

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 2468/10

In the matter between:

SAOU

First applicant

NAPTOSA

Second applicant

and

THE HEAD OF DEPARTMENT,

GAUTENG DEPT OF EDUCATION

First respondent

THE MEC FOR EDUCATION, GAUTENG

Second respondent

THE MEC FOR FINANCE, GAUTENG

Third respondent

THE PREMIER OF GAUTENG

Fourth respondent

THE DIRECTOR-GENERAL OF TREASURY

Fifth respondent

PERSAL

Sixth respondent

SITA (PTY) LTD

Seventh respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

- 1] This urgent application arises out of the lengthy and crippling public service strike of July and August 2010, lasting some 17 working days.
- 2] The first applicant is the Suid-Afrikaanse Onderwysersunie (SAOU). It represents about 8 960 members in Gauteng. The second applicant is the National Professional Teachers' Organisation of South Africa (NAPTOSA). It represents about 11 700 members in Gauteng. The members of the two trade unions are mostly teachers (or "educators", in the parlance of the Employment of Educators Act, registered as such with the South African Council of Educators). Some members are also staff members employed at public schools in Gauteng. NAPTOSA abides the decision of the court.
- 3] Following the strike, the Gauteng Department of Education (GDE) deducted money from the remuneration of educators who had been on strike. The applicants have no gripe with the "no work, no pay" principle. However, they say that, in the case of the SAOU, their members only went out on strike for one day; and in the case of NAPTOSA, for four days. Yet the GDE deducted salaries for many more days in many cases. In some cases, money was deducted from educators who did not strike at all.
- 4] The purpose of this application is to obtain an urgent interdict:
 - 4.1 directing the Head of Department, Gauteng Department of Education to refund all monies deducted from the salaries of members of the applicants pertaining to the public service sector strike that took place from July to September 2010 ("the strike") forthwith, pending the compilation of a factually correct database, recording which members of the applicants in fact participated in the strike and recording the correct number of days that such members participated in the strike;

- 4.2 prohibiting the Head of Department (and the other respondents) from deducting any further monies pertaining to the strike from the salaries of members of the applicants, pending the compilation of a factually correct database, recording which members of the applicants in fact participated in the strike and recording the correct number of days that such members participated in the strike.

BACKGROUND

- 5] At the beginning of the strike, the SAOU notified the GDE that its members would participate in the strike on Tuesday, 10 August 2010 only. NAPTOSA indicated that its members would strike on 10 August 2010 and thereafter on 20, 23 and 26 August 2010 – i.e. over four days.
- 6] On 26 July 2010 the Head of Department (the first respondent) sent out a circular headed "Circular 25/2010". It was distributed to deputy directors-general; chief directors; directors at head office and district offices; principals of schools; members of school governing bodies; employee organisations; and all employees.
- 7] In the circular, comprising 14 pages and headed "strike management", the Head of Department stated that:
- 7.1 The principle of "no work no pay" would be applicable and enforced by the GDE.
- 7.2 Deductions would "equal an amount equal to the number of days/hours of service not rendered by an employee during the period of the industrial action."
- 7.3 Each district in the GDE was obliged to establish a district strike management team. These teams had the duty and responsibility to

- 7.3.1 “ensure that all the strike related information is collected, is accurate, signed off and submitted daily by the stipulated time to the identified central point”;
- 7.3.2 monitor compliance with the circular policy and legislation related to the strike;
- 7.3.3 ensure that the strike information for the implementation of the principle of "no work no pay" is received and submitted.

8] The circular set out in detail how strike information had to be compiled and submitted.

- 8.1 Heads of institutions (ie principals) would telephonically report on the number of employees on strike at their school by 08:30 and 12:00 daily.
- 8.2 The manager of each district sub-directorate had to report on the number of employees participating in the strike to the labour relations officer by 08:30 and 12:00 daily.
- 8.3 The labour relations officer at the district office had to collate these statistics and report to the district director by 09:00 and 12:45 daily.
- 8.4 District directors were required to inform the relevant chief directors of the relevant information by 09:15 and 13:15 daily during the strike.
- 8.5 The chief directors would report the statistical information to the collective bargaining unit at head office by 09:30 and 13:30 daily during the strike. The collective bargaining directorate would present the final statistics to the deputy director-general: corporate services for signoff and presentation to the Department of Basic Education by 10:00 and 14:30 daily.

