

SOUTH AFRICA / JUDGMENT

NEHAWU and Others v North West Provincial Dept of Social Development and Another (J1254/21) [2021] ZALCJHB 376 (18 October 2021) [2021] ZALCJHB 376

COURT

Labour Court Johannesburg

BEFORE

A van Niekerk

CASE / FILE NUMBER

J1254/21

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Source record**THE****LABOUR COURT OF SOUTH AFRICA****(HELD****AT JOHANNESBURG)****Not****reportable****CASE****NO: J 1254/21****In**

the matter between:

NEHAWU

AND 172

OTHERS Applicants

and

NORTH

WEST PROVINCIAL DEPT OF

SOCIAL

DEVELOPMENT First

Respondent

HEAD

OF DEPT OF THE NORTH WEST

PROVINCIAL

DEPT OF SOCIAL DEVELOPMENT Second

Respondent

Date of hearing: 15

October 2021

Date of judgment: 18

October 2021

JUDGMENT

VAN NIEKERK J

- [1] The applicant approaches the Court on an urgent basis, seeking what amounts to a final order restraining the respondents from deducting monies from the salaries of the second to one hundred and seventy-second applicants (the individual applicants), on the basis of the 'no work, no pay' principle, applied by the first respondent with effect from 15 October 2021.
- [2] The application is brought pursuant to this Court's jurisdiction in terms of section 77 (3) of the Basic Conditions of Employment Act (BCEA), on the basis that the dispute is one that concerns the individual applicants' contracts of employment.
- [3] The material facts are not in dispute. The individual applicants are employed by the first respondent. Their place of work is the premises located at Provident House, Mmabatho, the head office of the first respondent. That building comprises four floors, and accommodate some 346 employees. The largest number of employees are located on the ground floor, where approximately 81 employees render administrative services. On or about 12 July 2021, an inspector acting in terms of the Occupational Health and Safety Act, issued a number of prohibition notices on account of insufficient ventilation in respect of some of the offices. The notices related to the ground floor office, and 11 other, smaller offices situated on the first and fourth floors of the building. Some 114 employees were affected by the notices, 70% of them working on the ground floor office.
- [4] The respondents contend that while the first respondent was engaged with the landlord to improve ventilation in the offices, the first applicant (the union) incited its members employed at Provident House, regardless of whether the members' offices were affected by the prohibition notices, to stop work with effect from 6 September 2021.
- [5] The respondents further contend that the conduct of the union's members extended beyond a refusal to render services, in that employees not affected by the prohibition notices and contractors were impeded from working. In effect, the functions of the first respondent ground to a halt on 6 September 2021.
- [6] The respondents aver that alternative arrangements were made for the ground floor staff, pending the installation of improved ventilation, in the form of accommodation was acquired in the Old Mutual building, opposite Provident House, with offices ready for occupation on 9 September 2021. All head office employees engaged on the ground floor of Provident House were required to work at the Old Mutual building, or work from home on a case by case basis, by arrangement. The respondents aver that the union's members based at its head office, regardless of whether the offices were affected, persisted with their refusal to work and with the prevention of the colleagues who wished to work, from doing so.

- [6] On 16 September 2021, the respondent states that the Department of Labour revoked the prohibition notice in respect of the ground floor of Provident House but that the ground floor staff, despite this revocation, persisted with their refusal to work. Certain of the limited number of employees whose workplaces were situated on the first to fourth floors and who had been affected by the prohibition notices similarly refused to work from home, but instead gathered with other union members outside of the Provident House building on a daily basis, without tendering their services.
- [7] In short, the respondents contend that from 16 September 2021, there was no legitimate reason for the work stoppage in which the individual applicants engaged. They took the view that the absence from work was unauthorised, and that the union members who had refused to work were not entitled to be paid for the days on which they had not worked. The individual employees were advised by way of a circular addressed to all head office staff on 27 September 2021 that the 'no work, no pay' principle would be implemented from 15 October 2021.
- [8] When the application was called after a postponement on 13 October 2021, the issue of urgency (which had been raised by way of a point in limine in the answering affidavit), was argued. The respondents dispute that the application is urgent and seek to have the matter struck from the roll, with costs.
- [9] The principles regulating urgent applications, and in particular, the threshold for urgency, are well-established. First, an applicant seeking urgent relief is required to depose to the circumstances which he or she avers rendering the matter urgent in terms that are both explicit and cogent. Whether or not a matter is urgent involves two considerations. The first is whether the applicant has set out cogent reasons in the founding affidavit and secondly, whether the applicant will not obtain substantial relief at some later stage. Where an applicant seeks final relief on an urgent basis, as the applicants in effect do in these proceedings, the court must be particularly circumspect in deciding whether or not urgency has been established. The court must necessarily consider the interests of the respondent, and in particular, the prejudice that the respondent may suffer if the matter is to be disposed of within the timeframes imposed by the applicant.
- [10] In so far as financial hardship and loss of income are concerned, this court has consistently held that neither ground is sufficient in itself to establish grounds for urgency (see *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16, where the court observed: 'The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in *Malatji v University of the North*
- [2003] ZALC 32 (LC) and *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO en Andere* (1990) 11 ILJ 971 (T)'). This rule is not inflexible, but an applicant seeking a departure from it, must necessarily establish a proper evidentiary basis for urgent intervention– see *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8.

