

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1794/2010

In the matter between:

POPCRU

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

Respondent

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JUDGMENT

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FRANCIS J

1. The applicant, the Police and Prisons Civil Rights Union (POPCRU), on behalf of and in the interest of all its affected members in Kwa-Zulu Natal (KZN), brought an urgent application to interdict and restrain the Department of Correctional Services (the department) from continuing to implement a shift system that requires employees to work a 10 hour a day, 10 continuous work shift system, after which employees are granted 4 days off, pending the outcome of a dispute that has been referred to the General Public Service Sectoral Bargaining Council (the GPSSBC).
2. The application was opposed by the respondent, the Minister of Correctional Services.
3. On 24 June 2009 the State as employer concluded a collective agreement - GPSSBC Resolution 2 of 2009 (resolution 2 of 2009) with trade unions in the GPSSBC on the implementation of an occupational specific dispensation (OSD) for correctional services officials. One of the objectives of resolution 2 of 2009 is the introduction of a 45-hour work week for the implementation of the OSD and the implementation of a 7-day

establishment shift system for centre based correctional officials. Clause 13 of resolution 2 of 2009 provides as follows:

“13. Introduction of 45 hour week and 7-day establishment

13.1 All Centre Based Correctional Officials shall be translated to the 45 hour work week, with effect from 1 July 2009.

13.2 The Department shall introduce a 7-day establishment for correctional facilities with effect from 1 July 2009.

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

4. Since the commencement of resolution 2 of 2009 on 1 July 2009, the department has been unable to implement a practical and lawful duty roster in all provinces in accordance with the principle of a 45-hour work week. On 25 August 2010 the regional commissioner of the department in Kwa-Zulu Natal issued an instruction to all area commissioners to implement a new shift system from 1 September 2010. On Friday 27 August 2010 the area commissioner for the Durban management area sent the instruction received from the regional commissioner to the head of the correctional centres in the Durban management area under cover of an internal memorandum. It appears that the decision to implement the new system was taken on 4 August 2010 after which the area commissioners informed all the relevant parties including the applicant on 31 August 2010. The applicants and correctional officials became aware about the new duty rosters on 1 September 2010 and raised their dissatisfaction with their local shop stewards, which dissatisfaction was communicated through the structures of POPCRU to national level.

5. On 3 September 2010 the applicant's attorney on behalf of the applicant referred a dispute relating to the interpretation and/or application of a collective agreement to the GPSSBC. The dispute is stated to have arisen on 1 September 2010 in KZN - Pietermaritzburg. The outcome required is "the setting aside of the shift system in terms of which correctional officers are required to work 10 hours a day for 109 consecutive days". The nature of the dispute was also set out.
6. The applicant instructed its attorney to bring this application. The application was filed with this Court on 6 September 2010 and was enrolled for a hearing on 7 September 2010. This Court is satisfied that the application is urgent and complies with the provisions of rule 8 of the rules of this court. Arguments were heard on 7 September 2010. An application to amend the notice of motion was granted and the respondent was granted leave to file a supplementary affidavit which it duly did. The application was postponed to 9 September 2010.
7. According to the document setting out the new shift system, correctional officials are categorised according to the functions performed by them. They are divided into two groups, namely those who are required to work 40 hours per week and those required to work 45 hours per week. The group of correctional officials required to work 45 hours per week is divided into two shift systems, namely those required to work 10 hour shifts for 10 continuous days (including a 1 hour lunch break), after which they are granted 4 days off and those required to work 10 hour shifts for 5 days (including a 1 hour lunch break), after which they are granted 2 days off. The department averages the number of

hours worked by correctional officials over two weeks and then comes to an average of 45 hours per week.

8. The following disputes arose as a result of the new shift system implemented by the department:
 - 8.1 Firstly, about the maximum hours correctional officials may be permitted to work per week without a rest period;
 - 8.2 Secondly, about the maximum hours correctional officials may be permitted to work overtime per week; and
 - 8.3 Thirdly, about the averaging of working hours.
9. Clause 9.5 of the GPSSBC resolution 1 of 2007 provides that the mechanisms and conditions for the averaging of working hours shall, where required, be determined in the respective sectoral bargaining councils. It is common cause that no agreement has been concluded in respect of the averaging of working hours. The provisions of chapter 2 of the BCEA do not apply to employees earning in excess of an amount determined by the Minister, which amount has been determined as R115 572.00 per annum.
10. The respondent has in its answering affidavit admitted that the aforesaid disputes arising from the implementation of the new shift system are disputes about the interpretation and application of a collective agreement, which disputes are arbitrable by the GPSSBC and that such a dispute has been referred to the GPSSBC. However in its supplementary affidavit it contends that the applicant is not alleging in its papers that there is a dispute between the parties about the interpretation and/or applicability of resolution 2 of 2009

