IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C1126/2010

In the matter between:

THE REGIONAL COMMISSIONER FOR CORRECTIONAL SERVICES, WESTERN CAPE — First Applicant

THE AREA COMMISSIONER FOR CORRECTIONAL SERVICES, GOODWOOD MANAGEMENT AREA — Second Applicant

and

POPCRU — First Respondent

SS BANGANI & OTHERS WHOSE NAMES APPEAR IN THE SCHEDULE "A" HERETO — Second to Further Respondents

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JUDGMENT

FRANCIS J

Introduction

1. This is an urgent application brought by the Regional Commissioner for Correctional Services, Western Cape - the first applicant and the Area Commissioner for Correctional Services, Goodwood Management Area - the second applicant, against the first respondent POPCRU, a duly registered union and the second to further respondents who are members of POPCRU, employed by the Department of Correctional Services (the department) in the Goodwood Management Area and the names appear in Annexure "A" annexed to the notice of motion, for the following relief:

    1. Condoning Applicants' failure to comply with the ordinary rules of the above Honourable Court and permitting this matter to be heard on an urgent basis;

2. *Declaring the action taken by the Respondents in pursuit of their demand for a two by 12 hour shift arrangement to constitute a strike in terms of the Labour Relations Act 66 of 1995;*

3. *Declaring such strike action to be unlawful and not in compliance with the provisions of the Labour Relations Act 66 of 1995;*

4. *Ordering the Second to Further Respondents to immediately desist from the strike action in which they are currently engaged and to tender their services during the festive season until 31 January 2011 in the manner required by the Applicants;*

5. *Restraining the Respondents from any and all further participation in the strike action in which they are currently engaged;*

6. *Restraining the Respondents from promoting, inciting or instigating the strike action of the First Respondent's members in the Applicants employ or any industrial action relating thereto;*

7. *That First Respondent be ordered to pay Applicants costs in this application should it be opposed;*

8. *Directing that services of this order be effected by a representative of the Applicant by faxing or delivering a copy of the order to First Respondent's offices of the Western Cape region and by posting the order on the main entrances and on all relevant notice boards in Goodwood Correctional facility;*

9. *Directing that the Applicants may supplement these papers;*

10. *Directing the parties as to the further conduct of this matter;*

11. *Granting the Applicants further and/or alternative relief."*

2. The application was heard by Basson J on 10 December 2010 who granted prayers 1 to 6 and 8 of the notice of motion. The respondents brought an urgent application to rescind the orders granted by Basson J. The rescission application was heard by Waglay DJP on 21December 2010 who rescinded the orders made by Basson J. The respondents were ordered to file their opposing papers by noon on 22 December 2010 and the applicants their replying papers by close of business on 28 December 2010. The parties were ordered to file their heads of arguments by noon on 30 December 2010 and the matter was postponed to 31 December 2010.

Background facts

3. The Correctional Services have been declared an 'essential service' in terms of section 71(8) of the Labour Relations Act 66 of 1995 (the LRA).

4. On 24 June 2009, the State as an employer concluded a collective agreement, "GPSSBC Resolution 2 of 2009" with trade unions in the GPSSBC, on the implementation of an occupational specific dispensation (OSD) for Correctional Services officials. One of the objectives of Resolution 2 of 2009 is the introduction of a 45-hour week and the implementation of a 7-day establishment shift system for centre based correctional officials. Clause 13 provides as follows:

"13. Introduction of 45 hour week and 7 day establishment:

13.1 All centre based correctional officials shall be translated to the 45 hour work week with effect from 1st July 2009.

13.2 The Department shall introduce a 7 day establishment for correctional

facilities with effect from 1st July 2009.

13.3 The Department shall develop a 7 day establishment models taking into consideration institution - specific needs."

5. The major challenge for the department and labour, has been clause 13.3 stating that "the Department shall develop a 7-day establishment model taking into consideration institution - specific needs". This has necessitated on going consultation between management and labour to develop shift systems that meet institution-specific needs. POPCRU contends that what is required is a shift system comprising two 12 hour shifts a day. This is the demand which the respondents are advancing at present in the Goodwood Correctional facilities. The department has been open to attempting the introduction of the said system, but it has been found that its implementation is extremely difficult given the severe shortage of staff in correctional facilities. In Goodwood a pilot project was implemented as from 3 July 2009 testing the two by 12 hours shift system, and the pilot was followed in Brandvlei. However, the pilot revealed that in these facilities the shift arrangement caused insurmountable problems due to shortage of staff, and the requisite security measures which the department is obliged to take, and the duties that the department has in respect of rehabilitation and development of offenders.

