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**
WITBOOI, ABBEY	**Third Respondent**
NTSOBI, PAT	**Fourth Respondent**

JUDGEMENT

NGALWANA AJ

Introduction

[1] Following commencement on 1 June 2007 of a national strike by public servants arising from a wage dispute between organised

labour and government, the first respondent held its national congress on 11 June 2007 at the conclusion of which a resolution was adopted that it would join the strike if no resolution is found to the wage dispute before close of business on 15 June 2007.

[2] News of this resolution, which were widely reported in the media, propelled the applicant into action and it addressed a letter to the first respondent on 15 June 2007 in which it "placed [the first respondent] on terms" that it undertakes by 14h00 of that day that its members would not participate in any strike action, failing which it (that is, the applicant) would seek recourse in this court.

[3] By 18h00 of that Friday evening there had been no response from the first respondent and so the applicant duly proceeded, on an urgent basis, to obtain an order from this court. As luck would have it, the applicant was met, virtually at the court's doorsteps, by the first respondent's representatives and so the parties proceeded seemingly amicably to obtain the following order by agreement:

"1) The [first and second] Respondents undertake that pending the return day of the rule *nisi* referred to in paragraph 2 below:
1.1) The [first and second] Respondents and the members

of POPCRU shall not promote, encourage, support or participate in the public sector strike by employees of the Applicant.

1.2) The [first and second] Respondents shall inform the members of POPCRU employed by the SAPS of the contents of this interim order and, in particular, that POPCRU members have undertaken not to participate in the strike pending the return day, which undertaking shall be communicated by the [first and second] Respondents' issuing public statements to the media and in written circulars to members, officials and office bearers of POPCRU and through such other means of communication as may be reasonable in the circumstances.

2) A rule nisi is issued calling upon the [first and second] Respondents to show cause on 20 June 2007 at 10:00 am or as soon thereafter as the matter may be heard why a final order should not be granted in the following terms:

2.1) Declaring that the employees of the SAPS are prohibited from striking as the Applicant is an essential service.

2.2) Interdicting the [first and second] Respondents from promoting, encouraging or supporting participation in a strike by employees off the Applicant.

2.3) Interdicting members of the First respondent who are employees of the Applicant from participating in the strike.

2.4) Ordering the [first and second] Respondents to inform the members of the First Respondent employed by the Applicant, by public statements to the media and in written circulars to its members of the terms of this interim order.

2.5) Requiring the [first and second] Respondents to report to the Honourable Court on the return date on the steps which the [first and second] Respondents have taken to comply with paragraph 1.2 above.

2.6) Ordering the [first and second] Respondents to pay the costs of this application.

2.7) Granting the Applicant further or alternative relief.

2.8) Ordering that the provisions of paragraph 1, 1.1 and 1.2 shall operate as an interim order with immediate

effect pending the return date."

[4] The following day, however, (Saturday 16 June 2007) the fourth respondent is quoted in the *Pretoria News* as having said,

"We are going to use this to our advantage.

On Monday we will be calling a special national executive committee meeting where we will deal with the preparations for the strike.

We are not going to be despondent and will use this opportunity to finalise plans for the complete withdrawal of labour."

[5] Two days later, on Monday 18 June 2007, the first respondent indeed convened its national executive committee meeting and issued a press statement through the fourth respondent which it titled, "POPCRU's response on the interdict by the South African Police Services". The press release read as follows:

"The NEC of POPCRU sat to deal with the modalities giving effect to the decision of our 6th National Congress on the public sector wage dispute.

The NEC took place against the backdrop of an application by SAPS to interdict POPCRU, preventing members working in this sector from taking part in the strike. The matter is set down for Wednesday the 20th of June 2007.

The right to strike is fundamental and enshrined in the constitution hence we are defending this application by the employer. Our organisation has taken a legal and political approach in dealing with the issues on the

nature and form of our participation.

> The NEC developed and adopted a programme which entails demonstrating starting on Thursday the 21st of June for the whole of next week. The culmination of this action will lead into a national march as we mobilise members to defend what is rightfully theirs.

