

SOUTH AFRICA / JUDGMENT

Minister for the Public Service and Administration and Another v National Education, Health and Allied Workers Union and Others (J 281/23) [2023] ZALCJHB 106 (17 April 2023)

[2023] ZALCJHB 106

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J 281/23

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: J 281/23

In the matter between:

MINISTER FOR THE PUBLIC SERVICE AND

ADMINISTRATION

First Applicant

THE DEPARTMENT OF PUBLIC SERVICE AND

ADMINISTRATION

Second Applicant

and

NATIONAL EDUCATION, HEALTH AND ALLIED

WORKERS UNION

First Respondent

MINISTER OF FINANCE

Second Respondent

NATIONAL TREASURY

Third Respondent

PUBLIC SERVICE COORDINATING

BARGAINING COUNCIL

Fourth Respondent

Considered in chambers

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 17 April 2023

JUDGMENT – LEAVE TO APPEAL

TLHOTLHALEMAJE, J

[1] Following an urgent application brought by the first applicant (the Minister) and the second applicant (the Department of Public Service and Administration) (DPSA), this Court issued an order on 4 March 2023, followed by the reasons for that order on 6 March 2023. The Court had set aside NEHAWU's strike notice dated 23 February 2023, and also interdicted the national strike action, picket, or any other form of industrial action that was planned to commence at 06h00 on Monday 6 March 2023.

[2] The basis of the urgent application was that the strike was unlawful and unprotected for a variety of reasons, including that the strike notice issued by NEHAWU had included employees employed by SASSA,

SIU, SANBI, and others not falling within the bargaining unit nor employed in the public service. Equally problematic with the notice was that notwithstanding its knowledge that its members in some instances fell within essential services, NEHAWU made reference to 'all the workplaces in the public service' or 'our members throughout the country'.

[3] The Court had in its judgment, concluded that based on the content of the strike notice, and to the extent that it included employees prohibited from joining the national strike, such a notice to strike

was not only defective but was also unlawful to the extent that it fell foul of the very limitations in section 65 of the Labour

Relations Act (LRA) that NEHAWU had acknowledged.

[4] NEHAWU has since filed leave to appeal against the whole judgment and order of the Court, which the Minister and the DPSA have opposed. For the sake of convenience and for the purposes of this leave to appeal, the parties shall remain as cited in the main judgment.

- [5] In seeking leave to appeal, NEHAWU insists that the Court erred in its findings in regards to the strike notice, more particularly since the strike complied with the statutory requirements, and that any impermissible portions of the strike notice were subsequently abandoned. NEHAWU contended that there was no need for a fresh strike notice to be issued, and that the interdict granted ought not to have extended to the entire public service, but only to essential services and the three organs of State identified in the strike notice. It was submitted that the broad interdict granted by the Court impermissibly limited the right to strike.
- [6] The approach to leave to appeal is fairly trite, and both parties had in their submissions, correctly set out the test and the relevant authorities. Just to reiterate however, flowing from the provisions of section 17(1) of the Superior Courts Act (SCA)[1], leave to appeal should only be granted when there is a sound and rational basis for such an order. Equally so, leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote[2]. The court tests the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court "would" interfere in the decision against which leave to appeal is sought[3].
- [7] As also correctly referred to on behalf of NEHAWU, the Labour Appeal Court (LAC) has further cautioned that the statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix would receive a different treatment or where there is some legitimate dispute on the law[4].
- [8] In the main judgment, it was pointed out that in the light of the objections raised by the DPSA to the contents of the strike notice, NEHAWU had rather than withdrawing that notice and issuing a fresh one, elected to address the defect through correspondence from its attorneys of record. The Court had concluded that such correspondence could not be equated with a notice contemplated within the meaning of section 64(1)(b) or (d) of the LRA. The Court had expressed the concern that due to the nature of the strike notice, all of NEHAWU's members in 'all the workplaces in the public service', inclusive of those rendering essential services and those employed by SASSA, SIU and SANB, would be joining the strike.
- [9] Since the judgment and order of the Court, it is common cause that the strike nonetheless had proceeded as planned. It would be remiss however of the Court not to take judicial notice of the events as

they unfolded during the national strike. As could further be gleaned from other events and applications before this and the Labour Appeal Court, indeed the Court's concerns regarding the participation of employees who ought not have done so proved to be founded.

[10] Upon the Court having issued its order on 4 March 2023, and before reasons for the order could be delivered, NEHAWU had promptly filed an application for leave to appeal. An application by the DPSA and the Minister in terms of section 18 of the SCA equally followed, which matter came before Van Niekerk J under the present case number. That application ended with an application for leave to appeal to the LAC in that regard brought by NEHAWU[5].

[11] In opposing this application for leave to appeal, the DPSA raises two main points, being mootness and there being no reasonable prospects that the appeal would succeed. The defence of mootness arose following from the events since the national strike. In this regard, the defence was supported by the contention the strike action has since been called off following a settlement reached between the parties; that the strike action pertained to wage increment in the financial year that ended on 31 March 2023, and that the budget for that year cannot be altered to accommodate demands made by NEHAWU; that NEHAWU in any event did not persist with the demands related to the financial year that has ended; and that negotiations

for the 2023/2023 have since commenced and resulted in the PSCBC Resolution 2 of 2023, thus disposing of the dispute that gave rise to the strike. It was submitted that there was thus no existing or live controversy between the parties

[12] NEHAWU had filed its submissions on 31 March 2023, whilst the DPSA and Minister had filed opposing submissions on 11 April 2023. In its submissions, and despite the Resolution referred to above having been concluded on 31 March 2023, NEHAWU did not make mention of these significant events since the strike action. It is against these facts that the Court proposes to dispose of the matter on the merits of the appeal and will thus accordingly, refrain from determining whether the matter is moot or not, save in respect of the aspects and conclusions to be dealt with and made in this judgment. Part of this reasoning behind this restraint is that as can be gleaned from the Resolution, NEHAWU has not signed it albeit it is a party to the PSCBC.