but rather that the respondent has unilaterally and without consultation, implemented a new shift system on 1 September 2010. Accordingly, so it was contended that where there is no dispute between the parties about the interpretation and/or applicability of a provision of a collective agreement, the GPSSBC will have no jurisdiction in terms of section 24(2) of the LRA. It was contended that the applicant is seeking relief in the GPSSBC in terms of which the shift system is set aside. The GPSSBC has no power to set aside a shift system that has been implemented as its jurisdiction is restricted solely to circumstances where the parties are not agreeable or have a dispute relating to the applicability and/or interpretation of a collective agreement. It was contended that there is no basis to grant the interim relief since the GPSSBC has neither jurisdiction to entertain the dispute referred to it by the applicant nor the power to grant the outcome as requested by the applicant. There is no pending *lis* in the GPSSBC and the relief sought is final relief. The decision taken by the functionary on 4 August 2010 remains valid and enforceable until such time as it has been set aside by this Court or the High Court but not the GPSSBC. There is no such pending proceedings challenging the aforesaid decision.

11. There is simply no basis for what the respondent is contending. It is clear from the referral to the GPSSBC what the nature of the dispute is. It is also clear from clause 19 of resolution 2 of 2009 that should there be a dispute about the interpretation or application of the collective agreement any party may refer to the GPSSBC for resolution in terms of the dispute resolution procedure of the GPSSBC. As stated above the respondent has admitted in its answering affidavit that the dispute before the GPSSBC is a dispute arising from the implementation of the new shift disputes which are disputes about the interpretation of a collective agreement and are arbitrable by the GPSSBC.

There is therefore a *lis* pending before the GPSSBC.

12. Disputes arising from the implementation of the new shift system are disputes about the interpretation and application of a collective agreement, which disputes are arbitrable by the GPSSBC.
13. This Court has jurisdiction to grant interim relief on an urgent basis in terms of section 158(1)(a)(i) of the LRA. The interim relief sought is in the form of an interim interdict, pending the resolution at arbitration. The employees earning less than R115 572.00 per annum, have a clear right in terms of section 9 of the Basic Conditions of Employment act 75 of 1997 (the BCEA), not to work more than eight hours a day, if they are required to work more than 5 days a week. The employees earning less than the prescribed rate per annum have a clear right in terms of section 15(1)(b) of the BCEA to a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include Sunday.
14. The new system implemented by the department is unlawful and infringes the statutory rights of the affected employees in terms of section 9, 10 and 15 of the BCEA, which infringement will continue until the shift system is abolished.
15. I am satisfied that the balance of convenience favours the affected employees. The department will not be inconvenienced if it implements a shift system that complies with the requirements of the BCEA pending the outcome of the arbitration. The affected employees will, on the other hand, be inconvenienced and prejudiced if the department is allowed to continue with the implementation of the new shift system.

16. It is clear from the facts provided to this Court that the respondent has unilaterally and without an agreement introduced the new shift. The applicant has referred to section 64(4) of the LRA in its referral. The respondent was in terms of section 64(4) of the LRA required to restore the terms and conditions for 30 days after it received the referral. It has not done so. It is clear from the answering affidavit that the respondent acknowledges that it did not obtain an agreement with the applicant in KZN to implement the new system. It is a pilot project which will be reassessed at the end of September 2010. POPCRU and the affected parties were consulted but no agreement was concluded between the parties about the implementation.
17. I am satisfied that the applicant has made out a proper case for the relief sought on an urgent basis.
18. The application stands to be granted.
19. Since the parties do have an ongoing relationship I do not believe that it would be appropriate that costs should follow the result.
20. In the circumstances I make the following order:
 - 20.1 The respondent is hereby interdicted and restrained for a period of 30 days from date of the referral to the GPSSBC (3 September 2010), from continuing with the implementation of a shift system in KZN in terms of which employees are required to work 10 hours shifts (including a 1 hour lunch break), for 10

consecutive days, after which the employees are granted 4 days off.

21.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT : BASSON INSTRUCTED BY GROSSKOPF
ATTORNEYS

FOR RESPONDENT : A RAMAWELE INSTRUCTED BY STATE
ATTORNEY PRETORIA

DATE OF HEARING : 7 & 9 SEPTEMBER 2010

DATE OF JUDGMENT : 10 SEPTEMBER 2010