IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Not Reportable
Case No: J 909.11

In the matter between:

SAMWU	Applicant
and	
JMS METER READING (Pty) Ltd	Respondent

Date of hearing:	27 May 2011
Date of Judgment:	31 May 2011

JUDGMENT

PATHER A.J.

Introduction

1. This is an application which was heard on 27 May 2011.

2. The applicant sought the following urgent relief:

> "2 Declaring that the deductions made from the applicant's members' (listed in annexure VM1) salaries paid on 25 May 2011 were unlawful;
> 3 Directing the respondent to pay the applicant's members' the amounts unlawfully deducted from their salaries within 24 hours of receipt of the order;
> 4 Directing the respondent to pay the costs of the application."

Background

3. The applicant's members are in dispute with the respondent concerning wages and others matters of mutual interest. Following an unsuccessful attempt at conciliation before the CCMA, a Certificate of Outcome was issued, and the applicant issued a strike notice on 23 May 2011. According to the strike notice, "Due to unresolved conciliation of mutual interest dispute held at CCMA on 17 May 2011 the Union hereby give a formal notice that our members will embark on indefinite strike starting from the morning of 26th of May 2011". Later on in the day, the respondent's general manager, Mr N Saloojee (Saloojee) informed the applicant's shop stewards, among other matters, that the striking employees would not be paid for the time that they did not work. Saloojee's earlier memorandum sent to the applicant's members on 10 May 2011 stated the following: "In terms of Company Policy employees on strike will not be remunerated" and further on, "You are reminded of the Company's policy of "no work no pay". This will apply during the period of the strike action."

4. The respondent further addressed a letter to the applicant in which it was stated that all members would be paid on 25 May 2011, but that payment for the days from 26 May 2011 onwards would not be included as the respondent had been advised that

members would be on strike from then onwards. In terms of its letter dated 25 May 2011 addressed to Mr Esauw Mbhele, chairperson of the applicant's Johannesburg branch, the respondent set out the procedures in terms of which employees' salaries are paid. The respondent pointed out that:

- All monthly payments are calculated from the 1st of a calendar month to the last day of a calendar month; as an example, 30th or 31st day of a month;
- Remuneration due is paid by electronic transfer of funds (EFT) to employees' chosen account on the nearest working day to the 25th day of a month or on the 25th day itself, if that is a working day; and
- This had been the practice for over 30 years, and employees are advised of this at the interview stage and during induction.

5. In accordance with the procedures outlined above, all employees were paid on 25 May 2011. However the applicant's members were not paid for the period 26 May 2011 to 31 May 2011. The respondent had deducted from the applicant's members' salaries, payment for those days commencing 26 May 2011, being the day it had been notified the strike would commence until the last day of the month of May 2011. While conceding that the respondent is entitled to apply the "no work no pay" rule, the applicant contends that it is not entitled to unilaterally decide that the strike would continue until "30 May" and therefore make deductions from the salaries according to that assumption. According to the applicant, the deduction from the salaries of

striking employees for time not spent at work are to be made from their salaries for the following month on 25 June 2011. The deductions made for May 2011, according to the applicant, demonstrate victimisation of striking employees as no deductions were made from the salaries of non-members, that is, those employees who were not on strike. In this regard, the respondent submits that the deductions arise precisely because of the stated intention of the applicant's members to embark on the strike, and that all non-striking employees are consequently not affected by such deduction.

6. The respondent denies that its action is designed to victimise or harass striking workers and contends that there is no obligation upon it to pay salaries when such salaries are not due. In this regard, the respondent refers to an extract of what appears to be its standard contract of employment, which, under the subheading "ABSENCE FROM WORK", again states its policy of not paying employees for time not spent at work.

Urgency

7. It was submitted that this matter be heard and determined without delay in order to prevent the respondent's undermining the strike. It was submitted further that an application in the ordinary course to recover "the unlawful deductions" would be of little value once the strike is over.

