""IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C553/2000

In the matter between:

First Applicant

HOSPERSA **Second Applicant**

PAWUSA **Third Applicant**

NUPSAW **Fourth Applicant**

Fifth Applicant

NEHAWU **Sixth Applicant**

and

Respondent

JUDGMENT

[1] The Applicants in this matter comprise 6 Trade Unions who have come to this Court seeking the following relief:

Granting the Applicants leave to bring this application on an urgent basis.

Making the settlement agreement attached hereto marked "X" an order of this Court in terms of s 158(1)(c) of the Act.

Ordering costs against the Respondent, but only in the event of it opposing these proceedings.

Further and/or alternative relief."

[2] In support of this application they filed an affidavit of one HAWA KHAN (hereafter KHAN) who simply alleges that she is the Provincial Manager of the First Applicant and entitled to depose to the affidavit. She later adds that she acting on behalf of the First Applicant, has been specifically mandated by the Second to Sixth Applicant to depose to the facts contained in her affidavit.

[3] During the course of the hearing Counsel for the Applicants handed in a further set of affidavits signed by persons who were either officials of the Second to Sixth Applicant or in one case an affidavit signed by a shop steward. Many of these "supporting" affidavit do not record the full names of the deponent although all of them confirm the contents of KHAN'S affidavit and confirm that KHAN was mandated to depose to the affidavit she did. All of them prayed that this Court grant the relief prayed for in the notice of motion.

[4] Firstly in support of their prayer that they be granted leave to bring this application as a matter of urgency, the following is stated:

"7.1 As will appear more fully below, the Respondent is in breach of a settlement agreement reached at the Commission for Conciliation Mediation and Arbitration.

7.2 The settlement agreement is crucial to the regulation of the day-to-day work functions of the Applicants' members in the employ of the Respondent.

7.3 The settlement agreement is also crucial to the existence of orderly collective bargaining between the Applicant and the Respondent.

7.4 Further the failure by the Respondent to comply with the agreement has had a severe effect on the legitimacy of the Applicants in the eyes their members. I fear the very real possibility that should the dispute

not be resolved on an urgent basis, the standing of the Applicants would be irreparably harmed.

7.5 Despite having pursued non-litigious means of ensuring compliance with the agreement, the Respondent has refused and/or neglected to ensure compliance therewith.

7.6 Should the Applicants members refuse to wear the prescribed uniforms, they stand to be disciplined both by the Respondent as well as the professional bodies regulating their profession."

[5] Secondly with respect to their prayers in terms of s158(1)(c) Applicants allege that on 30 September 1998 a collective agreement was concluded between the Respondent and them in terms whereof Respondent agreed to provide uniforms to their members who were employed as nurses on 1 April 1999 and 1 April 2000.(I shall refer to this collective agreement as the principle agreement.)

[6] The Respondent failed to comply with the principle agreement in that the uniforms it had agreed to provide to nurses on 1 April 1999 had not been provided and because of such failure the Applicants referred the dispute regarding the non-implementation of the agreement to the CCMA on 15 September 1999. At the conciliation meeting held on 21 October 1999 the dispute was resolved and an agreement concluded between the Applicants and the Respondent. The agreement records the following:

". The employer undertakes to furnish the Unions with a letter of apology concerning the administrative delays occasioned by the tendering process for the supply of new uniforms for the nurses.

- Such apology to be received by the respective Unions by the close of business on the 29th day of October 1999.

- Further the employer undertakes to furnish the first new set of nurse's uniforms to the serving employees, who qualify for the new uniforms as at 1 April 1999, by no later than the 4th of March 2000.

- Further the employer undertakes to furnish the subsequent two sets of new nurses uniforms to the serving employees who qualify for new uniforms as at 1 April 2000 by no later than 30th June 2000.

- Further the employer undertakes to furnish annual replacements of the said uniform to eligible employees commencing in the year 2001, by no later than the 30th of April of each year.

- In conclusion the trade union undertakes to withdraw a referral concerning (the) interpretation of a collective agreement concluded between the parties on 30 September 1998 and referred to CCMA on 10 October 1999."

