



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D1025-17

In the matter between:

UNITRANS PASSENGER (PTY) LTD t/a

GREYHOUND COUCHLINES

and

NUMSA and Members

SARPBAC

R MAHARAJ N.O.

Heard: 16 August 2017

Delivered: 21 August 2017

Applicant

First Respondent

Second Respondent

Third Respondent

JUDGMENT

WHITCHER J

- [1] In this matter the applicant seeks confirmation of a rule *nisi* in terms of which the first respondent's members were interdicted and restrained from striking over a dispute concerning an alleged unilateral change to their terms and

conditions of employment pending the final determination of the rule. The applicant contends that the change in issue constitutes a change to a work practice and accordingly the workers are not entitled to strike over the change.

- [2] The applicant operates a long-distance bus transport service for commuters which consists of various routes. The applicant employs bus drivers for purposes of operating these routes.
- [3] One such route has been running from Durban to Bloemfontein for a considerable time. For such a long distance route [a rota line] two drivers are scheduled, which, according to the applicant, is nothing other than a form of shift rostering.
- [4] The bus leaves Durban at 19h00 and arrives in Bloemfontein at approximately 05h30 the following morning. On arrival at Bloemfontein the drivers would hand over the service of the route to different drivers to drive the bus to Johannesburg via Kimberly. The drivers who drove from Durban to Bloemfontein would rest for the day and clock in again at about 18h30 in the evening, and at 20h00 commence to drive a bus from Bloemfontein to Durban.
- [5] In May 2017 the applicant gave notice and discussed with the union that, with effect from 29 May 2017, the Durban to Bloemfontein route will be extended to Johannesburg. For the two drivers from Durban this means that there is no longer a rest period in Bloemfontein; on arrival in Bloemfontein they have to offload and pick up new passengers; they have to continue to drive the bus to Johannesburg via Kimberley; the trip is extended by about 6 hours and they will be on the road for at least 18 hours straight.
- [6] The drivers have taken issue with these changes. In this regard, the union referred a dispute concerning alleged unilateral changes to terms and conditions of employment to the second respondent on 27 May 2017. The referral summarised the facts of the dispute as the employer “having extended

hours of work” and stated the result required as “worker must revert to the route and hours as per the known norm”.

[7] The applicant contends that the rest period in Bloemfontein was a work practice and not a term and condition of employment. Moreover, the extension of the trip by about 6 hours merely means that the average weekly working hours has increased from 39.75 to 42.75. This does not constitute a change to conditions of employment because it is common cause that the drivers have always been contractually obliged to work 45 hours per week and are paid for 45 hours per week. Furthermore, the fact that the trip takes at least 18 hours does not affect their hours of work or rest periods because there are two drivers - while one drives, the other one can sleep in a private sleeping compartment on the bus. Finally, the latest main agreement includes a R400 per month allowance for drivers due to spread-overs and the nature of hours and shifts worked by long distance bus drivers.

[8] It is common cause that the terms and conditions of employment of the drivers are regulated by an Industry Main Agreement. The relevant terms of the Agreement provide as follows:

(a) Ordinary hours of work includes all periods during which the employee is obliged to remain at his post in readiness to commence or proceed with his work and all time spent by a bus driver on work connected with the bus or the passengers, but does not include any meal intervals, sleep-over period or *any time for which a subsistence allowance is payable to an employee*, if during such period, the employee does no work other than remaining in charge of the vehicle.

(b) Spread-over means the period in any day from the time an employee commences work until he ceases work for that day, and, in the case of bus drivers, *the ordinary hours of work*, including the meal intervals where applicable and all overtime, shall on *any day* be completed within a spread-over of 14 hours.

[9] Three important factors emerge from the above. The ordinary hours of work does not exclude the time a driver may spend resting in “the private

compartment” while the other one drives. This makes sense since the drivers cannot be said to be off duty during these periods – they are still technically at work “in readiness to commence or proceed with [their] work” or assist the other driver if necessary. Secondly, the ‘spread-over’ may not exceed 14 hours. Thirdly, no proper evidence of an applicable subsistence allowance was adduced in this application.

- [10] To my mind, the changes effected by the applicant constitute a contravention of the Main Agreement in that the spread-over now exceeds the 14 hour limit, and therefore the dispute concerns a compliance issue rather than a change to terms and conditions of employment as set out in the Main Agreement. The drivers’ terms and conditions of employment are regulated by the Main Agreement and thus remain unchanged.
- [11] In any event, even if my conclusions are wrong, the issue about whether the applicant’s conduct constitutes a change to the drivers’ terms and conditions of employment is academic and the workers will acquire the right to strike after they have given the applicant 48 hours’ notice of the commencement of the strike. I say this because the union has not relied on section 64 (4) only in order to assert its right to go on strike.
- [12] The union referred a dispute concerning alleged unilateral changes to terms and conditions of employment to the second respondent on 27 May 2017. The referral summarised the facts of the dispute as the employer “having extended hours of work” and stated the result required as “worker must revert to the route and hours as per the known norm”.
- [13] A conciliation meeting took place before the third respondent on 27 June 2017 and a certificate of outcome was issued on the day indicating that the matter remained unresolved.
- [14] There is a collective agreement between the parties which provides that at least 48 hours written notice of commencement of a strike may be given once a certificate has been issued and a cooling off period of 30 days from the date

of such certificate has expired. This application was triggered by the union informing the applicant that it intends to issue a strike notice in terms of this provision once the cooling off period has expired. The strike notice has not been issued as yet. The union is waiting for the finalisation of this application.

