



Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no.: J 1120/11

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS

UNION obo ITS MEMBERS IN THE EMPLOY

OF THE RESPONDENT

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

Heard: 29 November 2011

Order: 29 November 2011

Reasons: 31 May 2012

Summary: Full time shopstewards entitled to payment of their salaries during a protected strike provided that they continue to tender their services to their union

in terms of an applicable collective agreement.

JUDGMENT

AC BASSON J

1] On 29 November 2011, I gave the following order:

1. The Respondent is interdicted from deducting amounts from the salaries of members of the Applicant in the Respondent's employ contrary to the provisions of section 34(1) of the Basic Conditions of Employment Act, of 1997.
2. The Respondent is ordered to make payments of their arrear salaries for the month of March, April, May and June 2011 to:

2.1.1 Elsie Pos;

2.2 Nhlanhla Mazibuko;

2.3 Phillip Moepye

3. The Respondent is interdicted from withholding the salaries of the aforesaid employees
4. The Respondent is ordered to make payment of the amounts which the Respondent undertook to deduct from the salaries of the employees and to pay to the creditors of Elsie Pos, Nhlanhla Mazibuko and Philip Moepye and which payments have not been made for the months of March, April, May and June 2011 within 24 hours of the issue of this order.

5. The Respondent is ordered to pay the costs of this application, which costs include the costs of Senior Counsel.

- 2] Here are the brief reasons for my order. The applicant (the South African Municipal Workers Union – hereinafter referred to as ‘SAMWU’) approached this Court on motion on behalf of three of its members for an order that the respondent (the Ekurhuleni Metropolitan Municipality) be interdicted from deducting amounts from the salaries of Ms. Elsie Pos (Clinic Head – hereinafter referred to as ‘Pos’); Mr Nhlanhla Mazibuko (Senior Property Officer – hereinafter referred to as ‘Mazibuko’) and Mr Phillip Moepye (Cashier – hereinafter referred to as ‘Moepye’) and for an order directing the respondent to repay the deductions made from their salaries.
- 3] When the matter first came before this Court by way of motion, the issue of whether the three employees mentioned above in fact attended work during the strike and therefore entitled to be remunerated was referred to oral evidence in light of the dispute of facts which arose on the papers. At issue was whether these three employees (full-time shop stewards) were entitled to be paid during the currency of a strike in circumstances where the principle of ‘no-work-no-pay’ was applied to the rest of the workforce who went on strike. The factual issue referred to oral evidence only concerns the narrow question of whether the three employees attended work during the strike.
- 4] The respondent treated these employees as if they were not rendering services during the currency of the strike and consequently applied the principle of ‘no-work-no-pay’ to them.
- 5] In terms of the South African Local Government Bargaining Council: Main Agreement (hereinafter referred to as ‘the main agreement’) concluded between the South African Local Government Association (‘SALGA’); the Independent Municipal and Allied Trade Union and SAMWU, the unions have the right to elect full-time shop stewards who will remain in the employ of the respondent but will represent the

interests of the trade union and their members on a full time basis. The three individual employees have been elected as full time shop stewards to represent SAMWU's members. In their capacity as full time shop stewards, they received their salaries and all benefits which are allowed for in the main collective agreement until the aforementioned deductions were made from their salaries on the basis that they have participated in the strike.

- 6] On 10 February 2011, SAMWU gave notice to the respondent that it intended to embark on protracted strike action from approximately 22 February 2011 to May 2012 with the intention to settle a dispute in respect of the issues as set out in the strike notice of even date.
- 7] According to the applicant, the full time shop steward did not participate in the strike but were actively engaged in managing the strike and communicating with the striking members and the respondent. In this regard, the Court was referred to clause 2.5.6 of the main collective agreement in terms of which it is stated that full time shop stewards 'shall represent the interest of their trade union and its members.' According to the applicant's founding affidavit, all three employees continued attending their places of work and continued with their duties during the currency of the strike. In support hereof the respective attendance registers of the three employees for the periods March, April and May 2011 are attached to the founding affidavit. Further in support of the contention that they were at work, the applicant attached to its papers a letter dated 21 February 2011 informing the respondent of the fact that the strike was to commence on 22 February 2011; correspondence relating to a LLF Task Team Meeting; documents confirming that the individual employees continued to deal with disciplinary proceedings that were set down by the respondent during the duration of the strike; documents confirming that discussion meetings were held with the respondent to bring the strike to an end and, lastly, documentation confirming that meetings were held between the respondent and SAMWU's branch executive committee.