- 8.6 Educators had to sign daily registers at all schools. The strike registers had to be returned to the strike administration project management team for capturing. Capturing would not be done at district level.
- 8.7 The circular specified that it is the duty of the Head of Department as accounting officer to ensure that the strike management teams perform their duties. Each strike management team had to, *inter alia* –
- 8.7.1 ensure that all the strike related information is collected and submitted to a central point for collation;
 - 8.7.2 ensure that districts establish district strike management committees and that those committees are fully functional;
 - 8.7.3 monitor compliance with the circular, policy and legislation related to industrial action;
 - 8.7.4 ensure that all the strike related information is collected, is accurate, signed off and submitted daily by the stipulated time to the office of the Premier, Department of Public Service and Administration, and Department of Basic Education;
 - 8.7.5 ensure that the strike information for the implementation of the principle of "no work no pay" is received; and
 - 8.7.6 ensure that the principle of "no work no pay" is correctly implemented.
- 9] The strike was suspended on 6 September 2010. It never recommenced.
- 10] The Department of Public Service and Administration sent out an advisory circular to all heads of national and provincial departments on 10

September 2010. It was headed: "Application of the 'no work no pay' principle: 2010 public service strike."

11] The circular refers to a draft collective agreement setting out an amicable settlement of the strike. The draft agreement would deal with return to work procedures, as well as the application of the "no work no pay" principle. Deductions would be based on working hours lost. It further stated: "To practically deal with the deductions of the 'no work no pay', departments are advised to deal with these matters in the spirit of the proposed draft agreement".

12] A collective agreement as envisaged was indeed entered into at the Public Service Coordinating Bargaining Council (PSCBC) on 19 October 2010. This agreement binds the GDE and the applicants. The agreement records that:

12.1 deductions in accordance with the "no work no pay" principle would be staggered over three months; and

12.2 the deduction would be based on working hours lost.

Events after the strike

13] The GDE did not report any problems in the collection of data to either of the trade unions during the strike.

14] There were a number of meetings between the GDE and the relevant trade unions¹ after the strike. The applicants say that, at all relevant and material times, the GDE created the impression that it would work with the unions in administering the deductions to be made in an orderly and correct fashion. The GDE does not deny this in its answering papers.

¹ The relevant trade unions were the SAOU, NAPTOSA and the South African Democratic Teachers' Union (SADTU). SADTU is not a party to these proceedings and I will concern myself with the SAOU and NAPTOSA only for the purposes of these proceedings.

- 15] On 4 October 2010 representatives of the unions attended a meeting of the Provincial Education Labour Relations Council (ELRC). The following appears from the minute of the meeting:
- 15.1 GDE indicated that it wanted to commence deductions at the end of November 2010.
 - 15.2 The applicants called for a list of educators, the number of days and the amounts to be deducted from each member.
 - 15.3 GDE indicated that it "would have proof before any deductions could be made against an individual employee".
 - 15.4 GDE indicated that it would provide information to all parties in relation to strike deductions.
 - 15.5 The parties agreed that GDE would present data for verification in a task team meeting on 14 October 2010.
- 16] On 10 October 2010 representatives of all the unions attended another ELRC meeting. The GDE representative handed the unions a database in electronic format. The GDE representative, Mr Sello Tshabalala – a director: collective bargaining, employed by the GDE – deposed to the answering affidavit on behalf of the first to sixth respondents in this application. He does not dispute that the data was not correct in all respects. At the ELRC meeting, he said that the data would be verified by district directors and that an updated database would be handed to the unions on 15 October 2010.
- 17] On 14 October 2010 the Gauteng chamber of the ELRC issued a "task team report: strike deductions [2010]". It recorded that the chamber mandated the task team to verify information on strike deductions as it would be presented by the employer. It further recorded that: "The employer indicated that in the implementation of strike deductions they would be mindful of the 2007 and 2008 deductions and would not subject

educators to further hardships." This assurance arose from the fact that some unauthorised deductions arising from a strike in 2007 had still not been repaid.

- 18] The employer provided the trade unions with the database on an electronic disc. The applicants reviewed the database and came to the conclusion that it was "riddled with errors". It appeared that the database recorded that many members of the applicants participated in the strike for more days than they in fact had participated.
- 19] On 14 October 2010, the employer stated that it would make information available to schools on the names, amounts to be deducted, timeframes and guidelines on how the deductions would be implemented before the process would start. However, it soon transpired that this did not happen.
- 20] By 2 November 2010 the GDE had not verified the database. Ms Wilma Henn, a SAOU shop steward, telephoned Mr Tshabalala to raise the union's concern. He replied that he was on his way to the National Department of Education and that he would revert "in due course."
- 21] On 4 November 2010 Mr Fanie Reyneke, the GDE's Director: Human Resources Appointments, visited the SAOU office. This meeting followed a number of calls from the SAOU, informing him that the database contained wrong information. Reyneke stated that the errors would be corrected. The GDE does not dispute that the information was incorrect in some respects. It says in its answering papers that it expected the trade unions to assist it in correcting the information.
- 22] A meeting was called between task teams of the unions and GDE on 10 November 2010. The meeting was attended by only one representative of GDE, Ms Thenjiwe Khubeka, a Director: Collective Bargaining of the GDE. She handed the unions a new database. The applicants pointed out that the database was still incorrect. The unions stated that they would not agree to any deductions being made on the basis of the incorrect

