THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2310 / 19

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION	**First Applicant**
EMPLOYEES OF THE RESPONDENT WHO ARE MEMBERS OF THE APPLICANT	**Second to Further Applicants**

and

RAND WEST CITY LOCAL MUNICIPALITY	**First Respondent**
THEMBA GOBA	**Second Respondent**

Heard: **27 November 2019**

Delivered: **5 December 2019**

__Summary__: **Urgent application – requirements for urgency – principles set out**

Urgency – applicant must make out case for urgency – urgency self-created – no explanation for material delay – application struck from the roll

Urgency – pay deduction – no basis for urgency – claim for payment can be brought in the normal course

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REASONS

SNYMAN, AJ

Introduction

[1] The applicants have brought an urgent application in terms of which the applicants sought relief to the effect that the respondents be interdicted and prevented from making deductions from the remuneration of the second to further applicants in contravention of the provisions of section 34 of the Basic Conditions of Employment Act ('BCEA').[1] The applicants also seek an order declaring that the deductions already made from the remuneration of the second to further applicants in October 2019 be declared to be unlawful, and that it be 'reversed'.

[2] The matter was opposed by the respondent, principally on the basis of a lack of urgency, and a contention that the applicants are able to obtain full redress in proceedings brought in the normal course.

[3] The application came before me for hearing on 27 November 2019 in the urgent Court. After hearing argument by both parties, I made the following order:

1. The application is struck from the roll for the want of urgency.

2. There is no order as to costs.

3. Written reason for this order will be handed down on 5 December 2019.

[4] This judgment now constitutes the written reasons referred in paragraph 3 of the order, *supra*. For ease of reference, in this judgment, I will refer to the first

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[1] Act 75 of 1997 (as amended).

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applicant as 'SAMWU', the second to further applicants as 'the individual applicants' and the first and second respondents jointly as 'the Municipality'.

The relevant background

[5] The relevant background facts are fortunately relatively straight forward.

[6] It appears that a dispute arose in August 2019 as a result of the categorization of the Municipality following a merger of two municipalities, being the former Westonaria and Randfontein local municipalities. This merger resulted in the Municipality being classified as a grade 6 municipality, and this would result in salary adjustments having to be made to the salaries of the individual applicants.

[7] This possibility of salary adjustments raised the ire of the individual applicants. They gate crashed an executive committee meeting of the Municipality on 19 August 2019 and demanded that the second respondent address them. When this did not happen, according to the Municipality, and on the same date, the individual applicants embarked upon unprotected strike action and further embarked upon a campaign of the harassment and intimidation of non-striking employees.

[8] The Municipality them implemented a 'no-work-no-pay' principle as from 19 August 2019 as a result of this unprotected strike action. The unprotected strike action continued after 19 August 2019 and persisted despite attempts to resolve the dispute, and have the individual applicants resume their duties. The Municipality then brought an application to this Court to interdict the individual applicants from continuing with the unprotected strike action, and the application was set down for 5 September 2019. However, and faced with this application, the individual applicants returned to work on 4 September 2019.

[9] On 12 September 2019, the dispute flared up again. SAMWU demanded that the grade 6 be implemented and the Municipality refused. On 13 September 2019, the unprotected strike action by the individual applicants restarted. Again, the Municipality applied the 'no-work-no-pay' principle.

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[10] The Municipality then brought a second application to this Court to interdict the unprotected strike action, which application was heard on 19 September 2019 under case number J 1932 / 19. On 19 September 2019, Gush J granted a *rule nisi* in terms of which the strike action embarked upon by the individual applicants was declared to constitute an unprotected strike, and was interdicted. The return date for the *rule nisi* was 29 November 2019. I may add that this *rule nisi* came before me on 29 November 2019, where the *rule nisi* was confirmed by agreement between the parties. The individual applicants however only returned to work on 30 September 2019.

[11] According to the Municipality, the individual applicants were embarking upon unprotected strike action for the period from 19 August to 30 September 2019, save for the days between 5 and 12 September 2019 when they returned to work. SAMWU and the individual applicants disputed that they embarked upon unprotected strike action in this period, and this is obviously a material dispute of fact that can only be resolved after proper determination and consideration of the evidence in the ordinary course.

[12] The Municipality instructed its managers to prepare a schedule of all the employees that had embarked upon the unprotected strike action, and the periods when they were not at work. This is how the individual applicants came to be identified. This schedule was presented to the human resources department of the Municipality in October 2019 for processing. It must be stated that the individual applicants were paid their ordinary salaries in August and September 2019, despite their participation in the unprotected strike action.