As of today, we shall be giving feedback to our members with regard to the outcome of the NEC as well as the progress on the wage negotiations."

[6] The following day, on Tuesday 19 June 2007, the third respondent (first respondent's general secretary) issued a circular to "all POPCRU Officials" in the following terms:

> "The NEC of POPCRU and the 2nd Respondent hereby inform all members of POPCRU who are members of SAPS of the contents of the Interim Order dated 15 June 2007, in the Labour Court of South Africa, case number J1444/07
> A copy of the order is attached hereto.
> In particular POPCRU and members of POPCRU "have undertaken not to promote, encourage, support or participate in a strike within the public service by employees of SOUTH AFRICAN POLICE SERVICES pending the return day; that is 20 June 2007".
> POPCRU accordingly calls upon all its members to abide by the terms of this undertaking."

[7] On 20 June 2007 the matter came up before me. As answering papers and an affidavit in compliance with paragraph 2.5 of the interim interdict was only handed up from the Bar that morning, it

was agreed that the matter be postponed until the following day so that I could become more conversant with the issues raised by the first and second respondents in their answering papers, and also to afford the applicant an opportunity to file replying papers, if any. The rule *nisi* was consequentially extended.

[8] Replying papers, now coupled with an application for the joinder of third and fourth respondents to these proceedings, as well as an application for contempt of court against all four respondents, were filed on the morning of Thursday 21 June 2007 and the matter proceeded to argument at 14h20 of that afternoon. Counsel for the applicant was at pains to point out that this was an application intended to "send the right message" to the respondents so that they that one cannot with impunity continue ignoring court orders. The order sought is in the form of a pure rule *nisi* without any interim effect. Counsel for the respondents indicated that the contempt and joinder applications are opposed.

The rule nisi of 15 June 2007

[9] During argument, counsel for the respondents conceded that as no notice to strike in terms of section 64 of the Labour Relations Act,

66 of 1995 ("the LRA") has to date been given, it would be competent for this court to confirm the rule *nisi* in respect of paragraphs 2.2, 2.3 and 2.4 thereof. He, however, indicated that it would then be open to the first respondent to issue a strike notice soon after such confirmation of the rule indicating that those of its members who are not "*members*" of the applicant (as defined in section 1 of the South African Police Services Act, 68 of 1995 ("the SAPS Act"), read together with sections 5(2)(c) and (d) as well as 29 of that Act) would embark on a strike action, and that the matter would no sooner be ruled upon by one judge on a technicality than it would be back for consideration by another judge on the crisp issue of whether or not the prohibition of a strike applies to all employees of the applicant or is limited only to "*members*" thereof as defined in the SAPS Act. To avert such a clearly undesirable result, both counsel were agreed that the issue of the reach of the prohibition be determined here and now, the respondent's counsel's concession as regards absence of a strike notice giving rise to competence of this court to confirm the rule of 15 June 2007 notwithstanding.

[10] Before embarking on that exercise I should dispose of the contempt

and joinder applications.

Contempt and Joinder applications

[11] Counsel for the respondents urged that this is not an appropriate case for a contempt finding. He submits that there has been no strike following the order of 15 June 2007. There have been no demonstrations even, said he, and there have been no fatalities as was the case in another fairly recent case in which this court made a summary contempt finding. In any event, says counsel for the respondents, the statement attributed in the *Pretoria News* to the fourth respondent – allegedly made, as they were, within moments of the order of 15 June 2007 – could well have been made without knowledge of the order since the newspaper in question hit the streets on the morning of Saturday 16 June 2007 and must thus have gone to print the previous evening. In circumstances where the order was not obtained until around 20h00 on the evening of 15 June 2007, it is conceivable that the fourth respondent was not aware of its terms when the statement was allegedly made by him. This, in my respectful view, is conceivable.

[12] Counsel for the respondents also submitted that there are potential disputes of fact around the statements allegedly made by the fourth respondent which would require oral evidence in order to be resolved. For that reason, the matter cannot be decided on the papers as they stand. But this does not explain why the fourth respondent did not correct any factual misperception there may have been. He could have filed an answering affidavit to the applicant's supplementary papers pointing out any factual inaccuracies. Some of the statements attributed to him were referred to in the founding papers and so he could have corrected any misperceptions similarly by filing answering papers or issuing a statement denying having said what was attributed to him. Failing him, the first or the second respondent could have issued such a statement. None of them did.

