



CONSTITUTIONAL COURT OF SOUTH AFRICA

Department of Home Affairs v Public Servants Association and Others

CCT 148/16

Date of hearing: 28 February 2017

Date of judgment: 4 May 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 4 May 2017, at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal concerning the scope of jurisdiction of the General Public Service Bargaining Council (Bargaining Council) over the subject matter of disputes that may result in the exercise of the right to strike, which is constitutionally protected.

On 6 February 2015, the Department of Home Affairs (DHA) proposed changes to the working hour schedule of its employees (new model). The DHA adopted the position that the new model would be put forth for consultation without any need for collective bargaining. The respondent unions were then afforded an opportunity to consult with their members before responding, and subsequently opposed the new model, claiming that it should be subject to collective bargaining. Pursuant to section 134 of the Labour Relations Act 66 of 1995 (LRA), the unions referred a dispute of mutual interest to the Bargaining Council for conciliation. The DHA raised a preliminary challenge to the jurisdiction of the Bargaining Council on the basis that the dispute did not involve a matter of mutual interest in terms of section 64(1) of the LRA. The Commissioner upheld this challenge and found that the employer had the prerogative to regulate working hours and shift changes, and since the matter was not one of mutual interest, the Bargaining Council consequently lacked jurisdiction in the matter.

The unions applied to the Labour Court to review and set aside the Commissioner's ruling regarding jurisdiction. The Public Servants Association (PSA) submitted that the jurisdictional ruling of the Commissioner was incorrect in interpreting the term "mutual interest" narrowly, on the following basis: the term "mutual interest" is not defined in the LRA, but appears in the definition of a strike, in the context of limiting the right to strike to matters of mutual interest. This limits the constitutionally protected right to strike, and as such the term "mutual interest" should be given the widest

possible meaning in order not to unduly limit this right. The Labour Court set aside the jurisdictional ruling, and ordered that the dispute of mutual interest be enrolled for conciliation. Leave to appeal to the Labour Appeal Court was denied by both the Labour Court and Labour Appeal Court.

In this Court, the DHA argued that the Labour Court should have construed the issue before the Bargaining Council as whether the dispute was either a dispute of right or a dispute of mutual interest. The DHA contended that all interest disputes (about the creation of new rights) and rights disputes (about the interpretation and application of existing rights) are matters of mutual interest, and that any substantive limitation on the right to strike should be assessed only after the Bargaining Council had firstly determined its own jurisdiction over the matter.

The unions contended that the granting of leave to appeal should be refused because there are, in their view, no prospects of success when taking into account that the DHA had conceded that the matter was one of mutual interest. The unions also argued that the DHA had created a “new” case before this Court, which also lacked reasonable prospects of success. The new issue was whether any strike action contemplated in respect of the new model dispute would be unprotected by virtue of the provisions of section 65(1) of the LRA, which provides that employees may not participate in a strike if the issue in dispute can be referred to arbitration or the Labour Court. The unions submitted that there was no basis for this argument, and also sought a punitive cost order against the DHA.

In a unanimous judgment by Froneman J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mojapelo AJ, Mhlantla J, Pretorius AJ and Zondo J concurring) the Court dismissed the application for leave to appeal. The Court held that invoking the right to strike may relate to a matter of mutual interest and therefore confers a right to recourse to arbitration or the Labour Court under section 65(1) (c) of the LRA, however this determination is separate and does not define the jurisdiction of a conciliator, nor prevent this conciliator from attempting to reconcile the dispute, or in failing to do so certify that this dispute remains unresolved.

The Court also dismissed the application submitted by the Department of Public Service and Administration for leave to intervene as a second applicant, on the basis that its explanation for late intervention was inadequate, its arguments were similar to those of the DHA, and evidence tendered did not comply with the Court’s rules.