29/9/2009

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE

CASE NO: 23157/2007

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION APPLICANT

AND

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
2009-09-29
DATE
SIGNATURE

MINISTER OF SAFETY AND SECURITY FIRST RESPONDENT

SOUTH AFRICAN POLICE SERVICE SECOND RESPONDENT

JUDGMENT

MAVUNDLA J.

[1] The crisp questions in this matter are: firstly, whether members of the second respondent undergoing training as student constables are "workers" as contemplated by section 23 (2) of

the Constitution and "employees" as defined in the Labour Relations Act 66 of 1995 (The LRA); secondly, whether the applicant is entitled to recruit such student constables as its members and whether the student constables are entitled to join the applicant as its members.

[2] It needs mention that the applicant contends that these student constables are workers and that they are entitled to join it as members and that it is entitled to recruit them as its members and that a declaratory order to that effect be issued. The respondents contend otherwise.

[3] Due to a combination of various factors, more in particular, the overwhelming work load in this division, it has not been possible for me to have this judgment prepared much earlier. I am however constrained to apologize for the delay.

[4] I am indebted to counsel of the respective parties for the heads of argument they furnished me with. My not repeating their submission in detail is in no way suggesting that their

submissions were irrelevant. I have nonetheless applied my mind to those submissions.

[5] I am of the view that student constables are not workers, as envisaged in the LRA. I am further of the view the applicant has no rights to recruit student constables to join it as its members. I will now proceed to set out the basis upon which I arrive at the aforesaid view. However, before doing so, I need firstly to deal with the preliminary point of *locus standi* raised on behalf of the respondent.

[6] It has been submitted by Mr. Kennedy, on behalf of the respondents, that the applicant lacks the requisite *locus standi* to advance the argument that the student constables fall within the definition of "employee" in section 213 of the LRA and under common law, and are also "workers" as contemplated in section 23(2) of the Constitution. Mr Kennedy further contends that the applicant relies on the expanded grounds of section 38 of the Constitution and lacks *locus standi* because the LRA is the legislation envisaged and it gives effect to the rights contained in

section 23 thereof and the applicant cannot place reliance thereon. It is further submitted by Mr. Kennedy that the applicant has not followed the procedural requisites as envisaged in section 23(2) of the Constitution. In this regard he refers to the matter of *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others*[1]. He submits that the application must therefore be dismissed on these grounds alone.

[7] I do not agree with the submission that the applicant does not have *locus standi,* as contended herein above. The approach in this matter need not be a simplistic and traditional one, seen primarily from the perspective of the interest of the student constables and require joinder of the student constables[2]. It

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[1] 2001 (4) SA 1184 (SCA).

[2] Vide *Ngxuza* matter (*supra*) at page 1192 where the Supreme Court of Appeal stated that:
"[4] In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. The class action was until 1994 unknown to our law, where individual litigant's personal and direct interest in the litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder.
The difficulties the traditional approach to participation in legal process creates are well described in an analysis that appeared after the class action was nationally regulated in the United States through a Federal Rule of Court more than 60 years ago:..." Vide also page 1193 B-C of the same case.

needs to be appreciated that student constables, are as transient as the duration of their training, they will come and go, but the structure through which they are siphoned into the police force will always remain. To insist that they must be joined is not pragmatic.

[8] The constable students are the applicant's potential members. The interest of the applicant lies in having this right to recruit these student constables, properly clarified. The applicant cannot recruit these students if there is no clarity on this aspect. The student constables cannot join unions unless this issue is clarified[3]. The interest of the applicant and that of the student constables are in my view, inextricable bound. In my view, the applicant has a constitutional right to bring these proceedings.[4]

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[3] The respondent has already indicated to some of the student constables that it will not effect deductions from their salaries towards their membership subscriptions.

[4] The Constitution provides, *inter alia,* that:

"38. Anyone listed in this section has a right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and

[9] I am further of the view that the need to have clarity on this aspect is also for the general public's interest[5]. In the result, I hold the view that it is not necessary for the applicant to join the student constables to bring these proceedings. I therefore conclude that the applicant has *locus standi* to bring these proceedings and that this Court is the right forum to deal with this matter.

[10] Section 23 of the Constitution of the Republic of South Africa[6] provides as follows:

"(1) everyone has the right to fair labour practice.

(2) Every worker has the right—

(a) to form and join a trade union,

(b) to participate in the activities and programs of the trade union;

and

(c) to strike.

(e) An association acting in the interest of its members."

[5] Vide *Ngxuza* (*supra*) at 1193 D-1194A.

[6] Act 108 of 1996.

(3) Every employer has the right:

(a) To form and join an employers' organisation; and

(b) To participate in the activities and programs of an employers'

Organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration programs and activities;

(b) to organize;

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with Section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the

extent that the legislation may limit the right in this chapter, the limitation must comply with Section 36(1)."

[11] The reason why the second respondent does not permit student constables to join unions is because it does not regard them as workers. A constitutionally enshrined right can only be limited in accordance with s36[7] of the Constitution[8]. There is no legislation that limits the student constables to join unions. Therefore, the answer to the question lies in determining whether student constables are workers.

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[7]" S 36. Limitation of rights:--- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that limitation is reasonable and justifiable in an open democratic society based on the human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right:
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and ; and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill."

[8] *Vide SANDU v Minister of Defence & others,* 2007 (1) SA 402 (SCA) at 413A-E.

