicants return to their workplace forthwith.

34.2 The first and second respondents are interdicted and restrained from taking any steps to treat the second and third applicants' absence from their workplace as unauthorised absence.

34.3 The first and second respondents are ordered to treat the second and third applicants in all respects as persons who have been duly seconded by it to first applicant as full-time shop stewards for the period 1 January 2011 to 31 December 2011.

[35] The third respondent – i.e. the Bargaining Council – is ordered to set the dispute under case number PSHS 761-09/10 down for arbitration by no later than 14 March 2011 and to issue its award within 14 days of the conclusion of the arbitration.

[36] There is no order as to costs.

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STEENKAMP J

Date of hearing: 4 February 2011

Date of judgment: 9 February 2011

For the applicants:	Adv RJ Seggie SC
Instructed by	Llewellyn Cain, Pietermaritzburg
For the respondent:	Adv T Golden
Instructed by	The state attorney, Cape Town