IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J1444/2007

In the matter between:

SOUTH AFRICAN POLICE SERVICE **Applicant**

and

POLICE AND PRISONS CIVIL RIGHTS UNION **First Respondent**

CEBEKHULU, ZIZAMELE **Second Respondent**

JUDGEMENT IN THE APPLICATION FOR LEAVE TO APPEAL

NGALWANA AJ

[1] On 22 June 2007 this court made an order in the following terms:

1 The *rule nisi* issued and the interim order granted on 15 June 2007 are confirmed, subject to the amendments in paragraphs 1.1 to 1.4 below. Accordingly, a final order is granted in the following terms:

Declaring that the *members* of the SAPS are prohibited from striking as they render an essential service.
Interdicting the respondents from promoting, encouraging or supporting participation in a strike by *members* of the applicant.
Interdicting members of the first respondent who are *members* of the applicant from participating in the strike.
Ordering the respondents to inform the members of the first respondent who are *members* of the applicant, by public statement to the media and in written circulars to its members of the terms of this order.

2 A further rule nisi is issued calling upon the respondents to show cause on Monday 13 August 2007, at 10h00 or as soon thereafter as the matter may be heard, why an order should not be made in the following terms:

Joining Mr Witbooi and Mr Ntsobi as third and fourth respondents, respectively;
Holding each of the respondents in contempt of court for failure to comply with paragraphs 1.1 and 1.2 (read with paragraph 3) of the interim order of 15 June 2007;
Ordering the first respondent to pay an amount of R500 000;
Committing the second, third and fourth respondents to terms of imprisonment not exceeding thirty days each for contempt of court.

3 The respondents are directed to serve and file any answering affidavits in opposition to the relief claimed in the rule nisi referred to in paragraph 2 hereof by close of business on Friday 20 July 2007. The applicant may file its reply thereto by close of business on Tuesday 31 July 2007.
4 The costs of the rule nisi referred to in paragraph 2 hereof are reserved for determination on return date thereof.
5 Each party in the main application is to bear its own costs.

[2] Applicant now seeks leave to appeal "against the whole of the judgment and the order for costs". However, it seems to me neither of the parties is at this stage concerned with the contempt and

joinder aspects of the judgment, even though papers in that regard were filed by both. Counsel do not deal with these aspects in their written submissions, and it appears the rule was extended on return day (13 August 2007) until 10 September 2007 on which date the parties agreed that the application be withdrawn and each party to pay its own costs.

[3] The gravamen of the remaining tussle, it seems to me, concerns whether all employees of the applicant ("SAPS") – regardless of the specific nature of the service each of them renders – are precluded from taking part in industrial action. Counsel for SAPS insists, invoking what he terms a "purposive interpretation" of the South African Police Service Act, 68 of 1995 ("the SAPS Act"), that if part of the SAPS workforce were to be allowed to go on strike and the other part not, then the objective sought to be achieved by the legislature (namely, to ensure public safety through uninterrupted provision of police services) would not be fulfilled. This cannot, with respect, be counsel's bull-point. Some may point out, dare I add not without merit, that public safety in our country, even in the absence of a strike action by the SAPS, is in any event at tenuous levels. Thus, a strike action by some

employees of SAPS would hardly be a *sine qua non* or a *fons et origo* for inadequate public safety.

[4] To fortify his argument, counsel for the applicant advances by way of example the emergency 10111 call centre operators whom he says provide vital support functions necessary for police officers to play their role. He also invokes other functionaries who capture and analyse crime data which in turn informs the proper deployment of police officers in various parts of the country. There can be no doubt that these are important support functions. But that by itself does not make them essential services as defined. Section 41(1) of the SAPS Act precludes *members* of SAPS from striking – not employees. Members are those categories of personnel appointed under the SAPS Act, or designated to be members pursuant to section 29(1) of the SAPS Act by the Minister of Safety and Security by notice in the Gazette. Thus, failing ministerial designation, data capturers, call centre operators and other similar categories of support personnel within SAPS are not *members* of SAPS.

[5] Even the purposive interpretation pressed by counsel for the applicant cannot make the clear legislative intent vanish. SAPS

comprises only *members* (section 5(2) of the SAPS Act), including designated categories of support personnel (section 29(1) of the SAPS Act). If the Minister should, from time to time, consider a category of SAPS support personnel so essential that an interruption of that category's work would "paralyse" (as counsel so graphically depicts the position) the provision of police services by members of SAPS, then he must designate that category of personnel as members by notice in the Gazette. So if call centre operators and crime data capturers and analysts fall into those categories, they must be designated as members. That is why section 29(1) of the SAPS Act is there. The section clearly demonstrates that the legislature was alive to the fact that not all employees of SAPS are essential service workers. Otherwise there would have been no need for it.

[6] Counsel for the applicant submits that section 71(10), read together with section 213, of the LRA deems the entire SAPS (as an institution) to be designated as an essential service. That construction is in my view too liberal and has the effect of rendering section 29(1) of the SAPS Act tautologous. The sections on which counsel relies for this broad interpretation must be read in context. Context is indeed everything, as counsel reminds us. That

context is provided by numerous provisions of the SAPS Act discussed in the main judgment. I cannot bring myself to accepting that a tea lady, a "corporate services" administrator, or human resource personnel are all essential service workers precluded from striking by reason only of being SAPS employees (in contra-distinction to *members*), whereas they could be free to do so if they worked, say, for the Department of Arts and Culture, dti or Finance.