6. In July and/or August 2009, the department in the Western Cape region set up a task team, consisting of management and POPCRU and the PSA, to try to find a solution to the problem of developing institution specific models as required by Resolution 2 of 2009. On a visit to the Goodwood and Brandvlei correctional facilities where the

pilot project was underway, the applicants found situations where one correctional official was responsible for 100 inmates. Such a situation is violating the Correctional Services Act and applicable prescripts. Standing Orders of the department require that the ratio should be 1:40. Subsequent to this inspection, the task team called a series of meetings to discuss the different options about shift managements to remedy the situation at Goodwood and Brandvlei. POPCRU stated that it was unable to attend a number of those meetings with resultant postponement of meetings.

7. On 22 November 2010, at a meeting between POPCRU, PSA, the regional management of the Western Cape Department and the managers of Goodwood and Brandvlei Management Areas, it was clear that no long term solution was in sight and going to be agreed through the task team. Due to the imminent festive season, and directives from the national commissioner about the special security measures needed every year during this period, proposals were urgently requested from both POPCRU and PSA, about arrangements for an interim shift system to be put into operation at Brandvlei and Goodwood for the period 1 December 2010 to 31 January 2011. POPCRU was unwilling to make any proposals in respect of this issue. As a result of POPCRU's refusal to present proposals, interim arrangements had to be decided upon by the regional management.

8. The Area Commissioners held meetings with POPCRU and PSA in this regard on 23 November 2010. Brandvlei Management and labour agreed on an interim shift arrangement but the representatives of POPCRU from Goodwood requested permission to be excused from the meeting because they stated that they would not budge from their demand regarding the two by 12 hours system. The interim shift

arrangement is that the employees should work a 5 shift system with effect from 1 December 2010.

9. In Goodwood Correctional facilities, the second to further respondents have refused to obey the instructions of management regarding the first interim arrangements, and by sticking to their demands that the pilot project two by 12 hour shift system remains in operation during the festive season are thus refusing to report to work according to the new interim shift arrangement. The shop stewards of POPCRU at Goodwood and the second to further respondents were informed that the meetings that were being held on the premises and their refusal to work as instructed, were illegal, and despite this continued with their actions.

10. On 3 December 2010, a meeting was held between the applicants and the provincial leadership of POPCRU. POPCRU's demands were to go back to the pilot two by 12 hour system immediately, until they had discussed the issue at their NEC meeting. It was explained to them that the challenge to such a situation would be impossible to deal with on an administrative and security basis, and therefore could not be agreed to. POPCRU then informed the regional commissioner that they would declare a dispute. However there has been no formal declaration of a dispute by POPCRU, and their members continue to engage in an illegal strike, according to the applicants. As a result of the second to further respondents stance, a second interim arrangement was put into place from 8 December 2010 which involves a 3 shift system. The second to further members again refused to work in terms of the interim arrangement.

11. In respect of the long term prospects of a shift system between the labour partners, the applicants agree with POPCRU that such must be done under the auspices of the GPSSBC and both parties are intent on pursuing this route in the new year. The applicants said that before the interpretation of the 2009 collective agreement and particularly clause 13 thereof can be dealt with in the appropriate forum, they urgently required this Court to put a stop to the unprotected strike that is threatening the security and well-being of offenders and of the public at large. At Goodwood, POPCRU members number 304 out of a workforce of 511. About 76 members of POPCRU are refusing to work in terms of the interim arrangements.

12. The applicants brought an urgent application on 9 December 2010 which was set down for a hearing on 10 December 2010.

The parties contentions

13. The applicants contended that the action taken by the respondents falls with the definition of a strike in section 213 of the LRA, with its purpose the demand that the two 12 shift hour shift system that operated during the pilot project continues during the festive season. The work that the employees are required to perform is work they are contractually obliged to do, and the second interim shift system is in line with the principles contained in Resolution 2 of 2009. The then National Commissioner issued a circular regarding the implementation of the 7-day establishment 45 hour week aligned to GPSSBC Resolution 2 of 2009. The applicants contended that they have a clear right to seek the prevention of strike action by its essential service employees.

14. It was further contended on behalf of the applicants that given the specific demands relating to security, care and rehabilitation of offenders, and the safety of the service providers and the community over the festive season, the balance of convenience clearly favours the applicants, i.e. that the relief prayed for be granted to implement an interim shift system for this short period until the end of January 2011, so that the constitutional obligations and standards of care that the department has in respect of offenders in Goodwood management area, are met. Given the continuing apprehension of serious harm should the Goodwood facilities remain understaffed, with second and further respondents continuing to stage their unprotected and illegal action, and the lack of alternative remedy to solve the crisis, the applicants seek the relief for prayed in the notice of motion.

