**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: J 1174 / 2013

In the matter between:

**UNITRANS SUPPLY CHAIN SOLUTION (PTY) LTD** **Applicant**

and

**SATAWU** **First Respondent**

**INDIVIDUAL RESPONDENTS** **Second to Further Respondents**

**Heard:** **26 July 2013**

**Delivered:** **13 August 2013**

**Summary:** **Strike – whether protected or unprotected – requirements relating to the issue in dispute – unilateral change of employment conditions**

**Strike – issue in dispute – distinction between employment condition and work practice**

**Strike – Section 64(4) – right to strike interim measure – expires on conciliation having been concluded**

**Interdict – clear right shown – rule nisi confirmed**

---

**JUDGMENT**

---

SNYMAN, AJ

Introduction

[1] This matter came before me as a return date on a rule *nisi* granted on 4 June 2013 in respect of an urgent application brought by the applicant in terms of which the applicant sought to have a proposed strike of the respondents declared to be unprotected and sought to interdict the respondent from embarking upon such strike action. *Inter alia* in terms of the rule nisi issued, and of relevance to this judgment, the proposed strike of the individual respondents was declared to be unprotected and the individual respondents were interdicted and restrained from embarking upon such proposed strike action.

[2] On 26 July 2013, I confirmed the *rule nisi* with no order as to costs, with written judgment to be handed down later. This judgment is now handed down pursuant to the order I granted on 26 July 2013.

Background facts

[3] The applicant is the supplier of logistics transport services. The applicant supplies such services to a number of customers, and of relevance to this case, a customer called Air Liquide. What the applicant in fact does for Air Liquide is to conduct a continuous delivery of bulk and cylinder cryogenic liquid gases for and on behalf of Air Liquid, to private and government hospitals nationally.

[4] Given the nature of the products transported by the applicant for and on behalf of Air Liquide, there is little room for disruption and the failure to properly and timeously deliver these products actually places lives at risk.

[5] The applicant at all relevant times prior to when this dispute arose had a service agreement in place with Air Liquide in terms of which the applicant provided its services to Air Liquide. This service agreement then came up for renewal and the applicant was compelled to renegotiate its terms with Air Liquide. The applicant was fortunately successful in this renegotiation with Air Liquide, and renewed the service agreement, but this was subject to some additional service requirements imposed by Air Liquide.

[6] As part of its normal operating process in place even under the prior service agreement, the applicant had a process where the drivers and crew employed by the applicant and conducting the actual transport of the Air Liquide products were debriefed. This required the completion of specific and prescribed questionnaires. As part of the additional service requirements imposed by Air Liquide, the applicant then sought to upgrade and refine these debriefing questionnaires. In essence, all that was changed was one of the questions on the form presented to the drivers, and the addition of a question on the form provided to the crew. Nothing else was changed.

[7] The respondents contended that these changes to the forms referred to above constituted a unilateral change to the employment conditions of the individual respondents. On 18 February 2013, the first respondent referred a dispute to the bargaining council (the road freight bargaining council having jurisdiction in this matter) concerning a unilateral change to terms and conditions of employment of the individual respondents. The applicant raised an issue that the council did not have jurisdiction to entertain the matter because it concerned a work practice and not a term and conditions of employment, but in a ruling dated 16 April 2013, the council determined that it had jurisdiction to conciliate the matter. The dispute remained unresolved and on 27 May 2013, the council issues a certificate of failure to settle confirming the matter was unresolved and recording that strike action was competent. The certificate also recorded that the issue in dispute was a Section 64(4) unilateral change to employment conditions dispute.

[8] On 31 May 2013, the first respondent then issued notice as contemplated by Section 64(1) to the applicant, recording the intention of the respondents to embark on strike action in terms of Section 64(4) of the LRA. It is this strike notification that then gave rise to the applicant's interdict application that came before Basson J on 4 June 2013 and which then led to the issue of the *rule nisi* with return date of 26 July 2013, being the matter now before me.

<u>The merits of the application</u>

[9] It is the duty of the Court to determine the true issue in dispute between the parties. In *Coin Security Group (Pty) Ltd v Adams and Others*[1] the Court said: 'It is the court's duty to ascertain the true or real issue in dispute; (*Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building Workers Union and others (2)* (1997) 18 ILJ 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and others*

[1] (2000) 21 ILJ 924 (LAC) at para 16.

*(1)* (1998) 19 ILJ 260 (LAC)). In conducting that enquiry a court looks at the substance of the dispute and not the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is not necessarily conclusive (*Ceramic* at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute'.

