



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2653/12

In the matter between:

SAPU

Applicant

and

MINISTER OF SAFETY & SECURITY

First Respondent

**NATIONAL COMMISSIONER OF SA
POLICE SERVICE N.O.**

Second Respondent

Heard: 12 October 2012

Delivered: 18 October 2012

Summary: Urgent application to prevent SAPS from advertising new posts for security guards. Requirements for interim interdict not met. Application dismissed.

JUDGMENT

STEENKAMP J

Introduction

- [1] *Quis custodiet ipsos custodes?*¹ That is the question that arises when the South African Police Services have to appoint security guards to guard their own police stations.
- [2] The applicant, the South African Police Union (SAPU) applied for an urgent interim interdict to prevent the SAPS from appointing anyone to serve as security guards, “pending consultation between the parties at the SSSBC² in terms of SSSBC resolution 2 of 2009”.

Background facts

- [3] The dispute arises from a decision taken by the SAPS pertaining to the performance of guarding duties at its various premises, including, ironically enough, police stations.
- [4] Until June 2012, the provision of guard duties was performed by a private security company, which deployed its own employees at the premises of the SAPS. There were approximately 4000 private security guards deployed across the country at the various premises of the SAPS. The SAPS also employed directly certain employees as security guards. These were small in number and supplemented the services provided by the private security firm.
- [5] The premises that were guarded by the private security guards included:
- 5.1 police stations;
 - 5.2 the national commissioner’s office;
 - 5.3 office of the Minister of Police;
 - 5.4 buildings containing the IT equipment;
 - 5.5 the crime intelligence unit; and
 - 5.6 the directorate of priority crimes unit.

¹ "Who will guard the guards themselves?" - traditionally attributed to the Roman poet Juvenal from his *Satires* (Satire VI, lines 347–8).

² Safety and Security Bargaining Council.

- [6] In April 2012, SAPU obtained an interim order in this Court on an urgent basis to interdict the SAPS from deploying or transferring any SAPS members for the purpose of performing operational duties (including security duties) without the SAPS members being assessed and being in possession of a competency certificate in terms of the Firearms Control Act.³ The reason, alarmingly enough, was that a number of SAPS officials in the North West province were not competent to carry firearms, yet they were being deployed as security guards.
- [7] During 2012, the SAPS decided to employ directly employees to perform guard duties at its premises. This was in anticipation of the lapsing of the contract between the SAPS and the service provider to which security duties had been outsourced, which lapsed on 30 June 2012. On 20 June 2012 a meeting was held at the SSSBC between the SAPS and the trade union parties represented at the SSSBC. Since there is a dispute as to what was agreed at that meeting, it is necessary to reproduce the decision in full:

“Decision

- Management will give feedback to their principals
- Labour agreed to the principle
- Management will start with the implementation process on 1st July 2012
- Engagements between Management and Labour will continue on the matter
- The process is jointly owned by Management and Labour
- Management will in the interim develop guidelines”.

- [8] The applicant union has contended that at this meeting, it was agreed that guarding should not be a member’s permanent post and that the SAPS would not employ ‘career security guards’.

³ Act 60 of 2000.

- [9] As the minute of the decision bears out, there was no such agreement reached at the SSSBC on 20 June 2012. All that was recorded, was that Labour (i.e. the trade unions, including SAPU) welcomed “the principle” that SAPS buildings should be guarded by “own personnel”; and that Labour expressed the wish that guarding should not be a SAPS member’s permanent post.
- [10] Following this meeting, the National Commissioner of the SAPS approved an operational plan on 28 June 2012. That operational plan envisaged the phasing out of private security guards and the employment of guards by the SAPS in two phases: the first was a short term strategy to employ police reservists on a short term period, while the second entailed the employment, on a permanent basis, of SAPS reservists as security guards.
- [11] On 1 July 2012 the SAPS enlisted reservists to perform guard duties. The contracts concluded with them were of a short term duration of four months. It was envisaged that they would lapse on 31 October 2012, after which they would be replaced by permanent employees.
- [12] On 10 July 2012 the SAPS presented the item of security guards at the SSSBC. The minutes show the following⁴:

“Management further indicated that the contracts of external service providers were terminated on the 30th of June 2012. However, they were faced with implementation challenges due to the shortage of manpower required to perform duties. Subsequent to that, 3500 trained reservists were deployed to render guard duties for four months, from July to October 2012 that they will be compensated and assisted by permanent members. Further the Nascom⁵ acted within the prescripts that allow her to call reservists on an ad-hoc basis to perform duties whereby they will be remunerated for services rendered which is in line with the regulations.

