THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 3750/18

In the matter between:

SOLIDARITY **Applicant**

and

THE SOUTH AFRICAN POLICE SERVICE **First Respondent**

THE SOUTH AFRICAN POLICE UNION **Second Respondent**

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

Heard: 14 November 2018

Judgment delivered: 15 November 2018

Labour Court

JUDGMENT

VAN NIEKERK J

[1] The applicant is a registered trade union. In these proceedings, brought on an urgent basis, it seeks a final order declaring that it is entitled to represent its member, Col B Janse van Vuuren, in a grievance hearing that she has initiated, and directing the first respondent to permit an official of the applicant to represent Col Janse van Vuuren in the hearing.

[2] The material facts are not in dispute. On 19 February 2018 Warrant Officer Mohlahlo, then a sergeant and subordinate of Col. Janse van Vuuren, lodged a grievance against Janse van Vuuren, accusing her of racism. It is common cause that on 26 March 2018, W/O Mohlahlo submitted an affidavit to the investigating officer of a disciplinary investigation, *inter alia* stating that he had opened a case of "*discrimination and racism against Colonel Van Vuuren"* and that his complaint had been sent to the SAPS National Commissioner, the Minister of Police, the Portfolio Committee on Police and the Human Rights Commission. W/O Mohlahlo's grievance was the seventh grievance or complaint regarding alleged "*discrimination and racism"* lodged by him against Col. Janse van Vuuren since 2015. Col Janse van Vuuren then lodged an official complaint against W/O Mohlahlo. The applicant came on record on 22 May 2018 and wrote to the Divisional Commissioner of Operational Response Services, Lt Genl. E Mavela, requesting that the matter be properly investigated and that the necessary steps be instituted by the SAPS, as required by s 60(2) of the Employment Equity Act, Act 55 of 1998 ("the EEA"). On or about 5 June 2018, a senior officer from Durban, Brig Gopaul, was appointed to investigate both W/O Mohlahlo's grievance and Col Janse van Vuuren's complaint. Brig Gopaul released a report of his findings and drew the following conclusions:

Labour Court

6.1 The allegations of Warrant officer M.P Mohlahlo had been previously investigated and were found to have had no basis and was unfounded.

6.2 The use of the grievance procedure by warrant officer Mohahlo irrespective of the number of complaints and provided that it did not repeat the previous grievance is the only recognised method to raise concerns formally is and should not be seen as harassment if it is used correctly.

6.3 Warrant officer M. P. Mohlahlo's cry for assistance to different officers in institutions outside of the grievance procedure was misconduct in itself.

6.4 Warrant officer M.P Mohlahlo's repeated complaints simultaneously to various institutions outside of the grievance procedure was driven by an intention to achieve the impact of placing Colonel B. Janse Van Vuuren in a position where she looked tainted and branded as a racist.

6.6 Warrant officer M.P. Mohlahlo's allegation that Colonel CB Janse van Vuuren was racists was to take the attention away from him in the fraudulent submission of his subsistence and travel claim.

6.7 In view of the above it is a finding that all of the complaints of warrant officer Mohlahlo against Colonel C.B. Janse van Vuuren are only the member's perceptions and not facts and are therefore unfounded.

6.8 In view of the above findings, it can be concluded that W/O Mohlahlo's repeated complaints to various institutions outside of the grievance procedure was not only false and unfounded but harassment and defaming towards Col B Janse van Vuuren and constitutes to various misconduct under regulation 5(3)(a) and (g)."

[3] In paragraph 7 of the report, under the heading "*RECOMMENDATIONS*" the brigadier concluded as follows:

Labour Court

It is recommended that:

7.1 Despite the findings above which reflects false accusation and defamation against a senior officer of the SAPS, it will not serve any good or progress to the SAPS, Warrant Officer M.P Mohlahlo or Col B Janse van Vuuren to be stuck on a journey of emotions of perceived racism or harassment in any departmental hearing and as such it is recommended that the complaints of Warrant officer M.P Mohlahlo be dismissed as unfounded.

7.2 The conduct of Warrant officer M.P Mohlahlo although mischievous be regarded as non-serious and be dealt with through remedial steps.

7.3 Warrant officer Mohlahlo be transferred out of the SCM environment of Division: ORS pending his transfer to PSS or any other environment as relationship between the member and the SCM commander Col B. Janse van Vuuren has completely broken down.

[4] After consideration of Brig Goupaul's recommendations, Col Janse van Vuuren, with the assistance of Solidarity, lodged a formal grievance, seeking to review the recommendations. Col Janse van Vuuren requested that she be represented by an official of the applicant in the grievance hearing. The SAPS refused that request, on the basis that the definition of 'representative' in the grievance procedure is limited to the following:

> 'Representative'means a co-employee or an office-bearer, or shop-steward or official of an employee organization or trade union that is admitted to the SSBC, but excludes a legal practitioner, unless the legal practitioner is employed by the trade union.