[13] The principal issue therefore is whether NEHAWU has demonstrated that there is a reasonable prospect that the factual matrix would receive a different treatment or whether there is some legitimate dispute on the law that deserves the attention of the LAC.

[14] As can be gleaned from the main judgment, the lawfulness of the strike was not an issue that the Court dealt with or the basis of its order to the extent that the procedural requirements of section 64(1)(a) and (b) of the LRA were complied with. The Court had confined itself to the nature and content of the strike notice, which was the basis upon which the intended strike was interdicted.

[15] There can be no doubt that NEHAWU's case remains that there was nothing defective about the strike notice to the extent that its attorneys had in their correspondence to the DPSA, abandoned its position in regards to the involvement of other employees prohibited from joining the strike. NEHAWU's posture is nonetheless perplexing in the light of the LAC's

clear rebuke of this approach in its judgment pertaining to the leave to appeal in the section 18 of the SCA application. The LAC had described the indefensible strike notice as intentionally broad and recklessly so. Worst still however was that the LAC had accepted that a strike by its members prohibited from partaking was impermissible, and had yet inexplicably and for no clear reason, opposed the application before this Court to interdict its members in such entities from continuing to strike.[6]

- [16] NEHAWU's contention that there was no need for a fresh strike notice to be issued, and that the broad interdict granted by the Court impermissibly limited the right to strike completely misses the point. Nowhere in the main judgment or order can it be said that the import thereof was to limit NEHAWU's right to strike, particularly in regard to its members who were ordinarily entitled to embark on the strike.
- [17] To equally have issued the restrictive interdictory order as proposed by NEHAWU misses the point, more particularly since NEHAWU had done nothing of substance following the complaints of the DPSA to ensure that employees in the essential service or others prohibited, did not join the strike. What NEHAWU instead did with its correspondence to the DPSA was non-committal and equivocal as correctly pointed out on behalf of the Minister and the DPSA. NEHAWU effectively with its

posture seem to suggests that this Court ought to have sanctioned its recklessness in issuing such a strike notice, and thus ignore the impact of such recklessness as the events during the national strike proved.

- [18] NEHAWU had a duty to properly abandon its posture prior to the strike commencing by withdrawing the strike notice given the set of circumstances. Therefore, its attorneys' letter to the DPSA informing it that it would abandon the strike in regard to prohibited employees could not have cured the defect in the strike notice, particularly since it was not directed to these employees.
- [19] It needs to be reiterated that the interdict as granted did not for all intents and purposes, prohibit NEHAWU and its members' rights to strike, unless its view remains that the prohibited employees were entitled to join the strike as per the defective notice. All that was required of NEHAWU was to issue a proper notice and unequivocally clarified the legal position to its members. I fail to appreciate what the haste was in proceedings with the strike in circumstances where NEHAWU clearly foresaw, if not intended that essential services workers and others would join the strike when this was legally impermissible.
- [20] In the end, even if this Court was inclined to grant the leave to appeal, the issues that the LAC might be required to deal with,

i.e., the content of the strike notice, have become moot, and do not raise any legitimate dispute on the law. This is so in that the LAC in the section 18 of the SCA appeal proceedings before it had issued an order interdicting and restraining members of NEHAWU in essential service, SASSA, SIU and SANBI. NEHAWU was also ordered to inform its members and officials and all persons to

whom it had given notice of the strike in every province, including but not limited to every hospital and clinic in South Africa at which it has members within the essential services, of the order of that Court. In the end, even if the LAC's order pertained to whether exceptional circumstances had been demonstrated for the purposes of section 18 of the SCA application, it is my view that since NEHAWU had in this leave to appeal submitted that this Court in the urgent application ought to have issued such a similar

order, I fail to appreciate what purpose would be served by the LAC having to be called upon to pronounce on the same issues albeit within the context of this leave to appeal, when it would not arrive at a different outcome.

[21] In summary, the LAC's order essentially confirmed what NEHAWU ought to have done in the first place prior to persisting with the strike action. Even if this Court ought to have initially issued a limited interdict as NEHAWU submitted, the issues raised in the leave to appeal do not raise novel points of law that deserves the attention of the LAC again, in the light of its judgment and order. This is even more so since as correctly pointed out on behalf of the Minister and the DPSA, the strike action came and went, and any other order of the LAC would not have any practical effect. If ever there are any other disputes pertaining to the 2022/2023 wage negotiations, that is a matter for another day. For all the above reasons, it follows that the leave to appeal ought to fail. Accordingly, the following order is made;

Order:

1. The application for leave to appeal is dismissed with no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

[1] Section 17(1) of the Superior Courts Act 10 of 2013 provides: "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that- (a) (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; (b) ... (c) ..."

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(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) ...

(c) ...”

[2] Ramakatsa and Others v African National Congress and Another

[2021] JOL 49993 (SCA) at para [10]; Smith v S (2012)

(1) SACR 567 (SCA) at para 7, where it was held; “What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

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[3] Four Wheel Drive Accessory Distributors CC v Rattan 2019

(3) SA 451 (SCA).

[4] Martin and East (Pty) Ltd v NUM (2014) 35 ILJ 2399 (LAC).

[5] NEHAWU v Minister for The Public Service and Administration and Others

[2023] ZALAC 7 (13 March 2023)

[6] At paras 43 – 44.

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