IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J624/2020

In the matter between:

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	First Applicant
NATIONAL TREASURY	Second Applicant
and	
ADV HLALELE MOLOTSI SC N.O.	First Respondent
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Second Respondent
DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA	Third Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	Fourth Respondent
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Fifth Respondent
PUBLIC SERVICE COORDINATING BARGAINING COUNCIL	Sixth Respondent

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ANSWERING AFFIDAVIT OF THE THIRD TO FIFTH RESPONDENTS

I the undersigned,

PHILLIP MASILO

do hereby make an oath and state that:

1 I am an attorney of the High Court of South Africa, practising as such as a director at Cheadle Thompson & Haysom Inc. I am the attorney responsible

for this matter on behalf of the third to fifth respondents. These respondents have authorised me to file this affidavit on their behalf in response to the applicant's application. I shall refer to the first applicant as "DPSA" in certain instances.

2 The contents of this affidavit are, unless the contrary is clear from the context, within my personal knowledge and I believe them to be true and correct. I also rely on the contents of documents to which I refer.

3 I have read the founding affidavit deposed to by Modise Lesley Letsatsi (**Mr Letsatsi**) filed in support of the DPSA's application for urgent relief as set out in the notice of motion.

4 This affidavit was prepared and will be filed on an extremely urgent basis. As a result, I do not provide seriatim responses to the founding affidavit.

5 The third to fifth respondents do not have a large legal team that can be split between this Court and the arbitration proceedings, both of which are scheduled to commence at 10h00. Their legal team will attend the arbitration at 10h00. The third to fifth respondents request the Court to consider this answering affidavit, to dismiss the application and to direct the applicants to return to the arbitration and raise the issues in paragraph 2.3 of the notice of motion with the Arbitrator, as well as any short postponement of the arbitration proceedings that they may wish to obtain. They must not be permitted to abuse the process of the Court.

6 I submit with respect that the urgent relief sought, including the *rule nisi*, is

without merit. It is a delaying tactic.

6.1 First, there is no reason whatsoever, and none has been disclosed, why the applicants do not approach the Arbitrator for the directions sought in paragraph 2.3 of the notice of motion. They have not even requested the respondents (**unions**) to agree to what they seek in paragraph 2.3 of the notice of motion. Although represented by counsel at the pre-arbitration meeting on 22 June 2020, the applicants did not raise with the other parties or the Arbitrator the need for the arrangements sought in paragraph 2.3 of the notice of motion. They should be directed to seek these arrangements before the Arbitrator.

6.2 Secondly, the applicants have not even sought agreement from the unions to commence the arbitration proceedings on a future date other than 7 and 8 July 2020 in order to allow them an opportunity to prepare properly. They should be directed to seek such an indulgence from the Arbitrator, with or without opposition by the other parties to the arbitration.

6.3 There is therefore no urgency in respect of the relief sought in paragraph 2.3 of the notice of motion and the applicants should be directed to approach the Arbitrator.

6.4 What the applicants really want is a postponement of the arbitration proceedings pending the outcome of the PSA application. They

sought this from the Arbitrator and failed. Instead of seeking the review and setting aside of the ruling of the Arbitrator in this regard and the substitution of a new ruling by this Court, they have brought a fresh postponement application before this Court. This is not competent. If granted it will undermine the jurisdiction and powers of the Arbitrator. In any event, the postponement application that they want to move on 14 July 2020 has no merit. I set out below the reasons for this under the section “LACK OF MERIT”.

6.5 The applicants suggest an irregularity in paragraph 18 of the founding affidavit but do not follow it through with any review relief. There is in fact no irregularity. First, the parties agreed expressly as recorded in the pre-arbitration minute that if they wanted the postponement of the arbitration proceedings they needed to file an application in accordance with the rules of the Bargaining Council and not to write letters. In fact, counsel for National Treasury made it clear at the pre-arbitration meeting that National Treasury would follow whatever the DPSA did. In effect that the DPSA is the true respondent in the arbitration proceedings. Secondly, the parties agreed that any documents to be filed had to all be filed by Friday, 3 July 2020, and that the Arbitrator would decide the matter on the documents filed as at that time and issue a ruling on 6 July 2020. Any written submissions filed on Monday, 6 July 2020, were filed out of time.

