



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D919/11

In the matter between:

HEALTH AND OTHER SERVICES PERSONNEL

TRADE UNION OF SA (“HOSPERSA”)

AND OTHERS

Applicants

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, KWAZULU NATAL

First Respondent

DEPARTMENT OF HEALTH, KWAZULU NATAL

Second Respondent

Heard: 20 October 2011

Delivered: 28 October 2011

JUDGEMENT

BOQWANA AJ

- 1] This is an urgent application brought on 13 October 2011 for an order interdicting and restraining the respondents from taking any steps to fill the posts of Finance Manager and Systems Manager arising out of the respondents' decision to separate what were formerly combined posts in hospitals in KwaZulu Natal.
- 2] The applicants filed their notice of motion on 13 October 2011 in which no date and time for the hearing was fixed and gave the respondents 10 days in which to file opposing papers. The application was initially filed to be heard as a normal application. The notice of motion was later amended on the same date, fixing the application hearing date as 20 October 2011 and giving the respondents until, 12:00 noon, 19 October 2011 in which to file opposing papers, thereby bringing the application on an urgent basis. The relief sought remained the same and the founding affidavit remained unchanged.
- 3] The respondents did not file opposing papers but made submissions based on the applicants' papers.
- 4] The applicant is the Hospersa ("the union"), a trade union registered in terms of the Labour Relations Act 66 of 1995 ("the LRA"), representing four of its members. The four members of the union who are also applicants are employed by the respondents in the following positions: Finance and Systems Managers. Apparently, these are four of many employees holding these posts within the

respondents.

- 5] On 16 September 2011, the Head of the second respondent sent a Human Resources Management Circular No 97/ 2011 (“the circular”) to the District Managers, Hospital Managers, Community Health Centre Managers, Heads of Institutions and Head of Office Managers stating, inter alia, that the posts of Finance and Systems Managers which were created as combined posts, had been separated and created as Finance Manager and Systems Manager posts.

- 6] The applicants contend that the separation of these two posts would amount to a demotion or lesser job status. They submit that, although the grading and salary would remain unchanged, their job descriptions would be significantly affected. I must state at the outset that neither job descriptions nor detailed averments were placed before me in order to provide the court with a better understanding of the extent to which the applicants’ responsibilities would be reduced. The applicants merely state that they will suffer diminution in status without supporting this averment with any significant detail. In support of the Applicants’ case, Counsel referred to John Grogan’s *Workplace Law* Tenth Edition (2009) at 79 para 5 which states that a demotion occurs if the employee’s remuneration, responsibilities or status is materially reduced. In the absence of any detail on the job description detailing the responsibilities of the applicants, it makes it difficult to determine whether the applicants’ responsibilities or status would be materially reduced in terms of the principle/definition of John Grogan.

- 7] The circular is also not very helpful as it simply outlines the decision to separate the two posts and the process to follow. This, in my view, supports the proposition made on behalf of the respondents by their Counsel that the application brought by the applicants is premature and pre-emptive of a process of “consultation” that still has to take place. It may well be that there is a reduction of responsibility from the reading of the circular, but that, in my view, would form

part of the consultation process between the parties. A dispute of unfair demotion has been referred to the Public Health and Social Development Sectoral Bargaining Council (“the PHSDSBC”) on 11 October 2011. Based on the nature of the dispute this is the appropriate dispute resolution process.

- 8] The second issue raised by the applicants is that they have a right to be consulted in terms of various collective agreements and policies. In particular, they allege that the respondents have failed to adhere to Resolution 3 of 1999 concluded at the Public Service Co-ordinating Bargaining Council (“the PSCBC”), which provides in paragraph 1 that:

‘Where changes in work organisation affect matters of mutual interest, the employer and employee representatives shall negotiate in the relevant sectoral, provincial or departmental council.’

- 9] In this regard, another dispute was referred to the PSCBC pertaining to the alleged breach of the Resolution above. Likewise, if the applicants are entitled to be consulted, that could be dealt with at the bargaining council.

- 10] It is trite that in order to succeed, the applicants must satisfy the court that the matter is urgent; that they have a *prima facie* right; that there is a well grounded apprehension that they may suffer irreparable harm; that the balance of convenience favour the granting of an interdict; and that it has no satisfactory remedy.¹

- 11]I first deal with urgency. The applicants contend that they are scared that if the

¹ *South African Aviation and Allied Workers Union v Airport Company South Africa (Pty) Ltd and National Education, Health and Allied Workers Union*, unreported judgement, case number J1064/11

interim interdict is not granted, *freezing the status quo*, the respondents will go ahead and implement their decision to separate the two posts without consulting with the applicants. The respondents, according to the applicants have demonstrated intent to implement this decision as a matter of urgency. The applicants further contend that the respondents' refusal to provide an undertaking not to go ahead with the implementation of the separation of the two posts, pending consultation process with the applicants is indicative of their intent to proceed.

12] Counsel for the applicants referred to paragraph 7 of the circular, which reads as *"The advertisement and filling of posts of Systems Manager by the Institutions as explained above must be finalised by the end of November 2011"*.

13] I must pause here to point out that the circular separates Regional and Tertiary Hospitals from District and TB Hospitals. Regional and Tertiary Hospitals are dealt with under paragraph 2.1 whilst District and TB Hospitals are dealt with under paragraph 2.2. This is significant in that, Counsel for the applicants submitted that the applicants fell under paragraph 2.2.