Management further indicated that the Nascom instructed that a long term mechanism should be looked into regarding guard duties and that a task team has been established to deal with the matter. Labour will be kept informed of all developments.

⁴ Grammar as in original.

⁵ Apparently a reference to the National Commissioner of the SAPS.

Labour indicated that Management should clarify if the reservists that are performing guard duties will still resort under CSC or has another unit been established and also the type of duties that were performed prior to the new arrangement...

Management further indicated that admin members are not utilised as the duties are operational in nature and that the bulk of duties are performed by reservists...

POPRCU indicated that Management should ensure that the reservists performing guard duties should be reminded they are only employed on a four (4) month project and there should be no expectation of permanent appointment.

...

Decision

Management to keep labour informed on all new developments."

- [13] Contrary to what Mr *Basson* submitted, the statement that "admin members are not utilised as the duties are operational in nature" does not constitute an undertaking that SAPS would not employ security guards under the Public Service Act⁶. It is merely a statement of fact of the situation that pertained at the time, i.e. that "admin members" (a concept that was not defined in the meeting, on the papers or by Mr Basson) were not being used as security guards at that time.
- [14] On 6 August 2012 there was another meeting held at the SSSBC during which the issue of guard duties was again discussed. At that meeting, the trade union parties were specifically advised that the SAPS would employ permanent employees when the contracts of reservists expired on 31 October 2012. Management indicated that more posts would be advertised in future and that the posts would be restricted to reservists.
- [15] At the meeting of 6 August 2012, the applicant union did not take issue with any agreement reached on 20 June 2012. Instead, the discussion was about eligibility to apply. POPCRU however raised the concern about SAPS employees being confined to guard duties. Even then, POPCRU did

⁶ Act 103 of 1994.

not contend that the decision to employ guards was in conflict with any decision taken on 20 June 2012.

The decision taken at this meeting was simply that feedback would be provided at a subsequent meeting of the SSSBC. In particular there was no agreement:

15.1 in terms of which the SAPS's powers of recruitment were limited; undertaking that new employees would not be employed on a full time basis as guards; or

15.2 that the SAPS would first seek an agreement at the SSSBC before employing the guards – indeed the only decision was to provide “feedback” at the following meeting of the SSSBC.

[16] As agreed, the next meeting of the SSSBC was held on 7 September 2012. The SAPS, in fulfilment of an undertaking reached at the previous meeting of the SSSBC, presented the item of guards for discussion. A full presentation was made. Several questions were raised by the trade union parties. Issues that were raised by the trade unions related to career prospects, salary level, and implications for existing employees. There was no contention that the decision was in conflict with any earlier decision, particularly that of 20 June 2012. It was agreed that there was a disagreement between the parties. Upon a query from SAPU about an undertaking that no SAPS officials would be made to perform guard duties on a permanent basis, the minutes reflect that:

“Management indicated that they are still committed to the undertaking and that Public Service Act employees will fall under a specific category within SAPS. Further that they had engagements with Provincial Commissioners to emphasise that no police officials should perform guard duties on a permanent basis.”

[17] The SAPS is now in the process of recruiting employees to take up the positions of security guards. It submits that there is urgency in the filling up of the positions, which must be done by 1 November 2012, simply because key buildings and premises will be left without guards if the positions are not filled and the contracts of reservists are not extended.