[5] It is common cause that the applicant is not admitted to the SSBC, and that its officials accordingly have no right in terms of the procedure to represent its members at grievance hearings.

Labour Court

[6] The applicant seeks final relief, and must accordingly establish a clear right to the relief sought, an injury actually committed or reasonably apprehended, and the absence of similar protection by other ordinary remedy.

[7] The relevant statutory provisions are to be found in Part A of Chapter III of the LRA. That section regulates the acquisition of organisational rights. Certain rights (the right of access in s 12, the right to check-off in s 13 and leave for trade union activities in s 15) may be claimed by representative unions, defined to mean unions that are 'sufficiently representative' of the employees employed by an employer in a workplace. Other organisational rights (the right to trade union representatives conferred by s 14 and the right to disclosure of information conferred by s 16) may be claimed by unions that meet a higher threshold, unions that have as members the majority of employees employed by an employer in a workplace.

[8] Section 21 regulates the exercise of organisational rights. In broad terms, a union meeting the required threshold may seek to agree with the employer that the rights sought should be extended; in the absence of a collective agreement conferring organisational rights, these may be acquired through arbitration.

[9] In *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC), the Constitutional Court had to decide whether s 20 permitted minority unions to conclude collective agreements affording them organisational rights, and in particular, whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognise its shop stewards. The court held there is nothing in s 20 to preclude an employer from entering into an agreement with an unrepresentative union to confer organisational rights, provided that the agreement does not prevent the exercise of statutory organisational rights by a representative union.

[10] In the course of its judgment, the court reflected more broadly on the nature and extent of the right to freedom of association. In the course of specific reference to the two key ILO conventions (Conventions 87 and 98) the court said the following, at paragraph 34 of the judgment:

Labour Court

> Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining. The first principle is closely related to the principle of freedom of association entrenched in s 18 of our Constitution, which is given specific content in the right to form and join the trade union entrenched in s 23 (2) (a), and the right of trade unions to organize in s 23 (4) (b). <u>These rights will be impaired where workers are not permitted to have that union represent them in workplace disciplinary and grievance matters that are required to be represented by a rival union that they have chosen not to join.</u> (Own emphasis).

[11] In the more recent case of *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and others* [2018] 11 BLLR 1035 (CC) the Constitutional Court had to determine whether s 18 of the LRA has the effect of prohibiting a minority union from engaging in collective bargaining with an employer in circumstances where there is a collective agreement between the employer and a majority union that determines the threshold of representativeness. (Section 18 provides that an employer and a majority union may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.) The majority of the court answered the question in the negative, and held that s 18 does not preclude a minority union from concluding a collective agreement that confers organisational rights with an employer in circumstances where that employer is party to a s 18 agreement with a majority union.

[12] At paragraph [102] of the judgment, Jafta J said the following:

> When properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways. First, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority

Labour Court

union does not have to bargain before exercising the rights in question. Second, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. Third, a minority union may refer the question of whether it should exercise this right to arbitration in terms of section 21 (8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organizational rights in the relevant provisions.

[13] The nature of the right in issue in these proceedings requires clarification and definition, if only because of the different thresholds that apply to different organisational rights. Although the founding affidavit is not entirely unambiguous, the notice of motion makes clear that what the applicant seeks is for one of its officials to represent Col Janse van Vuuren at the grievance hearing. In other words, this dispute does not concern the application of s14 of the LRA, which regulates the appointment and role of trade union representatives (usually referred to as shop stewards). The applicant does not seek to have one of its shop stewards (assuming there to be any), represent its member. By seeking to have one of its officials represent Col Janse van Vuuren, the applicable right would appear to be that conferred by s 12, which amongst other things, entitles trade union officials and office bearers to enter an employer's premises to serve the members' interests. This would extend to representation of members at disciplinary and grievance hearings.

[14] However, as I understood Mr Goosen, who appeared for the applicant, while the applicant appreciates that the nature of the right sought to be enforced finds reflection in s 12, the applicant does not rely on s 12 *per se* to secure the relief that it seeks. The applicant concedes that it does not meet the threshold established by the existing s 18 collective agreement (which it in any event contends is not a valid collective agreement for the purposes of that section since the union parties do not comprise a majority), nor does it seek to ground its right in s 12 itself (it does not contend that it is a 'representative' union). The applicant further acknowledges that it is not the beneficiary of any arbitration award issued in terms of s 21. Mr Goosen, who represented the applicant, sought to establish

Labour Court

a fourth means by which a minority union may acquire organisational rights and in doing so, relied particularly on *Bader Bop* to contend that a union's right to represent a member at a disciplinary or grievance hearing was a discrete, substantive right that was not the subject of any of the options identified in the *POPCRU* judgment. As I understood his submission, the right of representation in this sense is an element of the right to freedom of association, derived ultimately from the ILO Convention 187, embodied in s 23 of the Constitution and acknowledged in specific terms by the Constitutional Court in *Bader Bop.*

[15] There are a number of difficulties with this argument. The first is related to context. The *Bader Bop* and *POPCRU* judgments were concerned with the rights of minority unions to acquire organisational rights by means of collective bargaining (and in the case of *Bader Bop*, to the point of industrial action), where the employer was party to a s 18 collective agreement with a majority union. The *ratio* of both cases extends no further than an affirmation of the right of a minority union to seek to negotiate the terms of a collective agreement conferring organisational rights, and to strike in support of such a demand. Neither case establishes as an unequivocal principle that an official of any trade union, regardless of its level of representativity, is entitled to access to a workplace for the purpose of representing a member in a grievance or disciplinary hearing.