[13] Counsel for the applicant submits that it is important to send "the right message" to the respondents that court orders are not stuff simply to be ignored. He submits that the most important aspect of the order of 15 June 2007 was not so much the prohibition of the respondents from striking as the order that the first and second respondents convey the terms of the order to their members. The

fourth respondent, says counsel for the applicant, did the opposite of what was expected of him in mobilising members of the first respondent to "*defend what is rightfully theirs*" by which is understood the right to strike.

[14] It was also submitted that since this is a request for a rule *nisi simpliciter* and not an effective interim order for contempt, the respondents will have an opportunity to put matters right on return day. This could include the calling of oral evidence where the presiding judge considers desirable.

[15] But the third respondent, it seems to me, did what was expected of him in issuing a circular to all officials of the first respondent on 19 June 2007 calling upon all members to abide by the terms of the order. There would ordinarily seem to be no justification for an order of the kind sought against the third respondent. Nevertheless, as general secretary of the first respondent and therefore an important cog in the communication machinery of the first respondent, any order not including him would in my view be a limping one.

[16] I am satisfied that there exists enough material justifying the granting of the rule as sought against all four respondents. Now the first respondent and its members have an incentive to ensure that they do not throw away R500 000 in these hard times and lose their top officials to prison. I do hope things do not come to that, and that people are not thrown in gaol for exercising what is enshrined in the constitution as their constitutional right. But, as counsel for the applicant has pointed out, even constitutional rights are not absolute, especially where there are competing rights such as the right of the general public to delivery of essential services.

[17] That phrase brings me to the issue of the reach of the prohibition of the right to strike within the South African Police Services ("SAPS"). The applicant urges that all SAPS employees are prohibited from striking because they render essential services. The respondents maintain that only those employees of the applicant that are "*members*" of SAPS are prohibited from striking. Both parties seek a declaratory order on this issue.

Are all SAPS employees prohibited from striking?

[18] Counsel for the applicant urges that section 71(10) of the LRA is

clear. It provides that South African Police Service is "*deemed to have been designated an essential service*". Section 213 of the LRA also includes in its definition of "*essential service*" the South African Police Service. For this reason, counsel for the applicant submits it is "unhelpful" to engage in complicated constructions as regards which specific job description within SAPS would constitute an essential service and which would not. A tea lady and a cleaner who perform tea-making duties and cleaning duties, respectively, within SAPS render an essential service by reason of being in SAPS employ. The legislature, so the argument goes, designated the entire SAPS service as an essential service, not the individual components of that service made up of brass band musicians, electricians, clerks, human resource managers, tea ladies, financial administrators, uniformed policemen, detectives, undercover policemen, *et cetera*. If you work for SAPS, whether employed under the SAPS Act or the Public Service Act, 1994, you render an essential service and are prohibited from engaging in strike action. References to the SAPS Act are unhelpful and tend only to complicate what is essentially a simple enquiry.

[19] Not so, says counsel for the respondents. Only those employees of

SAPS who are "*members*" of SAPS are prohibited from striking. Section 1 of the SAPS Act defines a "*member*" as "*any member of the* [South African Police] *Service referred to in section 5(2), including –*

(a) …
(b) …
(c) any person appointed under any other law to serve in the Service and in respect of whom the Minister has prescribed that he or she be deemed to be a member of the Service for the purposes of this Act; and
(d) any person designated under section 29 as a member"

[20] Thus, persons appointed under the Public Service Act become members of SAPS only upon the Minister deeming them to be such for purposes of the SAPS Act.

[21] Section 5(2) makes it clear that the SAPS comprises only "*members*".

