REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J 1207 / 13

In the matter between:

AUTOPAX PASSENGER SERVICES SOC LIMITED	**Applicant**
and	
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	**First Respondent**
PERSONS LISTED IN ANNEXURE "A"	**Second to Further Respondents**

Heard: **28 June 2013**

Delivered: **15 July 2013**

Summary: **Urgent application - in respect of a dispute about a unilateral change of conditions of employment – characterisation of a dispute - it is the court's duty to ascertain the true or real issue in dispute. In doing so, the court is obliged to look at the substance of a dispute, and not the form in which it is presented. Nor is the characterization of a dispute by any of the parties decisive – benefits - the issue whether the benefit must be an entitlement**

which arises *ex contractu or ex lege* in the determination of disputes of rights against disputes of interest considered.

JUDGMENT

CELE, J

Introduction

[1] The applicant approached Court on what it called semi-urgent basis in terms of section 158 (1) (a) (ii) of the Labour Relations Act[1], (the "Act") seeking to be granted an order in the following terms:

1. 'Dispensing with the forms and service provided in the Rules of Court and disposing this matter as one of urgency in accordance with the provisions of Rule 8.

2. That a Rule Nisi do issue, calling upon the Respondents to show cause on a date to be determined by the above Honourable Court why an order should not be made in the following terms:

2.1. Declaring the strike currently contemplated by the Respondents in respect of the dispute concerning meal allowance and Sunday work, to be unlawful and prohibited in terms of section 65(1)(b) read with section 65(3)(a) of the LRA.

2.2. Declaring that the Applicant and the Respondents are bound by the terms and conditions of the Main Agreement extended to the Applicant by the Minister of Labour on with effect from 16 April 2012.

2.3. Declaring that the Main Agreement specifically deals with the circumstances under which meal allowance and Sunday work should be paid.

2.4. Declaring that the Applicant is not required to consult with the Respondents and/or to apply for an exemption before it can implement and/or comply with clause 6 or clause 9 of the Main Agreement.

[1] Act Number 66 0f 1995.

2.5. Interdicting and restraining the Respondents and/or the persons listed in Annexure "A" and other employees of the Applicant from participating in the strike referred to in paragraph 2.1 above.

3. The relief sought in paragraph 2 above, shall operate as a temporary interdict with immediate effect pending the finalization of this application on the return date.

4. Authorizing that the Applicant serves the interim order granted pursuant hereto on the First Respondent's Office by telefax: (011)333 9199 and physical service at 215 Marble Towers, 6th Floor, Cnr Jeppe and Von Wielligh Streets, JOHANNESBURG.

5. Costs of suit.

6. Further and/or alternative relief.'

[2] The respondent opposed the application. The matter was fully argued by the parties with the result that an order of a final nature is therefore to issue, whichever party is favoured thereby. Prayers sought in sub-paragraph 3 and 4 therefore stand to fall away.

Factual Background

[3] On or about 10 November 2011, the first respondent, hereafter referred to as the union and other employers associations entered into a collective agreement ("the Main Agreement") under the auspices of the South African Road Passenger Bargaining Council ("SARPBAC"). On or about 05 April 2012, the Minister of Labour declared that, in terms of section 32 (2) of the Act, the Main Agreement would be binding on the other employers and employees in the industry, with effect from 16 April 2012 and for the period ending 31 March 2013. From 16 April 2012, the applicant was therefore bound by the Main Agreement since it is the employer in the industry covered by the Main agreement. Paragraph 30 of the Main Agreement reads:

'Status Quo

All conditions of employment, or parts thereof, that were in force as at 31 March 2011 and not specifically dealt with in the Main Agreement, shall remain in force and shall continue to be regulated by the custom and practice

existing at that time, contracts of employment, collective agreements and/or relevant legislation.'

[4] Clause 7 deals with the scheduling of work and sub-clause 7.1 reads:

'Employers have the right to schedule employees for all ordinary hours of work in any day and/or week at ordinary rates of pay.'

[5] Just before and after the Main Agreement came into operation the applicant had a practice of giving certain of its employees a meal allowance of R170 per Coach Driver and Bus Steward per round trip. The applicant would also pay an employee, that is, a Coach Driver and a Bus Steward an additional compensation for working on a Sunday.

