

(1) REPORTABLE : YES / NO

(2) INTERESTED TO THE JUDGES : YES / NO

(3) REVISED

21/08/2017

DATE



SIGNATURE



**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 4915 / 2017

In the matter between:

THE SOUTH AFRICAN DEMOCRATIC TEACHERS UNION

APPLICANT

and

THE MEMBER OF THE EXECUTIVE COUNCIL

1ST RESPONDENT

DEPARTMENT OF EDUCATION LIMPOPO PROVINCE

THE HEAD OF DEPARTMENT OF EDUCATION LIMPOPO

PROVINCE

2ND RESPONDENT

JUDGMENT

[1] The applicant has approached the court for relief in the following terms:

- (1) Condoning the Applicant's non-compliance with forms and service and time periods provided in the Uniform Rules of this Honourable Court and permitting this application to be entertained as a matter of urgency in terms of Rule 6(12) of the Rules of Court.
- (2) Interdicting and/or restraining the respondents from effecting and / or causing to be effected any deductions from the salaries of applicant's members employed by the Limpopo Department of Education for the no work no pay related to the strike which took place from the 22nd March to the 11th April 2017.
- (3) Directing the respondents to ensure that any deductions already programmed on the salaries of members of applicant are reversed prior to the payment of the salaries on the 15th July 2017 and/or in respect of salaries payable on the 15th July 2017 and that members of applicant receive their salaries free of any deductions for the no work no pay related to the strike of the 22nd March to 11th April 2017.
- (4) Directing respondents to provide applicant's Attorneys with proof that no deductions were effected on the salaries of applicant's members by close of business on the 15th July 2017.

(5) That the Applicant be granted further and / or alternative relief.

(6) Costs of the Application.

[2] Deduction of money from the salary of an employee is regulated in terms of Section 34 of the Basic Conditions of Employment Act 75 of 1997, as amended (BCEA). The said Section 34 of the BCEA states that:

34. Deductions and other acts concerning remunerations

(1) Any employer may not make any deduction from an employee's remuneration unless-:

- (a) subject to subsection (2) the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
- (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

(2) A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if-

- (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
- (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

- (c) The total amount of the deb does not exceed the actual amount of the loss or damage; an
 - (d) The total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.
- (3) A deduction in terms of subsection (1) (a) in respect of an goods purchased by the employee must specify the nature and quantity of the goods.
 - (4) An employer who deducts an amount from employee's remuneration in terms of subsection (1) for payment to another person must pay one amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.
 - (5) An employer may not require or permit an employee to-
 - (a) repay any remuneration, except for overpayment previously made by the employer resulting from an error in calculating the employee's remuneration; or
 - (b) acknowledge receipt of an amount greater than the remuneration actually received.

[3] Section 34 of the Public Service Act of 1994 has similar provisions to Section 34 of the BCEA. The parties in this case are *ad idem* on the provisions of the above two statutes. It states that "the *salary of an employee shall not be reduced without*

his or her consent except in terms of Section 38, an Act of parliament, or an agreement.”

- [4] The applicant's case is that the intended deductions on the salaries of members of the applicant will constitute a violation of the above statutes. The respondents do not dispute same. Instead, the respondents submitted that the intended deductions are based on Section 67 (4) of the Labour Relations Act 66 of 1995, as amended (the LRA).

- [5] Section 67 of the LRA states the following:

67. Strike or lock-out in compliance with this Act

- (1) In this chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out that complies with the provisions of this chapter.
- (2) A person does not commit a defect or a breach of contract by taking part in-
- (a) a protected strike or a protected lock-out; or
 - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

- (3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however-
- (a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and
 - (b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court.
- (4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.
- (5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements.
- (6) Civil legal proceedings may not be instituted against any person for-

- (a) participating in a protected strike or a protected lock-out; or
 - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.
- (7) The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out.
- (8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.
- (9) Any act in contemplation or in furtherance of a protected strike or a protected lock-out that is a contravention of the Basic Conditions of Employment Act or the Wage Act does not constitute an offence.

[6] It is common cause that if members of the applicant were on strike, then they would have not engaged in an unprotected strike.

[7] The respondents rely more on section 67 (3) of the LRA in order to justify the intended deductions. When it was pointed to counsel for the respondents that

Section 67 (3) of the LRA is applicable in the event of a protected strike or protected lock-out, the respondents shifted the goal-posts and submitted that the court should expand the scope of Section 67 (3) to accommodate unprotected strikes and unprotected lock-outs. I decline this invitation due to the fact that there is no other legal mechanism in place to deal with this issue.

[8] At this stage there is a dispute of fact as to whether the employee members of the applicant failed to report for work because they were on unprotected strike or were simply obstructed from reporting for work by striking members of NEHAWU and PSA trade unions. This dispute could be resolved by the respondents by way of instituting disciplinary proceedings against the said employees or referring the matter to arbitration.

[9] Item 6 (1) of the Code of Good Practice provides that:

6.1 Participating in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

(a) the seriousness of contravention of this Act;

(b) attempts made to comply with this Act; and

- (c) whether or not the strike was in response to unjustified conduct by the employer.

[10] Once we move from the understanding that participating in an unprotected strike is an act of misconduct, then the respondents as employers of the affected members of the applicant should observe the principles of fairness and legality in dealing with the said employees in terms of the due process which should include disciplinary hearing or referral of dispute to the Bargaining Council for award or Labour Court for a Court Order.

[11] Section 68 (1) (b) & (5) of the LRA provide further remedy for the respondents in that it states that:

68. (1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a).....

(b) To order the payment of just and equitable compensation for any loss attributed to the strike or lock-out, or conduct, having regard to-

(i) Whether –

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out, or conduct premeditated;

(cc) the strike or lock-out, or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.

(2)

(3)

(4)

(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may

constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

[12] In the circumstances, I am of the view that the intended deductions are unjustified in law. The said intended deductions constitute a threat to clear tight of applicant's members. The said right is emanating from the provisions of Section 34 of the BCEA, Section 34 & 38 of Public Service Act of 1994, read with the LRA. The applicant does not have an adequate alternative remedy.

[13] The applicant has satisfied the requirements of an interdict. The respondents have an option of following the prescribed procedures of the law and recover their money, if any. There are no bases as to why costs should not follow the event. The applicant is a successful party in this application. Costs must follow success.

ORDER

[14] In the circumstances, I make the following order:

1. That the first and second respondents are Interdicted and / or restrained from effecting and / or causing any deductions from the salaries of applicant's members employed by the Limpopo Department of Education for the no work no pay related to the strike which took place from the 22nd March to the 11th April 2017.

2. That the first and second respondents are directed to ensure that any deductions already programmed on the salaries of members of applicant are reversed prior to the payment of the salaries on the 15th August 2017 and / or in respect of salaries payable on the 15th August 2017 and that members of applicant receive their salaries free of any deductions for the no work no pay related to the strike of the 22nd March to 11th April 2017.
3. That the first and second respondents are directed to provide applicant's attorneys with documentary proof that no deductions were effected on the salaries of applicant's members by close of business on the 15th September 2017, or any time thereafter.
4. That the first and second respondents are ordered to pay costs of this application on party and party scale, including all the reserved costs.



MS SIKHWARI, AJ
Acting Judge of the High Court,
Limpopo Division, Polokwane

REPRESENTATIONS:

- | | |
|--------------------------------|------------------|
| 1. Counsel for the Applicant | : Adv M Mannya |
| 2. Counsel for the Respondents | : Adv KE Masoga |
| 3. Date of hearing | : 10 August 2017 |
| 4. Date handed down | : 21 August 2017 |