

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: JA4/08

In the matter between

South African Police Services

Appellant

And

Police and Prison Civil Rights Union

1st Respondent

Zizamele Cebekhulu

2nd Respondent

JUDGMENT

WAGLAY DJP

Introduction

[1] The question to be resolved in this appeal is whether the designation of the South African Police Service as an “*essential service*” in terms of section 71(10) of the Labour Relations Act¹ (“the LRA”) prohibits all of the personnel of the South African Police Service from participating in a strike or whether the prohibition applies only to those members of staff who are *members* or who are deemed to be *members* of the SAPS as

¹ Act no 65 of 1995

defined under the South African Police Services Act² (“the SAPS Act”).

Background

[2] The South African Police Service (“SAPS”) has a staff complement of over 160 000 of which just over 130 000 are appointed under the SAPS Act, the remainder is employed under the Public Service Act³ (“the PSA”) and forms part of the broader public service. In 2007 employees in various sectors of the public service embarked on a general strike to secure their wage demands. After the strike commenced, the first respondent, the Police and Prisons Civil Rights Union (hereafter “POPCRU”) called upon its members who were employed within the SAPS to join the general strike.

[3] On becoming aware of POPCRU’s call, the SAPS, the appellant herein, immediately applied to the Labour Court for a declaratory order to the effect that employees within the SAPS constituted *essential services* as contemplated by s71(10) of the LRA and were, as such, prohibited from participating in a strike. The SAPS also sought an order:

- (i) interdicting and restraining POPCRU from calling for, promoting, encouraging or seeking for its members who are employees of the SAPS from participating in a strike; and,

² Act no 68 of 1996

³ Act no 103 of 1994

- (ii) interdicting and restraining POPCRU members who are employees of the SAPS from participating in the strike.

[4] POPCRU opposed the application in the Labour Court on the basis that not all of its members employed within the SAPS were prohibited from participating in a strike because not all of them were part of the *essential service* as set out in s71(10) of the LRA. According to POPCRU only those of its members who were employed under the SAPS Act or were deemed to be *members* as defined by s5 of the SAPS Act⁴ constituted the *essential service* component of the SAPS staff and therefore they only called on their members who were employed under the PSA and were not deemed to be members to join the strike as these employees were not prohibited from participating in the strike.

The Labour Court

[5] The Labour Court (Ngalwana AJ) granted the SAPS certain relief but upheld POPCRU's argument that there was a distinction to be drawn between those employees appointed under the SAPS Act and those employed under the PSA. The Labour Court held that in terms of s71(10) of the LRA only those members of the SAPS staff who were employed under the SAPS Act formed part of the *essential service* and were prohibited from striking while the prohibition did not apply to the other SAPS employees. It is this decision which, with the leave of the Labour Court, now comes before us.

⁴ See paragraph 18 *infra*.

The appeal

[6] Although POPCRU argued that the right to strike is enshrined in the Constitution of the Republic of South Africa⁵ (“the Constitution”) it accepts that this right is subject to limitations under s36 of the Constitution and that the limitation is manifest in s65(1) of the LRA. Section 65(1) of the LRA provides as follows:

“65 Limitations on right to strike or recourse to lock out

(1) *No person may take part in a strike or lockout or any conduct in contemplation or furtherance of a strike or a lock-out if –*

(a)

(b)

(c)

(d) *That person is engaged in –*

(i) *an essential service, ... (my emphasis)*

[7] Two crucial issues relevant to this matter arise from s65(1)(d) of the LRA: one is the concept of *essential service* in relation to the word *engaged*; and the other, the meaning that should be ascribed to the word *engaged*.

[8] I raise the issue of the concept of *essential service* in relation to the word *engaged* as set out in s65 (1) (d) of the LRA because, to my mind what this conveys is that when, for example, a body, organisation or a name of a company is declared to be an *essential service*, it is the functions that that body, organisation or company

⁵ Act 108 of 1996

performs, is obliged to perform or required to perform, that constitutes the *essential service* and it is the persons who are *engaged* in the performance of these functions who are not permitted to take part in a strike or any conduct in contemplation or furtherance of a strike. Therefore, when a body is declared an *essential service*, it is the actual service or functions performed by that body that needs to be insulated from being interrupted by way of a strike by those who are *engaged* in providing that service or carrying out the functions. I say this because a body cannot constitute a service or function. It may represent a service but not constitute it.

