THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

Case no: J 1164/2019

In the matter between:

CITY OF JOHANNESBURG **Applicant**

and

DEMOCRATIC MUNICIPAL AND ALLIED WORKERS UNION OF SA **First Respondent**

MEMBERS OF THE FIRST RESPONDENT **Second and further Respondents**

Heard: 24 October 2019

Judgment delivered: 14 November 2019

JUDGMENT

VAN NIEKERK J

[1] This is the return date of a rule *nisi* issued on 26 July 2019. The interim order reads as follows:

> 3. … A Rule Nisi is issued calling upon the Respondents herein to appear and show cause on 24 October 2019 why an Order should not be issued in the following terms:
>
> 3.1 DECLARING that the strike action by the Second to Further respondents

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is unprotected and unlawful as contemplated in Section 64, 65 and 68 of the LRA;

3.2 INTERDICTING the First Respondent from encouraging and inciting the Second to further Respondents to participate in such unprotected to strike action;

3.3 INTERDICTING AND RESTRAINING the Second to further Respondents from participating in and promoting such unprotected strike action.

4. The provisions of paragraph 3 shall operate as an interim order pending a final order being made on the return date of the Rule *Nisi* as aforesaid.

5. The applicant will continue to provide the Second to Further Respondents with security escorts to identified high risk areas…

[2] On 2 October 2019, the respondents filed an application in which they sought to anticipate the return date. To this end, they filed an affidavit some 900 pages long, and sought to have the matter heard on 4 October 2019. There was never any realistic prospect that the applicant could file a replying affidavit within the time available, or that an already burdened urgent court would be in a position to read the papers prior to the hearing. Be that as it may, the applicant filed a replying affidavit on 15 October 2019 and the matter was ultimately enrolled for hearing on the return date specified in the interim order. The conduct of the respondents in their conduct of this litigation is the subject of further consideration below, in relation to costs.

[3] The material facts that gave rise to the proceedings are not disputed. The individual respondents are employed by the applicant in medical emergency services, and based at various fire stations in the city. Their duties include ambulance and fire-fighting duties, which the applicant makes available to the residents of Johannesburg. In October 2016, the union referred a dispute to the bargaining council in which it was alleged that the applicant was not complying with legislation concerning the response to emergency incidents. The outcome desired was “No ambulance must respond to any emergency incident with only

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BAA crew in attendance without either AEA or ALS'. The referral was withdrawn in July 2017 in terms of a settlement agreement where the parties undertook to negotiate further at local level with the assistance of an external independent third party. The applicant states that in mid-July 2019, it became aware that the emergency communication centre, the call centre to which emergency calls placed by members of the public are directed, was experiencing an increase in call volumes. The increasing calls was the consequence of seven fire stations refusing to respond to calls for emergency ambulance services. When a fire station refuses to respond to such a call and dispatch an ambulance, the emergency communication centre is obliged to call other fire stations in the area to ensure that an ambulance was dispatched to the emergency situation. This increases the workload in the communication centre, with the consequence that the centre is slower to respond to other emergency calls. Fire stations that were affected were Jabulani, Central, Ivory Park and Rosebank. Employees at these fire stations confirmed that there were not attending to calls as they required the applicant to respond to certain demands that they had made. After further discussion, some employees return to work and the applicant assumed that the matter had been resolved. On 15 July 2019 it became apparent to the applicant that the matter had not been resolved and that there were employees who are refusing to respond to calls for emergency medical services. Further discussions were held, but to no avail. By 23 July 2019, it was apparent that the number of fire stations not responding to emergency calls was increasing. On the same day, an ultimatum was issued to affected employees. The employees were advised that they were on strike, that the strike was unprotected, that they were engaged in essential services and could not engage in strike action and that they were to return to work immediately and respond to emergency calls and duties. At the time the application for interim relief was brought, only 13 out of some 80 ambulances operational in the city of Johannesburg were available to respond to calls. It was in these circumstances that the interim order was granted on 26 July 2019.