[10] In determining what exactly must be considered when establishing the true or real issue in dispute, the Court in *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others*[2]:

> 'The purpose of the concerted refusal to work must be determined in the light of all the conduct of the respondents. This includes what the respondents wrote in the referral of the dispute to conciliation and in the strike notice where these can shed light on such purpose. In the form used for the referral of the dispute to conciliation there is a space where the form required the respondents to state what they desired as an outcome of the conciliation process. ….
>
> What is said in the strike notice is particularly important because it will probably reflect the views of the union or the strikers at the time that they were notifying the employer of the commencement of their strike ….'

[11] I also refer to *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others*[3] where the Court held: 'The issue in dispute in relation to a strike (in these proceedings, the demands made by the union) is to be ascertained from the relevant facts. These include the referral form, any relevant correspondence, the negotiations between the parties and the affidavits filed in this court'. I finally refer to *SATAWU v Coin Reaction*[4], where the Court held that the real or true dispute should be determined with reference to all the relevant facts 'including the referral form to conciliation, the correspondence immediately before and after conciliation, the negotiations and discussions

[2] (2006) 27 ILJ 1483 (LAC) paras 29 and 31
[3] (2009) 30 ILJ 2064 (LC) 2069G-H.
[4] (2005) 26 ILJ 1507 (LC) at 1512D

which took place at the conciliation and the content of the advisory award and affidavits filed with this court'.

[12] Applying the above principles, the issue in dispute in this matter in the end is a simple one. From the referral documents and the correspondence and the certificate of failure to settle itself, it is clear that the alleged unilateral change to conditions of employment concerns the proposed new briefing and debriefing process and the changes made to the questionnaires referred to above. That is all that is in issue. In fact, the issue can best be described with reference to the respondents' answering affidavit, where it is recorded that the van assistants were not required to do a debriefing and now have to, and there were additional briefing and debriefing issues allocated to the drivers. According to the respondents, these are not work practices but "duties", and thus conditions of employment. The crisp issue thus is – does the change to the briefing and debriefing processes of drivers and van assistants by the applicant constitute a unilateral change to the conditions of employment of such employees?

[13] It is also clear that the respondents have thus pinned their strike squarely on the issue of an alleged unilateral change of employment conditions and the application, as a result, of the provisions of Section 64(4) of the LRA.[5] Therefore, the first question is whether the conduct of the employer as set out above in fact constitutes a unilateral change of employment conditions. If it does not, then that is the end of the enquiry, as the right to strike simply does not accrue to the respondents. The second issue is whether, even if the dispute can be seen as one of a unilateral change of employment conditions, whether the right to strike has not lapsed by virtue of the

[5] Section 64(4) reads: 'Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection (1) *(a)* may, in the referral, and for the period referred to in subsection (1) *(a)*- *(a)* require the employer not to implement unilaterally the change to terms and conditions of employment; or *(b)* if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.'

interim nature of the right as contemplated by Section 64(4). Both these issues will be addressed hereunder.

[14] Dealing then with the first question, namely whether or not a unilateral change to employment conditions in fact exists in this case, reference is made to *Cape Clothing Association v SA Clothing and Textile Workers Union and Another*[6] where the Court held:

> '…. To invoke the remedy established by s 64, it is necessary to establish both an existing term and condition of employment and the fact of a variation of that term and condition by the employer, in circumstances where the employee has not consented to the variation. The easy examples are the unilateral change to hours of work or a shift system, or the unilateral implementation of an offer tabled by the employer during the bargaining process that has the effect of increasing employees' remuneration but not to the extent demanded by the union. Here, there is some overt act by the employer that constitutes the act of variation. That element is not present in this instance. The status quo relied on by the union is its interpretation of the main agreement and the 2011/2012 substantive agreement. That interpretation is contested terrain. It does not ordinarily amount to a unilateral change to employment conditions when a union claims that a collective agreement giving rise to those conditions provides for *x* while the employer claims that they provide for *y*. ….'

