IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J913/19

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

MSOMI, NKOSINGIPHILE & 21 OTHERS **Second to Further Applicants**

and

JOHN THOMPSON (a division of ACTOM) **Respondent**

Heard: **09 April 2019**

Delivered: **12 April 2019**

JUDGMENT

LALLIE. J

[1] The applicant launched this urgent application for an order mainly in the following terms:

> "1. CONDONING non-compliance with and DISPENSING with the provisions of the Rules of this Honourable Court relating to times and manner of service referred to therein and dealing with the matter as one of urgency in terms of Rule 8 of the Labour Court Rules.

2. DECLARING that short time work arrangement directed by the Respondent to Second and Further Applicants is a breach of their contract of employment.
3. DECLARING that short time work arrangement is not consented therefore compelling Second and Further Applicants to work systemically reduced time is unlawful unilateral change to terms and conditions of employment.
4. DECLARING that 2 and 3 above is contrary to 'fair labour practice', is serious harassment and abuse of authority thus a direct violation of Second to Further Applicants of their constitutional rights.
5. DECLARING that changing from section 189A of the Labour Relations Act facilitation process to short time work arrangement is unfair and unlawful designed to induce unfair resignation instead of retrenchments.
6. DECLARING that the warning issued by Commissioner, Mr Simon Makhubela on 7 February 2019 to the Respondent not to do anything untoward in relation to the facilitation process is binding on the Respondent.
7. DECLARING that the Ruling issued by Commissioner Makhubela as attached is final and legally binding on the Respondent until set aside by this Court.
8. DECLARING that the Respondent and the Applicants are engaged on the LRA regulated retrenchment process facilitation which must be completed before another form of restructuring process commences which involves same persons.
9. DECLARING that the National Union of Mineworkers is a non-party to the Metal and Engineering Industries Bargaining Council (MEIBC) collective agreement so are it members.
10. DECLARING that the MEIBC collective agreement has not been extended by the Minister of the Department of Labour to non-parties therefore is not applicable to the Applicants.
11. DECLARING, in the event Respondent relies on MEIBC, clause 7 of the agreement dealing with short time, which without consent of the employees or consensus by the parties' concerned is enforcement is unconstitutional.
12. ORDERING that a Rule Nisi issued calling upon the Respondent herein to appear and show cause on a date and time to be determined

by this Honourable Court why a final Order should not be granted, in the following terms:

12.1 Directing that the respondent returns to retrenchment process as facilitated by the CCMA to its completion.

12.2 Directing Respondent in terms of paragraph 11.1 above to engage on meaningful consultation, fair and objective selective criteria.

12.3 Directing that Respondent is from the 8 April 2019 until the matter is heard interdicted and restrained at least from-

12.3.1 Barring Second to Further Applicants from reporting for normal duties in terms of their respective contracts of employment and any other law;

12.3.2 Directing respondent to pay applicants their normal wages and salaries respectively;

12.3.3 Interdicting the Respondent from unilaterally selecting second to Further Applicant as casualties of retrenchment and subsequent targets for perpetual harassment, call to resign and forced short time work.

13. ORDERING that respondent comply with natural rules of justice and fairness and in accordance with and applicable provisions of the law, common law and the Constitution."

[2] The factual background of this matter is that on 26 November 2018 the respondent issued its employees with a notice in terms of section 189(3) of the Labour Relations Act[1] (the LRA) informing them of its contemplation to dismiss part of its workforce for its operational requirements (retrenchment). The notice further informed the employees, including the second to further applicants who are members of the applicant, that the retrenchment process was in terms of section 189A of the LRA. It also expressed the respondent's intention to request facilitation in terms of section 189A (3) of the LRA and to have the process possibly finalised by 24 January 2019. The first applicant (the NUM) requested facilitation from the Commission for Conciliation Mediation and Arbitration (the CCMA). After the parties dealt with their

[1] 66 of 1995 as amended.

differences of opinion, facilitation commenced. It had its fair share of disputes which the facilitating commissioner resolved by issuing rulings.

[3] On 25 March 2019, before the facilitation process was finalized, the respondent issued a notice in terms of clause 7 of the Metal and Engineering Industries Bargaining Council Consolidated Main Agreement (the MEIBC) expressing its intention to implement short-time. The roster for the manner in which the respondent intended operating during the short-time was attached and the unions and employees were informed that a consultation meeting would be held at 09h00 on 29 March 2019. The NUM responded by objecting to the implementation of short-time on the basis that it was a stratagem to frustrate the section 189A facilitation. It insisted that facilitation be proceeded with. The respondent maintained that nothing precluded it from effecting short-time concurrently with the retrenchment process. It relied on the MEIBC. The NUM did not attend the consultation meetings on short-time scheduled for 25 and 27 March, 1, 2 and 3 April 2019.