[22] Section 29(1) of the SAPS Act provides that the Minister of Safety and Security may "*by notice in the Gazette* ***designate categories of personnel employed on a permanent basis in the Service and who are not members, as members***". (my emphasis)

This seems to suggest that there exists, within SAPS, categories of personnel who are not members of SAPS but who can become members by the Minister's designation. Section 38(1) talks of "*a member or other employee of the Service*" and the rest of the section refers repeatedly to "*a member or employee*" in a way that is not suggestive of the two words being used *eiusdem generis* or interchangeably.

[23] Section 41(1) of the SAPS Act, which deals with strikes, says "*No **member** shall strike, induce **any other member** to strike or conspire with another person to strike.*" It does not say "no member or employee" or "no employee" shall strike or induce other employees to strike.

[24] Significantly, the word "employee" is nowhere defined in the SAPS Act. What is defined is "*member*". This in my respectful view indicates that SAPS comprises, as section 5(2) makes clear, not employees but members. That is why section 29 gives the Minister the power to designate categories of personnel within SAPS to be members for purposes of the Act. The LRA, on the other hand, defines "employee" and not "member". If the legislature had intended to prohibit "employees" of SAPS from

striking, in contradistinction to "members", it would have said so expressly in section 41(1).

[25] An important indication that only members are prohibited from striking and that, by implication, other personnel who are not members 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 a non-member who has given a section 64(1)(b) notice in terms of the LRA.

[26] It is thus my respectful view that not all employees of SAPS render an essential service, thus prohibiting them from embarking on a strike action. As Brassey says in *Commentary on the Labour Relations Act* (Vol 3) at A9-26:

> "*It is the service that is essential – not, as was so under the previous Act, the industry within which such services fall. Thus essential and non-essential service workers can be found working side by side in the same institution. In a hospital, for instance, doctors and nurses might be essential service workers, whereas the cleaners and gardeners would probably not be.*"

The suggestion that finance administrators and human resource personnel (much less tea ladies and persons employed to keep ablution facilities clean) render an essential service by reason only of being employed at SAPS, is in my respectful view difficult to comprehend.

[27] It cannot cogently be argued, in my respectful view, on the definition of "essential services" in the LRA that the interruption of the service of tea ladies and gardeners, on the one spectrum, and human resource personnel and finance administrators, on the other, at SAPS would "*endanger the life, personal safety or health of the whole or any part of the population*".

[28] Counsel for the applicant submitted that any order that some personnel of SAPS render a non-essential service and may strike, while others may not do so by reason of rendering an essential service, would be "enormously difficult" to implement. During argument I asked counsel for the respondents whether there is a

practical measure in which such an order could be implemented and I received an assurance that there would be. In any event, there is always the contempt rule *nisi* to fall back on if the process were not properly managed by the respondents.

[29] The effect of what has gone above is that paragraphs 1.1 to 1.4 of the draft order handed up by counsel for the applicant would have to be amended to say "members" of SAPS are prohibited from striking, instead of "employees" of SAPS. I have already indicated that counsel for the respondents has conceded to the granting of the orders in paragraphs 1.2, 1.3 and 1.4. I have also found that this is a proper case for the rule *nisi* prayed for by the applicant "to send the right message" that court orders are not to be trifled with. As regards costs, the applicant has been successful in so far as three of the four main prayers it sought have been granted but not in so far as the first prayer is concerned which has been limited only to members of SAPS as opposed to employees. That is what the respondents wanted. Opposition to the joinder and contempt rule *nisi* was not pressed with much vigour by counsel for the respondent and so I am not inclined to grant costs in that respect. All told, neither party has obtained substantial success in this case

and so I shall order that each party pays its own costs.

[30] In the result, I make the following order:

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:

1.1 Declaring that the *members* of the SAPS are prohibited from striking as they render an essential service.

1.2 Interdicting the respondents from promoting, encouraging or supporting participation in a strike by *members* of the applicant.

1.3 Interdicting members of the first respondent who are *members* of the applicant from participating in the strike.

1.4 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:

2.1 Joining Mr Witbooi and Mr Ntsobi as third and fourth respondents, respectively;

2.2 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;

2.3 Ordering the first respondent to pay an amount of R500 000;

2.4 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.

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Ngalwana AJ

Appearances

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 hearing: *21 June 2007*

Date of judgment: *22 June 2007*