- 8] The respondent's view was that the three individuals had taken part in a strike and consequently because the principle of 'no work no pay' applied, the respondent was entitled to withhold remuneration from the individual applicants. The respondent did not dispute that it had made the deductions unilaterally from the salaries of the three full time shop stewards and that they did not give them reasons for doing so.
- 9] As already pointed out, the factual dispute about whether the three shop stewards attended work during the strike and therefore entitled to be remunerated, was referred to oral evidence. In the present case, the three shop stewards allege that they did report for work as *per* normal at the union's offices. The respondent alleges that they were absent from work as they were participating in the strike. In essence, therefore, it is the case before this Court that because the trade union was on strike, the full-time shop stewards were deemed to also have been on strike.

Oral evidence

- 10] Pos and Kekana gave evidence on behalf of the applicant. The respondent called no witnesses. Pos confirmed that she was elected as a full-time shop steward in April 2004. Once appointed, she relinquished her position as a nurse to attend to the duties of the union full time. She confirmed that she submitted leave forms and study leave forms to the responsible person at Human Resources of the respondent. The union will, however, sign the leave form first. In respect of her duties, she confirmed that she is accountable to the trade union, its members as well as the structures of the union. As a full-time shop steward, she therefore did not do the duties of the employer. She testified that she reported to the chairperson of the region – a one Mr. William Kekana. He was employed by the respondent until his dismissal as an employee on 11 February 2011. He, however, remained as the chairperson of the region in terms of the constitution of SAMWU. At all material times he was her supervisor. Pos explained what her duties were during the course of the strike. She explained that she would remain doing her administrative duties during the strike and would report at the union offices. She would fill in the attendance register every

day and would go out to monitor the activities of the union. Sometimes she would have meetings with the employer and at other times she would attend to other union activities. With reference to her attendance register attached to the founding affidavit, she explained that she would fill in the register and attach her initials. Her supervisor (Kekana) would then sign the attendance register and would thereby confirm her attendance to the office for a specific period of time. If she is not at work, he will write a comment in the 'comment column'. She therefore confirmed, with reference to the attendance register that she was at work during the period in question. Kekana confirmed that he had signed her attendance register and that he therefore confirmed that she was at work at the relevant time.

11] With reference to the attendance register of Moepye, Pos confirmed that she had signed his attendance register as a supervisor since Moepye reported to her (as the branch secretary). Pos confirmed that Moepye reported for work during the strike. In respect of Mazibuko, Pos testified that he likewise attended work during the currency of the strike. Pos confirmed that the attendance registers were sent to the respondent and that the respondent never queried the correctness of the registers.

12] Pos confirmed that they had participated in a strike but testified that that did not mean that they did not do their duties (as full time shop stewards) in terms of the constitution of the union and in terms of the main agreement. She testified that they had continued to serve the interests of their members on a full time basis. She further, with reference to an affidavit filed on behalf of the union in another application brought by the respondent, testified that the shop stewards acted as marshals at all pickets and marches in order to ensure that the members disciplined themselves.¹

1 In this regard the following is stated in paragraphs [10] and [11] of the said affidavit: "[10] It is a longstanding policy of the union to deploy its shop stewards to act as marshals at all pickets and a march is organised by the union to ensure a disciplined event. At this moment and since the commencement of the strike on 22 February 2011, the union shop stewards have closely monitored the strike and the conduct of its members. No complaints of unlawful conduct by members have been brought to the attention of the union."

[11] I have personally attended most of the marches and pickets during the current strike. I can state without fear of contradiction, that there had been no unlawful acts committed by *bona fide*

13]Pos accordingly accepted that they were participating in the strike but testified that the situation of the three full-time shop stewards were different in that they represented the interest of the trade union during the strike. She explained that although the respondent continued to pay their salaries once they were appointed as full-time shop stewards, they ceased to work for the employer and instead rendered their services to the trade union. Consequently, once an employee becomes a full-time shop steward the reporting lines were different: a full-time shop steward no longer reported to the employer but reported to the union.

Evaluation of the merits

14]I am persuaded on the evidence that the three employees duly attended work during the period of the strike: They signed the attendance register during the course of the strike and attended to union activities during the strike. The only question that remains is whether full-time shop stewards (who attend to union business on a full time basis) is entitled to be paid by the employer despite the fact that their union is engaged in (protected) strike action and despite the fact that the principle of 'no-work-no-pay' was applied to all striking employees. The real issue in this matter is therefore the allegation by the respondent that it is not required to pay the salaries of the three shop stewards by virtue of the fact that, once they participate in the strike, they were not entitled to be paid by reason of the fact that they were not rendering their services. The respondent, so it argued, was therefore entitled to apply the principle of 'no-work-no-pay' to them.

