

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 89/10
[2011] ZACC 21

In the matter between:

SOUTH AFRICAN POLICE SERVICE

Applicant

and

POLICE AND PRISONS CIVIL RIGHTS UNION

First Respondent

ZIZAMELE CEBEKHULU

Second Respondent

Heard on : 1 March 2011

Decided on : 9 June 2011

JUDGMENT

NKABINDE J:

Introduction

[1] This is an application for leave to appeal against the decision of the Labour Appeal Court¹ upholding a decision of the Labour Court,² that only *members* of the South

¹ *South African Police Service v Police and Prisons Civil Rights Union and Another* [2010] 12 BLLR 1263 (LAC) (Labour Appeal Court Judgment).

² *South African Police Service v Police and Prisons Civil Rights Union and Others*, Labour Court, Case No J1444/2007, 22 June 2007, unreported (Labour Court Judgment).

African Police Service (SAPS) employed under the South African Police Service Act³ (SAPS Act) are engaged in an *essential service* under the Labour Relations Act⁴ (LRA). The relevant provisions of the LRA were interpreted by the Labour Appeal Court to exclude non-members employed by the SAPS under the Public Service Act⁵ (PSA). At issue is thus whether employees of the SAPS who are employed under the PSA are, in the contemplation of the LRA, engaged in an essential service. A determination of this issue turns on the proper meaning of *essential service* as defined in section 213 read with sections 65(1)(d)(i) and 71(10) of the LRA.

[2] The dispute arose in the context of the 2007 national general public service strike in which employees of the SAPS – some employed under the SAPS Act and others under the PSA – including members of the Police and Prisons Civil Rights Union (POPCRU), participated.

Parties

[3] The applicant, the SAPS, employs approximately 163 000 employees. Of these, about 129 000 are functional police officers who perform duties to combat and prevent crime, while about 33 000 perform support functions. These support functions include employees working in call centres (who support operational police officers), employees

³ 68 of 1995.

⁴ 66 of 1995.

⁵ 103 of 1994.

in the Community Service Centres (first port of call for reporting crimes), administration clerks, employees in supply chain management performing functions such as ordering vehicles, and employees engaged in general support services including finance and human resources.

[4] The first respondent, POPCRU, is a registered trade union in terms of the provisions of the LRA comprising of approximately 109 500 members within the SAPS. Together with the South African Policing Union (SAPU), it is recognised by and supports the rights of some of the employees of the SAPS. The second respondent is Mr Zizamele Cebekhulu, the President of POPCRU.

Brief factual background

[5] The state and trade unions in the Public Service Co-ordinating Bargaining Council, including the Congress of South African Trade Unions, to which POPCRU is affiliated, had been engaged in negotiations to determine the wage increase for employees in the public service. A national general public service strike involving several trade unions⁶ ensued in June 2007 after the wage dispute reached a deadlock. The leadership of POPCRU expressed an intention to call on its members to go on a strike. As a result, the applicant lodged an urgent application in the Labour Court against the members of

⁶ These unions include the Public Servants Association of South Africa, Health and Other Service Personnel Trade Union of South Africa, National Union of Public Service and Allied Workers, National Teachers' Union, Public and Allied Workers Union of South Africa, National Professional Teachers' Organisation of South Africa, SA Onderwysersunie, acting jointly with NAPTOSA, Professional Educator's Union, acting jointly with SAPU, and United National Public Servants Association of South Africa and Allied Workers Union, acting jointly with the Public Servants Association of South Africa.

POPCRU, who included members and non-member employees of the SAPS, interdicting them from embarking on a strike.

Labour Court proceedings

[6] The applicant contended that both the functional police officers employed under the SAPS Act, and the non-member personnel employed under the PSA, were prohibited from striking. The SAPS argued that it is an essential service as defined in section 213 read with section 71(10) of the LRA. In essence, the SAPS argued that all its employees render an essential service and are prohibited from striking.⁷ The respondents contended that only members – either appointed in terms of the SAPS Act or appointed under a different law and deemed to be members by the Minister for Police (Minister)⁸ in terms of section 29 of the SAPS Act – are prohibited from striking.⁹

[7] The Labour Court interdicted POPCRU from encouraging its members, excluding non-member personnel of the SAPS, to participate in the strike.¹⁰ It held that the provisions of the SAPS Act indicate that only members are prohibited from striking.¹¹ Therefore, the Court held, not all employees of the SAPS render an essential service and

⁷ Labour Court Judgment above n 2 at para 18.