[4] In order for this court to confirm the rule *nisi* and grant a final interdict, the

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applicant must establish that it meets the requirements for final relief, being a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy (see *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 *ILJ* 329 (LC)). The present case turns on the existence or otherwise of a clear right; in particular, the existence or otherwise of a strike. The individual respondents deny that their refusal to respond to emergency call-outs constitutes a strike. If they are found to be participating in a strike, there is no dispute that their strike is unprotected and that the applicant is entitled to the final order it seeks. (This is so primarily because the individual respondents are engaged in an essential service and thus not permitted to engage in strike action – see s 64(1)(d)(i) of the LRA.) If there is no strike, the applicant accepts that the rule *nisi* ought properly to be discharged.

[5] The definition of a 'strike' in s 213 of the LRA reads as follows:

> "Strike" means that partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and a reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.

[6] In *Transport and Allied Workers Union of SA obo Ngedle and others v Unitrans Fuel and Chemical Co (PTY) Ltd* 2016 (11) BCLR 1440 (CC), the Constitutional Court said the following (at paragraph 105 of the judgment):

> There are four elements or components that make up a strike under the LRA. In everyday parlance people call every collective stay-away from work or work stoppage a strike. Under the LRA a strike must have four elements. These are: (a) a partial or complete concerted refusal to work or retardation or obstruction of work, (b) by persons who are or have been employed by the same employers or by different employers, (c) for the purpose of remedying a grievance or resolving a dispute, (d) in respect of a matter of mutual interest between employer and employee.

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[7] As I have indicated, the issue in the present case is whether the employees are entitled to refuse to work in response to what they contend are unlawful acts by their employer. Under the 1956 LRA the courts had ruled that the concept of 'work' referred only to work that employees were contractually obliged to perform. Thus voluntary overtime work, and work which employees refuse to do because their employer had not performed its obligations in terms of the employment contract, did not constitute 'work' within the meaning of the definition of strike. (See *SA Breweries Ltd v FAWU* (1989) 10 *ILJ* 844.) In contrast, the definition in s 213 of the current Act provides that the reference to 'work' includes overtime work, whether it is voluntary or compulsory. In this context, overtime work has been interpreted to mean overtime work that has been worked in the past and is expected to be worked. A refusal to perform voluntary overtime work may therefore constitute a strike. In *National Union of Mineworkers obo employees v Commission for Conciliation, Mediation and Arbitration & others* [2012] BLLR 22 (LAC) the Lac said the following about refusals to work in the face of instructions form the employer that they regard as unlawful:

> [16] In the present case, the affected employees refuse to engage in the normal employment duty, which was to work on a particular shift. By refusing to observe the rules of the appellant and to carry out the instructions to continue to work in terms of the contract, they had refused to work. In this case, the action was concerted, in that a number of employees had participated in a decision to withhold their labour. As to the third requirement, there was a common purpose in so far as the employees were concerned, being to obtain redress for the third respondent's decision to withhold payment.
>
> [17] Reference was made to the decision by Basson J in *Nkutha & others v Fuel Gas Installations (Pty) Ltd*, where the learned judge said:
>
>> "[69] In the event, the refusal of employees to work in response to a failure on the part of the employer to perform its obligations, such as paying the employees for services rendered, is a lawful refusal in that it does not amount to a breach of contract under common law. In other words, the employees are legally entitled to refuse to carry out their side

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of the employment contract. In fact, it is the employer who is breaching the employment contract by unlawfully failing to perform its reciprocal obligation(s).

[70] Having regard to these legal principles, such lawful entitlement of employees to refuse to work, must in my judgment, be distinguished from a strike where the concerted refusal to work by employees amounts to an unlawful breach of contract under common law…

[72] In view of the foregoing, care should, in my judgment, be taken to ascertain the circumstances or facts which present themselves in every case under investigation. The question must be asked: Is the collective refusal to work in response to the failure of the employer to perform its reciprocal obligations under the employment contract or is the purpose of the collective refusal to work to place pressure on the employer to remedy a grievance or to resolve the dispute? Only in the last mentioned instance would such concerted refusal constitute a strike in terms of s 213 of the Act."