[7] It is the above agreement which Applicants seek to be made an order of this Court as the Respondent has to date failed to comply with the said agreement.

[8] The application is opposed by the Respondent. In its opposing papers Respondent has not dealt with the merits of the Application in terms of s158(1)(c) on the grounds that it did not have sufficient time to do so but has raised a number of points in limine.

[9] The Respondent adopted the attitude that it would argue its points in limine, which it believed would resolve the matter failing that it argued that it be given an opportunity to file papers on the merits. The Applicants contend that the matter was extremely urgent and that it was proceeding with the matter.

[10] The points in limine raised by the Respondent, some of which I believe should more properly be referred to as exceptions were the following:

(i) That Applicants have failed to make out a case for urgency.

(ii) That the agreement which the Applicants seek to make an order of this Court is in fact a collective agreement and as such this Court has no jurisdiction to make such an agreement an order of this Court.

(iii) That the Applicants are not properly before this Court .

(iv) That in terms of provincial statute the obligation to procure uniforms, which the Respondent agreed to supply to the nurses, was within the power only of the Tender Board of the Western Cape and as such, they had to be joined as Respondent to the application, and finally

(v) That the Court should refuse to make the agreement an order of this Court as such order would be meaningless because Respondent can not comply with such an order in the immediate short term.

[11] With regard to urgency the 6 reasons proffered by the Applicants as forming the basis for the matter being urgent neither individually nor collectively support Applicant's contentions that the matter is urgent.

[12] Applicants first contention that the matter is urgent because Respondent is in breach of a settlement agreement cannot be sustained. The mere fact that there is a breach does not make a matter urgent if this was so, there would be no need for a Court to grant leave to a party to come before it on an urgent basis as every matter has to relate to a breach of some kind.

[13] Applicant's further contentions as recorded in paragraphs 7.2 to 7.4 of KHAN'S affidavit (see paragraph 4 above) is also difficult to comprehend. The regulation of the day-to-day work functions of the Applicant's members as well as collective bargaining are matters that are dealt with on an ongoing basis. Why compliance with the settlement agreement is crucial for the day to day functions or orderly collective bargaining is simply not explained. Such bold statements without any form of supporting information cannot assist the Court in determining why it should accept the allegation made by the Applicants or, more

importantly why such allegation render an ordinary dispute as one which needs to be resolved as a matter of urgency. I also fail to see how the provision of uniform for Applicants members has all of a sudden became very urgent when they appear to have managed without them for over a year.

[14] Furthermore to also boldly allege that non-compliance by the Respondent of the agreement affects their legitimacy and may cause them irreparable harm is rather meaningless. This is not a matter where individual unions that operate within the Respondent's sphere of operation are vieing for membership at the expense or to the exclusion of other unions. All of the unions are faced with exactly the same dispute none are in a position more advantageous or more prejudicial to the other, why then would it affect their legitimacy I do not know, no reason again has been proffered as to why the Applicants would suffer irreparable harm. In any event what the irreparable harm is, is also not stated.

[15] The fact that Applicants pursued non-litigious means to resolve the matter may perhaps have founded grounds for urgency but this may only have been so if the Respondent deliberately sought to renege on the agreement or took no steps to ensure compliance thereof. In this respect the unchallenged evidence of the Respondent is that, that there is no refusal on its part to ensure compliance but rather that it has been hampered in complying with the agreement because:

(i) it has no control over the Western Cape Tender Board which in law is the body that is obliged to procure the uniforms;

(ii) Notwithstanding its lack of control it has become involved in the process to ensure compliance with the agreement as urgently as possible;

(iii) the uniforms that have been delivered to date were of such poor quality that it was neither acceptable to it nor the Applicants in this matter;

(iv) the number of uniforms required amount to over 24000 and therefore it is not possible to procure such uniforms overnight.

Furthermore Applicants also do not challenge the Respondents version that the Respondent is as much frustrated as the Applicants because of it not being able to supply the uniforms agreed to.

[16] Applicants final submission that the matter is urgent because their members may face disciplinary action if they do not wear their uniform is spurious. I fail to see how an employee can be disciplined for failing to wear a uniform when the employer has agreed to supply the uniform and has not done so.