database. Ms Khubeka says that she expected the unions to analyse the database and revert to the GDE with any discrepancies. At that meeting, Ms Khubeka indicated that “deductions would... be conducted based on the resolution from DoE [Department of Education]”. It later transpired that the Persal system, through which deductions would be made, had already been programmed at that stage.

23] An urgent chamber meeting of the ELRC was convened on 11 November 2010. The meeting was attended by representatives of the trade unions; and representatives of the GDE, including Mr Tshabalala and Ms Khubeka. At the meeting the following transpired:

23.1 GDE claimed that the strike had lasted for 31 days. This period was calculated on the basis of the 17 days of the actual strike, plus 14 days of a "period of disengagement" announced by SADTU. However, SAOU and NAPTOSA members did not participate in this "period of disengagement".

23.2 GDE stated that a deduction equal to 10 days' salary would be made from employees' remuneration at the end of November 2010. The period of 10 days would represent one third of the period of 31 days.

23.3 Mr Tshabalala stated that the Persal system had already been programmed to deduct an amount equal to 10 days' remuneration from each educator.

23.4 The trade unions objected and stated that the strike had only lasted for 17 days and not 31 days. They stated that the "period of disengagement" had to be dealt with separately. The applicants reiterated that SAOU members had only struck for one day and NAPTOSA members for a maximum of four days. These two unions had also resolved not to participate in the "period of disengagement".

23.5 The GDE presented the trade unions with an intended appeal procedure for employees to lodge an appeal if amounts were incorrectly deducted from them. The unions rejected this process and required an undertaking that no deductions would be made until the GDE had corrected its database.

23.6 During the meeting, Mr Tshabalala received a message informing him that National Treasury had been requested to "reverse" five of the 10 days that would be deducted and that Treasury had agreed thereto. It appeared, therefore, that only five days' salary would be deducted at the end of November 2010.

24] The SAOU sent a letter to the MEC for Education², Ms Barbara Creecy, on 12 November 2010. It set out its concerns, stating that the blanket deduction of 5 days' salary was based on a database that is clearly faulty. It expressed the view that the implementation of the deduction would be "palpably unfair and incorrect" and asked her to intervene. It stated that the union's view was that an appropriate remedy would be (a) to ensure that no deductions of an unlawful nature are made for November 2010; and (b) to require the GDE as a matter of urgency to establish an accurate database which can be applied by the Department going forward. The SAOU requested the MEC to deal with this issue "as a matter of the greatest urgency."

25] The only response was a letter from the office of the MEC on the same day, acknowledging receipt and stating that "your correspondence is receiving attention and we will revert to you shortly."

26] NAPTOSA also sent a letter to the Head of Department on 20 November 2010. It pointed out numerous errors and stated that the deduction of five days' salary was in many cases not based on correct information. It urged the Head of Department to review the matter and to "take the decision to correct a potentially damaging labour situation."

² The second respondent

- 27] The Head of Department sent an email to Mr Tshabalala and two others on 22 November 2010, calling on them "to meet Naptosa and discuss the issues raised herein with a view to find an amicable solution speedily." On 25 November 2010, the Head of Department sent out a further e-mail to officials to meet NAPTOSA's Mike Myburg on the same day. He stated: "We need to take this seriously and urgently."
- 28] A meeting did take place on 26 November 2010. The dispute could not be resolved.

Deductions and discrepancies

- 29] The applicants started receiving complaints from their members from 24 November 2010 onwards that large sums of money had been deducted from their salaries.
- 30] The applicants started investigating the complaints. The first applicant's counsel handed up four lever arch files in court containing discrepancies relating to a number of schools. In respect of each school, the bundle contains the following:
- 30.1 A summary of employees from whom deductions had been made.
 - 30.2 The number of days deducted from each such employee.
 - 30.3 The registers kept in accordance with Circular 25/2010 that were submitted to the GDE.
 - 30.4 Salary slips of the affected employees.
 - 30.5 Refunds, if any.
- 31] The information runs over 1310 pages. Examples of glaring discrepancies are numerous. Some educators have received refunds; others have not. Some have had 10 days' salary deducted from their remuneration, others

five days, others none. I was shown examples of educators who had been at work and who had signed the prescribed register, yet a number of days' salary had been deducted from their remuneration. One educator was on maternity leave, yet she had 10 days' salary deducted.

