IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J1152/09

In the matter between:

MINISTER OF CORRECTIONAL SERVICES APPLICANT

AND

POLICE AND PRISON CIVIL RIGHTS UNION

(POPCRU) RESPONDENT

JUDGMENT

N**YATHELA** AJ

Introduction

[1] Applicant approached court on an urgent basis on 04 June 2009 seeking an interim relief interdicting members of the respondent from engaging in certain conduct. A rule nisi was granted on 04 June 2009 and the return date is 13 August 2009.

[2] Respondent anticipated the return date and the matter was set down to be heard on 23 June 2009.

[3] On 23 June 2009, the matter was postponed to Monday the 29th June 2009 to allow applicant to file its replying affidavit.

The parties

[4] The applicant is the Minister of Correctional Services and is cited in his official capacity as the Minister responsible for the Department of Correctional Services.

[5] The respondent is POPCRU, a duly registered trade union acting in terms of section 200 of the Labour Relations Act 66 of 1995.

The facts

[6] On 04 June 2009, applicant approached court on an urgent basis without filing an affidavit and without notice to the respondent.

[7] Applicant presented to court oral evidence of one Ezekiel Khosa and as a result the court granted an interim order as follows: "IT IS ORDERED THAT:

> *1. The rules of court are dispensed with and the matter is disposed of on urgency;*
>
> *2. A rule nisi is hereby issued, calling upon the Respondent to show cause on the 13th August 2009 or soon thereafter why the following order should not be made final.*
>
> *2.1 Interdicting and restraining the Respondent and/or its members from engaging in an unprotected strike and any conduct in furtherance thereof;*
>
> *2.2 Interdicting and restraining the Respondent and/or its members from blocking and/or preventing employees of the Applicant and/or the public from entering or leaving the premises of the Applicant;*

2.3 Interdicting and restraining the Respondent and/or its members from interfering or intimidating the employees of the Applicant in the execution and/or furtherance of their duties;

2.4 Interdicting and restraining the Respondent and/or its members from coming within a distance of 200m from the premises of the Applicant save where they do so for purposes of the execution of their duties or rendering of services.

2.5 Interdicting and restraining the Respondent and/or its members from picketing within a distance of 200m from premises of the Applicant.

2.6 The respondent is to pay the costs of this application.

3. Prayers 2.1 to 2.6 above serve as an interim order".

[8] The return day is the 13th August 2009. Respondent anticipated the return day and approached court on 23 June 2009.

[9] The case was postponed to 29 June 2009 by agreement between the parties and to allow the Respondent to file its papers. The costs of the postponement were reserved.

[10] Applicant's filed its papers 29 June 2009.

POINT IN LIMINE

[11] Respondent raised points in limine and argued as follows:

11.1 The applicant has improperly abused the process of this Honourable Court to obtain an order to which it was not entitled, and regardless of the merits of its application, in circumstances where there was no good reason to proceed on an *ex parte* basis, and where it failed to place all relevant facts before the court. Neither the Labour Relations Act 66 of 1995 (LRA) nor the Labour Court Rules make provision for *ex parte* applications of this nature.

11.2 In terms of section 68(2) of the LRA, at least 48 hours notice must be given of an application to interdict a strike action or conduct in furtherance thereof. While the notice period may be reduced on good cause shown, it cannot be waived. The court lacks jurisdiction to interdict an alleged unprotected strike action or any conduct in furtherance thereof.

Analysis

Points in limine

[12] The first point in limine deals with Rule 7(1) of the Labour Court Rules provides that *"An application must be brought on notice to all persons who have an interest in the application"*. Marion Fouche' in her book titled **Rules of the CCMA and the Labour Courts Butterworths 2006**, at page 75 commented on this sub-rule as follows: *"If no relief of a final nature is sought against any person, an ex parte application is brought, which need not be served on any person other than the Registrar of the court"*. I accept the views expressed by the author in this regard as the prejudice which the respondent may suffer is

removed by the fact that the order is merely an interim order for which it has an opportunity to respond before a final order is granted and to even anticipate the return date. The point in limine is therefore dismissed.

[13] The second point in limine is that applicant should have complied with the notice period stipulated in section 68(2) of the LRA. In its answering affidavit, the respondent made reference to Mr Khosa's evidence that applicant has been designated as an essential service. Although respondent disputed certain aspects of the evidence, it did not dispute the fact that applicant has been designated as an essential service as testified to by Mr Khosa. I therefore accept that applicant has been designated as an essential service.

[14] Section 68(4) of the LRA provides as follows: *"Subsection (2) and (3) do not apply to an employer or an employee engaged in an essential service or a maintenance service.* In view of my finding that applicant is an essential service, I conclude that the notice period referred to in section 68(2) of the LRA is not applicable in this matter. The point in limine is therefore dismissed.

