

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case No: PR 314/2017

In the application of:

POLICE & PRISONS CIVIL RIGHTS UNION

Intervening Party

in re

the matter between:

THE SOUTH AFRICAN POLICE SERVICES

Applicant

and

BRIGADIER JN JANTJIES N.O

First Respondent

X S KATOO

Second Respondent

Heard: 7 December 2018

Delivered: 11 June 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] This application was brought before the Court in terms of the provisions of Rule 22(2)(a) read with Rule 22(3) of the Rules of this Court¹. The Intervening

¹ Rule 22: Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties

(1)...

(2) (a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

Party (POPCRU), seeks leave to intervene as co-respondent in the main application brought by the Applicant (SAPS) in which the latter seeks an order that the issuing of the final written warning by the First Respondent (Brigadier Jantjies) to the second Respondent (Warrant Officer Katoo) on 27 February 2017 be reviewed and set aside, and further that the matter be remitted to SAPS, and to be determined afresh by a proper disciplinary process convened under a different chairperson other than Brigadier Jantjies.

- [2] The final written warning issued to W/O Katoo related to allegations that he had indirectly or negligently enabled an arrested subject to abscond/escape from lawful custody. SAPS' contention is that in the light of the misconduct in question having involved a violation of its various Codes and National and Regional Instruments that specifically seeks to prevent escapes from police custody, a final written warning as issued by Brigadier Jantjies was not the appropriate penalty in the circumstances, and thus ought to be reviewed and set aside.
- [3] At these proceedings, POPCRU abandoned its alternative remedy to intervene as *amicus curiae*. It agreed with SAPS that the decision of Brigadier Jantjies ought to be reviewed and set aside. POPCRU as per its Notice of Opposition and Counter-Applicant in the main application however contends that it will further seek an order that the disciplinary proceedings be commenced afresh in accordance with provisions of the Regulations; and that SAPS be required to conduct those proceedings in terms of clause 11 of the Regulations and all other disciplinary hearings that are identified by SAPS to be in terms of clause 9 of the Regulations.

The submissions:

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- (b) When making an order in terms of paragraph (a) , the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs.
- (3) Any person entitled to join as a party in any proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party and the court may make an order, including any order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.

[4] POPCRU in seeking leave to intervene contends that once granted the order sought, it will make new, useful and necessary submissions in the main application in the form of a counter-application based on the following;

- 4.1 It is entitled to be joined to the proceedings by virtue of the provisions of section 200 of the Labour Relations Act (LRA)², as it has many members employed by SAPS, and is concerned with the promotion and protection of the interests of those members within SAPS.
- 4.2 As a party to the collective agreement to which the regulations give effect, it has a direct and substantial interest in the main application, as its members are adversely affected by the impact of the summary procedure currently being used in serious disciplinary hearings falling within the scope of clause 9 of the Regulations.
- 4.3 SAPS subjected its members, including W/O Katoo, to a disciplinary enquiry in terms of an 'Expeditious Process' contemplated in Clause 9 of the Regulations for the South African Police Service (The Discipline Regulations)³.
- 4.4 The process adopted in terms of clause 9 of the Regulations was conducted in a manner which ignored the provisions of clause 11 of the same Regulations, and as such, the requirements and procedures in the latter clause were ignored, as presiding officers have interpreted clause 9 to permit a process which disregards the *audi alterem partem* rule to the detriment of employees and its members accused of serious misconduct.
- 4.5 The approach and interpretation of clause 9 by presiding officers threatened the vested rights of SAPS' employees and breached the regulations, which are the product of a collective agreement as well as statutory rights of accused employees.

² Act 66 of 1995 (as amended)

³ Regulation No 40389 of 1 November 2016 (Made under section 24 of the South African Police Service Act, 1995 Act No. 68 of 1994)

4.6 The interpretation accorded to clause 9 of the Regulations was such that it rides roughshod over the rights of accused employees provided for in clause 11 of the Regulations. In this regard, employees are simply advised verbally of the charges against them by presiding officers; copies of documents to be used in any hearings are not made available to employees in advance; no witnesses are called as any form of 'evidence' is merely presented to employees who are then expected to deal with the allegations; no representatives of SAPS or the accused employees are allowed; and the presiding officer makes a finding which is conveyed to employees.

4.7 In its counter-application, it will seek an order that SAPS and its chairpersons have interpreted and applied clause 9 to the exclusion of clause 11, and a judgment in this matter would have profound effect on the rights of Katoo and other officers throughout the country similarly affected, as their constitutional and statutory rights are violated by an incorrect interpretation of the regulations by SAPS

[5] In the light of the above, it was submitted that POPCRU by virtue of the provisions of Rule 22 of the Rules of this Court is entitled to be joined as it had a substantial interest in the subject matter of the main application, as its members are involved or where the subject matter of the proceedings affects its members generally.