14] Paragraph 2.2 (c) of the circular stated as follows:

'If the Finance and Systems Manager posts which were initially created as combined posts are currently filled, Head Office will advertise the posts of Finance Manager. The incumbents who are appointed to the combined posts of Finance and Systems Manager must be absorbed in the posts of Systems Manager after consultation provided they were appointed on salary level 9 or 10 as the case may be.'

15] Based on the paragraph quoted above, it is clear to me that paragraph 7 cannot

apply to the applicants in that they will be absorbed in the posts of Systems Manager (after consultation) and the post to be advertised will be that of the Finance Manager. A copy of an advert appearing to advertise the position of the Finance Manager for, inter alia, Districts and TB Hospitals was handed in court by the applicants' Counsel. The respondents had no difficulty with this document being handed in court. It seems to be unfair to me that the applicants would be required to apply for the jobs that they currently hold, if that is the respondents' intent. However that does not make the matter urgent for the purposes of these proceedings. That remains a matter to be debated and discussed at another forum and not for this court to decide. A further point that strengthens a case against urgency is that the said advert is undated and contains no cut off date for submission of applications by the applicants for the posts.

16] I am also persuaded by the argument proffered by the respondents' Counsel that the circular itself under paragraph 2.2 (c) does subject the implementation of the decision, to absorb current incumbents, to a process of consultation.

17] I am therefore inclined to agree with the respondents' Counsel that, the applicants are, at this point, merely anticipating that implementation will take place without consultation. That, however, remains speculative and is an event that has not yet occurred. I also note that the applicants became aware of this circular since 29 September 2011 and only brought the matter to court on 13 October 2011. The applicants conceded that nothing had happened from the respondents' side since they got wind of this circular. Based on this I am not satisfied that the applicants have demonstrated any urgency.²

18] I have in any event also decided to deal with other requirements to satisfy an interim relief. The applicants contend that there is no satisfactory alternative remedy available to the applicants. First, the applicants have referred two

² See *Chiloane v Nhluvuto Agricultural Project and Others* (2000) 4 BLLR 392 (LC).

disputes to the bargaining councils. In my view this is a clear demonstration that there is an alternative remedy that is at the disposal of the applicants. This is a statutory remedy that is appropriate given the circumstances. Second, respondents made a submission that in an unfair labour practise dispute applicants would clearly be entitled to restoration to their positions prior to the implementation of the decision should they be successful at the bargaining council. The employer would be obliged to comply with whatever award as determined by the bargaining council. Applicants' Counsel submitted that bargaining councils would not order an employer to remove successful candidates who would be incumbents in the newly created positions. It may be that bargaining councils have been hesitant in giving orders that affect incumbents already in a job, however, I find no legal basis for them to refuse to order an employer to "unscramble the egg" that it had scrambled by itself as it were. Third, the respondents submitted that with regards to the material change to the job descriptions of the applicants, an order can be obtained by the applicants in terms of section 64(4) of the LRA. Last, the applicants could claim specific performance. I agree with this proposition. I will not go into detail on these other alternative remedies proposed by the respondents, save to mention that it is clear to me that there are a number of alternative remedies available to the applicants. The applicants' Counsel conceded that other alternative remedies are there, he however submitted that those were not satisfactory alternative remedies. I however disagree with that proposition. This then takes me to the next requirement of apprehension of irreparable harm that needs to be met by the applicants.

19] In dealing with apprehension of irreparable harm, I am not convinced with the proposition advanced by the applicants' Counsel that, if the interdict were to be refused and the employers went ahead to implement their decision without consultation, that it would be impossible to restore the *status quo*. I am of the view that the employer would be obliged to follow any award properly determined by the bargaining councils. It seems to me, that if the employer goes ahead to implement without consultation it would be doing so at its own peril. Further, it

would have to deal with the consequences of having to undo its decision to implement in the face of its own undertaking on paragraph 2.2(c) of the circular as well as the suggested collective agreements and policies referred to by the applicants.

20]As indicated above, the applicants seek for this court to intervene and give an order interdicting and restraining respondents from implementing their decision pending resolution of the disputes at bargaining council level. In this respect, the applicants must show that they have a *prima facie* right for an urgent relief sought. They have to show that this is one of those exceptional cases warranting the intervention of the court. In my view, the applicants may have established a *prima facie* right to be consulted before a decision was made by the respondents however, that falls within the jurisdiction of the bargaining councils and not for this court to decide. Further, neither parties nor this court has any control of when the disputes would be resolved at bargaining councils. It seems to me that the relief sought, if granted, may have far reaching consequences beyond the four applicants. An order such as the one sought by the applicants cannot be given lightly without the applicants passing all of the hurdles required for an urgent interdict.

21]Finally, the balance of convenience favours the respondents in that the matter has already been referred to the bargaining council. In the interest of expeditious resolution of disputes that process should be allowed to continue to finality. The overriding issue however, is that no urgency has been shown and that there are satisfactory alternative remedies available to the applicants.

[22] I therefore make the following order:

1. The application is struck off from the roll for lack of urgency.
2. The applicants are ordered to pay the respondents costs.

Boqwana AJ

Appearances:

For the Applicants: Advocate R Seggie SC

Instructed by: Llewellyn Cain Attorneys, Pietermaritzburg

For the Respondents: Advocate L Naidoo

Instructed by: State Attorney