6.6 If the applicants wanted a stay of the arbitration proceedings by this

Court on an urgent basis they ought to have approached the Court a considerable time ago. They failed to do this and are now creating urgency where none exists. That this is the position appears from the section “RELEVANT CHRONOLOGY” below.

RELEVANT CHRONOLOGY

7 The relevant chronology regarding the referral of the dispute to arbitration is set out under paragraphs 15 to 23 of the pre-arbitration minute signed by the parties to the arbitration proceedings on 22 June 2020. It is clear from those paragraphs that the dispute was referred to the PSCBC on 2 April 2020. Conciliation took place on 20 May 2020 when the dispute remained unresolved and a request for arbitration was made.

8 The dispute referred to arbitration relates to the application of the collective agreement (Resolution 1 of 2018). This is also confirmed in the pre-arbitration minute at paragraph 22.

9 The PSA application referred to in paragraph 2.2 of the notice of motion was served on the DPSA on 8 June 2020. This is clear from the stamp acknowledging receipt of the application by the DPSA Legal Service. The arbitration proceedings were initially set down to commence on 17 June 2020. The PSCBC issued the notice of set down on 25 May 2020, which is almost 14 days before the PSA application was served on the DPSA. Notwithstanding this, the DPSA delayed considerably in approaching this Court for any stay of the arbitration proceedings. It delayed further despite

the Arbitrator's advice to the parties on 22 June 2020 that a stay of the arbitration proceedings has to be sought in this Court and not from the Arbitrator.

10 The parties held the pre-arbitration meeting on 22 June 2020. They agreed the items recorded in the pre-arbitration minute. Counsel for the applicants did not at any stage of the pre-arbitration proceedings at all raise the need to agree any of the items now described in paragraph 2.3 of the notice of motion.

11 On 23 June 2020 the applicants directed inquiries to the DPSA in order to try to shorten the arbitration proceedings and to expedite the resolution of the dispute. The DPSA chose not to respond to the inquiries and now says it requires time to do so. But the responses to the inquires are in effect contained in its answering affidavit in the PSA application, a copy of which has been made available to the Arbitrator.

12 It is clear from the conduct of the DPSA that it does not wish to proceed with the arbitration and prefers motion proceedings – i.e. the PSA application. This will enable it and its witnesses to avoid cross-examination on the claims made in support of its alleged defences. This attitude of the DPSA undermines the integrity of collective bargaining under the Constitution and the LRA and the carefully arranged dispute resolution mechanisms of the LRA. It must not be countenanced.

13 Not once has the DPSA suggested that the arbitration proceedings be

referred to the Labour Court, consolidated with the PSA application and referred to trial.

LACK OF MERIT

14 In addition to what I have already stated above, there are a number of reasons why the applicants should not obtain any urgent relief.

15 First, there is no issue that the dispute referred falls within the jurisdiction of the Bargaining Council and must be arbitrated. It does not fall within the jurisdiction of the Labour Court. It involves the application of the collective agreement. As I explain below, most of the alleged defences of the DPSA in fact make the dispute also about the interpretation of the collective agreement.

16 Secondly, the cause of action in the PSA application differs materially to the cause of action in the arbitration proceedings. It is clear from paragraph 1 of the notice of motion in the PSA application that the applicants there allege a breach of the contracts of employment of the applicants' members. Under paragraph 24 of the founding affidavit in the PSA application, under the heading "Nature of the Application", states expressly that the application is brought in terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997. The applicants contend that:

16.1 clause 3 of the collective agreement has been incorporated into the employment contracts of the applicants' members;

16.2 the DPSA and the other respondents are in breach of clause 3.3 of the collective agreement; and

16.3 the applicants are consequently entitled to the relief that they seek on behalf of their members.

17 Consequently, the issues of law that the Labour Court is called upon to determine in the PSA application are different from those that the Arbitrator is called upon to determine in the arbitration proceedings. That the outcome may in effect be the same is not decisive to the convenience of postponing the arbitration proceedings pending the outcome of the PSA application at all.

18 Thirdly, the parties in the PSA application and the parties in the arbitration proceedings are not the same. The five applicants in the PSA application are not parties to the arbitration proceedings. The applicants in the PSA application are also not parties to the collective agreement – they did not sign it. There are seven government respondents cited in the PSA application, only two of which are respondents in the arbitration proceedings.

