

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

CASE NO: P485/18

In the matter between:

NEHAWU

Applicant

and

**EASTERN CAPE, DEPARTMENT OF SPORTS,
RECREATION, ARTS AND CULTURE**

First Respondent

Heard: 21 November 2018

Judgment delivered: 22 November 2018

Edited: 21 December 2018

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks an interim order declaring deductions that the respondent has made against the salaries of certain of its members declared unlawful, reimbursing the members for the amounts deducted, and interdicting the respondent from deducting any further monies from the members' salaries.
- [2] The events giving rise to this application have their roots in an unprotected strike that occurred at the respondent's office in the Alfred Nzo district. The unprotected strike commenced at the district office on 12 October 2018. The applicant approached this court on an urgent basis on 19 October 2018, seeking an interim order declaring the strike unprotected and interdicting the respondents from committing acts of misconduct. That misconduct extended to threats of violence, acts of disruption, kicking and banging of doors, tampering with computer service and telephone lines, and locking the registry office. On the return date, on 13 November 2018, the rule *nisi* was confirmed by Lallie J, except in one respect that is not material to these proceedings. There were 46 employees identified by the respondent (who was the applicant in the urgent proceedings) as employees participating in the strike; they were listed in an annexure to the notice of motion. Not one of them opposed the confirmation of the rule *nisi* on the basis that they did not participate in the strike by reason of their being on annual leave, on duty outside of the office when the strike took place, or for some other reason.
- [3] The grounds for urgency in the present instance relate to various attempts by the parties to resolve the issue of the application of the respondents 'no work, no pay' policy in relation to the strike. I am satisfied that applicant took reasonable steps to file the application without undue delay.
- [4] However, that is not the end of the inquiry into urgency. This court has conventionally been disinclined to regard loss of income *per se* as a ground for urgency (see *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC)). If this were to be recognised as a ground for urgency in itself, virtually every

dismissed employee would have the right to approach this court for urgent relief. (See *SACAWU v Shoprite Checkers (Pty) Ltd* [1997] 10 BLLR 1360 (LC).)

- [5] The applicant contends that the application is urgent because the amounts to be deducted are significant and will have a 'detrimental effect' on the members' finances, to the extent that the members will not be able to meet their obligations to creditors and their dependants. However, the applicant has provided no evidence of any irrevocable harm that its members would suffer should the relief sought be refused – the averment of a negative impact on their financial circumstances is no more than a sweeping statement made by the regional secretary. That statement is not substantiated in any way, neither by way of confirmatory affidavits nor evidence of individual hardship and irrevocable harm that would be occasioned should urgent relief be denied.
- [6] In the absence of any specific evidence that places this case in the category of the exceptional, the general rule must prevail. It is not sufficient, as the applicant's counsel submitted, to contend that the papers were prepared in haste, and that the applicant was unable, within the time available to it, to provide any particularity of financial hardship. The applicant chose to file the application when it did. It must have been aware of the general rule against the granting of urgent relief when the claim is in effect for loss of income, and it ought to have foreseen the need to establish a case of exceptionality. The applicant failed to do so. In the circumstances, the general rule must apply, and application stands to be struck from the roll for lack of urgency.
- [7] While not strictly relevant to these proceedings given my finding that the application is not urgent, in so far as the applicant's claim to a *prima facie* right is based on s 34 of the Basic Conditions of Employment Act (which prohibits deductions from remuneration without consent or authority in law), in the present instance, there is no deduction. Section 34 assumes a deduction from remuneration earned. The application of a 'no work-no pay' principle is simply that remuneration is not payable for days not worked. This is recognised by s 67 (3) of the LRA, which states clearly that an employer is not obliged to remunerate

an employee for the period that the employee participates in a protected strike. *A fortiori*, there is no obligation to remunerate an employee for the period of any unprotected strike. In short, when an employer refuses to pay remuneration for days not worked on account of strike action, s 34 is not breached when payment is withheld.

- [8] It is also not necessary for me to consider the parties' submissions regarding the identity of those of the applicant's members who participated in the strike and those who aver that they did not. I would observe though that given the members' failure to oppose the confirmation of the rule *nisi*, this court made a finding on 13 November 2018 that at least 46 employees participated in an unprotected strike. In the present application, the applicant represents 43 of its members. There is no attempt to identify how many of those now represented were the subject of the finding regarding the unprotected strike. Instead, makes broad averments that members worked and signed an attendance register, were off-site on official duty or on leave. These are not matters of which the deponent to the founding affidavit, the regional secretary, could have personal knowledge. None of the averments are supported by confirmatory affidavits from any employee to state that he or she rendered services during the strike and is thus entitled to remuneration. It was incumbent on the applicant to identify those applicants whom it claims rendered their services during the strike, and to provide some proof of that fact. Again, there is not a single confirmatory affidavit.
- [9] Finally, s 162 affords the court a broad discretion to make orders for costs according to the requirements of the law and fairness. In my view, there is no reason why costs ought not to follow the result. The opposition to these proceedings, which never had any reasonable prospect of success, has been funded by the taxpayer. There is no reason why the respondent ought not to be entitled to recover its costs.

I make the following order:

1. The application is struck from the roll for lack of urgency, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv Ntsepe, instructed by Thanyaane Attorneys

For the respondent: Adv Mayekiso, instructed by the state attorney.