IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J 106/2011

In the matter between:

RAM TRANSPORT (SA) PTY LTD	**Applicant**
and	
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	**First Respondent**
MOTOR TRANSPORT WORKERS UNION	**Second Respondent**
THE INDIVIDUALS LISTED IN ANNEXURE A	**Third to further Respondents**

JUDGMENT

VAN NIEKERK J

[1] On 26 January 2011 I granted an order in the following terms, after hearing argument in an application in which the applicant sought an interim order interdicting strike action by the third and further respondents and various acts of misconduct claimed to have been committed by certain of them:

> *1 The third and further respondents are interdicted and restrained from:*
>
> *1.1 intimidating non-striking employees;*
> *1.2 damaging the property of the applicant or non-striking employees;*
> *1.3 interfering in any way with the lawful conduct of the applicant's business operations.*
> *2. The application for condonation for the failure to comply with s*

68(2) is refused. In respect of the relief sought in prayer 2.1 of the Notice of Motion, the application is postponed to 28 January 2011 at 14h00.

3. *The respondents' may file supplementary affidavits by close of business on 27 January 2011 and the applicant may file a reply by Friday January 2011 at 12h00.*
4. *The costs of today are reserved.*

The first and third respondents did not oppose the relief concerned with acts of violence and other misconduct. Prayer 2 of the notice of motion seeks to interdict the strike on the basis that it is unprotected. The reason for the postponement was the applicant's failure to give 48 hours notice of the application as is required by s 68(2) and the absence of any factual basis to justify a relaxation of that requirement. Indeed, the papers were drafted as if s 68 (2) did not exist. The application to condone the non-compliance with the Act was moved ultimately from the Bar, but in circumstances where the founding affidavit made no direct reference to any of the grounds on which this court is entitled to condone a failure to give the required notice. The application was postponed both to cure the s 68 defect and to afford the first and third and further respondents the opportunity to file a more considered and substantive answering affidavit.

[2] Before the matter was called yesterday, the applicant filed a supplementary notice of motion in which it sought a rule nisi calling on the third and further respondents to show cause why they should not be held in contempt of the order granted on 26 January 2011. I shall return to this aspect of the dispute in due course.

[3] The background facts are a matter of common cause, but for two aspects that I will highlight. The applicant conducts business as a courier. The first and second respondents represent an undisclosed number of its employees. The first respondent is not a party to the dispute that is the subject of these proceedings.

On Friday 21 January 2011, the first respondent (the union) telefaxed a strike notice to the applicant, together with a copy of the referral of a dispute to the bargaining council. The referral was made in respect of a dispute concerning the unilateral change to terms and conditions of employment, "in that the employer changed the working hours." The referral is dated 9 December 2010. It is not disputed that this was the first occasion on which members of the applicant's management had sight of the referral. It is also not disputed that on enquiry to the bargaining council, it transpired that the council had no record of having received the dispute on 9 December 2010, the date on which the union claims that it telefaxed the referral to both the applicant and the bargaining council. On Tuesday 25 January 2011, the third to further respondents commenced the strike presaged by the notice. While there is some disagreement about whether the demands made of the applicant were confined to a dispute about hours of work, this is not material for present purposes, and I shall accept the union's version that the issue giving rise to the strike is a change to working hours.

[4] The applicant does not dispute that during December 2010, the working hours of those employees engaged on what is termed the '10/7 shift' were changed. Prior to the change, the employees worked from 10h00 to 19h00. To deal with an increase in the volume of work, the shift time was changed to start at 9h00, ending at 18h00. In other words, the affected employees were to work the same number of hours, the only difference being that the shift commenced one hour earlier and finished an hour earlier. The applicant contends that all of the affected employees (including the union's members) agreed to the change, which had the advantages that they would qualify for overtime and end the working day an hour earlier. The union contends that its members engaged on the shift did not agree to the change.

[5] The applicant raises two primary arguments in support of the relief sought. The first is that on a balance of probabilities, there was no proper referral of the dispute to the bargaining council. In this regard, the applicant points to the

undisputed fact that neither the applicant nor the bargaining council have any record of receipt of the referral, and to discrepancies in the status reports recording the transmission. In particular, the original status report appears to indicate that four pages were transmitted; a copy annexed to the founding appears to record that two pages were sent. Secondly, the applicant contends that there is no dispute between the parties since there was agreement on the change to working hours, and because the change to shift times in the present instance did not, in any event, constitute a unilateral change to conditions of employment. In this regard, the applicant relied on two submissions, the first being that the terms of the relevant contracts permitted a variation of shift times; the second being that, as a matter of law, the change did not amount to a unilateral variation of the relevant contracts. In the absence of any unilateral change to a term and ocndition of employment, and that being the nature of the dispute that the union claims was referred to the bargaining council, the strike is unprotected.