15]Clause 2.5 of the main agreement provides that each trade union has the right to elect full-time shop stewards who will be remunerated on the basis of the post they held at the time of election. Full-time shop stewards will receive all salary notches, general increases and service condition improvements applicable to such post (clause 2.6.7.1 of the main agreement). Clause 2.5.7.6 of the main agreement

members of the union during the strike. The applicant is invited to approach the union of any complaints of unlawful conduct by its members for its part. The union will continue to preach to its members the importance of disciplined strikes, especially since unlawful conduct of striking members is prejudicial to the interest of the union.'

further states that '[a]ll applications for leave will be dealt with in accordance with the applicable conditions of service and will be authorized by the relevant trade union subject to the provisions that the person designated in terms of clause 2.5.9.1 is duly informed'. Clause 2.5.9 states that full-time shop stewards must report to a designated member of the employer for administrative purposes. In terms of clause 2.5.9.2 full-time shop stewards *shall report and be accountable to the trade union structures or members* in accordance with the respective constitutions and policies of that trade union. I have already referred to clause 2.5.6.1 which expressly states that '[f]ull-time shop stewards shall represent the interest of their trade union and its members'.

16] It is clear from these clauses of the main agreement that a full-time shop steward no longer renders work to the employer for the benefit of the employer. The task of the full-time shop steward is to act for the benefit of the union and its members on a full time basis and in doing so will, *inter alia*, liaise with the employer whenever necessary. The anomaly of the position of the full-time shop steward is the fact that although he/she remains employed by the employer and as such is entitled and subject to the same conditions of service, policies, rules and regulations which prevail in his/her employer, the full-time shop steward will not render a service to, or work for the employer for the benefit of that employer: The full-time shop steward works for the union and for the benefit of the union. The further anomaly of this position as full-time shop steward is the fact that the shop steward, by virtue of his/her position, will often engage in conflict with the employer over union related matters. As such full-time shop stewards and employers are 'natural adversaries'. (See in this regard: *Independent Municipal & Allied Trade Union and Others v Rustenburg Transitional Council*.²⁾

2 (2000) 21 ILJ 377 (LC). The court held at paras 5 - 7 that 'So much should be trite. In the nineteenth century it most certainly was. No one I denied the adversarial nature of the relationship between unions and employers and each dealt with the other accordingly. The question became confused, however, when the role of unions became secure and their legitimacy was accepted, for efforts were then made to recast them as partners in a corporatist enterprise. It took a Kahn-Freund to debunk these unitarist theories and remind us that the conflict between capital and labour is eternal: 'Any approach to the relations between management and labour is fruitless unless the divergency of their A interests is plainly recognised and articulated. . . . It was [Mr Justice Higgins, "the principal Founding Father of the Australian system of arbitration and conciliation"] who said that "the war between the profit-maker and the wage-earner is

17] Furthermore, if regard is had to clauses 2.5.9.2 and 2.5.9.3 of the main agreement, it is clear that, although shop stewards must report to a designated member of the employer for 'administrative' purposes, the full-time shop steward is accountable for the satisfactory performance of his/her full-time shop steward duties to the trade union. Furthermore, in terms of clause 2.5.9.3, the trade union 'shall ensure that they [the full-time shop stewards] carry out their duties efficiently and effectively'.

18] In respect of the practice of 'no-work-no-pay', it is trite that this practice arises from the principle that an employee is to tender his/her services to the *employer* in return for payment of its salary. If the employee does not tender her services during the currency of a protected strike, she will not be entitled to payment of her remuneration. If regard is had to clause 2.5.6 of the main agreement, it is clear that a full-time shop steward represents the interests of the trade union and as such he/she renders his/her services to the trade union to act as its representative in dealings with the employer. The full-time shop steward, although still an 'employee', no longer

always with us'. (The passage is taken from the last edition of which he was sole author: see *Labour and the Law* (1977) at 16-17.).

In some cases, no doubt, the conflict is veiled. Years of cooperation, which can be of considerable mutual benefit, can encourage a belief that the union is the employer's friend. One of the first applicant's constituent unions was, it seems, seen in precisely this light in the period preceding the amalgamation of 1995, presumably because wage negotiations were normally smooth and because the union, by efficiently administering its employee benefit schemes, was providing the employer as well as its members with a useful service. In such a climate it is easy to see why the employer might look with indulgence upon a situation in which its top management occupied the senior positions in the union. Such relationships are seldom enduring, however, as municipalities have discovered in the period since 1995. Obligated to live together though they are, unions and employers are natural adversaries, and the first applicant and the respondent are no exception.

