

Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case no: JR 316/2010

In the matter between:

POPCRU

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES First respondent

NATIONAL COMMISSIONER OF

CORRECTIONAL SERVICES

Second respondent

JUDGMENT

STEENKAMP J:

Introduction

- 1] The applicant trade union, POPCRU, seeks to review and set aside a housing policy approved by the Minister of Correctional Services (the first respondent) in terms of s 158(1)(h) of the Labour Relations Act.¹
- 2] The union seeks to review the policy on three grounds:
 - 2.1 Firstly, it contends that the authority to determine the conditions of occupation of official accommodation does not vest in the Minister, but in the National Commissioner; and that the Minister's approval of the policy was *ultra vires*.
 - 2.2 Secondly, the Minister failed to consult with trade unions over the contents of the policy.
 - 2.3 Thirdly, the policy is not rational.

The legislative framework

- 3] The Correctional Services Act² provides for a correctional system that is meant to contribute to maintaining and protecting a just, peaceful and safe society by detaining all inmates in safe custody whilst ensuring their human dignity, and by promoting the social responsibility and human development of all sentenced offenders.³ To fulfil this purpose, the Department of Correctional Services was established by s7(2) of the Public Service Act.⁴

1 Act 66 of 1995 ("the LRA").

2 Act 111 of 1998.

3 s 2 of the Correctional Services Act.

4 Public Service Act, 1994 (promulgated under Proclamation 103 of 1994).

- 4] The Department consists of the National Commissioner, other correctional officials appointed by the National Commissioner in terms of the Correctional Services Act and other employees appointed in terms of the Public Service Act.⁵ The Department is under the control of the National Commissioner, who must determine the fixed establishment and the distribution of the numerical strength of the Department, appointed correctional officials and organise the Department into various components, units or groups.
- 5] In terms of the [now repealed] Correctional Services Act of 1959⁶ the Minister may make regulations as to the occupation of official quarters by correctional officials.⁷ The Correctional Services Regulations were published on 31 December 1965.⁸ In terms of regulation 25:
- "The Commissioner may allocate any official quarters to a correctional official for occupation and require the correctional official to occupy such quarters for such period and under such conditions as may be specially or generally determined by him."
- 6] In order to give effect to the provisions of the 1959 Act and regulation 25 of the 1965 regulations, the National Commissioner issued a document known as an "A-order". Chapter 7 of the A-order deals with housing in official departmental accommodation. Clause 1 provides that the Act and the regulations refer to the provision and occupation of official departmental accommodation "...and qualify all members for functional housing irrespective of where such personnel is employed." Clause 3 provides that the allocation of official quarters rests with the area manager; and clause 4 sets out the rental tariff for official quarters.

5 s 3(4) of the Correctional Services Act.

6 Act 8 of 1959 ("the 1959 Act") [prior to repeal by Act 111 of 1998].

7 s 94(1)(b)(ii) of the 1959 Act.

8 GN R 2080 of 31 December 1965.

- 7] In terms of the 1998 Act, the Minister published new regulations in 2004.⁹ Regulation 31 of the 2004 regulations, under the heading "work facilities", provides that:

"The Commissioner may allocate official residential accommodation to a correctional official for occupation for such period and under such conditions as he or she may determine."

- 8] Despite the repeal of the 1959 Act and the 1965 regulations, chapter 7 of the A order continued to exist.
- 9] On 1 December 2009 the Minister approved a housing policy in terms of which chapter 7 of the A-order was repealed and provision was made for new conditions and periods of occupation of official accommodation.

The review grounds

- 10] I have set out above the review grounds relied upon by the union. I shall deal with each of those in turn.
- 11] However, I first need to consider the basis for the review application and the jurisdiction of this court to hear it.

Jurisdiction

- 12] Mr *Basson*, who appeared for the union, specifically disavowed any reliance upon section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act.¹⁰ He did so on the assumption and understanding that, following the decisions of the Constitutional Court in *Chirwa v Transnet Ltd & others*¹¹ and *Gcaba v Minister of Safety &*

9 Published under Government Notice R914 of 30 July 2004.

10 Act 3 of 2000 (PAJA).

11 (2008) 29 ILJ 73 (CC).

*Security & others*¹², employment and labour relations issues – such as this one – do not amount to administrative action within the meaning of PAJA.

- 13] Instead, the union relied on s 158(1)(h) of the LRA that provides as follows:

“The Labour Court may –

review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.”

- 14] These grounds, Mr *Basson* submitted, included the principles of legality and rationality.