19 Fourthly, the defences that the DPSA wishes to raise in the arbitration proceedings are more suited to arbitration (or trial) than motion proceedings. It is not an answer to suggest that circumscribed issues may be referred for the hearing of oral evidence. This is a matter that requires a trial (i.e. arbitration) in relation to the applicants' alleged defences and the basis for

them. For example, the alleged tacit terms would require a full investigation of what happened during the negotiations leading to the conclusion of the collective agreement. All the minutes and other records of the negotiations would have to be disclosed at the very least by the applicants and interrogated. Cabinet minutes may have to be discovered given the applicants' alleged defences. If such discovery generates disputes regarding alleged privilege or secrecy in Cabinet records, the Courts would ultimately adjudicate. But all of these must be addressed at the arbitration and not in motion proceedings that will not allow full discovery and full cross-examination of the applicants' witnesses that have deposed to affidavits – namely, the DPSA Minister and Letsatsi to start with.

20 The alleged defences also make it clear that the Arbitrator would have to interpret the collective agreement to determine whether the defences are made out. I underline the defences that fall within this category. The defences were set out in paragraph 30 of Mr Letsatsi's affidavit in support of the postponement application before the Arbitrator as follows:

> "30.1 Enforcement of and/or clause 3 and/or clause 3.3 themselves, offend public policy.
>
> 30.2 Enforcement of and/or clause 3 and/or clauses 3.3 themselves, offend the constitutional provisions imposing a duty on the State to give effect to constitutional rights, duties and values and/or in particular the duty to deliver services to the poor and vulnerable to relieve distress and hardship during the time of Covid-19 and/or under the current economic crisis.
>
> 30.3 The agreement is subject to an implied term that clause 3.3 is enforceable only if there is funding and/or budget for the increase and/or if the increase is affordable.
>
> 30.4 There is no funding and/or budget for the increase and/or the

increase is affordable.

30.5 Alternatively, the agreement is subject to a tacit term that clause 3.3 is enforceable only if the cost cutting measures proposed by the DPSA at the time, namely reducing funding allocated for performance incentives, and implementing early retirement on a large scale were implemented as contemplated and/or successfully.

30.6 All the unions opposed the cost cutting measures contemplated, when the State attempted to implement them.

30.7 Consequently, they were not implemented successfully, and as a result, even when the State managed to implement them, implementation could not realize the contemplated savings.

30.8 Clause 3.3 has become objectively impossible of performance after and/or because of the following unforeseen events:

30.8.1 Moody's Investment Service (Moody's) downgraded South Africa to sub-investment (junk) status on 27 March 2020 thereby affecting its ability to borrow funds affordably;

30.8.2 The Covid-19 pandemic and/or associated lockdown implemented on 26 March 2020 has resulted in an economic crisis that renders the increase impossible to implement and/or impossible to implement affordably and/or impossible to implement sustainably in a way that will not materially damage the fiscus and the ability of the State to pay the increase and deliver the services that it is constitutionally obligated to deliver".

21 The question of what the terms of the collective agreement are, and whether they include an implied or tacit term that the DPSA contends for:

21.1 falls within the jurisdiction of the Arbitrator as regards the interpretation of the collective agreement[1] and not that of the Labour

[1] I am advised that the law is clear that in order to decide whether a tacit term is to be imported into the contract one must first examine the express terms of the contract. *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C. Christie's *The Law of Contract in South Africa* 6th Ed at p 174.

Court;

21.2 requires the DPSA to indicate precisely what the implied or tacit term is that it relies upon, i.e. its exact formulation;

21.3 requires the leading of appropriate factual evidence to ground the claim;

21.4 will be disputed;

21.5 will require cross-examination in order to enable the Arbitrator to determine the disputed facts and whether the DPSA's claim is made out, which is not possible in the PSA application because it is a motion proceeding.