By joining a union, an employee commits himself to a body that stands in opposition to his employer. In a real sense he "goes over" to the opposition. This can be a breach of the duty of fidelity owed by an employee to an employer for "the servant is bound to give of personal service to his master and, as a consequence, to refrain from any course of conduct the natural tendency of which used to injure his master's trade or business" (*R v Eayrs* (1894) 12 SC 330 at 332). The judgment in *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) at 867H-I is in the same vein: "There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests." As these and other cases reveal, the employee can commit a breach of the duty by moonlighting for a competitor, and does so when he discloses confidential information, touts for business on another's behalf or encourages fellow employees to leave the employer and take up work elsewhere. There is, as far as I know, no case in our law in which it has been held to be lawful to dismiss an employee for joining a union but I have little doubt that such a dismissal might be legitimate at common law. Aligning oneself with a body specifically established as a counterweight to the employer is arguably a greater infringement of the duty of fidelity than taking up a part-time position with a competitor; it certainly seems to be no less.'

tenders his/her services to the employer. As long as the full-time shop steward tenders and/or engages in the duties and obligations of a full-time shop steward he/she is therefore entitled to the payment of his/her salary. I am of the view that this principle extends to full-time shop stewards who participates in a strike in the sense that they fulfill their union obligations whilst the strike is continuing. The principle of 'no-work-no-pay' therefore does not apply to a full-time shop steward during the course of a strike (provided that the full-time shop steward engages in trade union activities to the satisfaction of the trade union (clause 2.5.9.2 of the main agreement) and provided that the full-time shop stewards in terms of the collective agreement report to the trade union structures during the currency of the strike).

19] I am further of the view that, because of the nature of what full-time shop stewards do, their position cannot be equated with that of an 'ordinary' shop steward who remains obligated to render his/her services to the employer. A full-time shop steward has by virtue of his/her position (as a full-time shop steward) been exempted from rendering his/her services to the employer. I have debated the question with counsel on behalf of the respondent namely whether, in light of the fact that a full-time shop steward no longer renders a service to the employer, it may be concluded that a full-time shop steward can participate in a strike. This question is relevant in light of the anomaly that arises namely that, once an employee is appointed as a full-time shop steward he/she no longer renders a service/work to the employer in the strict sense although he/she remains entitled to the remuneration he/she would have received had he/she remained in the position appointed to. Inherent to strike action is the withdrawal or refusal to work. In this regard a 'strike' is defined as 'the partial or complete concerted *refusal to work*³ ... by persons who are or have been employed by the same employer ... for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee..'.⁴ The question therefore arises whether a full-time shop steward who participates in a strike but at the same time continues to fulfill its obligations towards its union during the strike, can be said to participate in the strike

3 My emphasis.

4 Section 213 of the LRA.

particularly in light of the fact that he/she is not withdrawing his/her services from the employer.

20] In the present case, I am of the view that the employees did not participate in the strike and therefore they are entitled to their remuneration for the months in question. In arriving at this decision, I have taken note of the following: Firstly, on the facts, the employees did not withhold or withdraw their labour from the employer: They signed in every day and reported for work (as full-time shop stewards). Secondly, during the course of the strike they attended to their duties as full-time shop stewards: They monitored the strike and attended disciplinary hearings and meetings. Thirdly, although I do take the point that a full-time shop steward never loses his/her status of being an employee; the three employees participated in the strike in the capacity of serving the interests of the union and its members. Fourthly, the employer's obligation to remunerate an employee is suspended in terms of section 67(3) of the LRA which states that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike. There is no evidence before this Court that the individual employees did not render their services. They continued as normal and their involvement in the strike was in their capacity as full-time shop stewards who had to manage the strike on behalf of the union. They did not refuse to render services to the employer as this obligation was suspended by virtue of their appointment as full-time shop stewards.

21] In the event, it is concluded that the three employees were at work and hence entitled to their salaries. In respect of costs, I can find no reason why the applicant should not be entitled to its costs which costs include the employment of senior counsel.

AC BASSON J

APPEARANCES

FOR THE APPLICANT: H van der Riet SC

Instructed by AC Schmidt Incorporated

FOR THE RESPONDENTS: Unknown

Instructed by Maria Phefadu Attorneys