- 15] *Hoexter*¹³ explains that the fundamental idea underlying the principle of legality is that the legislature and executive in every sphere of government are constrained by the principle that it may exercise no power and perform a function beyond that conferred by law. It may only act within the powers lawfully conferred on it and the exercise of public power is only legitimate when it is lawful. It is the obverse facet of the *ultra vires* doctrine and an aspect of the rule of law.

- 16] Even though the applicant does not rely on PAJA, the legality principle is exemplified in the post-constitutional context in the *Pharmaceutical Manufacturers*¹⁴ judgment of the Constitutional Court. As Chaskalson P explained:

“[50] What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution, according to the doctrine of legality.”

12 (2009) 30 *ILJ* 2623 (CC).

13 Cora Hoexter, *Administrative Law in South Africa* (2007) at 116-7.

14 *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).

- 17] The court further pointed out that the exercise of public power must be lawful; and it must not be arbitrary or irrational.¹⁵
- 18] This principle was also enunciated by the Constitutional Court in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*¹⁶. The court pointed out that the principle that an organ of state – in that case, a local government – may only act within the powers lawfully conferred upon it, is a fundamental principle of the rule of law, that the exercise of public power is only legitimate where lawful. And there is no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality.
- 19] In the recent case of *De Villiers v Head of Department: Education, Western Cape Province*¹⁷, Van Niekerk J gave a succinct exposition of the question of administrative action in the employment sphere in the post-*Chirwa* era.
- 20] The question in *De Villiers* was whether the conduct of the Head of Department in failing to reinstate the employee – after his deemed discharge in terms of s 14(2) of the Employment of Educators Act¹⁸ -- constituted administrative action.
- 21] With reference to s 158(1)(h) of the LRA, Van Niekerk J considered the test set out by Chaskalson CJ in *President of the RSA v SARFU*¹⁹:

15 Paras [51], [85] and [90]. See also *Minister of Correctional Services & others v Kwakwa and another* 2002 (4) SA 455 (SCA); [2002] 3 All SA 242 (A) paras [35] – [36].

16 1999 (1) SA 374 (CC) paras [56] – [59].

17 (2010) 31 *ILJ* 1377 (LC).

18 Act 76 of 1998.

19 2000 (1) SA 1 (CC) para [134], cited with approval by Ngcobo J in *Chirwa* (supra) at 414G-

“Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said, depend primarily on the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33 [of the Constitution]. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.”

22] In the employment context, as Van Niekerk J pointed out in *De Villiers*, the question whether a power exercised constitutes administrative action, has been complicated by the jurisdictional debate generated by s 157(2) of the LRA; and the related policy driven debate on the relationship between ss 23 and 33 of the Constitution and whether administrative law remedies ought to be available to public sector employees.

23] Van Niekerk J noted that in *Chirwa*, Ngcobo J²⁰ determined that the employer’s conduct in dismissing Chirwa did not amount to administrative action; yet he accepted that Transnet’s conduct amounted to the exercise of a ‘public power’:

“In my view, what makes the power in question a public power is the fact that it is vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power.”

24] These sentiments were cited with approval in *Gcaba*.

25] Van Niekerk J²¹ was at pains to point out that he did not understand the

415A.

20 As he then was.

judgment in *Gcaba* to suggest that the conduct of a state employer can never be categorized as administrative action:

“To read the judgment in this manner would be to elevate a single factor in the *SARFU* test to a determinative and overriding consideration, something that the court in *Gcaba* does not expressly do.”

26] I find myself in respectful agreement.

27] Mr *Basson*, for POPCRU, referred me to the judgment of Plasket J in a matter concerning the same actors as those before me, viz. *POPCRU v Minister of Correctional Services & others*.²² Van Niekerk J also referred to that judgment in *De Villiers*. In *POPCRU*, Plasket J was faced with the question of whether the decision to dismiss correctional services officers constituted administrative action in circumstances where the power to dismiss was founded in statute.²³ It was argued that this function was not administrative action, since it did not affect the public as a whole. Plasket J rejected this submission in the following terms:

"In my view, the elusive concept of public power is not limited to exercises of power that impact on the public at large. Indeed, many administrative acts do not. The exercise of the power to arrest is a good example of administrative action that would only have a significant impact on the arrestee and, perhaps, the complainant.... In these instances what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim."²⁴

28] Van Niekerk J summarised the position as follows:²⁵

21 At para [15] of *De Villiers*.

22 2008 (3) SA 91 (E); (2006) 27 *ILJ* 555 (E).

23 Correctional Services Act, 1998, s 3(5)(g).

24 115 C-E.

25 *De Villiers* para [19].