[7] While it is true that the LRA "trumps" the SAPS Act to the extent that the two Acts are in conflict with each other (section 210 of the LRA), the relevant provisions of the LRA still beg the question of what an essential service is in the context of SAPS. There is no conflict between the SAPS Act and the LRA and so there is no need to invoke section 210 of the LRA in this case. Essential service, as Brassey points out in *Commentary on the Labour Relations Act* (Vol 3) at A9-26, by its *ipssissima verba* defines a service and not an industry or, I might add, an employer or institution. Thus, a tea lady or gardener or human resource manager does not render an essential service by reason only of being a SAPS employee – unless the Minister designates him or her as such by notice in the Gazette. The legislature must have been aware of this when section 213 of the LRA was enacted. The

legislature is presumed to be consistent with itself (*Principal Immigration Officer v Bhula* 1931 AD 323 at 345.

[8] As it happens, on 24 May 1996 (just over five years before the LRA came into effect) former Minister of Safety and Security did just that pursuant to section 29(1) of the SAPS Act. He designated as *members* of SAPS categories of personnel ranging from forensic analysts, engineers, pilots, data technologists, computer systems analysts and explosives experts to musicians, chaplains, language practitioners, personnel practitioners, chemists and social workers. Again, on 26 February 1999 (over three years after section 71 was introduced into the LRA and over two years since the LRA came into effect) the Minister further designated as *members* of SAPS communications officers, training officers, survey statisticians, librarians, aircraft maintenance engineers, fingerprint experts and food service managers. These designations are rather comprehensive and tend to indicate in my view that mere employees are not members and are thus not subject to the section 41(1) prohibition. Otherwise there would be no point for these designations.

[9] In fact, if the legislature's intention in defining "essential service" in section 213 to include the SAPS as an institution was to deem all employees of SAPS to be essential service workers prohibited from striking, there would have been no need for a designation of categories of personnel as members of SAPS *after* the commencement of the LRA on 11 November 1996, or after the introduction of section 71 to the LRA on 1 January 1996, because the section 213 definition would have meant that all SAPS employees are similarly subject to all the provisions in the SAPS Act that apply to *members* of SAPS. That the Minister, in giving effect to Parliament's clear intention, continued after the LRA came into effect to designate certain categories of SAPS personnel to be members clearly demonstrates that he was mindful that sections 213 and 71 of the LRA do not constitute all SAPS employees into essential service workers.

[10] I am not aware of any other designation that has been made since that of February 1999, and counsel has not alerted me to any. If there is no other designation, then in my view no personnel category not contained in these schedules can be said to be a *member* of SAPS and subject to the section 41(1) prohibition.

[11] Still in context, an important indication that only *members* are prohibited from striking and that, by implication, other personnel who are not *members* (or who have not been so designated) are not so prohibited, can be found in the regulations to the SAPS Act. Regulation 20(y), for example, which deals with misconduct, provides that an employee will be guilty of misconduct if he or she "*participates in any unlawful labour or industrial action*". This begs the question whether there is room for *lawful* industrial action which would not open an employee up to a charge of misconduct. This would seem to follow logically in my view, so that any *member* who participates in a strike action is automatically guilty of misconduct by reason of the prohibition in section 41(1) of the SAPS Act, but not so an employee (in contra-distinction to *member*) who has given a section 64(1)(b) notice in terms of the LRA. If all employees of SAPS (regardless of category of services they render) were prohibited from striking, then regulation 20(y) to the SAPS Act serves absolutely no purpose. The legislature is always presumed not to legislate fortuitously.

[12] I am thus un-swayed by counsel's submissions. Nevertheless, I do consider that it would be in the interests of justice that this issue be decided by a higher court – even the highest court since it involves

the proper interpretation of statutory provisions (see *NEHAWU v UCT and Others* 2003 (3) SA 1 (CC) at paragraphs [14] and [15]).

[13] Counsel for the applicant also submits that the applicant achieved "overwhelming success" and so is entitled to its costs. He relies on numbers for this proposition, saying the applicant sought to prevent 76 000 "members" from striking while this court allowed only 10 000 of them to go on strike resulting, according to counsel, in a 87% success rate for the applicant. He says the applicant was also successful in its joinder application and so must be awarded its costs in that regard, too. I disagree with both submissions.

[14] What is at stake here is not a numbers game but a legal principle and, because there is an interpretation and application of a statute in issue, a constitutional issue. The applicant wanted to restrain all employees of SAPS from striking. It also sought a declaratory order that all employees of SAPS are not allowed to strike, and a mandatory interdict that the first respondent inform all its members who are employees of SAPS that they are prohibited from striking. It failed on all counts because this court found that only *members* of SAPS are prohibited from striking. The application was not for the restraining of 76 000 "members" from striking, of whom

66 000 were so restrained. It was for the restraining of all employees. That application did not succeed.

[15] The applicant also sought a *rule nisi* calling upon the respondents to show cause why two of its office-bearers should not be joined and held in contempt of an earlier court order. It succeeded, but then went on to withdraw the application subsequently and agreed to pay its own costs thereanent. An appeal at this stage to be awarded costs on a withdrawn application is rather academic, even if that application may later be re-instated as the applicant is entitled to do since it has not abandoned the application.

[16] In the result, while I am far from persuaded that a higher court may come to a different conclusion than that reached by this court, I am nevertheless of the view that it is in the interests of justice that the main issue in this case be considered by a higher court, perhaps even ultimately by the highest court as it raises a constitutional issue, so that the question is settled one way or the other. That issue in my view is this: Does the Labour Relations Act, read together with the relevant provisions of the South African Police Service Act and regulations thereto, deem all employees of SAPS (in

contra-distinction to *members*) to be essential service workers and thus prohibited from engaging in strike action?

Ngalwana AJ

For the applicant:	*Mr P Kennedy SC*
Instructed by:	*Bowman Gilfillan Attorneys*
For the respondents:	*Mr P Buirski*
Instructed by:	*Kevin Allardyce Attorneys*
Date of judgment:	*30 October 2007*