[15] Clearly, the respondents' mere contention that there had been a change in employment conditions is insufficient. The fact that the parties may have differing views, which is clearly the case kin this current matter, is also insufficient. There must be an actual act of variation of existing employment conditions by the employer (the applicant). In *Department of Community Safety: Western Cape Provincial Government v General Public Service Sectoral Bargaining Council and Others*[7] the Court said the following:

[6] (2012) 33 ILJ 1643 (LC) para 12
[7] (2011) 32 ILJ 890 (LC) para 54 – 55

> 'I agree with the applicant's submission that the point of departure should have been to establish whether the applicant was in law obliged to negotiate a collective agreement before changing the working times on a duty roster.
>
> Had the existing employees indeed had a contractual entitlement to only work fixed hours and at fixed times from Monday to Friday, a unilateral amendment to the duty roster could not have been implemented by the employer. Consent to a variation to terms and conditions would indeed have been required in those circumstances. As already pointed out, however, no such contractual entitlement existed in respect of the employees affected by the shift system.'

The issue of the existence of a unilateral change to conditions of employment is thus one of a contractual entitlement or right being infringed. The respondents would have to show that they have an actual and existing contractual entitlement or right to the issue alleged to have been unilaterally changed by the applicant.

[16] A further example of the issue as to what could constitute unilateral change to employment or not can be found in *Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers Union and Others*[8] where the Court held: 'In the case before me, SAMWU has not been able to point to any term contained in a collective agreement or in the bus drivers' contracts of employment that accords them a vested right to a specific shift schedule. They have vested rights with regard to maximum working hours, and the right to pick shifts according to seniority. These rights have not been changed or infringed. The change implemented by Metrobus comprises 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 s 64(4) of the LRA.' The issue as articulated in this judgment is that a change to a work practice of an employer would normally not constitute a change to terms and conditions of employment of employees. That was the principal case

advanced by the applicant, and that in my view, and for the reasons set out hereunder, this case has merit.

[17] The recent authority in *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others*[9] is also instructive, where the Court said the following:

> 'It also seems to me that, in the present context, the term 'marketing' was simply bandied about and loosely used in a manner which, in my view, did not actually entail the change in the work practice which the company had envisaged. On the facts, this scenario was not meant to refer to the formal business marketing profession. As I have said, it only entailed solicitation of work which Mr Van Jaarsveld was, after all, involved with. It clearly did not require of him to have had some special training 'in marketing' in order to be able to perform the job. In my view, the employer had the right to effect these changes in the work practice in order to adapt to the changing economic environment that was adversely affecting the operational requirements of the company. Therefore, a denial of flexibility in the interpretation of the terms and conditions of Mr Van Jaarsveld's unwritten employment contract would be unreasonable and absurd, as it would have the effect of frustrating the company's efforts towards its economic revival, an objective that was in the interest of both the company and all its employees, including Mr Van Jaarsveld.'

The effect of this judgment is to confirm, once again, that a change in work practice is as a matter of general principle not a change to conditions of employment. However, and further, the Court reiterated that employers are entitled to change work practices should economic and operational circumstances so dictate. That is exactly the case in the current matter now before me. The applicant has given a proper operational reason as to why it sought to change its

---

[8] (2011) 32 ILJ 1107 (LC) para 40 – 41
[9] (2013) 34 ILJ 1440 (LAC) para 40.

questionnaire, being the operational needs of its service contract with its customer, Air Liquide. The employer (the applicant) is entitled to adapt to the changing environment of its renegotiated service agreement, and this adapting would not constitute a unilateral change of employment conditions of the employees. This is precisely what happened in this case.

[18] The judgment in *National Union of Metalworkers of SA on behalf of its Members v Lumex Clipsal (Pty) Ltd*[10] dealt with a requirement of "doubling up" by employees on machines, and the Court held as follows::[11]I am also satisfied that, in the context of the analysis set out in the case authority to which I have referred, the 'doubling-up' requirement did not constitute a unilateral change to the terms and conditions of the employment contracts of the individuals concerned. It was one, in my view, which did not alter the nature of their work to such a degree that, as defined in *Cresswell*, it was no longer the work that the employees had agreed to perform under the terms of their contracts. Nor, finally, was the requirement unreasonable in the light of the reasons advanced by the respondent in its presentation of its proposed rationalization programme to its body of employees. As early as September 1997, what the company described as 'an unfortunate combination of ... facts and circumstances', had been comprehensively conveyed to the applicants and the commercial rationale dictating the necessity for the programme was at no time substantively or materially challenged.' The same approach was followed in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others*[12] which also concerned the issue of employees being required to work on two machines, and the Court said: 'On those facts it was not a term of the contracts of employment that the applicants would operate only one machine. A description of the work to be performed as that of "operator" should not, in my view, 'be construed inflexibly provided that the fundamental nature of the work to be performed is not altered' (Wallis Labour and Employment Law para 45 at 7-:19). I agree with the view expressed by the learned author at 7-23n9 that employees do not have a vested right to preserve their

---

[10] (2001) 22 ILJ 714 (LC)
[11] Id at para 25

working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner.' These same contentions, as set out in the above judgments, in my view, also directly apply to the current matter before me, and I agree with the reasoning in these judgments. To use the respondents' own phraseology, even to add additional 'duties' to the individual respondents relating to briefing and debriefing simply cannot constitute a material change to working conditions. It does not change the nature of the job or any of the material employment conditions. t is an issue that the applicant is entitled to unilaterally change.