⁸ The Minister for Police was previously referred to as the Minister for Safety and Security as defined in section 1 of the SAPS Act.

⁹ Labour Court Judgment above n 2 at paras 19-22.

¹⁰ Id at para 30.

¹¹ Id at para 25. The Court referred to Regulation 20(y) of the SAPS Act which provides that an *employee* will be guilty of misconduct if he or she “participates in any unlawful labour or industrial action”.

are prohibited “from embarking on a strike action.”¹² The applicant, having been granted leave to appeal by the Labour Court, appealed against the latter’s decision to the Labour Appeal Court.

Proceedings in the Labour Appeal Court

[8] The issue for determination in the Labour Appeal Court was whether the “designation of the [SAPS] as an essential service in terms of section 71(10) of the [LRA] prohibits all of the personnel of the [SAPS] from participating in a strike”, or only members as defined in the SAPS Act.¹³ The Labour Appeal Court determined, first, the concept of essential service in relation to the word “engaged” and, second, the meaning to be ascribed to the word “engaged”.¹⁴ With regard to the first issue, the Court stated that what this concept conveys is “the functions that the body . . . performs . . . that constitute the *essential service* and it is the persons who are *engaged* in these functions who are not permitted to take part in a strike”.¹⁵

[9] The Court held that *essential service* in section 65(1)(d)(i) must be understood as the policing functions of the SAPS as set out in the Constitution and spelled out in the SAPS Act.¹⁶ The Court held that the SAPS Act itself distinguishes between *employee*

¹² Labour Court Judgment above n 2 at para 26.

¹³ Labour Appeal Court Judgment above n 1 at para 1.

¹⁴ Id at para 7.

¹⁵ Id at para 8.

¹⁶ Id at para 19.

and *member* and that, with the power of the Minister to designate employees as members, each constitutes a distinct category of employees of the SAPS.¹⁷ It held that the word “engaged” in the provision applies to those employed under the SAPS Act, including those deemed to be members by ministerial decree in terms of section 29 of the SAPS Act.¹⁸ The Court held that “[a]ll the functions set out in s 13 of the SAPS Act can . . . only be performed by those employees of the SAPS who are *members* of the SAPS.”¹⁹ It held that while employees under the PSA serve an important support function, they cannot be deemed to render an *essential service*, and are therefore not prohibited from striking.²⁰ The Court therefore dismissed the appeal. The applicant then applied directly to this Court for leave to appeal.

In this Court

[10] The applicant sought leave to appeal against the decision of the Labour Appeal Court. It had also sought leave to introduce further evidence but this application was abandoned.

[11] Broadly, the applicant contended that the SAPS is a single integrated essential service as defined in section 213 of the LRA.²¹ It maintained therefore that all its

¹⁷ Id at para 16.

¹⁸ Id at para 19.

¹⁹ Id at para 15.

²⁰ Id at para 19.

²¹ Section 213 is set out in full at [21] below.

employees are engaged in an essential service. It argued that the Labour Appeal Court, in interpreting the phrase “engaged in”, failed to have regard to the text of sections 71(10)²² and 213. The applicant contended that the interpretation by the Labour Appeal Court placed too much emphasis on the distinction between members in terms of the SAPS Act and personnel appointed under the PSA. It submitted that all functions within the SAPS are critical for effective crime prevention, and that the operational members employed under the SAPS Act would be unable to perform their functions effectively without the support of the non-member personnel employed under the PSA.

[12] The applicant advanced five reasons why the SAPS should be viewed as a single, integrated essential service. First, section 199 of the Constitution refers to a “single police force”. Second, the constitution of the Safety and Security Sectoral Bargaining Council, which regulates bargaining in the SAPS, does not make a distinction. Third, the contracts of service of the non-member personnel appointed under the PSA indicate that they are part of the SAPS. Fourth, the treasury allocation to the SAPS makes no distinction. Finally, the Annual Human Resource Plan reflects that the workforce of the SAPS is made up of both members and non-member personnel.

[13] The respondents took issue with the applicant’s approach and interpretation. They contended that the applicant’s construction finds no support on a textual basis in the

²² Section 71(10) is set out in full at [21] below.

LRA, the SAPS Act, or the Explanatory Memorandum.²³ The respondents argued that the interpretation contended for by the applicant, if accepted, will limit extensively the PSA employees' right to strike in terms of section 23(2)(c) of the Constitution. The limitation, they submitted, cannot be justified under the Constitution. Finally, they submitted that the applicant's construction is over-inclusive and thus in violation of principles adopted by the International Labour Organisation (ILO).