[9] With the above in mind when consideration is given to SAPS as a body or organisation then the fact that it is designated as an *essential service*⁶ means that the functions that it performs or is required to perform constitutes an *essential service*. The next step then in order to establish who is *engaged* in performing the *essential service* is to determine the purpose for the establishment of the SAPS and the functions it performs or is required to perform.

[10] The SAPS was established under s214(1) of the Interim Constitution⁷ and s5(1) of the SAPS Act which respectively state the following:

s214(1)

“There shall be established and regulated by an Act of Parliament a South African Police Service, which shall be

⁶ The definition section of the LRA defines essential service to mean, inter alia, “ *The South African Police Service*” and S71(10) goes on to provide as follows:

“(10) The parliamentary service and the South African Police Service are deemed to have been designated as an essential service in terms of this section.”

⁷ Constitution of the Republic of South Africa Act 200 of 1993.

structured at both national and provincial levels and shall function under the direction of the national government as well as the various provincial governments.”

S5(1)

“The South African Police Service contemplated in section 214(1) of the Constitution is hereby established.”

[11] The present Constitution reinforces the establishment of the SAPS by providing in s199(1)⁸ that the police service is part of the *security services* of the Republic. Section 205(3) of the Constitution then goes on to set out the objects of the police service which it states is:

..... to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.”

[12] The functions that the SAPS performs and is obliged to perform or required to perform is that of policing. In terms of the Constitution and the SAPS Act it is the prevention and investigation of any violation of the law, and, the maintenance and enforcement of the law, which constitutes the policing function of the SAPS. These are the functions that form part of the *security service* of the Republic and these are the functions that would constitute the *essential service* as contemplated by s71(10) of the LRA and referred to in s65(1)(d)(i) of the LRA.

⁸ See paragraph [13] *infra*.

[13] Following on the above it needs to be established who is *engaged* in the policing functions of the SAPS. According to the SAPS all of its employees are involved in the policing functions. This argument is simplistic and does not take into account policing as part of the *security service* as contemplated by the Constitution. Section 199 of the Constitution which deals with the “*Establishment, structuring and conduct of security services*” provides that the SAPS is part of the security service and is made up of *members*. This section provides as follows:

s199(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) ...

(3)...

(4)...

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order. (my emphasis)

[14] The above provisions read together with s205(3) of the Constitution which sets out the objects of the police service⁹, are then reinforced by s5(2) and s13 of the SAPS Act which sections provide as follows:

s5(2) The service shall consist of –

⁹ See paragraph [11] supra

- (a) *all persons who immediately before the commencement of this Act were members-*
- (i) *of a force which, by virtue of section 236 (7)(a) of the Constitution, is deemed to constitute part of the Service;*
 - (ii) *appointed under the Rationalisation Proclamation;*
 - (iii) *of the Reserve by virtue of section 12(2)(k) of the Rationalisation Proclamation;*
- (b) *members appointed in terms of section 28(2) of this Act; and*
- (c) *persons who become members of the Reserve under section 48(2) of this Act. (my emphasis)*

s13. Members.-- (1) *Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*

(2) *Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.*

(3)(a) *A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and function, perform such duty in a manner that is reasonable in the circumstances.*

(b) *Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.*

(4) *Every member shall be competent to serve or execute any summons, warrant or other process whether directed to him or her or to any other member.*

(5) *Any member may in general or in any particular instance be required to act as prosecutor, or in any other respect to appear on behalf of the State in any criminal matter before any magistrate's court, of a special justice of the peace or any other lower court in the Republic."*

(6)... (and so on , emphasis is mine)

