

Reportable

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**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

CASE NO J253/11

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

1ST APPLICANT

**JOHANNESBURG METROPOLITAN BUS SERVICES
(PTY) LTD**

2ND APPLICANT

and

**SOUTH AFRICAN MUNICIPAL WORKERS UNION
THE APPLICANTS' EMPLOYEES WHO ARE
MEMBERS OF THE FIRST RESPONDENT**

1ST RESPONDENT

**2ND AND FURTHER
RESPONDENTS**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant seeks a rule *nisi* calling on the respondents to show cause why

an order should not be granted to the effect that strike action by the second and further respondents (all employees of the second respondent) that commenced on 9 February 2011 is unprotected and unlawful, and that secondary strike action by employees of the first applicant, scheduled to commence on 18 February 2011, is similarly unprotected and unlawful. In the interim, the applicant seeks an order restraining the respondents from participating in the primary and the secondary strike. The application was argued as a matter of urgency yesterday afternoon, and my reasons for judgment are necessarily brief.

Factual background

[2] The first respondent (the union) is recognised by both applicants as representative of the majority of their employees. On 30 September 2010, the second applicant informed the union that it intended to implement a revised shift system, with effect from 15 November 2010. On 22 November 2010, the union referred a request for conciliation to the bargaining council.

[3] On the same date, this court granted an interim order interdicting the second respondent from embarking on strike action. The rule was confirmed on 10 December 2010. Steenkamp J delivered a written judgement (unreported, case number J2276/10) in which he considered whether the implementation of the revised shift schedule on 6 December 2010 constituted a unilateral change to bus drivers' terms and conditions of employment. The court concluded as follows

The changes implemented by Metrobus comprise no more than a change in work practice. It does not amount to a unilateral change in the bus drivers' terms and conditions of employment. Therefore, the trade unions representing the drivers do not have the right to strike over a unilateral change to terms and conditions of employment in terms of section 64 (4) of the LRA.

[4] On 7 January 2011, the union again made a referral to the bargaining council in respect of the change in shift times. In paragraph 3 of the referral, the union described the nature of the dispute as one concerning a matter of mutual interest and summarised the defects of the dispute as follows:

The employer implemented the new shift system on 6 December. The union

demands that (a) the shift system before 6 December be immediately reinstated; (b) the employer agrees, in writing, that it will not change the shift system in future without the unions agreement; (c) that the employer reinstate the task team – which will meet annually to negotiate on whether changes to the shift system on this is an undesirable; (d) the employer agrees that the picking of shifts, based on seniority, will be permitted every time the shift system has been altered were amended; (e.g.) drivers will only be obliged to work on the shift they have picked (provided that the shift has been picked in accordance with seniority).

[5] On 14 January 2011, the second applicant addressed a letter to the union inviting the union to a pre-conciliation meeting. In the letter, the second applicant stated that ‘in view of the pending conciliation (date still to be determined) with regard to the dispute relating to the rescheduling and new shift system, Metrobus Management wishes to extend an invite to meet with SAMWU representatives at the level of pre-conciliation meeting (sic)’. The proposed meeting took place on 18 January 2011. At this meeting, the second applicant expressed the view that the union’s referral to the bargaining council was premature, given that a dispute had not yet arisen between the parties.

[6] Despite the second applicant’s objection, the bargaining council appointed a commissioner to preside at the conciliation meeting. The representative of the second applicant raised an objection to the effect that the bargaining council did not have jurisdiction to consider the referral to conciliation. The objection was in essence that the referral of the alleged dispute to the bargaining council by the union was premature and invalid, that there was no issue in dispute capable of being referred to the bargaining council, and that the allegation made by the union in its referral that the parties had had discussions which had failed to yield any agreement was factually incorrect. After being addressed on the points *in limine*, the commissioner postponed the meeting. On 7 February 2011, the commissioner issued what is termed a ‘jurisdictional ruling’. The salient part of the ruling reads as follows:

It appears that after receipt of the ruling from the Labour Court, the parties never met to discuss the issues which could lead to the declaration of a dispute in case they deadlocked. The applicant claimed that there was a

meeting, however such could not be proved.