[13] The Municipality then informed SAMWU and the individual applicants of its intention to apply the 'no-work-no-pay' principle for the period of the unprotected strike referred to above, and conveyed that it would effect a recovery from the salaries of the individual applicants from their salaries for October 2019. This happened at the beginning of October 2019.

[14] The Municipality normally pays its employees on the 25th of the month. Having been informed by the Municipality at the beginning of October 2019 that it would effect a recovery on the next pay day (25 October 2019), as aforesaid, SAMWU then wrote to the Municipality on 23 October 2019, indicating that it

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required confirmation whether the Municipality was going to apply the “deplorable’ no-work-no-pay principle for the next pay day. The Municipality the indicated on 24 October 2019 that it would indeed proceed to effect the recovery on 25 October 2019. It then indeed effected a deduction from the salaries of the individual applicants on 25 October 2019.

[15] On 25 October 2019, SAMWU again wrote to the Municipality. It stated that it disputed that the individual applicants embarked upon unprotected strike action and demanded proof from the Municipality, by close of business on 28 October 2019, of this alleged strike action. The Municipality was required to urgently comply with this demand, or face external recourse pursued by SAMWU.

[16] SAMWU also sent a second and far more formal letter of demand to the Municipality on 25 October 2019. In this letter, SAMWU specifically took issue with the deduction from the individual applicants’ salaries on 25 October 2019. It contended that such deductions were unlawful, and that it would cause the individual applicants severe prejudice. The following was specifically stated in this letter:

> ‘You are called upon and required to reverse immediately all the unlawful deductions which the municipality has effected in the salaries of our members in your employ and to give us a written undertaking by close of business today, 25 October 2019, that the reversals will be effected immediately.’

The letter concluded that if the undertaking demanded was not forthcoming, legal proceedings would be instituted in the Labour Court.

[17] The Municipality did not effect the reversals as demanded by SAMWU. However, no Labour Court proceedings followed. In fact, nothing was done by SAMWU until 18 November 2019, almost four weeks later, when its attorneys sent a letter of demand to the Municipality. In this letter of demand, it was again contended that the October 2019 deductions were unlawful and had to be repaid to the individual applicants. The letter further indicated that further deductions were to be made from the individual applicants’ November 2019 salaries, and it was stated that such a deduction would also be unlawful. An undertaking was demanded from the Municipality, to be provided by close of

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business on 19 November 2019, that it would not effect the deductions from the individual applicants' November 2019 salaries. If the undertaking was not forthcoming by the demanded deadline, an urgent application would follow.

[18] The undertaking was not provided, and the current application followed on 20 November 2019. Inexplicably however, the application was set down for 27 November 2019, which was after the Municipality's salary run on 25 November 2019. As a result, and when this matter came before me for hearing on 27 November 2019, the deductions has already been effected and salaries paid to the individual applicants. The Municipality also indicated in its answering affidavit that this would be the final deductions to be made and no further deductions would be made going forward.

Principles - Urgency

[19] Urgent applications are governed by Rule 8 of the Labour Court Rules. in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[2] applied Rule 8 as follows:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[20] Further, and when considering whether urgency has been established, it must be considered whether an applicant would not be afforded substantial redress in due course, and the applicant must provide proper reasons in support of such a case.[3] As succinctly described in *Maqubela v SA Graduates Development Association and Others*[4]:

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[2] (2010) 31 ILJ 112 (LC) at para 18.
[3] *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) at para 17; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6.
[4] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

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> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. …'

[21] Where an applicant seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established.[5] In *Tshwaedi v Greater Louis Trichardt Transitional Council*[6] the Court said:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ….'

[22] The Court must also further consider the interest of the respondent party, and in particular, the prejudice the respondent may suffer if the matter is urgently disposed of. In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[7] the Court held as follows:

> 'But it is not just about the applicant. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.'

[23] Finally, urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[8] As the Court said in *Northam Platinum supra*[9]:

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[5] [2002] JOL 9452 (LC) at para 8.
[6] [2000] 4 BLLR 469 (LC) at para 11.
[7] (2016) 37 ILJ 2840 (LC) at para 26. See also *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) SA 108 (C) at 113D-114C.
[8] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50.
[9] Id at para 26. See also *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 ILJ 1692 (LC) at para 18; *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* [2002] JOL 9452 (LC) at para 8.

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> '… the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. …'

<u>Analysis</u>

[24] In applying the above principles relating to urgency to the facts of this matter, I have little hesitation in concluding that the applicants' application is not urgent, for the reasons I now set out.