[18] I find it difficult to accept the justification for this distinction between a collective refusal to work in response to a contractual breach by an employer and a collective refusal to work to place pressure to resolve a dispute. That is not in accordance with the section. Section 213 provides that '[t]he partial or complete concerted refusal to work or the retardation or obstruction of work by persons who are or have been employed by the same employer… for the purpose of remedying a grievance' constitutes a strike. Whether affected employees can decide to cancel the contract pursuant to a breach by the employer or sue for damages is beside the point. <u>The key issue is to classify whether, on its own, the refusal to work for whatever reason in order to remedy a grievance falls within the scope of the Act's regulation of a strike</u> <u>(own emphasis).</u> In my view, it manifestly does so and accordingly the dictum in *Nkutha* does not adequately reflect the position as encompassed in s 213.

[8] There is a gloss on this decision, in the form of *G4S Cash Solutions SA (Pty) Ltd v Motor Transport Workers union of SA & others* (2016) 37 *ILJ* 1832 (LAC). In

that case, which concerned the number of employees who had refused to work on Sundays despite their having done so previously on a voluntary basis, this court held that the employees' refusal to work on Sundays did not constitute strike action since the employees were not obliged to work in excess of a six-day week in terms of their contracts of employment. The LAC upheld this finding, and referred to the *National Union of Mineworkers* judgment. Specifically, the court held that the question was whether the employees had refused to engage in employment pursuant to a duty imposed on by the terms of their contracts of employment. The court examined the contracts of employment and found that they made clear that there was no obligation on the employees to work every Sunday. Therefore, the employer enjoyed no corresponding right to demand that the employees work a seven-day week. On this basis, the court held that the employees' refusal to continue to work on Sundays did not fall within the definition of 'strike' in s 213 of the LRA.

[9] Much of what is contained in the affidavit filed in support of the respondents' anticipation of the rule *nisi* relates to events that occurred at various stations after the rule *nisi* was issued. On a reading of the affidavit, the respondents appear to raise two grounds on which they contend that they are not obliged to render services, and that in the absence of any obligation to work, there can be no strike. In the introduction to the affidavit filed in support of the anticipation of the rule *nisi*, the respondents aver 'Failure to take unlawful instructions and work stoppage due to perceived threat to safety does not amount to a strike'.

[10] Despite its 881 pages, the affidavit filed by the respondents is vague, imprecise and often incoherent. The respondents fail to articulate or advance any case based on legal principle. At one level, the respondents appear to submit that their actions in refusing to work are justified, with the consequence that their actions do not constitute a strike. First, the respondents contend that the instructions to work contravene applicable regulatory measures, that they are thus entitled to refuse to carry out duties that would amount to a contravention of those measures. In particular, they aver that the applicant is not supervising employees

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who practice as basic ambulance assistants (BAAs) in terms of the ruling, because the applicant allows two BAAs to staff an ambulance without an independent practitioner being physically present. The applicant disputes this interpretation of the guideline. Secondly, the individual respondents contend that it is unsafe for them to perform their duties, and that they are thus entitled to refuse to work. In particular, the respondents contend that the applicant is not providing security for its employees and that it has failed to make security escorts available to them when they attend emergency call-outs. The applicant disputes this, and avers that it has taken measures to the satisfaction of other (majority) unions and non-unionised employees to secure, as far as is reasonably practicable, the safety of emergency service personnel.

[11] It is not in dispute that the duties that are the subject of the individual respondents' refusal are contractual duties; indeed, the obligation to respond to call-outs lies at the core of their employment contracts. It seems to me therefore that on the respondents' own version, the principle established in the *National Union of Mineworkers* judgment applies - i.e. where the work forms part of employees' contractual duties, a refusal to perform it will fall within the definition of a 'strike' even if the refusal is a response to what is contended to be unlawful conduct (in the form of a breach of contract) by the employer (see Du Toit *et al Labour Law Thorough the Cases* (Lexis Nexis, LRA 9-26). It is clear from the papers that the individual respondents regard their interpretation of the HPCSA guidelines as terms and conditions of their engagement – the nature if the grievances raised in respect of this issue since 2016 suggest that the individual respondents' complaint is in essence one about working conditions in the form of the staffing of ambulances. In so far as the other elements of the definition of a strike are concerned, on their own version, the individual respondents' refusal to perform their duties is causally linked to a grievance. In their affidavit, the individual respondents locate the source of their discontent in the grievance lodged as far back as mid-2016. Their current refusal to work is in pursuit of the same grievance. There is no dispute that the action of the individual respondents is concerted. All four of the elements of the definition of a strike being present,

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the individual respondents' refusal to work constitutes a strike.