I acknowledge the fact that the application was not brought in according to procedures, it would be irresponsible not to attend to it as Commissioners have a duty to check if they have jurisdiction on matters that they have to preside over. I share the same view with the respondent, that the referral was premature. The starting point should be that the parties should be freshly brought before the employer, only when the parties deadlock, a referral can then be made. Continuation with a matter that has been ruled over by the Labour Court would constitute an irregularity, and therefore cannot be limited. Therefore I make the following ruling:

4. Ruling

Until such time that a new right would have been created, the Council does not have jurisdiction to deal with the matter at present.

The reasoning supporting the commissioner's conclusion borders on the incomprehensible, but be that as it may, the ruling is relevant to these proceedings only to the extent that the applicant contends that its existence renders the strike unprotected.

The merits

[7] The applicants contend that the strike is unprotected because:

- a. there is no dispute between the parties;
- b. the bargaining council has ruled that it has no jurisdiction to entertain the referral made by the union; and
- c. this court has already determined that the dispute between the parties is a dispute of right and not a dispute of interest (the *res judicata* point).

I deal with each of these contentions below.

The existence of a dispute

[8] The applicants submit that the judgment of Steenkamp J effectively categorised the issue in dispute as a dispute of right rather than a dispute of interest.

In the second referral form, the union described the nature of the dispute as one concerning a matter of mutual interest. This, the applicants contend, it cannot do, given the finding by this court that the changes to the shift system were within the contemplation of what the parties agreed in a collective agreement between them. Further, the applicants contend that if any one of the parties is in dispute with the other, the dispute should be stated clearly and not clothed in such a way that, objectively viewed, the other party does not know that it is in dispute. In this sense, a dispute arises only when the parties in fact expressly different views and assume different positions in relation to a specific factual complex. The mere fact that one party may be unhappy about a particular state of affairs does not give rise to a dispute (see *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA & others* (2007) 28 ILJ 642 (LC), and also the statement by Zondo AJ (as he then was) in *SACCAWU v Edgars Stores Ltd & another* (1997) 18 ILJ 1064 (LC) to the effect that for a dispute to exist, it must 'postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions'.

[9] Support for this view is to be found in *City of Johannesburg Metro Municipality v SAMWU & others* (case number J to 2236/07) in which Basson J, referring to the judgment in *Leoni Wiring Systems*, said the following:

I am of the view that, although it is not a prerequisite that one of the disputing parties must formally or even expressly declare a dispute (as was the case under the previous Labour Relations Act), at the very least the issue referred to conciliation must be an issue over which the parties have reached a "stalemate" in the sense that the employer must have had the opportunity to reject or accept a demand put forward by the employees or their representative. To hold otherwise may, in my view, give rise to a situation where employees may refer the issue to conciliation without first having afforded the employer an opportunity to formulate a negative response or to reject a demand or grievance put forward by the employees or their representative. At the very least the employer should know what the dispute is about what is required to resolve the demand or dispute (at paragraph [18] of the judgment)

[10] To the extent that the terms of this judgment require, separately from any requirement established by the LRA, the articulation of a demand and its rejection prior to either party invoking the statutory dispute resolution mechanisms, this is not an interpretation that is supported by the wording of the Act. The basic substantive requirements for a protected strike are that there must be a grievance or a dispute in respect of any matter of mutual interest between employer and employee. These requirements can be gleaned from the definition of a 'strike' in s 213 of the LRA, which contemplates a concerted refusal to work 'for the purpose of **remedying a grievance** or **resolving a dispute** in respect of any matter of mutual interest...' (own emphasis). These proceedings are not concerned with any procedural defects in the form of a failure to comply with the provisions of s 64 of the LRA. The only issue for determination therefore is whether there is a grievance or dispute in relation to a matter of mutual interest between the parties.

[11] The grievance in the present matter clearly concerns a matter of mutual interest – to the extent that the applicants appear to contest otherwise, they confuse the concepts of a 'matter of mutual interest' and a 'dispute of interest'.¹ A matter of mutual interest, broadly speaking, is any matter concerning employment (see *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC)). Steenkamp J did not find that the dispute before him did not concern a matter of mutual interest. (I deal further with the judgment below in the discussion on the *res judicata* point.)

[12] The underlying premise of the applicants' contention appears to be that strikes are pegged by 'demands' and 'deadlocks' in the sense in which these terms were employed under the 1956 Labour Relations Act. But as Zondo JP pointed out in *TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others* (2006) 27 ILJ 1483 (LAC):

[There are] three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute (at paragraph [27] of the judgment).