[15] Having regard to the provisions of the Constitution and the SAPS Act as quoted, it appears that while the Constitution provides the framework of the responsibilities of the SAPS, s13 of the SAPS Act provides the detail of the functions of the policing service. Included in the prevention, investigation, maintenance and enforcement of the law, are the functions of executing legal processes and representing the state in lower courts. All the functions set out in s13 of the SAPS Act can, in term of this section, only be performed by those employees of the SAPS who are *members* of the SAPS. Those who are not *members* do not have

the powers, duties or obligations set out in s13 of the SAPS Act and therefore cannot perform the policing functions that are set out in the SAPS Act. In the absence of being included as *members* SAPS staff employed under the PSA are not entitled to carry out the policing function which the SAPS is enjoined to provide in terms of the Constitution. The non-*member* employees therefore cannot be regarded as part of the “*police service*” within the *security service of the Republic* as contemplated by s199 of the Constitution.

[16] Those employed by the SAPS either under the SAPS Act or the PSA are so employed by design and not by any accidental process. That there is a deliberate and calculated intention to differentiate between the two categories of employees is fortified by the fact that reference is made within the SAPS Act to *employees* and *members*¹⁰ and the fact that the Minister of Safety and Security is empowered in terms of s29 (1) and (2) of the SAPS Act to designate personnel employed under the PSA deeming them to be *members* for the purposes of the SAPS Act.¹¹ The Minister has utilised s29(1) of the SAPS Act in May 1996 and February 1999 to

¹⁰ For example s38 of the SAPS refers to “*members or other employees of the service*”

¹¹ s 29(1) and (2) reads:

“*Designation as member* (1) *The Minister 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.*

(2) *Personnel designated as members under subsection (1), shall be deemed to be members appointed to posts in the fixed establishment of the Service under section 28(2) with effect from a date determined by the Minister in the notice concerned: Provided that a person who is a member of a category of personnel so designated who does not, within one month of such designation, consent thereto and, if applicable, consent as required by section 212(7)(b) of the Constitution, to having the retirement age applicable to him or her on 1 October 1993 changed as a result of such designation, shall not be affected by such notice.*

designate a number of categories of employees employed under the PSA as deemed *members* of the SAPS¹². The utilisation of these sub-sections by the Minister to deem certain categories of persons employed under the PSA as *members* demonstrates that those employed under the PSA may not, unless they are deemed to be *members* perform the functions set out in s13 of the SAPS Act. Put differently, the fact that those who are not *members* can be deemed to be *members* must reinforce the view that non-*members* constitute a distinct and separate category of employees of the SAPS.

[17] Counsel for the SAPS placed a great deal of emphasis on the vital support function rendered by those employed under the PSA to the SAPS arguing that they serve an important component of the functions performed by the SAPS. While this is true that they serve an important support function, it merely remains a “support function”¹³. Counsel for POPCRU on the other hand argued that providing a support function did not catapult those employed under the PSA into constituting SAPS personnel that are “*engaged in ... an essential service*” as set out in s65(1)(d) of the LRA. POPCRU argued that those employed under the PSA are not engaged in the

¹² See Government Notices R888 and R248 in Government Gazette 17221 of 24 May 1996, amended by Government Notice 914 in Government Gazette 17228 of 31 May 1996 and in Government Gazette 19775 of 26 February 1999 respectively.

¹³ In the main those employed under the PSA carry out functions that are complementary to the policing functions and include:

- (i) crime prevention administrators such as: operators of emergency call centres, operators of crime information systems;
- (ii) data capturers in crime intelligence administration; and,
- (iii) personnel involved in procurement of protective gear, fire-arms, vehicles etc – items required for purposes of carrying out the policing functions.

essential service because they do not form part of the *South African Police Service* as provided in s71(10) of the LRA. The argument is that those employed under the PSA perform functions that are complementary, supplementary or support functions which can be purchased from outside the SAPS. These are functions, says POPCRU, that can be outsourced without interfering or disrupting the policing function carried out by *members* of the SAPS Act and therefore cannot form part of the functions designated to be an *essential service*.