Leave to appeal

[14] When deciding whether leave to appeal should be granted, two issues arise: the first is whether the case raises a constitutional matter and, if so, the second issue is whether it is in the interests of justice to grant leave.

[15] The issue in this case concerns the proper meaning of essential service as defined in section 213 read with sections 65(1)(d)(i) and 71(10) of the LRA, within the context of the right to strike in section 23(2)(c) of the Constitution. As its preamble illustrates, the interpretation of the LRA must be firmly rooted in the Constitution. This Court, in *NEHAWU v University of Cape Town and Others*²⁴ (*NEHAWU*), held that the proper interpretation of the LRA raises a constitutional issue.²⁵ There can be no doubt,

²³ Ministerial Legal Task Team "Explanatory Memorandum" (1995) 16 (1) *Industrial Law Journal* 278. This memorandum sought to "highlight the main innovations in the draft [Labour Relations] Bill on a chapter by chapter basis, and . . . set out both the content of these innovations and the thinking underlying them."

²⁴ [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC). In that case reference was made to section 27 of the interim Constitution. This section is the equivalent of section 23 of the Constitution.

²⁵ *Id* at para 14.

therefore, that this case raises a constitutional issue. The next question is whether it is in the interests of justice to grant leave to appeal.

[16] An important consideration relevant to the interests of justice is the nature and importance of the constitutional issue at stake.²⁶ Fundamentally, the interpretation and application of the provisions concerned have implications for the many PSA employees' right to strike. There is little doubt that strikes within the public service will continue to occur. Additionally, this is the first occasion on which this Court adjudicates on the meaning of essential service. The SAPS owes a duty to the public in relation to their safety and security. If the duty is not discharged, other entrenched rights might be affected adversely²⁷ because violence occasionally takes place during strike action. It is thus in the public interest for this Court to pronounce on this matter. In all these circumstances, it is in the interests of justice to grant leave to appeal.

[17] Before I consider the meaning of essential service, it is necessary to discuss briefly the constitutional and statutory framework to evaluate properly the correctness of the construction of the relevant provisions contended for by the parties.

²⁶ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (8) BCLR 771 (CC); 2002 (5) SA 401 (CC) at para 14. See also *NUMSA and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (2) BCLR 182 (CC); 2003 (3) SA 513 (CC) (*Bader Bop*) at para 16.

²⁷ For example, the right to freedom and security of person entrenched in section 12 of the Constitution might be affected.

Constitutional and statutory framework

[18] Section 23(1) and (2) of the Constitution confers upon every worker the right to strike. It provides that:

- “(1) Everyone has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.”

[19] The importance of the right to strike,²⁸ a “component of a successful collective bargaining system”,²⁹ was stressed by this Court in *In re: Certification of the Constitution of the Republic of South Africa, 1996*.³⁰ The Court stated:

“Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and

²⁸ The right to strike is also recognised as a fundamental right in both international and regional instruments. Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights, 6 *ILM* 360 (1967) (the Covenant) states “[t]he State Parties to the present Covenant undertake to ensure: . . . [t]he right to strike, provided that it is exercised in conformity with the laws of the particular country.” The Covenant was adopted on 16 December 1966 and came into force on 3 January 1976. South Africa signed the Covenant on 3 October 1994 but has not yet ratified it. Article 4(e)(i) of the Southern African Development Community (SADC) Charter of Fundamental Social Rights, adopted on 26 August 2003 and came into force on the same day, <http://www.sadc.int/index/browse/page/171>, accessed on 1 June 2011, which states:

“Member States shall create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining so that:

- (e) the right to resort to collective action in the event of a dispute remaining unresolved shall:
 - (i) for workers, include the right to strike and to traditional collective bargaining”.

²⁹ *Bader Bop* above n 26 at para 13.

³⁰ [1996] ZACC 26; 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC).

the exclusion of workers from the workplace The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out.”³¹ (Footnote omitted.)

[20] The LRA was enacted, among other things, to regulate the right to strike in conformity with the Constitution.³² While the LRA confers upon every employee the right to strike,³³ it also imposes limitations on this right. Section 65(1)(d)(i) provides that “[n]o person may take part in a strike . . . if . . . that person is engaged in an *essential service*”.³⁴ The SAPS Act prohibits members of the SAPS from striking or inducing any other member to strike. It empowers the National or Provincial Commissioner to discharge summarily from the SAPS any member who strikes or conspires with another to strike.³⁵ It follows therefore that the right to strike, albeit accorded constitutional protection, is not absolute.