Evaluation: the applicable test

- [18] Since this is an application for interim relief, it is incumbent upon the applicant to show a *prima facie* right to the relief sought, in addition to the other requirements for interim relief.⁷
- [19] The applicant has argued that its rights that have allegedly been flouted by the SAPS flow from two sources – resolution 2 of 2009 and an agreement allegedly concluded at the SSSBC on 20 June 2012. The respondents have argued that neither resolution 2 nor the meeting of 20 June 2012 created any sort of entitlement for the union and its members. To the extent that the SAPS had any duty to consult, they say, such duty was discharged at the four consultative meetings held between the parties.
- [20] The test applicable in respect of interim applications is that contained in *Webster v Mitchell*.⁸ The applicant must show:
- 20.1 a *prima facie* right (although open to some doubt) to the final relief, which will be sought in due course;
 - 20.2 an apprehension of irreparable harm, if the application is not granted and the applicant ultimately establishes his or her claim;
 - 20.3 that the balance of convenience favours it; and
 - 20.4 the absence of any other satisfactory remedy.

Prima facie right?

- [21] The *prima facie* right to be shown by the applicant is that it has a right to be consulted and that it has been infringed. First, it contends that on 20 June 2012 an agreement was reached at the SSSBC that employees would not be employed on a permanent basis as guards. Second, it argues that resolution 2 of 2009 requires consultation with the trade union parties before the decision to employ security guards can be taken. The relevant clauses of that resolution provide:

⁷ *Webster v Mitchell* 1948 (1) SA 1186 (W).

⁸ Footnote 7 above. See also *Setlogelo v Setlogelo* 1914 AD 221. Recently, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18 (20 September 2012) the Constitutional Court endorsed the applicability of the *Setlogelo* test.

“Before the employer implements a position in relation to matters referred to hereunder, the employer must consult formally with admitted trade unions...

Specific matters for consultation:

Unless the matters for consultation are regulated by a collective agreement, admitted trade unions are entitled to prior consultation by the employer about proposals relating to the following matters (including but not limited to):

- (a) restructuring;
- (b) ...
- (c) ...
- (d) changes in the organisation of work;
- (e) procedures for enlistment / recruitment.”

[22] The applicant has not been able to sustain either of its contentions:

22.1 The minutes of the meeting of 20 June 2012 simply do not bear out the allegation that there was any agreement on the terms contended by the applicant. The minutes simply show that the trade unions contended that guard duties must not be performed by employees on a permanent basis. But it is clear from the minutes that there was no agreement in this respect. There is therefore no basis for the claim that the meeting of 20 June 2012 gives the applicant any *prima facie* entitlement to the relief sought.

22.2 Next is the question of resolution 2. This claim is premised on a misconception that resolution 2 of 2009 applies in the current circumstances. But on a proper reading of the resolution, it is quite clear that it does not apply:

22.2.1 The appointment of security guards does not constitute “restructuring” – no case has been made by the applicant to show why it is contended that the filling of vacancies amounts to restructuring. While the term “restructuring” has not been defined, it must be accepted that it implies an activity akin to re-organisation of the structures that currently

exist within the SAPS. No case has been made out illustrating that there will be any changes to the organisational structure of the SAPS.

22.2.2 The appointments do not amount to any changes in the organisation of work for any employees. New employees are being recruited to provide guard duties. They are replacing a private security firm. The existing employees will not be redeployed from their functions. There will be no changes in the organisation of work of current employees.

22.2.3 There is also no change to the recruitment procedures. The SAPS has undertaken that it will follow the existing procedures for the appointment of employees when it hires the security guards.

[23] It is therefore clear that resolution 2 is also of no application to the present facts. The filling of vacancies is within the prerogative of the employer. That is because the Constitution itself requires the “control and management” of the SAPS to be done by the National Commissioner of the SAPS. Section 207(2) of the Constitution says:

“The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.”

[24] Mr *Ngcukaitobi* submitted that the peremptory phrase “must exercise control” is a clear enunciation of the extent of the powers entrusted upon the national commissioner. I agree. That power implies the ability to employ employees to fill vacancies within the existing establishment. This power is also confirmed by section 28(2) of the South African Police Service Act, 1995, which empowers the national commissioner to fill any vacancies in the fixed establishment, subject to the Constitution.

[25] There is simply no warrant to restrict the statutory and constitutional powers of the national commissioner by reference to resolution 2. In this regard, it is noteworthy that resolution 2 itself draws a distinction between “consultation” and “negotiation” – the latter being limited to matters of

mutual interest. Mr *Basson*, for the applicant, restricted the relief sought to consultation and abandoned a prayer for negotiation.