[11] The only indication of any grounds for urgency is an averment that the individual applicants 'have monthly personal and family obligations' and that they would 'be severely prejudiced if by the wrong application of the no work no pay principle (sic). Much was made by the applicants, in relation to urgency, of the prohibition notices issued by the Department of Labour and what was contended to be the individual applicants' compliance with those notices. Indeed, counsel for the applicants submitted that the primary ground for urgency on which the applicants relied is that there was a determination made and a notice issued by an inspector on 13 July 2021 in terms of section 30 of the OHSA, and that the ground floor of the premises at Provident House as well as several other officers were determined to be unsafe and unfit for occupation. The individual applicants had done no more than comply with that determination, and the respondents' manifestly unlawful conduct in the form of retrospective deductions from their remuneration constitutes exceptional circumstances for the purposes of urgency.

[12] This submission overlooks the nature of the dispute between the parties. The applicants are before the court in terms of section 77 (3) of the BCEA - they contend that in breach of their employment contracts, the first respondent has made deductions from their remuneration. In essence, the defence to that claim is that the remuneration concerned was never earned, on account of the individual applicants' refusal to work in circumstances where they were not entitled to withhold their labour. In this sense, the dispute has less to do with the application of the OHSA than contractual principles relevant to the enforcement of an employment contract. The nature of the claim is one that inherently requires a court to ascertain, on an individual

basis, which of the individual applicants' workplaces had been affected by the prohibition notices, whether any of the individual

applicants had been directed to perform work at an alternative workplace but refused to do so, and the like. These are matters that quintessentially ought to be resolved by the leading of evidence. The applicants appear to assume that the mere fact that prohibition notices were issued in respect of some of the offices at Provident House entitled them en masse to refuse to report for work and to claim payment for the days concerned. This is manifestly not the case. What the applicants attempt to do in the present instance is secure what amounts to a final order to have the respondents reverse any deductions effected from their remuneration in circumstances where it is by no means clear that in respect of each individual applicant, the amount claimed was actually earned. Put another way, it is by no means clear that what the applicants contend are deductions are deductions at all.

[13] Whether or not the application is urgent must necessarily be determined from this perspective. First, it is not as if the individual applicants are being deprived of an entire month's salary. The application of the 'no work, no pay' principle has not deprived them of all of their remuneration for the month of September/October. Secondly, the applicants have manifestly failed to establish any exceptional circumstances which warrant a departure from the general rule that financial hardship is in itself not a ground for urgency. Those

cases in which this court has departed from the general rule have concerned detailed averments regarding financial loss and hardship and in particular, the financial consequences of the respondent's refusal or failure to pay remuneration. In each case, appropriate documentation has been furnished to sustain the averment that the negative financial consequences of the employer's conduct would not be capable of being remedied should the application

be heard in the normal course, e.g. foreclosure of a mortgage bond. In short, the applicants have failed to adduce evidence that might serve to sustain a departure from the general rule that financial loss or hardship is not, in itself, a basis for urgency. For that reason, the application is not urgent and stands to be struck from the roll on that basis.

[14] Insofar as costs are concerned, the application is one brought under section 77 (3), in which this court exercises jurisdiction over contracts of employment concurrently with the civil courts. The Labour Appeal Court has held that in these circumstances, absent special circumstances, the regime is that costs follow the result (see *Baise v Mianzo Asset Management (Pty) Ltd* (2019) 40 ILJ 1987 (LAC)). In my view, there are no special circumstances that warrant a departure from the general rule. The applicants have dismally failed to show that there are any special and specific individual financial circumstances that render the application urgent. This case is no different to any other case languishing in the substantial backlog that regrettably exists in this court in which employees seek to claim unpaid salaries. The application is in any event not an application for interim relief in the proper form. There is no averment to the effect that that the applicants have filed, or intend within a specified period to file a statement of case in which they claim the amounts of the deductions from their remuneration that they contend were effected in breach of a contract of employment. The papers do not disclose the rudiments of a claim in contract nor, for the reasons reflected above, do they establish any circumstances that warrant urgent intervention by this court by way of motion proceedings.

[15] The conduct of the applicants' representative also leaves much to be desired. The present application was served on the respondents after working hours on 11 October 2021, affording them only one working day in order to file their answering affidavit. The answering affidavit was filed on 13 October 2021 in circumstances where on the same morning, the day on which the applicants had enrolled the matter for hearing, they sought a postponement in order to file a replying affidavit. In my view, this constitutes nothing less than an abuse of this court's rules. The rules do not permit one party to ambush the other by affording an unreasonable period within which to respond to a substantive application for urgent relief. It is also not open to a party, having placed its opponent on unreasonable terms within which to file an answering affidavit, to then seek an indulgence in the form of an extended period within which to file a replying affidavit. The applicants fixed an unreasonable period for the exchange of affidavits and were caught in a situation of their own making when they found themselves unable to file a replying affidavit prior to the hearing. What weighs particularly heavily with me is the fact that the applicants had

provided a written undertaking to the state attorney to serve a draft copy of the application over the weekend of 9 to 10 October 2021. No such application was served and, as I have indicated, the papers were served only after business on Monday 11 October 2021, setting the matter down for hearing at 10h00 am on Wednesday 13 October 2021. Having elected to litigate by ambush, it seems to me that the order for costs ought to extend to the costs occasioned by the postponement granted on 13 October 2021, when costs were reserved.

I make the following order:

1. The application is struck from the roll for lack of urgency.
2. The first applicant is to pay the costs of the proceedings, such costs to include the costs occasioned by the postponement of the proceedings on 13 October 2021.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicants: Adv SM Tisani, instructed by Zisiwe Attorneys

For the respondents: Adv M Hitge, instructed by the State Attorney.

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Prepared on 13 October 2026 · Esheria