32] It serves no purpose to enumerate the many examples of discrepancies from these 1310 pages. Suffice to say that it is glaringly obvious that many mistakes have been made. The examples handed up in court are not exhaustive. They were compiled as a matter of urgency. The applicants say that complaints and further examples are still streaming in. The respondents cannot dispute this. Although the respondents say that, after these errors had been brought to the attention, they have attempted to correct them and were in the process of refunding the affected members, it is clear that many of the applicants' members are still being prejudiced.

33] The applicants contend that the deductions are unlawful for the following reasons:

33.1 Amounts are being deducted, despite the fact that some of the applicants' members were at work. Many of the members did not participate in the strike at all.

33.2 The GDE deducted money in an arbitrary fashion with no regard whether the employees participated in the strike or not.

33.3 The deductions are based on incorrect data. The GDE knew that its database was flawed and undertook to rectify it before making any deductions. It did not do so.

33.4 GDE breached the chamber decision of 4 October 2010 to present the data for verification in a task team meeting on 14 October 2010.

33.5 GDE breached the following undertakings given at the chamber meeting of 4 October 2010:

- 33.5.1 its undertaking to provide the applicants with the information of deductions to be made before the process would start;
 - 33.5.2 that proof would be obtained before any deductions would be made from an employee;
 - 33.5.3 its undertaking to provide information to all parties in relation to the deductions.
- 33.6 The decisions at the chamber meeting of 4 October 2010 are binding on the applicants.
- 33.7 The deductions are contrary to the directives contained in Circular 25/2010, circulated to all of the applicants' members, that deductions would equal an amount equal to the number of days or hours that they had not worked during the strike;
- 33.8 the deductions are contrary to the provisions of the agreement signed in October 2010 at the PSCBC;
- 33.9 it contravenes section 38 of the Basic Conditions of Employment Act³;
- 33.10 it is administratively unfair;
- 33.11 the GDE is not entitled to assume that the applicants' members participated in the strike and place the burden on them to prove that they did not; and
- 33.12 contrary to what is stated in circular 34/2010, GDE deducted 10 days' salary from some employees and not five days.

3 Act 75 of 1997

IN LIMINE: JURISDICTION

- 34] Mr *Khoza*, for the first to sixth respondents, raised a jurisdictional point *in limine*. He contends that the dispute concerns the interpretation and application of a collective agreement, namely the agreement entered into at the PSCBC in October 2010. Therefore, he says, the dispute must be referred to the PSCBC in accordance with s 24 of the Labour Relations Act.⁴
- 35] This argument is, at first blush, compelling. But is the substance of the urgent application really a dispute about the interpretation and application of a collective agreement?
- 36] Arguing to the contrary, Mr *Van Reenen*, for the first applicant, referred me to the unreported Labour Appeal Court case of *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and others*.⁵ In that case, Zondo JP⁶ drew a distinction between a dispute about the fairness of a transfer – albeit that the relevant collective agreement set out the transfer procedures – and a dispute about the interpretation and application of a collective agreement.
- 37] In the course of this judgment, Zondo JP referred to the case of *Johannesburg City Parks v Mphahlanjani & others*.⁷ In that case, the LAC explained the difference between a “dispute” and an “issue in dispute”⁸:

“There are a number of areas in the LRA which contain references to disputes or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolution. Some of the sections of the LRA which contain such references are sections 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be dealt with in order to resolve the main dispute. Let me make an example to illustrate the distinction that I seek to draw between a dispute and an issue in dispute. One

4 Act 66 of 1995

5 PA 2/09, unreported, 29 January 2010.

6 as he then was

7 Unreported, JA 31/08 (LAC).

8 Paras [18] – [20]

may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement, the employer was supposed to follow a certain procedure before dismissing the employee, but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer might argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement were applicable or were complied with before the employee was dismissed is an issue necessary to be decided in order to resolve the real dispute.

In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It would be different, however, when the main dispute, as opposed to an issue in a dispute, is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute would be required to be resolved through arbitration in terms of the LRA."