"As a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following *SARFU*) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute; see *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA)), whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject-matter of the power. I venture to suggest that the existence of any alternative remedies may also be a relevant consideration – this was a matter that clearly weighed with the court in both *Chirwa* and *Gcaba*, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation."

- 29] Applying these considerations to the facts of the case before him, Van Niekerk J found that the respondent's conduct in deciding in terms of s 14 (2) of the Employment of Educators Act to refuse to reinstate the applicant constituted administrative action, and that the Labour Court was entitled to exercise its review jurisdiction on this basis.
- 30] But Van Niekerk J went further. Even if he was incorrect in coming to the conclusion that the respondent's conduct amounted to administrative action, he held, the respondent's action remained open to review under section 158(1)(h) of the LRA on the ground of legality. Even if the decision not to reinstate the applicant did not constitute administrative action, he held, this court retains review jurisdiction on the grounds of legality (at least), which incorporates most, if not all, of the grounds of review relied upon by applicant in his founding affidavit. These would certainly require that functionaries exercise public power in a manner that is not irrational or arbitrary, and that they be accountable for the manner in which that power is exercised.
- 31] I have already discussed the principle of legality above. It is on that principle that POPCRU relies in this case. And I agree with Van Niekerk J

that it is entitled to do so in the light of the provisions of s 158(1)(h) of the LRA and the case law discussed above. In those circumstances, I need not decide whether the Minister's approval of the housing policy constitutes administrative action.

Locus standi

32] The respondents submitted that POPCRU does not have *locus standi* in these proceedings. It is common cause that the housing policy has, to date, only been implemented in respect of senior management service (SMS) members. POPCRU does not act on behalf of those members, but in respect of its members in job levels 2 to 12. The housing policy will only be implemented in respect of those members once the union has been consulted. Mr Semenya, for the respondents, therefore, submitted that the matter is also not ripe for hearing in respect of those members.

33] I address the question of collective bargaining hereunder. The union's argument is that the respondents had to engage in collective bargaining with it over the determination of the policy, and not only its implementation.

34] In terms of s 200(1) (c) of the LRA:

"A registered trade union... may act in any one or more of the following capacities in any dispute to which any of its members is a party –

- (a) in its own interest;
- (b) on behalf of any of its members;
- (c) in the interests of any of its members."

35] In the present instance, the union purports to be acting in the interests of its members in job categories 2 to 12. I can see nothing wrong with that approach. As Sutherland AJ explained in *Manyele & others v Maizecor (Pty) Ltd & another*,²⁶ the reference to a trade union acting "in the interests

26 [2002] 10 BLLR 972 (LC).

of any of its members" refers to situations where "intrinsically collective interests" are involved. That is exactly what the applicant union is doing in this case. I hold that it does have *locus standi*.

Ultra vires?

36] Mr *Semenya*, for the Department, argued that the approval of the housing policy was, as the subject matter suggests, a matter of policy and therefore not administrative action. And if the Minister is entitled to make policy – which is not a reviewable action – he axiomatically acted *intra vires*.

37] In this regard, Mr *Semenya* referred to s 85(2)(b) of the Constitution.²⁷ He also pointed to s 1 of PAJA, that expressly excludes executive powers in terms of s 85(2)(b) of the Constitution from the definition of “administrative action”. He argued that the Minister, in approving the housing policy, was developing and implementing national policy as envisaged by s 85(2)(b) and that it was, therefore, *intra vires* and not reviewable.

38] But, as I have set out above, the applicant union specifically relies on a legality review in terms of s 158(1)(h) of the LRA. It does not rely on PAJA. Therefore, I need not decide whether the Minister’s action constitutes administrative action and if PAJA applies.

27 Constitution of the Republic of South Africa, 1996.

Failure to consult

39] The next ground of review is that the Minister and the Department failed to consult with labour generally, and POPCRU in particular, about the contents of the housing policy. This, the applicant submits, is a reviewable irregularity on the ground of legality.

40] POPCRU initially argued in its pleadings and its heads of argument that the conditions and period attached to the occupation of official accommodation is not simply a “work practice”, but forms part of the service conditions of correctional officials.

41] In oral argument, though, Mr *Basson* conceded that the provision and allocation of official accommodation to correctional officials is a “work practice”. He nevertheless maintained that it remained subject to collective bargaining.