[16] The second objection is one that goes to the source of the right contended for by the applicant. Generally speaking, ILO conventions are binding only on those member states that have ratified them. Member states are required to ensure that the terms of a ratified convention are reflected in the national law and practice. South Africa has ratified Convention 187, the Freedom of Association and Protection of the Right to Organise Convention. At its core, ILO Convention 187 provides that workers and employers, without distinction, have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing and participate in their activities.

[17] Section 18 of the Constitution affords everyone the right of freedom of association. In the labour context, this right is affirmed in s 23 (2), which affords

Labour Court

every worker the right to form and join a trade union, to participate in its activities and programmes, and to strike. Section 23 (4) confers on every trade union and employers' organisation the right to determine its own administration, programmes and activities and to organise.

[18] However, the principle of subsidiarity requires that where legislation is enacted to give effect to the Constitutional right, reliance must be placed on the provisions of the specific legislation (see *Baron and others v Claytile (Pty) Ltd & another* 2017 (5) SA 329 (CC)). In *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers* [2012] 12 BLLR 1267 (LAC), Murphy AJA said the following, at paragraph 18 of the judgment:

> In my view, the Labour Court erred in declaring the award of increased remuneration inconsistent with section 9 (equality) and section 23 (fair labour practices) of the Constitution. Where legislation has been enacted to give effect to a constitutional right, a party may not bypass that legislation and rely directly on … the general provisions of constitutional right to fair labour practices in section 23 or the equality clause in section 9 of the Constitution.'

[19] The LRA gives expression to the constitutional right of freedom of association. Section 4 of the LRA reads as follows:

> **'4. Employees' right to freedom of association**
>
> (1) Every employee has the right-
>
> (a) to participate in forming a trade union or federation of trade unions; and
>
> (b) to join a trade union, subject to its constitution.
>
> (2) Every member of a trade union has the right, subject to the constitution of that trade union-
>
> (a) to participate in its lawful activities;
>
> (b) to participate in the election of any of its office-bearers, officials or trade union representatives;
>
> (c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and

Labour Court

(d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation-

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers or officials; and

(c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office.

[20] The applicant has not sought to locate the clear right on which it relies in any of the provisions of s 4 directly, nor has it sought to challenge the constitutionality of any of the provisions of Part A of Chapter III of the LRA on the basis that they unjustifiably limit the right to freedom of association, to the extent that they deny minority unions the right to have their officials represent members at disciplinary and grievance hearings. Such an attack is foreshadowed by the extract from the *Bader Bop* judgment reflected in paragraph X above, in which the view was expressed that a majoritarian system will not be compatible with freedom of association, '*as long as minority unions are allowed to exist, to organize members, to represent members in relation to individual grievances and to challenge minority unions from time to time*'. In *POPCRU*, the Constitutional Court observed:

> 90. …Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance hearings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at a disciplinary hearing seriously undermines the right to freedom of association described earlier.

[21] In summary, the applicant does not meet the threshold in the s 18 agreement, it is not the beneficiary of any collective agreement concluded outside of the

Labour Court

existing s 18 agreement and has no arbitration award in its favour in terms of which its officials may represent members in grievance hearings. *Bader Bop* and *POPCRU*, read in context, do not confer a substantive right on union officials to represent union members at grievance hearings. They do no more than affirm the right of a minority union to bargain for and strike in support of a demand for organisational rights notwithstanding the existence of a s18 collective agreement with a majority union. Whether s 4 confers a right on union officials to represent union members at grievance hearings notwithstanding the provisions of Part A of Chapter III of the LRA, and whether the latter provisions give full expression to the rights contained in s 18 and s 23 of the Constitution, were not matters canvassed in these proceedings.

[22] For the above reasons, in my view, the applicant has failed to establish the existence of a clear right to the relief that it seeks. It is not necessary for me to consider the submissions made by the applicant in relation to the further requirements for final relief, and the application accordingly stands to be dismissed.

[23] Finally, in relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. In my view, this is one of those matters where there is a *bona fide* dispute between an employer on the one hand and a union seeking to further the interests of its members. The interests of the law and fairness are best served by there being no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge

Labour Court

REPRESENTATION

For the applicant: Adv. C Goosen, instructed by Serfontein Viljoen & Swart

For the respondent: Adv. E Richards, instructed by the state attorney

Labour Court