[19] In *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others*[13] the Court dealt with a change to shift times by an employer, and said: '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.' In *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*[14] the issue concerned the employer unilaterally reducing the number of cabin crew staff from five to four, and it was held: 'John Grogan, writing in *Collective Labour Law* (Juta 2007) notes that the precise limits of s 64(1)*(a)* have not yet been determined, but expresses the view that it must concern the terms under which employees work, or their benefits, rather than a mere 'working practice' (at 145). He continues: 'The difference between "terms and conditions of employment' and working practices is generally determined by whether the employees are able to demonstrate that the changes affect their contractual rights, whether emanating from their individual contracts of employment or from a collective agreement. A shift change may, for

[12] (1995) 16 ILJ 349 (LAC) at 357 – 358
[13] (2011) 32 ILJ 1722 (LC) para 7.
[14] (2010) 31 ILJ 1219 (LC) para 32

example, fall within the terms of the remedy; an instruction that work will be done in a particular manner not.' In the absence of any evidence of any change that affects any of the union's members' terms and conditions of employment, s 64(4) has no application in the present instance.' The comparisons to the current matter before me is immediately apparent. I wish to make final reference in this respect to the judgment of *SA Police Union and Another v National Commissioner of the SA Police Service and Another*[15] where the Court said: '…. 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 merely a work practice not a term of employment.'

[20] Based on all of the above, it is my view that the proposed changes to the briefing and debriefing process and accompanying questionnaire, and what the employees would forthwith be required to do as part of their duties, as fully set out above, and pursuant to the operational changes on the renewed Air Liquide service contract of the applicant, do not constitute unilateral changes to the terms and conditions of employment of the employees. These are clearly only changes relating to work practices, implemented by the applicant for sound business and operational reasons, as it was entitled to do. As such, the right to strike in terms of Section 64(4) cannot accrue to the respondents and any strike action proposed by them in this respect would be unprotected.

[21] I also wish to deal with the issue of the right to strike accruing in terms of Section 64(4) as an interim measure. In this regard, I will commence with a reference to the judgment in *Eskom v National Union of Metalworkers of SA and Others*[16]

[15] (2005) 26 ILJ 2403 (LC) para 84
[16] (2002) 23 ILJ 2208 (LAC) para 11 – 14

where the Court held as follows:

> 'There are two periods referred to in s 64(1) *(a)*. Each one commences when the dispute is referred to a council or to the CCMA. The one ends when a certificate is issued in terms of s 64(1) *(a)* (i). The other one ends 30 days after the referral of the dispute (s 64(1) *(a)* (ii)). The question is whether it is the purpose of s 64(4) to refer to only the one described in terms of a number of days. …. The above interpretation of s 64(4) accords with the clear purpose of s 64(4) and (5) which is to retain or restore the status quo until the conciliation stage regarding a dispute about a unilateral change to terms and conditions of employment is over and both parties are in a position to resort to the use of economic power. I conclude that the words 'for the period referred to in subsection (1)*(a)* ' where they appear in s 64(4) refer to either the period mentioned in s 64(1)*(a)* (i) or to the one referred to in s 64(1)*(a)* (ii), as the case may be. …. When the application was brought in this case and also when the court a quo issued the order, the period referred to in s 64(1) *(a)* (i) had expired. The second dispute had been referred to the CCMA and the latter had issued a certificate stating that the second dispute remained unresolved. It follows that, when the court a quo issued its order, even on the assumptions I have made, the appellant no longer had an obligation not to implement the wage increase. The court a quo should accordingly not have issued the order it did. The appeal must succeed.'

It is clear from the above that the provisions of Section 64(4) are intended to constitute status quo relief and is clearly an interim measure. It is a measure where the employees can resort to strike action immediately to compel the employer to restore the status quo pending conciliation of the matter if the employer does not respond to a call to restore the status quo.[17] Once the

[17] See Section 64(5)

conciliation period prescribed in Section 64(1) expires, the issue of entitlement to the status quo relief expires along with it.