15. The respondents denied that the authority to determine work hours by the national commissioner has been properly delegated to the levels of the regional commissioner, or the area commissioner. They could accordingly not determine working hours on the basis of the circular by the national commissioner, as such a circular was not a proper delegation in accordance with section 97 of the Correctional Services Act. The regional commissioner and the area commissioner are not properly delegated to exercise the authority to determine working hours in the department.

16. The respondents contend that the dispute arose as a result on the instruction issued by the applicants to work the so-called straight shift system. The refusal to work did not arise from a dispute about a matter of mutual interest the employees wanted to resolve. The refusal to work was accordingly the catalyst for the dispute and the

dispute was the result of the refusal to work. The refusal to work does not amount to a strike according to the definition of the LRA and an interim order cannot be granted against the respondent.

17. The instruction issued to work according to the so-called straight shift system does not reflect how many days per week the correctional officials are required to work, or how the night shift will be dealt with. The instruction is so vague that no proper effect could be given to it. As far as the straight system introduced by the regional commissioner and area commissioner complied with the circular by the national commissioner dated 1 July 2009, it contravenes section 15 of the Basic Conditions of Employment Act (the BCEA) in that correctional officials are not granted a weekly rest period of at least 36 hours. The shift system introduced and implemented by the applicants is unlawful and cannot be enforced.

Analysis of the facts and arguments raised

18. It is not necessary to deal with all the grounds raised in this application. The crucial question that needs to be determined is whether the second to further respondents had embarked on unprotected strike action. If they have embarked on an unprotected strike, the application stands to be granted irrespective of whether the regional commissioner's decision was unlawful as contended by the respondents.

19. It is common cause that the Correctional Services have been declared an 'essential service' in terms of section 71(8) of the LRA. As a result, the second to further respondents are prohibited from embarking in any strike action and must refer any

dispute that they might have to arbitration. In this regard see sections 65(1)(d)(i) and 74(1) of the LRA.

20. It is common cause that on 23 November 2010 the area commissioner of the department in the Goodwood management area issued an instruction that correctional officials must work according to a so-called "5 shift system". They refused to comply with the instruction. The area commissioner issued a further instruction on 8 December 2010 that theymust work according to a so-called "3 shift system" and they again failed to give effect to the instruction. The second to further respondents have demanded to work the two 12 hour shifts and were not prepared to render any services in terms of the new interim arrangements. They felt aggrieved with the new interim arrangement.

21. Mr Basson who appeared for the respondents when asked by this Court whether the second to further respondents were rendering any services, said that since 21 December 2010 after Waglay DJP had rescinded the default order, they were rendering services in terms of the two 12 shifts arrangements.

22. It was not entirely clear whether the second to further respondents were rendering services before 21 December 2010. It is pleaded by the applicants in paragraph 7 of the founding affidavit that the second to further respondents have on 1 December 2010 embarked on prohibited industrial action in a bid to further their demands that shift arrangements during December 2010 and 31 January 2011 be organised on the basis of two 12 hour shifts. In paragraphs 10 of the founding affidavit it is pleaded that since 1 December 2010 the second to further respondents have been refusing to

work according to interim shift arrangements and instead demand that they work a shift system consisting of two 12 hour shifts. Although they were present at the Goodwood Correctional Centres at the time they would work in terms of the two by 12 hour system, they were refusing to carry out any of their duties. In paragraph 11 of the founding affidavit it is pleaded that in the region of 76 members of POPCRU were involved in this action, which action amounts to an unprotected strike in terms of the LRA. In paragraph 12 it is pleaded that despite negotiations the unprotected strike continued. In paragraph 25 it is pleaded that they have refused to obey the instructions of management regarding the first interim arrangements, and are sticking to their demands and are refusing to report to work according to the new interim shift arrangement. In paragraph 25 and 26 and 30 it is pleaded that the unprotected strike action was ongoing.

23. The respondents have pleaded in paragraphs 3 and 34 to 40 of the answering affidavit that the applicants did not have the authority to determine working hours in the department and that the instruction issued by them to work according to the new shift system was *ultra vires* and invalid. The dispute that has arisen between the parties was the consequence of the respondents' refusal to work caused by the introduction of the straight system and that the dispute was not the catalyst for the refusal to work. The refusal to work did not arise from a dispute about a matter of mutual interest the employees wanted to resolve. The refusal to work according to the new shift system was the catalyst of the dispute between the parties. The new shift system was unlawful and contravened section 15 of the BCEA. The respondents in paragraph 15 denied that the conduct of the employees constitutes industrial action and said that the

refusal to work according to the new shift system was not the result of a deadlock during negotiations on working hours.