There are no bright lights between these categories. Sometimes the word 'demand' is used in a generic sense to refer to all three categories of strikes; sometimes it is

¹ See Van Niekerk et al., *Law@work*, Lexis Nexis, Durban, 2008, at p 400

used to refer to demands for higher wages. But these are not statutorily sanctioned requirements. The LRA refers only to a 'grievance' or a 'dispute'. There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council.

[13] In the present instance, the grievance in issue appears in the union's summary of its demands. It can be summarised as concerning the following:

- a. The reinstatement of the shift system which applied before 6 December 2010;
- b. Employer to commit that there will be no changes in the shift system without the consent of the union;
- c. the reinstatement of the task team, responsible for the negotiation of the shift system;
- d. employees to be allowed to choose shifts freely based on seniority;
- e. employees only to work on those shifts which have been selected.

[14] Even if I am wrong in coming to this conclusion, the definition of 'dispute' in s 213 includes 'an alleged dispute'. For the purposes of the definition of a strike, therefore, all that need be established as an objective fact is the allegation of a dispute, not its existence. This the union has done.

The referral to conciliation and the commissioner's jurisdictional ruling

[15] The referral to conciliation was made on 7 January 2011. In so far as the applicant contends that the jurisdictional ruling made by the commissioner renders the strike unprotected, while it may be correct that the commissioner found that the bargaining council had no jurisdiction to entertain the referral, the applicants' submissions overlook the fact that it is not necessary under the LRA for a conciliation hearing actually to take place before a strike can be protected. In terms of section 64 (1) (a) of the LRA, it is sufficient if 30 days have elapsed since the referral of the dispute. In other words, the commissioner's ruling affected only the convening of the conciliation process; it says no more than that the bargaining council did not have the jurisdiction to conciliate the dispute. Since a conciliation meeting is not a

precondition for a strike to be protected (because it is sufficient that 30 days have elapsed after the date of the referral) the commissioner's ruling is not a relevant factor.

Res judicata

[16] The applicants submit that the strike must be interdicted because it is contrary to the rule regarding *res judicata*. In particular, it is contended that Steenkamp J confirmed the rule *nisi* on the basis that a change in a shift system was no more than a change in a work practice. This was permitted in terms of the applicable collective agreement, and hence there could not be a unilateral change to terms and conditions of employment. This submission is predicated on a misunderstanding of the approach taken by the union. The union contends that the strike is protected because there is a grievance that has been referred for conciliation, which remains unresolved. Steenkamp J was called on to decide only whether the changes in the shift system constituted a unilateral change to terms and conditions of employment for the purposes of section 64 (4) of the LRA. This much is apparent from the quote from the judgment in paragraph [3] above. Steenkamp J did not decide, nor was he required to decide, whether the union's members were entitled to demand the reinstatement of the old shift system.² Thus, for the purposes of the present application, it is immaterial whether the changes introduced by the second applicant amounted to changes in terms and conditions of employment.

[17] In short, there is manifestly a grievance or issue in dispute between the parties; the grievance patently concerns a matter of mutual interest; the grievance has been referred to conciliation and more than 30 days have elapsed since the date of the referral. There is accordingly no discernible barrier to the strike action that the union has undertaken and the secondary action that it intends to undertake.

² To the extent that Steenkamp J held that since the change was one to work practices the union was not entitled to call its members out on a protected strike, it is not clear to me why a union ought not to be entitled to call a strike over a change to a work practice. Even if a change to shift times is a change to a work practice rather than to terms and conditions of employment, there is nothing in the LRA that prevents workers from striking in respect of the change to the work practice, provided, of course, that the strike satisfies the procedural and substantive requirements established by sections 64 and 65 respectively (see Grogan *Labour Law Sibergramme* 1/2011 at p6).

[18] Finally, in relation to costs, neither party raised any basis why the general rule should not apply i.e. that costs should follow the result.

I accordingly make the following order:

1. The application is dismissed with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application 17 February 2011

Date of judgment 18 February 2011

Appearances

For the applicants: Adv N Cassim SC with Adv T Ratsheko, instructed by Werksmans Inc.

For the respondents: Adv Tembeka Ngcukaitobi, instructed by Cheadle, Thompson and Haysom Inc.