[12] In the matter of *NUMSA and Others vs BADER BOP (PTY) LTD and Another*[9] the Constitutional Court said at para "[13] In Section 23, the constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike actions, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is of both historical and contemporaneous significance. In the first place it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in s23, therefore, the impotence of those rights in promoting a fair work environment must be understood. It is also important to

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[9] 2003(3) SA 513 (CC) at 526I-527C.

comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting a constitutional concrete, principles governing that bargain which may become absolute or inappropriate as social and economic conditions change."

[13] It brooks no argument that the applicant, as a union, has the right to recruit employees, vide *SANDU v Minister of Defence & Others*[10]. Equally so workers do have the right to join and belong to unions, vide *Numsa and Others v Bader Bop (Pty) Ltd and Another (supra)* is the right to join a union. Regard must also be had to the fact that the Labour Act proscribes against an employer demanding from a person seeking employment not to be a member of a trade union; vide s5(2)(a). Regard must also be had to the fact the Constitution[11] proscribes against discrimination.

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[10] 2007 (1) SA 402 (SCA) at pages 412F-13E, et *SANDU V Minister of Defence & Others* 2007 (1) SA 422 (SCA) at 426.

[11] Section 9 Act 108 of 1996.

[14] In the matter of *Minister of Defence and Others v SANDU and another*[12], the Supreme Court of Appeal stated, *inter alia*, that:

"[5] The Constitution does not distinguish between workers or trade unions depending upon the nature of their work or industry in which they function. All workers have the constitutional, right to strike and all trade unions have the constitutional right to engage in collective bargaining.[13] In South African National Defence Union v Minister of Defence[14] it was held that members of Permanent Force of SANDF are workers for purposes of section 23(2) of the Constitution of the Republic of South Africa, 1996. It follows that their trade unions have the constitutional right to engage in collective bargaining and that their members have the constitutional right to strike in furtherance of collective bargaining".

[15] *In casu*, the issue is whether the student constables are workers, as contemplated in the Labour Relations Act. In the matter of *Liberty of Association of Ltd v Niselow* (1996)17 ILJ (LAC) at

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[12] 2007 (1) SA 422 (SCA) at 426.
[13] Ft note 3 Ss 23(2) (c) and 23(5) respectively.
[14] Ft note 4 1999 (4) SA 368 (CC) [Also reported at (6) BCLRS 615 (CC)-Ed.]

p681 I to 682A the SCA in determining whether a person was a worker, looked at whether the person worked under a degree or supervision and control which pointed to a relationship of employer.

[16] In the matter of *S v Dental Laboratory (Pty) Ltd and Another* [15]Trolip J (as he then was) stated that the general meaning of the word "work" means the product or result of work, it is some particular task or piece of work which the principal or contractor gives out to another for him to perform or execute by his labour or services. This view, with respect, seems to be shared by Smallberger JA in the matter of *SA Breweries Ltd v Food & Allied Workers Union & Others*[16].

[17] S213 of the Labour Relations[17] provides that an "employee" "means—

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[15] 1965 (3) SA 192 (TPD) at 195A.
[16] 1990 (1) SA 92 (AD) at 100A-B.
[17] Act 66 of 1995.

"(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

any other person who in any manner assist in carrying on or conducting the business of an employer, and 'employed" and "employment" have a meaning corresponding to that of "employee".

[18] From these two cited authorities herein above, it is clear that central to the relationship between the employer and employee, is "service" provided by the employee for the employer, vide also *The State v A.M.C.A;*[18] *Nat Automobile & Allied Workers' Union.*[19]

[19] The relationship between a student constable and the second respondent is governed by the contract that the parties have to enter into[20]. The contract provides, *inter alia*, progressive phases of training of the student constable. It is only after completion of

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[18] 1962 (4) SA 537 (AD);
[19] 1994 (3) SA 15 (AD) at 23 C-E.
[20] Annexure AW4 at paginated pages 34-37 is the copy of the 'MEMORANDUM OF AGREEMENT".

all three phases that a student constable qualifies to be taken as a permanent police officer.[21]

[20] In my view, the dominant feature in the contract between the student constable and the second respondent is the training of the former. The answer to the question whether a student constable is an employee, must therefore be answered in the context of whether such a student provides any "services" to the second respondent. In my view, the answer is no. The service will be provided after successful completion of training.

[21] The fact that during the training, the student constable may be trained on the job, is of no great moment, such student constable remains a trainee. Besides, in my view, it is ill conceived to unionise student constables who are supposed to be empowered with policing skills.

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[21] Clause 2.2.4 of the contract provides: "Upon successful completion of the training, the Trainee is obliged to render services to the Service for a minimum period of 4 (four) year years at a place determined by the National Commissioner unless the National Commissioner decides otherwise."

[22] I am of the view that the application should be dismissed with costs. With regard to the costs, the general principle is that a successful party is entitled to its costs. Both parties made use of the services of senior counsel. Only in the case of the respondent, the senior counsel was assisted by a junior counsel.

[23] The respondents are successful in the main application and are therefore entitled to their costs which should include the costs of engaging two counsel.

[24] The applicant was the successful party in the interlocutory matter, equally so, is entitled to its costs including of senior counsel.

[25] In the result I make the following orders:

AD POINT IN LIMINE:

1. The point *in limine* is dismissed with costs, inclusive costs of engaging senior counsel.

AD MAIN APPLICATION:

1. The main application is dismissed with costs, inclusive of costs of engaging two counsel.

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

DELIVERED: 29 SEPTEMBER 2009

APPLICANT`S ATT : ALLARDYCE AND PARTNERS.

APPICANT`S ADV : MR. C.E WATT-PRINGLE SC;

RESPONDANTS' ATT : MOLEFU DLEPU ATTORNEYS.

RESPONDANTS' ADV : MR. PAUL KENNEDY SC,

With

MS MICHELLE AUGUSTINE.