- [18] POPCRU’s argument as a general proposition cannot be correct. The fact that a particular function may be outsourced cannot serve to determine whether or not it falls within the *essential service* category. Where a service is validly designated to be an *essential service* the fact that some component of it can be outsourced cannot be used to sever that function from being an *essential service*. In the context of the present dispute, where personnel are appointed under two different and distinct contracts of employment¹⁴ with the functions of one differing from the other, it is unavoidable to conclude that the two categories of employees of the SAPS are separate and must be treated as such. The argument presented by the SAPS is that the functions performed by those employed under the PSA are indispensable for the proper functioning of the SAPS and the employees employed under the PSA must therefore also constitute personnel that are “*engaged in ... an essential service*” as set out in s65(1)(d) of the LRA. This argument is misconceived. The SAPS clearly is able to function

¹⁴ Employment under an Act constitutes an employment contract concluded in terms of the Act under which the person is employed.

uninterrupted without those employed under the PSA as their *members* will be able to perform the functions of the non-*members*, or personnel can be hired to render the support function without seriously compromising the service, this notwithstanding the fact that a particular function may be indispensable to the service that is designated an *essential service* does not make it an *essential service*. Unless a service is part of the designated *essential service* or is specifically designated as an *essential service* it cannot be an *essential service* as provided in the LRA. There is no automatic designation of a service as an *essential service*¹⁵.

- [19] In the circumstances the *essential service* as contemplated by s65 (1) (d) of the LRA in relation to the SAPS is clearly the policing function as set out in the Constitution and spelled out in the SAPS Act. The term *engaged* in the *essential service* in this section must therefore only apply to those employees employed under the SAPS Act and designated as *members* as well as those employees deemed to be *members* by Ministerial decree in terms of s29 (1) and (2) of the SAPS Act. The *members* are the employees who constitute the *South African Police Service* that is part of the South African *security service*. While those employed under the PSA provide an important support and complementary functions to the SAPS they do not form part of the SAPS that is contemplated by the Constitution and the SAPS Act and as such they are not part of the SAPS that is designated as an *essential service* by the LRA. These employees are therefore not *engaged* in the *essential service* as

¹⁵ See sections 70 and 71 of the LRA which set out how a service may be designated an essential service or where it is designated how the designation may be removed or altered.

contemplated by s65(1)(d) of the LRA and are not prohibited by the limitation on the right to strike as set out in s65 (1) of the LRA.

[20] Finally I may add that s23(2)(c) of the Constitution guarantees “every worker” the right to strike subject to the limitation imposed in s36. Where a limitation is placed on a right, especially one enshrined in a Bill Of Rights of the Constitution, the Courts must ensure that the limitation is restricted to the clear and unequivocal wording of the instrument that validly seeks to limit that right. In the present matter the SAPS argument that the all of its employees, including those employed under the PSA be included as personnel *engaged in the essential service* is neither justifiable nor reasonable. Giving the interpretation sought by the SAPS would in my view unjustifiably restrict the fundamental right enshrined in the Constitution more particularly where the Minister is able to designate employees who are not *members* as deemed *members*.

Conclusion

[21] In the premises I see no basis to interfere with the order of the court *a quo*.

Costs

[22] With respect to costs while the SAPS would have succeeded in its application because of POPCRU’S failure to give notice to it as required by the LRA, both parties were of the view that no purpose would be served if the application was granted on that basis as the parties would then again find themselves in Court a few days later. This was a sensible approach and therefore it does not help to simply consider the fact that the SAPS would have succeeded on a

point which left the dispute essentially unresolved. Both parties believed that the real dispute between them was the one which was dealt with by the Court *a quo* and is now before this Court on appeal. Costs must therefore be determined having regard to the issue before this Court. The matter before this Court, in my view, was of some consequence but having regard to both law and equity I believe that there is no basis for costs not to follow the result, this is also what the parties contended for in argument.

[23] In the result the appeal is dismissed with costs.

Waglay DJP

I agree

Khampepe JA

I agree

Tlaletsi JA

APPEARANCES

For the appellant Adv. P Kennedy SC assisted by Adv. T. Manchu
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For the respondents Adv. C.E. Watt- Pringle SC
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Date of judgement 3 September 2010