- 38] It appears to me that the main dispute in this urgent application is not the interpretation and application of a collective agreement. The relief sought is for the Head of Department to refund the money deducted from the applicants' members pending the compilation of a factually correct database. In the course of deciding whether the applicants are entitled to the relief sought, I have to consider various undertakings by the GDE, some of which are contained in collective agreements of the PSCBC. Those agreements form part of the issues in dispute; but the main dispute is not the interpretation or application of a collective agreement.
- 39] I am satisfied that the Labour Court does have jurisdiction to decide the application.

URGENCY

- 40] The respondents further submit that the application is not urgent. They point out that, by 11 November 2010, the applicants knew that the Persal system had been loaded to make deductions by the end of November 2010. Yet the applicants only launched this application on 2 December 2010.
- 41] I take into account, though, that the applicants attempted to resolve the dispute relating to the deductions throughout November 2010. The SAOU wrote to the MEC on 12 November 2010 in an attempt to get her to intervene. They had received no substantive response by the time they launched this application. NAPTOSA attempted to meet with the Head of Department; after a number of attempts, they managed to meet with his representatives on 26 November 2010. The matter could not be resolved. The pleadings in this matter comprise close to 300 pages, and the bundles of documents a further 1310 pages.
- 42] I am satisfied that the applicants acted with due haste in compiling the voluminous information and launching this application once it became apparent that the parties could not resolve their dispute amicably. It is also apparent that the educators involved face a bleak festive season if the matter is not disposed of urgently. The matter should therefore be considered on an urgent basis.

A CLEAR RIGHT?

- 43] The applicants have made out a clear right for the relief sought. It appears from the evidence before me that the prescribed registers, detailing their members' attendance or non-attendance during the strike, were submitted to the GDE. The GDE deducted money from their salaries without having established a proper basis to do so.
- 44] I must stress that the applicants' members have no right to be paid for

days on which they were on strike. They must be refunded pending the compilation of a factually correct database only. Once that has been done, the respondents will be able to deduct the amounts equal to the days or hours during which the educators were, in fact, striking.

ABSENCE OF ALTERNATIVE REMEDY

- 45] The affected educators could follow the appeal process outlined in Circular 34/2010 , issued on 17 November 2010.
- 46] However, that process only relates to deductions that have been made for the period 23-27 August 2010. From the bundles that were provided to report, it appears that deductions were made in respect of other periods as well.
- 47] The timeframe set out in the appeal process gives no indication as to when refunds will be made. As the applicant pointed out, some deductions made in 2007 have still not been refunded. The appeal process does not provide a satisfactory alternative remedy.

BALANCE OF CONVENIENCE

- 48] The balance of convenience favours the affected educators.
- 49] The Department has budgeted for the payment of their salaries. Once it has compiled and verified a factually correct database, it will be able to deduct the correct amounts from employees who participated in the strike.
- 50] The applicants' members, on the other hand, were given the assurance that money would only be deducted for the days on which they were actually on strike. The “festive season” will be a misnomer for those educators who either did not participate in the strike or in respect of whom money was deducted for more days than those on which they were on strike. For those of the Christian faith, the celebration of Christmas will be

tempered. (I hasten to add that those educators who were on strike, and in respect of whom the correct amounts were deducted in accordance with the "no work, no pay" principle, cannot complain about a resultant lack of money during the school holidays and the festive season).

CONCLUSION

- 51] The applicants have made out a case for the relief sought. Although they have an ongoing relationship with the respondents, they were forced to incur significant legal costs to approach this court only after attempts at an amicable resolution failed. In law and fairness, costs should follow the result in this case.

ORDER

- 52] The prescribed forms of service and time periods are dispensed with and this matter is heard as one of urgency in terms of rule 8.
- 53] The first respondent is ordered to refund all monies deducted from the salaries of the applicants' members pertaining to the public service sector strike that took place from July to September 2010 by no later than 31 December 2010, pending the compilation of a factually correct database, recording, which members of the applicants in fact participated in the strike and recording the correct number of days that such members participated in the strike.
- 54] The first to sixth respondents are prohibited from deducting any further monies pertaining to the strike from the salaries of the applicants' members, pending the compilation of a factually correct database, recording, which members of the applicants in fact participated in the strike and recording the correct number of days that such members participated in the strike.
- 55] The first to sixth respondents are ordered to pay the applicants' costs

jointly and severally, the one paying, the other to be absolved.

STEENKAMP J

Date of hearing: 10 December 2010

Date of judgment: 21 December 2010

For the applicants: Adv WHJ van Reenen

Instructed by Erasmus Inc, Pretoria

For the respondents: Adv M Khoza

Instructed by The State Attorney, Johannesburg