[15] The important point I make is that the union has followed and intends to continue to follow the pre-strike procedures set out in section 64(1) of the LRA; not section 64(4).

[16] Steenkamp J set out the position regarding strikes in terms of section 64(4) and 64(1) in *Intercape Ferreira Mainliner (Pty) Ltd v NUMSA and others*¹ as follows:

[12] This court dealt with the provisions of s 64(4) in *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU*.² It found that the changes implemented by the bus company in that case comprised no more than a change in work practices. It did not amount to a unilateral change in the bus drivers' terms and conditions of employment. Therefore, it held, the trade unions representing the drivers did not have the right to strike over a unilateral change to terms and conditions of employment in terms of section 64 (4).

[13] Discussing that judgment, Grogan³ commented:

"The finding that the shift change merely amounted to a change of work practice seems correct. But the court's conclusion that the strike was accordingly unprotected is debatable. Section 64 (4) merely confers on unions the right to demand that employers restored changed terms and conditions of employment for 30 days. Nothing in the LRA suggests that employees may not strike over a change in work practice, even if it does not amount to a change in terms and conditions of employment."

[14] Shortly thereafter, on 29 January 2011, Van Niekerk J held in *Ram Transport (Pty) Ltd v SATAWU*⁴ that, in that case, there was no unilateral change to

¹ (C179/15, dated 2 April 2015).

² (2011) 32 *ILJ* 1107 (LC); [2011] 3 *BLLR* 231 (LC).

³ John Grogan, *Labour Law Sibergramme* 1/2011 (13 January 2011) at 6.

⁴ (2011) 32 *ILJ* 1722 (LC).

terms and conditions of employment. “For this reason, the strike called by the union is unprotected.” With reference to the comments by Grogan, though, he noted that this is not an uncontested position.

- [15] Some two weeks later, Van Niekerk J again dealt with Metrobus and SAMWU.⁵ Subsequent to this court’s earlier judgment relating to section 64 (4), the union had referred a new dispute to the bargaining council describing the nature of the dispute as one concerning a matter of mutual interest. Holding that it could call its members out on strike on that basis, Van Niekerk J remarked (referring to Grogan in a footnote):

“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.”

- [16] And most recently, Gush J pronounced in *Apollo Tyres*:⁶

“[T]he second and further respondents may not rely on the provisions of section 64 (4) of the LRA and are required to tender their services in accordance with new shift patterns. This does not, however, preclude the respondents pursuing the dispute regarding the imposition of the new shift patterns as a dispute of interest in accordance with the provisions of section 64 (1) of the LRA.”

- [17] In summary, the position is this: in terms of section 64 (4), the union may call its members out on strike without further ado, and without following the procedures set out in section 64 (1), if the employer unilaterally changes workers’ terms and conditions of employment. If those changes merely amounted to changes in work practice, it cannot do so. However, nothing precludes the union from declaring a dispute over a matter of mutual interest and calling its members out on strike after having followed the prescribed

⁵ *City of Johannesburg Metropolitan Municipality v SAMWU* [2011] 7 BLLR 663 (LC) para 16.

⁶ *Apollo Tyres South Africa (Pty) Ltd v NUMSA* [2012] 6 BLLR 544 (LC) paras 31-32.

procedures in section 64 (1) and adhering to the time periods prescribed in that subsection.⁷

[18] In this case, the union relies on section 64 (4) only in order to assert its right to go on strike immediately. It is therefore important to decide whether Intercap has indeed unilaterally changed the drivers' terms and conditions of employment.

[17] What Steenkamp J was referring to paragraph 18 of his judgment was the fact that the union in the matter before him had argued that it need not follow the steps set out in section 64(1) in order to embark on a protected strike, that is, either waiting for a certificate stating that the dispute remains unresolved after conciliation, or for a period of 30 days; and then giving 48 hours' notice of the commencement of the strike.

[18] In this case, the union has followed the prescribed pre-strike procedures set out in section 64(1) and has adhered to the time periods prescribed in that subsection. It has moreover adhered to the procedures set out in the collective agreement. And it has indicated to the applicant that it intends to give the applicant 48 hours' notice of the commencement of the strike.

[19] The union members have thus elected to rely on the pre-strike procedures set out in section 64(1) to go on strike. Moreover the matter does concern a matter of mutual interest.

[20] By following the procedures prescribed in section 64(1) and the collective agreement, the union's members will acquire the right to strike if they give the applicant 48 hours' notice of the commencement of the strike.

Order

[21] The rule is discharged with costs.

⁷ See also the discussion in *Imperial Group (Pty) Ltd v SATAWU* (2014) 35 ILJ 3162 (LC) paras 16-21.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: F van der Merwe, instructed by Hana Geldmacher Attorneys

For Respondents: Harkoo Brijlal and Reddy

Labour Court