[12] In so far as the respondents contend that the refusal to perform call-out duties is not a strike because they fear for their safety, no more need be said other than to observe that it is not disputed that the applicant has an arrangement in place in terms of which high risk areas and times have been identified. This arrangement involves collaboration with the SAPS and the JMPD, and has been put in place in consultation with employees. As I have indicated, none of the other (majority) unions that represent the applicant's employees nor the non-unionised employees have contested the adequacy of these arrangements. This is what no doubt inclined the court hearing the application for interim relief to include paragraph 5 of the order, which requires the applicant to continue to provide the individual respondents with security escorts in identified risk areas. The applicant does not seek the deletion of that part of the interim order, and it stands to be confirmed with the balance of the order.

[13] In summary: the individual respondents' refusal to work falls within the scope of the LRA's regulation of a strike. The refusal by the individual respondents to respond to call-outs constitutes a strike as defined in s 213 of the LRA. The strike is unprotected, not least because the individual respondents are engaged in an essential service and because none of the procedural requirements for the exercise of the right to strike have been met. The applicant has thus established a clear right, and the rule *nis*i stands to be confirmed.

[14] Given the basis of my finding, it is not necessary for me to make any findings in relation to the merits of the substantive dispute between the parties, i.e. that referred to the bargaining council and withdrawn on the basis that further negotiations would be conducted between the parties. The parties have identified the dispute as one that concerns as interest issue, one that must ultimately be resolved in terms of the dispute mechanisms and procedures open to employees engaged in essential services. Nor is it necessary for me to make any findings in relation to the applicant's contention that the opposition to the confirmation of the

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rule *nisi* is contrived, and that the real nature of the respondent's grievance related to demands for the removal of particular managers. Again, this may or may be so, but it is not relevant in circumstances where on their own version, the individual respondents' refusal to work for the reasons they proffer constitutes a strike as defined.

[15] In relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. As I have indicated above, the respondents have placed an unnecessary burden on the court by filing an affidavit stretching to almost 900 pages, much of which is frankly misconceived. The application to anticipate the return date was made on two days' notice in circumstances where the interim order had already been in place over two months and where the return date was some three weeks away. I must also necessarily take into account that the applicant succeeded both in respect of the application for interim relief, and on the return date. The evidence further discloses that there is no collective bargaining relationship between the parties. This court ordinarily does not make an order for costs where such a relationship exists, and where the order for costs may pose a degree of prejudice to that relationship. It is not in dispute that the first respondent is not a recognised union, nor is it been disputed that the strike has not found favour or support from other unions recognised by the applicant, or non-unionised employees. Finally, I cannot ignore that the individual respondents have elected to refuse to perform their duties in circumstances where they are fully aware that they are engaged in an essential service. Indeed, the nature of their work is such that lives literally depend on them rendering the services that they are employed to provide. The consequences of the refusal to provide municipal emergency services to those who require them most, typically the less privileged and more vulnerable members of the community, are dire. In the circumstances, the requirements of the law and fairness are best met by an order to the effect that costs ought to follow the result. The applicant has sought costs on a punitive scale, including the costs of two counsel. At the hearing of the application, one counsel representing the applicant and it seems to me that in the circumstances, only the

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costs of one counsel should be allowed. Further, although the opposition to the application was misguided, the respondent's conduct was not such that a punitive costs order is warranted.

I make the following order:

1. The rule nisi issued on 26 July 2019 is confirmed.
2. The first respondent is to pay the costs of the proceedings.

André van Niekerk

Judge

APPEARANCES

For the applicant: Adv. Z Ngwenya, instructed by Bowman Gilfillan. (Heads drafted by Advs. G Fourie SC, Z Ngwenya and F Sangoni).

For the respondents: Mr. ST Mosomane, Mosomane Inc.

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