Merits

[15] In Polyoak (Pty) Ltd v Chemical Workers Industrial Union & Others (1999) 20 ILJ 392 (LC) at 395 the court held as follows: *"Four prayers are typically included in the notice of motion for which there is either no basis in law or none that is laid in the papers.*

1 The first is one in which an interdict is sought against all strikers when acts of misconduct are alleged only against a portion of them. Generally

speaking, a person can only be restrained by interdict if the evidence demonstrates that, as a matter of probability, he or she will commit the act in question within the period encompassed by the proposed order. The conclusion is competent when the evidence shows that person has undertaken or agreed to commit the act or that an inference to this effect can be drawn from the fact that he or she has previously done so. In the absence of evidence identifying the respondent as a prospective perpetrator or accomplice in the acts of a perpetrator, however, he or she cannot be interdicted, and it matters not that the person is one of a group of strikers containing malefactors or that his or her interests as striker happen to be promoted by the wrongdoing in question. Our law knows no concept of collective guilt".

[16] In this matter, applicant maintained throughout the proceedings that the alleged demonstrations took place during lunch time only at the following centres: viz: Pretoria, Baviaanspoort, Zonderwater, Boksburg, and Leeukop. In both Mr Khosa's testimony and the applicant's replying affidavit, applicant maintained that centres like Johannesburg did not participate in the picketing. It is therefore clear that an interdict which applies to all centres will not be appropriate as not all the centres participated in the picketing. I accept the reasoning in the Polyoak case above that even though other centres have POPCRU members it will be inappropriate to interdict them if they are not participating in the picketing. Mr Khosa's testimony further indicates that the Johannesburg Centre actually refused to participate in the picketing on the ground that such picketing was

unprotected. This is a clear indication that there is no probability that the other centres will participate in the picketing given the reasons for Johannesburg's non participation in the picketing. In the circumstances, I find that the interdict should be limited only to the centres mentioned by Mr Khosa on page 13 line 17 of the record.

[17] AD order 2.1: This order was granted on the assumption that members of the respondent were engaged in an unprotected strike. One key element of a strike is that it should involve a refusal, retardation or obstruction of work by employees. In this matter, it is common cause that the picketing in which members of the respondent were involved only took place during lunch hour. Applicant has never contended that the picketing also took place during office hours. In the circumstances, I find that the picketing did not involve a refusal, retardation or obstruction of work and thus it cannot be classified as a strike in terms of section 213 of the LRA. Since the assumption that members of respondent were engaged in a strike is incorrect, this order cannot stand.

[18] AD order 2.2 and 2.3: In paragraph 46 of the Answering affidavit, the respondent denied that its members blocked access gates during the demonstrations. Respondent further maintained that the SAPS was present at the scene of the picketing and if there were incidents like blockades etc, their members would have been arrested. According to the respondent the SAPS never intervened as the demonstration was peaceful. Apart from making a bare denial, applicant has never disputed the specific facts made by the respondent in its affidavit in this regard. In the circumstances, I find that the picketing was

peaceful as contended by the respondent. I therefore conclude that orders 2.2. and 2.3 cannot be justified as the conduct complained of neither took place nor did members of respondent threaten to embark on such conduct.

[19] AD 2.4 and 2.5: Applicant has not disputed the fact that members of the respondent in the affected centres had been granted permission by the relevant Local Authorities hold the gatherings / picketing in question. The said picketing/ gatherings were therefore lawful. However, applicant's contention is that members of respondent breached the conditions of the permission granted in that they amongst others wore their uniform mixed with respondent's T-shirts etc. It is for this reason that respondent sought order 2.4 and 2.5.

[20] To substantiate its case, applicant submitted Annexure KM3 which is a photo album containing photos allegedly taken by one Johan Welden, at the Boksburg Management Area during the picketing. It should be mentioned that these photo album was only introduced by applicant in its replying affidavit. Mr Khosa never mentioned in his evidence the said photos existed. The photos are therefore new evidence which was introduced in the replying affidavit. I cannot accept such evidence since the replying affidavit is not meant to introduce new evidence. Furthermore, respondent had no opportunity to deal with the authenticity and admissibility of such evidence. Moreover, this evidence even if it had been accepted only deals with what is alleged to have been non compliance with the condition of the permission granted at the Boksburg Management Area. In the light of the Polyoak decision referred to above, applicant cannot be justified in seeking an interdict against members of

respondent in all the other centres based on the Boksburg incident alone. There is no evidence to show that members of respondent in the other centres breached the conditions of the permission which they had been granted by their respective Local Authorities. Since applicant is seeking the order in 2.4 and 2.5 above on the basis that members of respondent breached the conditions of the permission they had been granted, and having found that that conclusion is not justified, these orders cannot be allowed to stand.

Order

[21] In the light of the above analysis, I make the following order:

(i) The interim order granted on 04 June 2009 is hereby discharged.

(ii) The applicant is ordered to pay respondent's costs including costs reserved on 23 June 2009.

Nyathela AJ

Date of Hearing : 29 June 2009

Date of Judgment : 04 August 2009

Appearances

For the Applicant : Adv. L.M Moloisane

Instructed by: State Attorney

For the Respondent: Adv. G.A Fourie

Instructed by: K.A Allardyce & Partners