22 That the determination of the terms of the collective agreement, including any alleged implied or tacit terms falls within the jurisdiction of the Arbitrator and must be determined in the arbitration proceedings by construing the collective agreement based on evidence is confirmed by the judgment of the LAC in *Van Wyk*.[2] The LAC said the following at paragraphs :

> "[17] It is common cause that the OSD collective agreement does not define what a "speciality unit" is. The appellant contends that in the absence of such a definition in the OSD, the Department had the prerogative to determine which of its units should be regarded speciality units. The main and perhaps the only basis for the appeal by the appellant is that the arbitrator failed to recognise the fact that the appellant's classification of the gastroenterology unit as a non-speciality unit cannot be interfered with, unless it is found that the appellant acted in an arbitrary manner, with bias, malice or

[2] *Western Cape Department of Health v Van Wyk and others* [2014] 11 BLLR 1122 (LAC).

ulterior motive.

> [18] There is nothing in the OSD that suggests that in the absence of the definition of a "speciality unit" it shall be the prerogative of the appellant to give meaning to that term. The OSD agreement is a product of collective bargaining and not something the appellant may, unilaterally, vary or interpret. There is therefore no reason why the appellant's interpretation of the OSD collective agreement should be preferred over that of the trade union. As pointed out by the respondents' Counsel, were managerial prerogative be permitted to be the determining factor in deciding how to interpret and apply a collective agreement, this would undermine our industrial relations framework and the primacy of collective bargaining. …
>
> [21] The arbitrator had the authority to determine, in the event of disagreement as to the correct interpretation of the OSD collective agreement by the parties, the interpretation and how the agreement should be applied. The managerial powers of the DG cannot, in my view, trump the statutory powers of the arbitrator when interpreting and applying the collective agreement.
>
> [22] In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes.In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties." (Emphasis added)

23 The claim of the DPSA that the collective agreement (i.e. clause 3.3) or its implementation is contrary to public policy and/or objectively impossible also:

23.1 requires the Arbitrator to interpret the clause in the context of the collective agreement;

23.2 requires the DPSA to lead and prove appropriate factual evidence

to ground the claims;[3]

23.3 may give rise to disputes of fact that require cross-examination to resolve, which is not possible in the PSA application because it is a motion proceeding.

24 Fifthly, the arbitration is ready to proceed whereas the PSA application is still at a pleading stage. There is no guarantee that as soon as argument is heard in the PSA application, judgment will be handed down urgently or expeditiously.

25 Sixthly, the contention that the matter raises important questions of fiscal policy does not afford any good reason why the arbitration proceedings must await the final outcome of the PSA application. The same policy issues can be decided by the Courts after the arbitration proceedings have investigated the relevant facts and created a record upon which further determinations may be made. The legislature's choice is that disputes regarding the interpretation and application or implementation of collective agreements must be arbitrated. The legislature must be taken to have been aware that certain of such disputes may implicate important matters of policy.

26 Seventhly, the dispute between the parties has been clearly described in the pre-arbitration minute read with paragraph 30 of the affidavit of Mr

[3] I am advised that the law is clear that the party who attacks the contract or its enforcement bears the onus to establish the facts. *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 49.

Letsatsi in support of the postponement application before the Arbitrator. The DPSA did not raise the need for pleadings at the pre-arbitration meeting. It raises this for purposes of delay. Arbitrators are required by the LRA to resolve disputes expeditiously and with less formality than Courts of law.

27 In the circumstances, I submit with respect that the DPSA has failed to make out a case for the urgent relief, including the rule nisi that is sought.

28 The application must be dismissed or struck from the roll with costs and the applicants directed to return to the arbitration and raise their issues under paragraph 2.3 of the notice of motion and any further indulgence they seek prior to the commencement of the arbitration. These are issues that have not yet raised with the Arbitrator or the other parties. The postponement application that was dismissed was to stay the arbitration proceedings pending the outcome of the PSA application. A postponement application to merely delay the commencement of the arbitration for a limited period of time stands on a different footing.

CONCLUSION

29 The applicants pray for the dismissal of the urgent application or that it be struck from the roll with costs for lack of urgency.

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DEPONENT

SIGNED AND SWORN BEFORE ME AT _____ BY THE DEPONENT ON THIS THE ____ DAY _____ 2020, AFTER HE HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND REGARDS SAME TO BE BOTH TRUE AND CORRECT AND HAS TAKEN THE PRESCRIBED OATH WHICH HE REGARDS AS BINDING ON HIS OWN CONSCIENCE AND UTTERED THE WORDS ‘SO HELP ME GOD”

_____

COMMISSIONER OF OATHS

FULL NAME :

CAPACITY :

AREA :