³¹ Id at para 66.

³² The long title and section 1 of the LRA refer to section 27 of the interim Constitution. The corresponding provision in the Constitution is section 23.

³³ Section 64(1)(a) provides:

“Every employee has the right to strike and every employer has recourse to lock-out if—

- (b) the issue in dispute has been referred to a council or to the Commission as required by this Act”.

³⁴ Section 65(1)(d)(i) of the LRA provides:

“No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if—

- (d) that person is engaged in—
 - (i) an *essential service*”.

³⁵ Section 41(1), (2) and (3) of the SAPS Act provides:

- “(1) No member shall strike, induce any other member to strike or conspire with another person to strike.
- (2) If the National or Provincial Commissioner has reason to believe that a member is striking or conspiring with another person to strike, the Commissioner concerned may, in a manner which is reasonable in the circumstances, issue an ultimatum to the member

[21] Section 213 of the LRA elaborates further on this limitation and defines essential service as—

- “(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- (b) the Parliamentary service;
- (c) the South African Police Services”.

Section 71(10) of the LRA states that “[t]he Parliamentary service and the [SAPS] shall be deemed to have been designated an essential service in terms of this section.”

[22] The Constitution provides for the establishment, structuring and conduct of security services.³⁶ It further provides that “[t]he security services of the Republic consist of . . . a single police service . . . established in terms of the Constitution.” It requires that

concerned to terminate or desist from carrying out such conduct within the period specified in such ultimatum.

- (3) In the event that the member refuses or fails to comply with the ultimatum referred to in subsection (2), or if the National or Provincial Commissioner could not reasonably be expected to issue such an ultimatum to a member personally, the Commissioner concerned may, without a hearing, summarily discharge such member from the Service: Provided that—
 - (a) such member shall as soon as practicable after the date of such discharge, be notified in writing of such discharge and the reasons therefor;
 - (b) such member may, within 30 days after the date of receipt of such notice, make written representations to the Minister regarding the revocation of the discharge; and
 - (c) the Minister may, after having considered any representations, reinstate such member from the date of such discharge.”

³⁶ See section 199 of the Constitution. The corresponding provision in the interim Constitution was section 214 that required legislation for the establishment and regulation of the SAPS “which shall be structured at both national and provincial levels and shall function under the direction of the national government as well as the various provincial governments.”

the “security services must be structured and regulated by national legislation”,³⁷ and that:

“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.”³⁸ (Emphasis added.)

[23] Section 205 of the Constitution deals specifically with the “Police service”. Section 205(2) states that “[n]ational legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively”. Section 205(3) provides that “[t]he objects of the police service are 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.”

[24] The relevant provisions of the SAPS Act are these: section 1 defines the members of the force; section 5 elaborates on the establishment and composition of the SAPS; section 13 deals with certain powers, duties and functions of the members of the SAPS; section 29 empowers the Minister to designate further categories of employees in the SAPS as members; and section 41 prohibits members from striking.

³⁷ Section 199(4).

³⁸ Section 199(5).

[25] The SAPS was established and structured in terms of section 5 of the SAPS Act.³⁹ This section makes it quite clear that the SAPS consists only of *members*. Section 5 provides that:

- “(1) The South African Police Service contemplated in section 214(1) of the [interim] Constitution is hereby established.
- (2) The Service shall consist of—
- (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 [interim] 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;
 - (c) persons who become *members* of the Reserve under section 48(2) of this Act; and
 - (d) *members* appointed to the Directorate for Priority Crime Investigation established by section 17C.” (Emphasis added.)

[26] Section 1 of the SAPS Act defines *member* to mean—

- “any *member* of the Service referred to in section 5(2), including—
- (a) except for the purposes of any provision of this Act in respect of which the National Commissioner may otherwise prescribe, any *member* of the Reserve while such *member* is on duty in the Service;
 - (b) any temporary *member* while employed in the Service;

³⁹ Although the LRA was assented to on 29 November 1995, it came into operation more than a year later on 11 November 1996, while the SAPS Act, assented to on 28 September 1995, came into operation on 15 October 1995.

- (c) any person appointed in terms of 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*". (Emphasis added.)