42] The Department of Correctional Services forms part of the public service established by s 197 of the Constitution.²⁸ Correctional officials are appointed and remunerated in accordance with the Correctional Services Act, the LRA and the Public Service Act.²⁹ The relationship between the Department as employer and the officials in its service is regulated by the provisions of the LRA and the Public Service Act.³⁰

43] The Minister for Public Service and Administration issued the Public Service Regulations under s 41 of the Public Service Act³¹ on 5 January

28 s 3(1) of the Correctional Services Act.

29 s 3(5)(g) of the Correctional Services Act.

30 s 96(2) of the Correctional Services Act.

31 Proclamation 103 of 1994.

2001.³² Chapter 1, Part V, regulation E provides as follows:

“E Service benefits, compensatory practices and work facility practices

E.1 The Minister shall determine service benefits, compensatory practices, work facility practices and allowances for employees through the collective bargaining process or, for employees who fall outside the Labour Relations Act, directly.

E.2 The Minister may make a determination regarding-

- and
- (a) special daily allowances for visits abroad by employees;
 - (b) the application of a service benefit, compensatory practice, work facility practice or allowance.

E.3 Subject to the terms of a relevant collective agreement, an executing authority may provide the cash equivalent of benefits received by permanent employees to employees on fixed-term contracts, other than heads of department.”

44] The scope of those regulations is spelt out in Chapter 1 part I:

“D Scope of application

These Regulations apply-

- (a) to all persons employed, and to institutions governed, in terms of the Act; and
- (b) subject to the provisions of the Act, to persons employed in the Services, the Agency or state educational institutions, only so far as they are not contrary to the laws governing their employment.”

45] “The Services” is not defined. But a “member of the services” is defined in the Public Service Act to include a member of the Department of Correctional Services appointed in terms of the Correctional Services Act,

³² GN R1 in *Government Gazette* 21951 of 5 January 2001.

1998.³³

46] It is clear from Part V Regulation E.1 of the Public Services Regulations of 2001, quoted above, that the Minister may only determine “service benefits” as well as “work facility practices” through the collective bargaining process.

47] Both parties appear to accept that the provision of housing in terms of the housing policy is, at least, a “work facility practice”. It is further common cause that the respondents have not consulted labour generally, and POPCRU specifically, on the content of the new housing policy, even though the respondents maintain that they will consult labour over the implementation of the policy.

48] As set out above, the Public Service Regulations do apply to correctional service officials. They are members of “the Services” as set out in s 1 of the Public Service Act, where a “member of the services” is defined to mean a member of –

“(c) the Department of Correctional Services appointed, or deemed to have been appointed, in terms of the Correctional Services Act, 1998 (Act No 111 of 1998).”

49] Section 3(5)(h) of the Correctional Services Act provides as follows:

"The Department is under the control of the National Commissioner, who must, without derogating from the generality of subsection (2), enter into collective agreements as provided for in the Labour Relations Act pertaining to matters within his or her authority."

50] When the Minister approved the new housing policy, she determined a new "work facility practice". All of the parties are bound by the Public Service regulations. In terms of those regulations, the Minister could not validly do so unilaterally. The Minister and the National Commissioner had to engage in a collective bargaining process with labour. That has not happened. That ground of review succeeds.

33 Public Service Act s 1.

Rationality

- 51] The third ground of review is that the Minister's decision to approve the housing policy without providing for the rental tariffs to be applied in respect of officials occupying official accommodation, and further to limit the period of occupation to specific periods without consulting the officials currently occupying the housing, is irrational and therefore reviewable.
- 52] Following *Pharmaceutical Manufacturers*³⁴ the exercise of all public power is subject to review on the basis of irrationality.
- 53] Given my finding on the ground of legality, though, it is unnecessary to consider this ground of review.

Conclusion

- 54] I find that POPCRU has *locus standi* to bring this application and that this court does have jurisdiction.
- 55] I further find that the respondents were obliged to enter into a collective bargaining process with the applicant union in determining the housing policy. This they failed to do. The review application succeeds on that ground on the basis of legality and in terms of s 158(1)(h) of the LRA.

Costs

- 56] The parties before me will have to enter into a collective bargaining process pursuant to this judgment. An adverse costs order may have a chilling effect on that process. In law and fairness, no costs order should follow.

34 *Pharmaceutical Manufacturers of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC).

Order

57] The housing policy approved by the first respondent on 1 December 2009 is reviewed and set aside.

58] There is no order as to costs.

STEENKAMP J

Date of hearing: 19 April 2011

Date of judgment: 10 May 2011

For the applicant: Adv JL Basson

Instructed by Grosskopf attorneys

For the respondents: Adv IAM Semanya SC

Adv T Mkhwanazi

(Heads of argument drafted by Adv R Sutherland SC)

Instructed by The State Attorney