24. The respondents denied that their conduct constitutes industrial action. The refusal to work according to the new shift system was not the result of a deadlock during negotiations on working hours, and is not a strike. The refusal to work according to the new shift system was the catalyst of the dispute between the parties.

25. It is clear from the pleadings and from what Mr Basson informed Waglay DJP that from 1 December 2010 to 20 December 2010 the second to further respondents were not rendering any services at all. The applicants have pleaded in their founding papers that they reported for work in terms of the two by 12 shifts arrangements but were refusing to carry out their duties. This was not disputed by the second to further respondents. It would appear from the undertakings made to Waglay DJP that they have since 21 December 2010 carried out their duties. They did not deem it necessary to have approached this Court on an urgent basis to declare the said arrangement as unlawful. They did not deem it necessary to utilise the provisions of section 74 of the LRA which deals with disputes in essential services which should be referred to conciliation and arbitration. They have been demanded to work the two 12 hour shifts. Their conduct amounts to strike action as defined in section 213 of the LRA.

26. This Court was informed that Cele J had dealt with the issue of delegation in an unreported judgment under case number D1004/2010. Problems were encountered in obtaining a copy of the *ex tempore* judgment due to mechanical problems. It does not

for purposes of this judgment matter whether the applicants were not properly delegated to exercise the authority to determine the working hours in the department. The fact is that the second to further respondents were rendering essential service and cannot embark on any strike action. As pointed out above they have several remedies available to them and did not follow that route.

27. I am satisfied that the applicants have made out a proper case for the relief sought. They have met the requirements for interdictal relief. It follows that the application stands to be granted.

28. I had initially raised with the parties that since this is an urgent application, the application must comply with the provisions of rule 8 read with rule 7 of the Rules of this Court. Rule 8(1) provides that a party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and if applicable 7(7). Rule 7(2)(e) provides that the notice of application must substantially comply with Form 4 and must be signed by the party bringing the application. The application must be delivered and must contain a notice advising the other party that if it intends to oppose the matter, that party must deliver an answering affidavit within 10 days after the application has been served, failing which the matter may be heard in the party's absence and an order of costs may be made.

29. It is apparent from the provisions of rules 8(1) and 7(2)(e) that they are couched in peremptory terms. This Court can condone a failure to comply with the time limits contained in the rule but it cannot in my view condone non compliance with the rule.

The notice of motion does not contain the provisions stipulated in rule 7(2)(e). However since the parties were ordered by Waglay DJP to file their papers within specified time limits it is implicit that the applicants' failure to comply with rule 7(2)(e) was condoned.

30. All that remains to be determined is the issue of costs and the costs reserved in the rescission application. It is unclear on what basis costs were reserved in the rescission application. The applicants had sought final relief as opposed to interim relief in the urgent application. It is unclear why final relief was sought. Had the Court issued a *rule nisi* the respondents would have anticipated the return date and there would have been no need to have brought the rescission application. However I do not believe that this is a matter where costs should follow the result. The respondents were successful in the rescission application. The applicants are successful in this application. The parties have an ongoing relationship. It would in the circumstances be fair and just not to award any costs at all.

31. In the circumstances I make the following order:

31.1 The applicants' failure to comply with the rules of this Court is condoned and this matter is heard on an urgent basis;

31.2 The action taken by the second and further respondents in pursuit of their demand for a two by 12 hour shift arrangement constitutes an unprotected strike which is not in compliance with the provisions of the LRA;

31.3 The second to further respondents are to immediately desist from the strike action in which they are currently engaged and to tender their services during the festive season until 31 January 2011 in the manner required by the applicants or until they obtain a court order;

31.4 The second to further respondents are restrained from any and all further participation in the strike action in which they are currently engaged;

31.5 The second to further respondents are restrained from promoting, inciting or instigating the strike action of the first respondent's members in the applicants' employ or any industrial action relating thereto;

31.6 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS	:	T GOLDEN INSTRUCTED BY STATE ATTORNEY
FOR RESPONDENTS	:	JL BASSON INSTRUCTED BY GROSSKOPF ATTORNEYS
DATE OF HEARING	:	31 DECEMBER 2010
DATE OF JUDGMENT	:	7 JANUARY 2011