[22] The Court in *Cape Clothing Association*[18] said the following with specific reference to Section 64(4):

> 'In any event, I am not persuaded that the provisions of s 64(4) give rise to a right to strike in the present circumstances. That section is concerned to preserve the status quo, pending the outcome the conciliation process prescribed by the Act. Secondly, the temporary nature of the status quo relief is a clear indication that it is not intended to apply in circumstances such as the present. Du Toit et al in *Labour Relations Law: A Comprehensive Guide* (5 ed) observe that s 64(4) does not apply to changes that may be referred to arbitration or adjudication in terms of the Act, because such disputes are excluded altogether from the ambit of protected industrial action (see at 304). There is another reason why this is so. Assuming the union's submissions to be correct, it would mean that the employers in the sector are obliged to pay annual leave pay at the rate the union contends for, but only for the period referred to in s 64(4), ie the period of the conciliation proceedings. Presumably, after the expiry of that period, the union's members would then be obliged to return the additional leave pay they claim to their employers. This is not consistent with the purpose of s 64(4), which, as I have indicated, is ultimately directed at delaying an employer's right to resort to economic power in the form of a unilateral implementation of changes to conditions of employment. In short: even if the dispute between the parties is to be categorized as a dispute concerning a unilateral change to conditions of employment, the status quo remedy established by s 64 is not applicable in the present instance, and the union is not entitled to rely on s 64(1) to give notice of a strike without the time periods established by s 64 being exhausted.'

[23] In *SA Commercial Catering and Allied Workers Union v Ellerine Holdings (Pty) Ltd t/a*

[18] Id at para 12 – 13

*Ellerine Furniture (Pty) Ltd and Ellerine Trading (Pty) Ltd*[19] the Court specifically dealt with an instance where the Section 64(1) time period, within the context of the application or not of Section 64(4), had expired, and held:

> '…. I wish to make a few observations in relation to the *prima facie* right on which the applicant relies in bringing this application. Section 64(4) is a temporary remedy. It may be invoked when a party refers a dispute to the CCMA in circumstances where an employer party has or intends unilaterally to change terms and conditions of employment. The employer must restore the status quo or agree not to implement the changed terms, as the case may be. The penalty for a failure to comply with the requirements of s 64(4) is that the time-limits otherwise applicable to the acquisition of the right to strike fall away - a union may immediately commence strike action. In these circumstances, it is doubtful whether this court is empowered to grant interdicts enforcing the restoration or maintenance of the status quo - the section contains its own remedy. But the remedy is limited - s 64(4) applies only for so long as the conciliation process continues; once the period for conciliation lapses, or once a certificate of outcome is issued, the protection offered by the section falls away. The purpose of the section is clear - once it is invoked, equality in the bargaining position of the parties is maintained for the duration of the conciliation process. In the present instance, s 64(4) ceased to have any effect once the agreed-to extension to the 30-day period lapsed during December 2008. To the extent that the present application relies on a right derived from s 64(4), it is misconceived.'

I agree with the above reasoning. The right to strike in terms of Section 64(4) accrues only for the interim period as contemplated by Section 64(1). Upon the expiry of this period, it lapses. As the respondents in the current matter based their right to strike on Section 64(4), their right to strike lapsed when the conciliation period was completed by the issue of the certificate of failure to settle referred to above.

[19] (2009) 30 ILJ 2476 (LC) para 8

[24] I am therefore satisfied that the applicant has the necessary right to the relief sought. The applicant was thus entitled to the interdict it sought, and the *rule nisi* was properly granted. This *rule nisi* now clearly stands to be confirmed.

[25] This then only leaves the issue of costs. The parties still have an ongoing relationship with one another. The authorities also indicate that matters such as these are such that parties should not be burdened with costs orders. This Court in any event has a wide discretion where it comes to the issue of costs, and in my view fairness in all the circumstances of this matter together with the continuing relationship dictates that no order as to costs be made.

[26] It is for all the above reasons that I made the order I did on 26 July 2013, referred to above.

_____

Snyman AJ

Judge of the Labour Court of South Africa

APPEARANCES:

| | |
|---|---|
| Applicant: | Advocate A Snider |
| Instructed by | Cliffe Dekker Hofmeyr Inc |
| Respondent: | Advocate F Darby |
| Instructed by: | M M Mitti Inc |