[6] Following the extension aforesaid, the applicant wrote a memorandum to the General Secretary of SARPBAC, Mr Gary Wilson, applying for an exemption and declaring its intention to comply with the terms and conditions of the Main Agreement. The applicant declared its intention to comply with the provisions of clause 6 with effect from 01 September 2012 and it felt there was no need to apply for an exemption in respect of clause 6 of the Main Agreement. The applicant declared its intention to comply with the provisions of clause 9 with effect from 01 December 2012 and to phase out an *ex-gratia* meal allowance of R170 per Coach Driver and Bus Steward per round trip over three months ending 30 November 2012. The applicant undertook to strictly comply with the provisions of clause 9 as defined in the Main Agreement and it therefore felt that there was no need to apply for an exemption in respect of clause 9 of the Main Agreement.

[7] Despite the time periods indicated in the memorandum specifically as to when the applicant would commence compliance with clause 6 and clause 9 of the Main Agreement, following further discussions and arrangements, the parties in this matter agreed to defer the implementation date of the said clauses to 01 April 2013 in a written agreement. On or about 14 March 2013, the applicant wrote a letter to the union sensitizing and reminding it that the implementation date of 01 April 2013 was approaching. The applicant further indicated that in the event that the union was of the view that the applicant was misinterpreting any of the provisions of the Main Agreement, the union

should follow the prescribed dispute resolution procedure outlined by SARPBAC and have the matter adjudicated at that forum.

[8] On or about 22 March 2013, the applicant addressed a memorandum of even date to all its employees, notifying them that with effect from 1 April 2013 the provision of meals and payment for Sunday work allowances for coach drivers and hostesses would cease to exist. On or about 25 March 2013, the applicant addressed another memorandum of even date to all its employees wherein it was indicated at paragraph 4 thereof, that on 03 December 2012, the 2 recognised unions had signed an agreement with the applicant which specifically provided for the restoration of Sunday payment until 31 March 2013. Paragraphs 1 to 3 of the memorandum read:

> '1. Contrary to the belief by some employees the provision of meal allowance and on-board personnel is neither a condition of employment nor an employment benefit. This allowance is paid directly from operational expenditure and not through payroll as is the case with other employment benefits.
>
> 2. The meal allowance (unique to Autopax in the bus industry) only benefits a certain category of employees, making it patently unfair to other employees of the Company.
>
> 3. The Company operates a 24 hrs/7 days schedule bus service business and accordingly, there is no rational for paying Sunday allowance. This view is in line with the practice in the bus sector and has been confirmed by SARPAC.'

[9] On or about 26 March 2013, Mr Assaria Mataboge the National Sector Co-ordinator of the union wrote an e-mail to the applicant indicating that the applicant's approach to the issue was tantamount to a violation of the Main Agreement and the letter written to the applicant by the General Secretary of SARPBAC. The union threatened to declare a dispute of non-compliance or unilateral change to conditions of employment. On or about 26 March 2013, the applicant responded to the e-mail referred to.

[10] On or about 25 March 2013, the union referred a dispute to SARPBAC concerning unilateral change to terms and conditions of employment in that the employer intended to withdraw meal allowance and Sunday payment without applying for exemption or consulting with labour. On or about 29

March 2013, SARPBAC's attempts to resolve the dispute were unsuccessful and a certificate of outcome was issued on 30 April 2013. The applicant did, in fact, cease making payment of the meal allowance and Sunday Payment with effect from the 1 April 2013.

[11] On or about 24 May 2013, the applicant's attorneys wrote a letter to the union, *inter alia*, requesting it to provide a written undertaking that it would not embark on a strike. In paragraph 11 of the letter, it was indicated that the union was obliged, in terms of the dispute resolution procedure referred to in annexure B to the Main Agreement, to refer the dispute to arbitration. In paragraph 15, the union was required to make a written undertaking within three days that it would not embark on a strike and in paragraph 16 the required undertaking was to reach the attorneys' offices by close of business on Monday 27 May 2013. The union did not furnish the applicant with the requested undertaking.

[12] On or about 30 May 2013, Mr Mataboge, sent an e-mail to the applicant indicating, *inter alia,* that based on the acquired certificate of a strike, the union was entitled to furnish the applicant with a 48 hours' notice and that failure to respond might compel the union to serve the applicant with the 48 hours' notice. On or about 31 May 2013, the applicant responded to the union and rejected the union's demand to pay for Sunday work and for a meal allowance. On or about 06 June 2013, the applicant instructed its attorneys to institute this application. The union was notified of this urgent application, in terms of section 68 (2) of the Act, on 6 June 2013 by the applicant's attorneys.

[13] In and during April/May 2013 the applicant became a party to the SARPBAC. A new Main Agreement was entered into between the parties on or about the 15 May 2013 which was effective from the 1 April 2013. According to the union this agreement sets out, in paragraph 30 thereof that:

> **'**Status Quo
>
> All substantive terms and conditions of employment and benefits that were applicable at an employer as at the effective date of this agreement and are not regulated by the agreement, shall remain in force and effect. Further, any substantive terms and conditions of employment and benefits that were applicable as at the effective date of this agreement at a level higher/better

than regulated in the agreement, such higher/better terms and conditions of employment and benefits shall continue to apply.