[27] Section 13 of the SAPS Act deals with the powers, duties and functions of *members* of the SAPS. It is quite clear that they are entrusted with specific policing functions. The relevant parts of section 13 read as follows:

- “(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 functions, 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 a prosecutor, or in any other respect to appear on behalf of the State in any criminal matter before any magistrate’s court, any magistrate holding a preparatory examination, a court of a special justice of the peace or any other lower court in the Republic.
- (6) Any *member* may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without a warrant search any person, premises, other place, vehicle, vessel or

aircraft . . . and seize anything found . . . which may lawfully be seized.”
(Emphasis added.)

[28] It is noteworthy that neither section 5(2) nor section 13(1) – which refer to “members” and to a “member” or a “police official” respectively – mention “personnel employed” or non-members in the SAPS. It is also important to point out that non-members may be designated as members of the SAPS by the Minister in terms of section 29. Section 29 provides:

- “(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.” (Emphasis added.)

Interpretive approach

[29] In determining the proper meaning of *essential service* as defined in section 213, it is important first to consider the principles applicable to the proper interpretation of statutes. Section 39(2) of the Constitution enjoins every court, tribunal or forum, when interpreting any legislation, to “promote the spirit, purport and objects of the Bill of

Rights.”⁴⁰ The interpretive process in conformity with the Constitution is limited to what the texts of the provisions in question are reasonably capable of meaning.⁴¹

[30] In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in section 1(a).⁴² The provisions in question must

⁴⁰ Section 39 provides in relevant part:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum—
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

See also section 3 of the LRA which imposes an obligation on any person applying that Act to interpret its provisions—

- “(a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the *Republic*.”

⁴¹ See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at para 24; *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC) at para 20; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) (*Hyundai*) at paras 21-6; and *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at para 15.

⁴² Section 1(a) provides:

“The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are—

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution”. (Footnote omitted.)

thus not be construed in isolation, but in the context of the other provisions in the LRA and the SAPS Act.⁴³ For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike.⁴⁴ Were legislation to define essential service too broadly, this would impermissibly limit the right to strike.⁴⁵

[31] It is against this background that the meaning of essential service must be determined.

Meaning of ‘essential service’

[32] Essential service is defined in section 213 to include “the South African Police Services”. The LRA does not however define the SAPS. The Legislature must, therefore, have intended that the SAPS would bear the meaning assigned to it in the SAPS Act, including sections 1 and 5(2).

⁴³ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (7) BCLR 702 (CC); 2002 (4) SA 768 (CC) at para 49.

⁴⁴ See *NEHAWU* above n 24 at para 41; and *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZACC 16; 2009 (2) BCLR 111 (CC); 2009 (1) SA 390 (CC) at para 34. See also *Hyundai* above n 41 at para 21.

⁴⁵ According to the Report on the International Labour Conference 81st Session 1994 *Freedom of Association and Collective Bargaining* at 69-70 para 159, the ILO adopts a restrictive interpretation of “essential services” to avoid limiting the right to strike. This is because “[t]he principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner”, as the applicant does.

[33] Section 5(2) provides that “[t]he Service shall consist of . . . all persons who . . . were *members* . . . of a force . . . *members* appointed in terms of section 28(2) . . . persons who become *members* of the Reserve . . . and *members* appointed to the Directorate”.⁴⁶ Section 1 of the SAPS Act in turn defines a “member” to mean “any member of the Service referred to in section 5(2)” and it includes “any person designated under section 29 as a member”. Significantly, persons who may be designated under section 29 include “personnel employed on a permanent basis in the Service and who are not members”.

[34] The applicant contended that the SAPS as a whole should be viewed as “a single police service” in terms of section 199 of the Constitution. That construction assimilates all the employees of the SAPS together and applies essential service to the entire entity. This cannot be correct. The fact that section 199 contemplates “a single police service” does not mean that everybody employed in the SAPS is, without more, a *member* of the SAPS.

[35] The applicant argued that the language used in sections 71(10) and 213 is unambiguous and is meant to encompass all 163 000 employees. It was further contended that employees must be understood to include *members* of the SAPS as well as non-members, namely the PSA employees who have not been designated as *members* of the SAPS. The difficulty with this contention is that it construes the provisions relied on in isolation. In addition, it construes essential service over-broadly.

⁴⁶ Emphasis added.