[25] Firstly, there has been an inordinate delay in the bringing of this application by SAMWU, which *per se* diminishes urgency. SAMWU had been aware since the beginning of October 2019 that the Municipality considered the individual applicants to have embarked upon an unprotected strike in August and September 2019, intended to apply the no-work-no-pay principle, and would effect deductions from the salaries of the individual applicants. However, and if there was any doubt, this was dispelled on when the deductions were actually effected on 25 October 2019. Nothing was however done by SAMWU from 25 October until 18 November 2019, when the last letter of demand was sent. Therefore, the total delay in this instance, from when it could be said that SAMWU was aware of what would happen, and until the application was brought, was some seven weeks. By comparison, in *Mashiya v Sirkhot NO and Others*[10] the Court dealt with a period of delay of four weeks, which was considered to be unacceptable. In *Ngcongo v University of South Africa and Another*[11] the Court found a five week delay in seeking to urgently challenge a ruling, not to be not urgent. In *Northam Platinum supra*,[12] the Court held the same view about a delay of a month. *In casu*, the delay is far more than the delay in all these cases, and is thus unacceptable and destructive of urgency.

[26] SAMWU simply offers no explanation why no urgent legal proceedings were instituted at the very least immediately after the first deduction was made on

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[10] (2012) 33 ILJ 420 (LC).
[11] (2012) 33 ILJ 2100 (LC) at para 9.
[12] Id at para 28.

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25 October 2019. It similarly offers no explanation for the delay of some three weeks between that date, and then when the application was finally brought. If the unexplained period from beginning October 2019 is thrown into the mix, what one has in this case is an excessive delay with no explanation for it. In *Northam Platinum supra*[13] the Court held:

> 'The applicants simply offer no explanation why no urgent legal proceedings were instituted immediately after 5 July 2016, and why no urgent action was taken as threatened in the letters by Nkome Inc on 20 June and 8 July 2016. The failure to offer such an explanation weighs heavily against the applicants where it comes to urgency. …'

[27] The only explanation why this matter was brought as one of urgency is indicated in the founding affidavit as being a case of 'ongoing wrong'. This in my view is just another name for self-created urgency. The circumstances where it comes to the October deductions and the following November deductions are the same. It arises out of the same events in August and September 2019. SAMWU had raised its first formal complaint on 25 October 2019 and demanded from the Municipality that it urgently reverse the same or face immediate Labour Court action. To then wait until 18 November 2019 and then use the intended November 2019 deduction as a basis for urgency, is thus self-created urgency. There is no reason why the application could not have been brought at least four weeks before it was actually brought.

[28] Further, the case of urgency brought by SAMWU and the individual applicants is also based on considerations of hardship, sympathy and merits of the case itself. In simple terms, it is said that urgency is established by the alleged unlawfulness of the Municipality's conduct of making deductions from the remuneration of the individual applicants without proper cause and in contravention of the provisions of section 34 of the BCEA. It is alleged that this deduction causes the individual applicants extreme hardship because they have no funds to take of their families.

[29] The problem, *in casu*, where it comes to financial hardship as a basis for urgency, is that the case made out in the founding affidavit is sparse and

[13] Id at para 29.

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completely lacking in particularity. Only general statements are made as to the individual applicants being unable to take of their families, pay school fees, accommodation, monthly accounts and groceries. There kind of general submissions are of little assistance when deciding urgency. In *CWIU v Sasol Fibres*[14] the Court held:

> 'As far as the issue of irreparable harm is concerned, the applicants state that they will suffer substantial reduction of income. I accept that that is correct but the Court is not told what effect that situation will have on the union's members. It is simply not acceptable for parties to make bald allegations and leave it to the Court to fathom consequences of the conduct complained of.'

[30] In any event, the general principle is that financial hardship does not establish a basis for urgency. In *Democratic Nursing Organisation of SA and Another v Director-General, Department of Health and Others*[15] the Court said:

> '… as a general principle financial hardship or loss of income cannot be regarded as grounds for urgent relief. For the applicant to succeed when relying on financial hardship or loss of income he or she must show the existence of exceptional circumstances justifying the granting of an order on an urgent basis and on the ground of financial hardship. In the present instance the applicants have not shown that there are special circumstances for granting the relief sought. …'

However, this general principle may be departed from if exceptional circumstances exist.[16] In *Harley v Bacarac Trading 39 (Pty) Ltd,*[17] the Court held:

> 'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent

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[14] (1999) 20 *ILJ* 1222 (LC) at 1227B – C.
[15] (2009) 30 ILJ 1845 (LC) at para 19. See also *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16; *Northam Platinum* (*supra*) at para 37.
[16] *Jonker* (*supra*) at paras 17 – 18.
[17] (2009) 30 ILJ 2085 (LC) at para 8.