Evaluation

8 Mr Maddern on behalf of the respondent argued that contrary to the applicant's submission, the deductions were not unlawful. In this regard, he referred to section 67

(3) of the Labour Relations Act, ("the Act"), [1], which provides *inter alia*, that an employer is not obliged to remunerate an employee for work not rendered during a protected strike. Furthermore, he argued, this legal position accords with the respondent's policy as set out in its standard contracts of employment. Arguing further that the legal position is trite, Mr Maddern submitted that the power play in terms of strikes must be allowed. In regard to the applicant's contention that the respondent sought to undermine the strike by withholding remuneration of striking employees, Mr Maddern pointed out that the respondent did not offer non-striking employees any more than being remunerated for the days that they worked; the policy of "no work no pay" applied to all employees. In this regard, if the striking employees returned to work before the end of May 2011, the respondent would be obliged to effect payment for those days on which their services were tendered.

9 Mr Daniels responded that the respondent's policy was being applied inconsistently in that if a non-union member did not come to work on 31 May 2011, she/he would still have been paid on 25 May 2011. I asked Mr Daniels whether the situation he referred to entailed a non-union member's having given notice that she/he would not be at work on 31 May 2011. He responded that he was referring to a situation in which such employee for example, becomes sick on such a date and is therefore prevented from tendering her/his service. This exchange in my view takes care of the applicant's argument that striking employees, and since they all are members of the applicant, therefore, union members, are being treated differently simply by virtue of the strike; that the

[1] 66 of 1995.

respondent's act of deducting payment of salaries for the days not work during the strike, amounts to an attempt to undermine the strike. The fact is that the applicant signalled to the respondent in clear and unequivocal terms that the strike would commence on 26 May 2001 and would continue indefinitely. In terms of its policy as outlined above and the rights conferred on it in the Act, the respondent was entitled to deduct that portion of the applicant's members' remuneration for the days that they had indicated they would not tender their services. It is trite that an employer's obligation to pay remuneration is reciprocal to an employee's obligation to render service. However, if the respondent had gone further and made deductions from the salaries of monies owing to the striking employees for periods beyond 31 May 2011, only then can it be claimed that the respondent's conduct may be unlawful, and based on its unilateral assumption. No deductions have been made from the salaries of non-striking employees precisely because unlike striking employees, they have not indicated that they would not be tendering their services. If, for whatever reason, a non-striking employee does not attend work on 31 May 2011, it is true; such employee has already been paid in advance on 25 May for that day. In such a case, the respondent would later have to consider the circumstances surrounding that employee's absence and determine whether a proportionate deduction will have to be made from her/his salary in June 2011, in view of the fact that such employee was already paid in advance. Where however, an employee either from the ranks of union members or non-union members, has indicated a clear and unambiguous intention not to be at work on any day or days after the 25th of a month but before payment of salaries on that 25th or the closest working day after, then in that case, the respondent will be entitled to make the proportionate deductions for that part of the month up to and including the last day of that month. If the strike continues beyond 31 May 2011, the respondent will have to attend to the further application of its policy relating to absence from work on or before 25 June 2011.

10 Mr Daniels referred the court to the cases *of National Union of Mineworkers v Namakwa Sands – A Division of Anglo Operations Ltd*[2]**,** and *FAWU and Others v Pets Products (Pty) Ltd*[3] neither of which are applicable in view of the finding that the respondent, by making deductions from the salaries of striking employees, is not acting unlawfully.

11 Did the facts of the case warrant an urgent application? In the ordinary course, financial hardship and loss of income are sadly, a consequence of strike action generally, and particularly, in terms of the respondent's contract of employment relating to absence from work for "work stay-aways, stoppages, go slows, sit or sleep-ins and strikes" (paragraph 16, exhibit "D" of the opposing affidavit). The applicant has not shown why its allegation of unlawful deduction from members' salaries could not have been referred to the Department of Labour who, under the Basic Conditions of Employment Act[4] is tasked with its monitoring and enforcement.~~–~~. In the circumstances, the applicant has not set out a case for urgent relief to be granted to it.

[2] (2008) 29 ILJ 698 (LC).
[3] 2000 (21) ILJ 1100 (LC).
[4] 75 of 1975.

12 In view of the continuing strike, and power play, which Mr Maddern correctly submitted must be allowed to play itself out, I am reluctant to tip the scales by awarding a costs order against one party in this early stage of the dispute.

13 In the premises, the following order is made:

The application is dismissed.

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PATHER AJ

Date of Hearing : 27 May 2011

Date of Judgment: 31 May 2011.

Appearances

For the Applicant : R. Daniels from Cheadle Thompson & Haysom Attorneys

For the Respondent: R. Maddern from Wright, Rose-Innes Inc