[4] In a letter dated 1 April 2019 the applicant lodged a formal dispute with the respondent opposing short-time. It relied on section 64 of the LRA which governs unilateral changes to terms and conditions of employment, the Constitution of the Republic of South Africa[2] (the Constitution), section 158 of the LRA which enables the Labour Court to grant urgent interim relief, the Basic Conditions of Employment Act[3] (the BCEA) and common law. It further advised the respondent that it would launch an urgent application in this Court on being advised of the commencement date of the contemplated short-time. On 3 April 2019 the respondent informed the applicant that only those employees rostered to work would be permitted on site. The NUM reacted by filing the application at hand on 5 April 2019. The application is opposed by the respondent.

[5] The urgency of the application will be determined first as it is challenged by the respondent. The respondent submitted that this application is not urgent. It

[2] 108 of 1996.
[3] 75 of 1997.

considered the period it was allowed to file its answering affidavit unreasonably short on the grounds that the first applicant had been aware since 25 March 2019, 11 days before the application was served on 5 April 2019, that it intended implementing short-time arrangements with effect from 8 April 2019. This submission is not factually correct. The letter the respondent sought to rely on was sent to the NUM on 25 March 2019. It conveys the respondent's intention to implement short-time, however, it does not disclose its commencement date. It is therefore the applicant's version that is supported by the letter, the respondent sought to rely on.

[6] It is common cause that the NUM objected to the implementation of short-time and when it was apparent that the respondent was taking procedural steps towards its implementation, the NUM, on 1 April 2019 declared a dispute and informed the respondent of its intention to approach this Court on an urgent basis on receipt of the short-time commencement date. It is in the letter of 3 April 2019 that the respondent informed the NUM that only the employees who were rostered to work would be allowed on site. The respondent effectively informed the NUM of the short-time commencement date on 3 April 2019 and the application at hand was filed the following day. The NUM did not delay in filing the application.

[7] I have considered the respondent's submission that the limited time within which it was required to file the answering affidavit warrants that the application be struck off the roll. Other grounds on which urgency was attacked was that the applicants have alternative remedies including seeking relief in terms of section 64 of the LRA which they have not pursued because they find it inconvenient. Each case is decided on its merits. While the period the respondent was given to file its answering affidavit is limited, the applicants' conduct is excusable.

[8] The respondent submitted that it was its intention to have the facilitation process and therefore the retrenchment exercise finalised by 24 January 2019. The parties are engaged in a retrenchment exercise and facilitation has commenced. Seeking relief in terms of section 64 of the LRA will not

constitute effective alternative relief for the applicants owing to the limited time the parties have before the finalisation of the retrenchment exercise. The material and relevant issues raised by the applicants render this application inherently urgent and refusal to deal with it urgently will result in denying them excess to justice. In the circumstances, I find the application urgent.

[9] During argument it was established that properly distilled, the relief the applicants approached this Court for was to have the respondent interdicted from unlawfully implementing short-time against the individual applicants. The legal position in respect of requiring employees to work overtime which is consistent with the letter and spirit of the LRA and the BCEA is expressed in the following words in *CWIU & Others v Algorax (Pty)*[4]:

> "Where, for example, an employer seeks to reduce costs in his business and demands that his employees agree to work short-time, that employer has genuine operational requirements justifying the working of short-time but, without the employees' consent, he is not entitled to require them to work short-time. He can demand that they work short time but they are not under any obligation to comply with is demand"

[8] It is common cause that the respondent implemented short time in terms of clause 7 of the MEIBC which is a collective agreement. The agreement is valid as it was extended until 2020. It, however, is not binding on the applicants because the respondent conceded that the NUM is not a signatory to the MEIBC and the MEIBC was not extended to non-parties. Clause 7 of the MEIBC in terms of which the respondent implemented short-time is binding only to parties to it as by being parties they consented to all the terms of the collective agreement including clause 7. The respondent did not attempt to seek the individual applicants' consent to work short-time. It took the decision that they work it and sought to consult them about the manner in which it would be worked. It was labouring under the incorrect view that the MEIBC is binding on the individual applicants.

[4] [2003] 11 BLLR 1081 para

[9] It was argued on behalf of the applicants that the respondent's conduct of demanding that the individual applicants work short-time without their consent has no legal basis. It is also in violation of sections 1, 2, 3, 4 and 5 of the BCEA. The BCEA provides in unequivocal terms that ordinary working hours may be varied in terms of a collective agreement. Employees' consent is therefore a requirement for implementing short time. The applicants established that the respondent's conduct of demanding that they work short time without their consent is unlawful. The respondent provided no valid and lawful reason for its conduct.

[10] In the premises, the following order is made:

Order:

1. The non-compliance with the provisions of the Rules of this Honourable Court is hereby condoned and the provisions relating to times and manner of service referred to therein are hereby dispensed with and this matter is dealt with as one of urgency in terms of Rule 8 of the Labour Court Rules.

2. The Respondent is interdicted and restrained from-

   2.1. Demanding that the Second to Further Applicants work short time without their consent; and

   2.2. Barring Second to Further Applicants from reporting for their normal duties in terms of their respective contracts of employment.

3. The Respondent is directed to pay the Second to Further Applicants their normal wages and salaries lost as a result of being prevented by the Respondent from working their normal working hours.

4. No order is made as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Mr Bongi Zwane (Union Official of NUM)
For the Respondent:	Ms Penny Bosman
Instructed by:	Hogan Lovells