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> relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

[31] The founding affidavit makes out no case as to why the circumstances of the individual applicants are exceptional, and would not be capable of being fully addressed in the normal course. I accept that the individual applicants will suffer financial hardship, but there is no demonstration of undue hardship of such an exceptional nature that cries out for immediate intervention.[18] There is nothing different between the individual applicants and the thousands of other employees standing patiently in the queue waiting for an opportunity to claim their unpaid salaries in Court. In my view, the vague and general case of financial hardship as raised in the founding affidavit, does not substantiate a case of urgency.

[32] SAMWU and the individual applicants can get full and proper redress in the ordinary course. What happened in this case was deductions from the individual applicants' salaries in October and November 2019. There are to be no further deductions. SAMWU believes the deductions are unlawful because it is in contravention of the provisions of section 34 of the BCEA. If this case ultimately succeeds, the Municipality will be ordered to pay back these deductions, providing full redress. There is no need to resort to these urgent proceedings.

[33] There is another reason why I believe it is important that this case be properly ventilated in the ordinary course, and that proper evidence be led, determined and considered. The sole reason why the Municipality made deductions from the salaries of the individual applicants is because it considered them to have embarked upon unprotected strike action. It is trite that in the course of unprotected strike action, the principle of no-work-no-pay applies. Employees are only entitled to be paid salaries if they tender service, which is not the case when they embark upon strike action. It is thus critical to decide whether the individual applicants were embarking upon unprotected strike action over the period in August and September 2019 referred to. The fact that the individual applicants may have embarked upon unprotected strike action may also have an implication on the application of section 34 of the BCEA. In *NEHAWU v*

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[18] *Northam Platinum* (*supra*) at para 37.

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Eastern Cape, Department of Sports, Recreation, Arts and Culture[19] the Court held:

> '… 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.'

But there is no need to decide any of this now, and all of this must be dealt with and decided in the ordinary course.

[34] Applying the above reasoning, I am not satisfied that any exceptional circumstances exist for this Court to intervene based on financial hardship, and SAMWU and the individual applicants have simply not shown this to exist. In the end, the individual applicants' claim is for the refund of deductions made from their salaries. The individual applicants can be fully indemnified where it comes to the relief sought, by way of an award for the payment of money in due course, plus interest. Further, the approach SAMWU decided to adopt is inconsistent with establishing a case of exceptional circumstances of financial hardship, in that it simply did not launch an immediate challenge as it should have.

[35] One final consideration remains. The interdictory relief sought by SAMWU has become moot. By the time this matter was heard, the deductions from the individual applicants' salaries had already been effected. The undisputed evidence was that after this November 2019 deduction, there were no further deductions to come. It follows that there was nothing left to interdict, and all that remained was a monetary claim for the two deductions that had already

[19] (P485/18) [2018] ZALCPE 43 (22 November 2018) at para 7.

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been made. As a comparison, in *Centlec (SOC) Ltd v SA Municipal Workers Union and Others*[20], the Court refused interdictory relief sought by the applicant in that matter to interdict unlawful conduct in the course of a strike because the strike action ceased, and thus there could be no further unlawful conduct performed that can practically be interdicted. Another example is *Tor Industries (Pty) Ltd v Gee-Six Superweld CC and Others*[21] where it was held that it was too late to obtain an interdict to prevent the disclosure of confidential information where it had already been conveyed. As held in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[22]:

> 'A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

[36] Therefore, the applicants have failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied. This is clearly a matter of self-created urgency. The application falls to be struck from the roll.

[37] This then only leaves the issue of costs. SAMWU elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. Normally, this would justify a costs order. But the parties have an ongoing employment relationship and there is clearly litigation to follow to decide the issue giving rise to the deductions. It is my view that it would be inappropriate to mulch either of the parties with a costs order going forward, in these circumstances. In any event, and in terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs, and in this instance, I exercise this discretion in favour of making no order as to costs.

[38] Based on all the above reasons, I made the order that I did on 27 November 2019, referred to in paragraph 3 of this judgment, *supra.*

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[20] (2019) 40 ILJ 846 (LC) at para 10.

[21] (2001) 22 ILJ 1327 (W) at 1345D-F

[22] 2000 (2) SA 1 (CC) at fn 18.

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S.Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr J Gwebu of Madlela Gwebu Mashamba Attorneys

For the Respondents: Adv F Nalane

Instructed by: Edwin S Nkwana Inc Attorneys

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