

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1500/19

In the matter between:

NATIONAL TERTIARY EDUCATION UNION

Applicant

and

TSHWANE UNIVERSITY OF TECHNOLOGY

First Respondent

**NATIONAL EDUCATION HEALTH AND
ALLIED WORKERS UNION**

Second Respondent

Heard: 03 July 2019

Delivered: 03 July 2019

EX-TEMPORE JUDGMENT

CELE, J

Introduction.

[1] The application before me is one brought on an urgent basis where the applicant seeks an order in terms of section 158(1)(a) of the Labour Relations Act¹ (the LRA) in the following terms:

- ‘1. That the first respondent’s notice regarding the applicant’s membership of the Tshwane University of Technology Bargaining Forum (TUTBF) dated 8 April 2019 be suspended and the applicant be allowed to remain a member of the said bargaining forum, pending the steps set out in prayer 3 and 4 below and the outcome thereof.
2. That the council of the first respondent be ordered to concede a ratification of an agreement reached at the said forum on 14 March 2019 and to do so at its next meeting.
3. That should the first respondent’s council fail to ratify the agreement as aforesaid, the applicant will within the working days’ institute a dispute procedure provided for in clause 14 of the recognition and procedural agreement dated 21 February 2013.
4. Costs of the application only in the event of opposition which costs are to be paid jointly and severally, the one paying the other to be absolved in the event of opposition by both the respondents opposing the application.’

[2] This application has been opposed by both respondents.

Background

[3] The first respondent is the Tshwane University of Technology (TUT). It is a registered tertiary institution in terms of the Higher Education Act² (HEA) with its principal place of business situated at Staatsartillerie Road, Pretoria.

[4] There are trade unions that operate within the first respondent. These include the second respondent, which has for some time been the majoritarian union, the applicant and NUMSA. The applicant for some time had a membership which went beyond 30% plus 1. Currently it has dropped to about 26.9%.

¹ Act 66 of 1995, as amended.

² Act 101 of 1997.

NUMSA has a membership which is in the region of about 20%. The university and the unions have formed a bargaining forum (TUTBF). Both respondents and the applicant are members of this forum.

- [5] The threshold that was in existence for some time, has been that a union had to have a minimum of 30% plus 1. In this respect then the second respondent was the majority union. However, it would seem that gaining membership in this institution is fairly difficult, because it remains common cause that the second respondent's membership dropped, just as it has happened for the applicant, to a percentage below 30% plus 1.
- [6] For this reason, the members of the bargaining forum held a meeting on 14 March and amongst others, discussed the threshold and agreed that there was to be a proposal to be made to council, which proposal would then recognise the difficulty of having membership by the unions, to then drop the threshold to 25% plus 1.
- [7] Both respondents and the applicant participated in the meeting of 14 March 2019. It appears that at the meeting it was resolved to have the threshold lowered, but the second respondent only agreed, subject to this being confirmed by its members. A follow up meeting was planned for 18 April 2019. However, it would seem that from the events of this meeting the applicant may have been alerted to the fact that there might be difficulties about the agreement coming to fruition.
- [8] What then happened on 8 April 2019, the HR director of the first applicant issued a notice to the applicant to indicate to it that it had observed that its membership had dropped to a percentage lower than 30% plus 1, and it had three months to regain the threshold, failing which it would lose its membership.
- [9] The applicant was not bothered so much about this notice, because it had assumed that the new agreement would take effect. It assumed further even though the HR director had written this notice, the notice would be overtaken by the ratification of the agreement by council. However, when NUMSA came

to know about the lowering of the threshold, it lodged an objection around 18 June 2019. Apparently the applicant was notified about this.

- [10] When preparing the agenda for the meeting of council on 21 June, Exco realised that there were objections to the lowering of the threshold. It then remitted the matter to the bargaining forum for further discussions in order to give a reason why there was a need to drop the threshold. I do not quite understand the rationale for remitting the matter to the bargaining forum. If one has a look at the institutional rules on recognition and threshold for representativeness by unions, there is an objective that was to be achieved. It is not clear if that objective fell short of giving the rationale or the reason why there was to be a drop in the threshold.
- [11] Be that as it may, the proposed agreement did not see the light of day as it could not be debated or presented to council, therefore it was not ratified. In law what this effectively means is that the status quo remained as it was. That meant that the applicant had failed to reach the set threshold. The applicant feels that it has been prejudiced by the attitude of the executive in failing to present the proposed agreement to lower the threshold for ratification, because if this had been done, then that event would have overtaken the three months' period consequent to the notice given by the HR Director.
- [12] However, the applicant's approach in this respect seems to have made a number of presumptions. Firstly, it brings an application to this Court on an urgent basis and therefore has to demonstrate that the matter is indeed urgent, and yet it knew as far back as 8 March 2019 that its membership was under attack.
- [13] Even though the applicant has submitted to Court that it assumed that the right hand did not know what the left hand was doing in relation to the first respondent, from the deliberations I had with Mr Ackerman, it would seem that the right hand very well knew what the left hand was doing. The HR Director knew what the University was doing. The HR Director took part and went to all of these meetings with the applicant. The applicant failed to immediately challenge the notice, seeing that the time was slowly running out for it. The

applicant therefore lost the first opportunity to attack this notice as early as April. It allowed the time to go.

- [14] I assume that urgency exists today, because the three month period is about to lapse. This is self-created urgency. Come next week, if the applicant is not rescued by this Court through the order that it seeks, it will cease to be a member of the forum. I am alive to the fact that this will not be the first time, if it will happen, that it is going to lose representability.
- [15] When considering the dispute resolution measures that are in place, it would appear that the applicant has an alternative relief that it could but did not resort to. I think it was an effective alternative relief that was open to the applicant. It now seeks an intervention from this Court to give it time to revert to these remedies, but they were always available to it.
- [16] In my view, the applicant has failed to sufficiently demonstrate to this court that this application is urgent. When I deliberated this matter with Mr Ackerman, I asked, even if the applicant saw that there was potentially a new agreement in its favour, in the event that it did not materialise, why there was no alternative plan, the plan B. I do not know really what Mr Ackerman said plan B was, but it seems he thought there was no need for plan B. However, there was a need for it, because the clock was ticking. There was a dispute resolution mechanism that should have been resorted to; and in my view, it would have been effective and sufficient enough.
- [17] On the basis of urgency alone the Court cannot come to the assistance of those who sleep on their rights, which is what the applicant did. I find that this application is not properly before me and the application should accordingly be struck off the roll with no order as to costs.
- [18] In the premises the following order is made:

Order

1. The urgent application is struck off the roll for lack of urgency.

2. There is no order as to costs.

H. Cele

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M. F. Ackermann

Instructed by: Len Dekker Attorneys Inc

For the Respondent: Advocate A. Mosam SC and K. Naidoo

Instructed by: Zarina Walele Attorneys