[6] SAPS opposed the application to intervene on the grounds that;

6.1 POPCRU has no direct or substantial interest in the matter and has further failed to establish that it would make different submissions in assisting the Court to arrive at a proper and just outcome in the main application. It was submitted that POPCRU would simply traverse grounds already covered, and that leave to intervene may merely and unnecessarily extent the length of litigation.

6.2 POPCRU's application should be denied as the 'nuts and bolts' of both parties' contentions are that the expeditious process of the Regulations

do not imply that the traditional or required pre-dismissal procedures should be bypassed.

- 6.3 The provisions of section 200 of the LRA do not on their own establish a right to be joined to proceedings, and that it only grants a right to represent.

The legal framework and evaluation:

- [7] The principles applicable in instances a party seeks to intervene are trite as summarised by the Constitutional Court in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* as follows;

‘It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no

discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”⁴[Authorities and citations omitted]

[8] Having had regard to the above principles, I fail to appreciate the reason any conclusion can be reached that POPCRU does not have any substantial or direct interests in the main application before this Court. My reasoning in this regard is based on the following;

8.1 It is not in dispute in this case that POPCRU represents a large number of its members within SAPS, which invariably implies that it regularly represents them in disciplinary and other processes that take place in accordance with the Regulations. W/O Katoo is one such member, and irrespective of the merits of the dispute, it is common cause that the sanction issued to him followed upon a process involving the application of the Regulations.

8.2 Inasmuch as both parties agree that the sanction imposed on W/O Katoo ought to be reviewed, set aside and that the matter be remitted for a hearing *de novo*, different grounds are nonetheless advanced as to the reason why this should be so. SAPS' contention is that the sanction was lenient in the light of the misconduct in question, whilst POPCRU's approach is that the manner with which such disciplinary proceedings are conducted under clause 9 of the Regulations, are not in sync with the provisions of clause 11 of the same regulations.

8.3 In applications for leave to intervene, it is trite that the applicant need not be overconcerned with the intrinsic merits of the dispute which can be fully canvassed in the main application, and that the party seeking leave to intervene can rely on allegations which, if proved in the main application, would entitle it to succeed.⁵ In this case, POPCRU has made such allegations insofar as it contends that the provisions of the Regulations are not properly applied to the detriment of its members.

⁴ 2017 (8) BCLR 1053 (CC) at paras 9 – 11. See also *Snyders v De Jager (joinder)* 2017 (5) BCLR 604 (CC) at para 9

⁵ See *Ex parte Moosa: In re Hassim v Harrop-Allin* 1974 (4) SA 412 (T) at 416F; *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 766 (TK)

8.4 In the light of the divergent reasons advanced by the parties, it cannot therefore be correct to suggest that POPCRU, once granted leave to intervene, would simply rehash SAPS' arguments as to the reason that the disciplinary matter involving W/O Katoo should be remitted to SAPS for a re-hearing. I did not understand the purpose of POPCRU's counter-application to be to simply rehash SAPS' arguments.

8.5 POPCRU further relied on the provisions of section 200 of the LRA⁶ in seeking to intervene, as it acts on behalf of its members, and also in its own interests. SAPS however contends that these provisions on their own, do not entitle POPCRU to be a co-respondent in legal proceedings. Again, it is not in dispute that POPCRU is a party to the collective agreement to which the Regulations give expression, and that the application and/or interpretation of those Regulations are at the core of the main dispute. How it can be said that POPCRU does not have a substantial interests in the judgment of this Court particularly in regards to the interpretation of those Regulations when that interpretation would directly affect it as a union, and its members is not clear.

8.6 It is further my view that to deny POPCRU leave to intervene would not be in the interests of justice nor legal certainty. This is so in that to the extent that the Regulations are the basis of day to day discipline that takes place at the workplace, and where it (POPCRU) is regularly called upon to defend its members, this Court will benefit from its submissions in coming to an informed decision. As already indicated,

⁶ **200. Representation of employees or employees**

(1) A registered *trade union* or registered *employers' organisation* 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 interest of any of its members.

(2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings.

whether POPCRU's submissions would have merit or not is not for this court to determine.

[9] In the light of the above, it is concluded that POPCRU has satisfied the requirements for, and made out a case for leave to intervene. I have further had regard to the issue of costs, and it is my view that such an award should be in the cause.

[10] Accordingly, the following order is made;

Order:

1. POPCRU is granted leave to intervene in the main application as the third respondent.
2. POPCRU is granted leave to file answering affidavits in the main application, and to do so within 30 (Thirty days) from the date of this order.
3. The Applicant, to the extent that it so desires, may file replying affidavits within 14 days from the service of the answering.
4. Heads of Argument are to be filed and served in accordance with the provisions of Paragraph 11.6.2 of this Court's Practice Manual
5. The costs of this application are to be determined in the main application.

Edwin Tlhotlhamajane

Judge of the Labour Court of South Africa

APPEARANCES:

For the Intervening Party:

Beyleveld SC, instructed by
Wheeldon Rushmere & Cole INC

For the Applicant:

M Thys, instructed by State
Attorney, Port Elizabeth

LABOUR COURT