[36] There are other considerations which further highlight the difficulty with the applicant's interpretation. Section 38(1) of the SAPS Act implies a distinction between *members* and "other employee[s] of the Service".⁴⁷ Section 41(1) of the SAPS Act is significant. Consistently with section 65(1)(d)(i) of the LRA that limits the right to strike by those engaged in an essential service, section 41(1) provides that "[n]o *member* shall strike, induce any other member to strike or conspire with another person to strike."⁴⁸ Sections 41(1) and 65(1)(d)(i) imply that non-members and those not "engaged in an essential service", respectively, are not statutorily prohibited from striking. It is inconceivable that the non-member employees, who have not been designated and deemed to be *members* in terms of section 29 of the SAPS Act, can perform duties and

⁴⁷ Section 38 of the SAPS Act provides:

- "(1) If a member or other employee of the Service is reported missing, such member or employee shall for all purposes be deemed to be still employed by the Service until—
- (a) the National or Provincial Commissioner otherwise determines;
 - (b) he or she again reports for duty; or
 - (c) a competent court issues an order whereby the death of such member or employee is presumed.
- (2) The salary or wages and allowances accruing to a member or employee during his or her absence contemplated in subsection (1) shall, subject to subsection (4), be paid—
- (a) to his or her spouse; or
 - (b) if he or she has no spouse, to his or her dependants; or
 - (c) to any other person who, in the opinion of the Commissioner concerned, is competent to receive and administer such salary or wages and allowances on behalf of the member or employee or his or her spouse or such other dependants.
- (3) Payment of any salary or wages and allowances in terms of subsection (2) shall for all purposes be deemed to be payment thereof to the member or employee concerned.
- (4) Notwithstanding subsection (2), the National or Provincial Commissioner may from time to time direct that only a portion of the salary or wages and allowances of a member or employee be paid in terms of the said subsection or that no portion thereof be so paid."

⁴⁸ Emphasis added.

functions contemplated in section 13 of the SAPS Act⁴⁹ and section 205(3) of the Constitution,⁵⁰ which, strictly speaking, are generally “assigned to a police official”, as contemplated in section 13(1).

[37] The Labour Appeal Court aptly pointed out that:

“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 . . . the Minister of Safety and Security is empowered in terms of s 29(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.”⁵¹ (Footnote omitted.)

Notably, the Minister exercised his powers in terms of section 29(1) in May 1996 and February 1999 and designated a number of categories of personnel employed under the PSA and deemed them as *members* of the SAPS.⁵²

[38] The applicant’s contention, that the existence of certain facts or events⁵³ that took place after the SAPS Act was enacted supports the construction of the term essential service, can be dealt with briefly. I fail to see how events that happened outside

⁴⁹ For example, to serve or execute summons, warrants or other processes, act as prosecutors and appear in the lower courts, and conduct searches without warrants and seize assets.

⁵⁰ “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”.

⁵¹ Labour Appeal Court Judgment above n 1 at para 16.

⁵² *Government Gazette* 17221 GN R888, 24 May 1996 as amended by *Government Gazette* 17228 GN R914, 31 May 1996 and *Government Gazette* 19775 GN R248, 26 February 1999.

⁵³ As set out in [12] above.

Parliament, presumably on the basis of an understanding of the phrase essential service by some or other entity, can constitute a guide to the interpretation of the term with which we are concerned in this case.

[39] Remarkably, as stated earlier, neither section 5(2) nor section 13(1) of the SAPS Act mention the “personnel employed” or non-members in the SAPS. I conclude that persons who are engaged in an essential service, and who are hit by the essential service strike prohibition in terms of section 65(1)(d)(i) of the LRA, are members of the police force. They include the “personnel employed” in the SAPS who have been designated as *members* in terms of section 29 of the SAPS Act. The interpretation the SAPS contended for cannot therefore be upheld.

Conclusion

[40] In all the circumstances, the Labour Appeal Court cannot be faulted in holding that not all SAPS employees are engaged in an essential service and that the interpretation sought by the SAPS is incorrect.

Costs

[41] Neither the applicant nor the respondents seek costs. In the circumstances, I will make no order as to costs.

Order

[42] In the event, the following order is made:

- (a) The application for leave to appeal is granted.
- (b) The appeal is dismissed.
- (c) There is no order as to costs.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Mogoeng J, Mthiyane AJ,

Van der Westhuizen J and Yacoob J concur in the judgment of Nkabinde J.

For the Applicant:

Advocate GJ Marcus SC and Advocate
K Pillay instructed by Bowman Gilfillan
Inc.

For the Respondents:

Advocate JG van der Riet SC and
Advocate H Barnes instructed by
Allardyce and Partners.