[6] I deal with the last point first. It is not disputed that the change to the shift times was that described above, i.e. the new times did not impose any increase in working hours, the only change was to commence the shift an hour earlier than was previously the case. That being so, it seems to me that the principles recently referred to by Steenkamp J in *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* (unreported, case J 2276/10, 10 December 2010), are relevant. In that case, the court reviewed the authorities relevant to changes to work practices on the one hand and terms and conditions of employment on the other, and how to discern the difference between the two. In *SA Police Union v National Commissioner of the SA Police Service* (2005) 26 ILJ 2403 (LC), Murphy AJ (as he then was) stated:

> *In short, it was not a term of the contract of employment that employees working 12 hour shifts would always be entitled to do so. Without express, implied or tacit contractual rights to such effect, the employees do not*

have a vested right to preserve their working times unchanged for all time. The alteration of shifts does not result in the employees being required to perform a different job thereby entitling them to claim a material breach or alteration in the supposition of the contract. The change in timing does not amount to a change in the nature of the job. The shift system was accordingly a work practice not a term of employment (at 2427 H-J).

This distinction has its roots in the principle that employees do not have a vested right to preserve their conditions of employment completely unchanged from the moment they are employed. In *A Mauchle (Pty) Ltd t/a Precsion Tools v NUMSA* [1995] 4 BLLR 11 (LAC) the court distinguished between 'terms of employment' on the one hand and 'work practices' on the other, the latter being subject to the employer's prerogative and its introduction not constituting a unilateral change.

[7] On this basis, in the present instance, there is no term of any collective agreement or contract of employment that accords the third to further respondents a vested right to specific shift times. Their rights have not been affected by the applicant's conduct, and the applicant was entitled as a matter of law to introduce what amounted to a new work practice. There was therefore no unilateral change to terms and conditions of employment. For this reason, the strike called by the union is unprotected. This is not an uncontested position – Grogan has suggested that while it may e correct that a change in shift times constitutes a work practice rather than a change to terms of employment, there is nothing in the Act that precludes employees from striking in respect of a change in a work practice (see *Labour Law Sibergramme* 1/2011 at p 6). It is not necessary for me to make any finding on this point since, in any event, the terms of the contracts of employment of the third to further respondents acknowledge the necessity for flexible working hours, and record their express agreement to the requirement that working hours should be 'reasonably flexible'. It seems to me that an adjustment in the starting time of a shift by an hour is not by any stretch of the imagination unreasonable, particularly in the absence of any

particular complaints by the union about any inconvenience or other prejudice that its members might suffer consequent on the change. I fully appreciate that a copy of the contract of employment was introduced in the replying affidavit, but given the nature of the proceedings and in the absence to any challenge to the terms of the contract, the court is entitled to have regard to it. In short - the change in shift times is contemplated and permitted by the contract of employment. In the absence of any unilateral change to a term and condition of employment, the strike called by the union is unprotected.

[8] In view of my finding on the existence or otherwise of a unilateral change to terms and conditions of employment, it is not necessary for me to consider the applicant's submissions in relation to the validity of the referral to the bargaining council.

[9] Turning next to the supplementary notice of motion, Mr Naidoo, who appeared for the first and third and further respondents, stated that he had no instructions to oppose the relief sought. The affidavits filed in support of the rule nisi that the applicant seeks, identifies only a person named 'Jabulani' as having physically threatened an employee not participating in the strike. (There is an averment that a Dumisani Twala called another employee a 'sell-out', but this does not on the face it constitute a breach of the order). In the absence of any further particulars about the identity of 'Jabulani', I am reluctant to make the order sought. Regrettably, the detailed incidents of violence and damage top property perpetrated by unidentified persons that are recorded in the papers are representative of a blight that has come to characterise the South African industrial relations landscape. This court is always open to those who seek the protection of the right to strike. But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose.

[10] In view of the basis for my finding, little purpose would be served in granting the interim relief sought by the applicant. The applicant has established a clear right to the relief it seeks and a final order is appropriate. Finally, in relation to costs, there is an ongoing relationship between the applicant and the union, however fraught it might be at present. Given that consideration, and the fact that the applicant has only partially succeeded in the relief that it has sought (both on 26 and 28 January 2011) it seems fair to me that there should be no order as to costs.

For these reasons, I make the following order:

1. The strike action embarked upon by the third to further respondents, at the instance of the first respondent, is unprotected and unlawful.
2. The respondents are interdicted from participating in the unprotected strike.
3. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 28 January 2011
Date of judgment: 29 January 2011.
Appearances
For the applicant: Adv A Redding SC, with Adv G Fourie, instructed by Werksmans Inc
For the respondent: Mr K Naidoo, instructed by Cheadle Thompson and Haysom Inc.