[17] In the result and in so far as urgency is concerned I am not satisfied that the Applicants have made out a case for urgency and consequently but for what I have to say later in this judgment I would have referred this matter to the ordinary roll to be heard in the normal course.

[18] Turning then to the issue of jurisdiction Respondent contends that I am not empowered to make the agreement which Applicant seeks to be made an order of Court, an order of Court because the agreement relates to terms and conditions of employment alternately to a matter of mutual interest between the parties. The basis for this contention is that the agreement is in writing and has been concluded between the unions(Applicants) and the employer(Respondent) and therefore falls within the ambit of a collective agreement within the meaning of s213 of the Labour Relations Act (hereafter the Act). Further the provisions of s158(1)(c) of the Act specifically do not allow this Court to make a collective agreement an order of Court.

[19] I accept that I do not have the jurisdiction to make a collective agreement an order of

this Court however before I dismiss the Application I need to be satisfied that the agreement which Applicant seek to make an order of Court is indeed a collective agreement and not, as argued by the Applicants a settlement agreement.

[20] In order to determine the kind of agreement I have before me I need to consider what was referred to CCMA for conciliation and whether the settlement arrived at by the parties related to that referral. Where a dispute is referred to the CCMA or a Bargaining Council which has jurisdiction over the dispute any settlement concluded in pursuance of that referral and limited to addressing the dispute referred I believe is a settlement agreement - this notwithstanding that the parties to the dispute may be one or more trade unions on the one side and an employer on the other.

[21] In this matter Applicants record that they referred the dispute relating to the Respondents failure to comply with the principal agreement. The dispute was referred to the CCMA on 15 September 1999. Having regard to the principal agreement which was annexed to Applicants papers the Respondent had agreed in that agreement to provide nurses with uniforms in two phases. In the first phase which would commence on 1 April 1999 the Respondent agreed to provide nurses with one set of uniform and in the second phase which would commence on 1 April 2000 the Respondent agreed to provide nurses with two sets of uniforms and Respondent further agreed to replace one uniform per person per financial year commencing as and from 1 April 2001.

[22] The non-compliance that Applicant complained of therefore could only relate to the failure by the Respondent to provide the uniforms it had agreed to in the first phase that which commenced on 1 April 1999. The agreement concluded at the CCMA does not however relate simply to the complaint referred to above - it goes further, it in fact amends, alters and changes the principal agreement by postponing so to speak, the obligation the Respondent had agreed to i.e it dealt not only with the complaint but also changed the dates on which the second phase of the principal agreement would commence. Furthermore part of the

agreement relates to an apology which Respondent agreed to give because of the delay in the "tendering process" and also the Applicants withdrew a further referral it had made to the CCMA dated 30 September 1999 (which referral was not placed before this Court). Clearly this settlement agreement is demonstrative of the fact that the settlement concluded at the CCMA and which settlement Applicants seek to make an order of this Court is not a settlement arrived at in relation to or connected with the dispute referred to the CCMA but in fact an agreement on the further conduct of the parties vis-a-vis the provisions of uniforms which had been due and which were not due at the time the dispute was referred for conciliation and the settlement concluded.

[23] In the circumstances the settlement agreement before me is not a settlement agreement which I am able to make an order of Court in terms of s158(1)(c) as it constitutes a collective agreement as defined by s213 of the Act in that the agreement deals with a mater of mutual interest and does not simply resolve the dispute referred to the CCMA on 15 September 1999.

[24] For the above reason I am satisfied that the above application falls to be dismissed.

[25] Having decided that the Application should be dismissed I do not consider it necessary to deal with the other points raised by the Respondent. I may however add that I find it unacceptable that the application lacked basic averments relating to whether or not the parties attesting to the affidavits were duly authorised to bring this Application and the fact that their full names were not recorded on the affidavits.

[26] With regard to costs, notwithstanding the fact that this matter should not have been brought as a matter of urgency and that the agreement is incapable of being made an order of court as also the tardy manner in which the affidavits were drafted I am not satisfied that this is a matter in which costs should follow the result.

[27] In the premise the Application is dismissed, there is no order as to costs.

WAGLAY J