- [26] The distinction between consultation and negotiation is not without significance. Resolution 2 lays out the threshold requirements for consultation, which are:

“Before the employer implements a position ... the employer must consult formally with admitted trade unions. At this time the employer must furnish labour with all information pertaining to the matter under consideration.

The employer must allow admitted trade unions an opportunity during consultation to make representations and advance alternative proposals.

The employer must consider and respond to the representations or alternative proposals made by admitted trade unions and if the employer does not agree with them, to state reasons for disagreement.”⁹

- [27] Consistent with the general tenor of resolution 2, it is clear that the employer is not required to reach agreement with employee parties when consulting. In this instance all the duties imposed by clause 4 of resolution 2 were fulfilled:

27.1 The employees were consulted over an extensive period of time – from June to September 2012;

27.2 The information relevant to the decision was communicated to them;

27.3 They were allowed to make alternative proposals, which they did;

27.4 The SAPS considered the representations, and where it was decided to reject them, reasons were furnished.

- [28] The duty to consult was clearly fulfilled. The applicant contends that the representatives of the SAPS stated that the meeting of 7 September 2012 was an “information sharing” meeting. That may well be. The point is that in substance there was a full consultation which met the requirements of resolution 2. A comment made that the meeting was an information sharing cannot detract from the substance of the activity being performed, namely a consultation meeting concerning the employment of guards.

⁹ Resolution 2 of 2009, clause 4.

- [29] The applicant has established no *prima facie* right to the relief sought. On this ground alone, the application must be dismissed. Since there is no *prima facie* right, there can be no threat of a violation of a right. I shall nevertheless consider the remaining requirements for interim relief.

Balance of convenience

- [30] The balance of convenience does not favour the granting of this application. It favours its dismissal. The consequences of being unable to fill the guard positions are profound. They impact on the public at large since they threaten the security of highly sensitive premises and highly sensitive information being stored at such buildings. It is not for this Court to question why the SAPS have not been able to guard its own premises, much less protect the public; what is plain, is that the public interest strongly requires the appointment of guards without delay.
- [31] There are also no concrete rights of the applicant or its members that have been affected as a result of this decision. The decision will have no impact at all on existing employees. It only affects potential applicants for the positions. The only issue that affects the applicant is compliance with a collective agreement. I have accepted that there has been full compliance with the collective agreements in this matter.

Absence of alternatives

- [32] The applicant has argued that it has no alternative but to bring this application. This claim cannot be sustained. The only issue of concern to the applicant is information about the conditions of employment of the security guards and the impact of the decision on existing employees. That issue can be raised at the consultations at the SSSBC. There is no reason advanced in the papers before me why that cannot be done.
- [33] It must also be taken into account that four meetings have been held over this issue. The collective agreement that the applicant relies upon does not offer it any substantive rights – it requires consultation. That duty, if it exists, has been fulfilled. To the extent that the applicant believes that there is insufficient consultation or that it seeks certain specific

information, it can ask for the information. The SAPS has indicated that the doors for consultation are not closed.

Conclusion and costs

[34] The present application stands to be dismissed.

[35] I agree with Mr *Ngcukaitobi* that, in view of the following factors, costs ought to be granted against the applicant, despite the ongoing relationship between the parties:

35.1 There are no real grounds for urgency. The applicant has known about the decision it seeks to attack since August 2012, and the advertisement it seeks to stop since 5 September 2012. It brought this application a month later on two days' notice to the respondents.

35.2 The decision being challenged has no impact on the rights of any member of the applicant – the affected employees are yet to be employed.

35.3 The applicant is fully cognizant of the fact that the consultation doors are not shut in any topic that it may wish to raise.

Order

[36] The application is dismissed with costs.

Steenkamp J

APPEARANCES

APPLICANT: JL Basson

Instructed by Van der Merwe Du Toit, Pretoria.

RESPONDENTS: Tembeka Ngcukaitobi

Instructed by the State Attorney, Pretoria.

LABOUR COURT