Therefore no employer shall reduce such substantive conditions of employment and benefits to the level of what is contained in the Main Agreement.'

[14] In its replying affidavit the applicant merely denied the contents of paragraph 30 as set out by the union without indicating what the true contents are. The respondent failed to annex a copy of the new Main Agreement to the answering affidavit.

Submissions by the parties

Applicant's submissions

[15] The application is for urgent relief to interdict the union from participating and promoting participation in an unlawful and prohibited strike. While it is not clear to the applicant as to when the intended strike is due to commence, because the union has not yet served the applicant with a notice to strike, the applicant submitted that the union had a clear intention to serve the applicant with its notice and to commence with the strike in due course.

[16] The purpose of the strike, as understood by the applicant, is to compel the applicant to continue with its old practice of paying meal allowance and paying for work carried out on Sundays, despite the fact that the parties are bound by a collective agreement which, *inter alia,* specifically deals with the circumstances under which meal allowance and Sunday work may be paid for in terms of the current collective agreement. Alternatively, the strike is intended to compel the applicant to consult with the union and/or to submit an application for exemption to the bargaining council, before it can implement and/or comply with clause 6 and clause 9 of the Main Agreement. The submission is that the proposed strike is unlawful and prohibited in terms of section 65 (1) (b) read with section 65 (3) (a) of the Act, in that the union is bound by a collective agreement that requires the issues in dispute to be

referred to arbitration and/or the issues in dispute as set out above are regulated by the collective agreement.

[17] When clause 30 of the Main Agreement was considered, the issue for determination, according to the applicant, was therefore whether or not payment for Sunday work and meal allowance are specifically dealt with in the Main Agreement. The applicant submitted that payment for Sunday work was specifically dealt with in the definition of the word *"day"* and the word *"week*", as well as in the provisions of clause 6 read with clause 7 of the Main Agreement. The Applicant further submitted that a meal allowance was specifically dealt with in clause 9 of the Main Agreement. In terms of the dispute resolution procedure referred to in Annexure B to the Main Agreement, the Union was therefore obliged to refer the dispute concerning payment for Sunday work and meal allowance to arbitration.

[18] The submission was that the applicant would suffer irreparable harm if the relief sought was not granted in that its business operations would be compromised and hampered, causing huge financial loss which might never be recovered should the unprotected or illegal strike proceed. The union would, if not interdicted, proceed with the unprotected strike contrary to the provisions of the collective agreement referred to and that would render the Main Agreement worthless. It was submitted that the applicant did not have any alternative relief as the Court has exclusive jurisdiction to grant the relief sought herein. On the contrary, the union had sufficient and/or adequate alternative remedy of referring its dispute to arbitration. It was contended that the application was urgent in that an attempt to secure an undertaking from the union and a further attempt by the attorneys were rebuffed. There were clear indications from the union's e-mails that the union would serve the applicant with the 48 hours strike notice anytime soon. It was paramount that the operations of the applicant were not unnecessarily interrupted and inconvenienced including members of the public, commuters and passengers and other stake holders who rely on the applicant's services on daily basis.

<u>Respondent's submissions</u>

[19] Given the timelines, this matter should not be heard as one of urgency. The Main Agreement under the auspices of the SARPBAC was extended to non-parties, including the applicant, from 16 April 2012, at the time when the applicant's employees received a meal allowance and Sunday payment as part of their terms and conditions of employment. The meal allowance received was substantially more beneficial than that provided for in the Main Agreement. There was no specific provision relating to Sunday pay in the Main Agreement.

[20] The submission was that the applicant's employees were entitled, in terms of clause 30 to retain their terms and conditions of employment as their more beneficial terms and conditions were not regulated by the Main Agreement. The applicant continued to make payment of meal allowances and Sunday pay as per the employees' conditions of employment and the provisions of the Main Agreement. In November 2012, the applicant indicated that it intended to unilaterally change the meal allowance and that it would provide meals instead. No agreement was reached in regard to any amendment to terms and conditions of employment and the applicant continued to make payment as per the employees' terms and conditions of employment.

[21] Consequent upon the applicant unilaterally ceasing payment of the Sunday payment and meal allowances in September 2012, and the respondents taking issue with this, an agreement was reached as annexed to the applicant's papers that the applicant would "*restore the conditions of employment in terms of Sunday payment* (emphasis) until March 2013". There was no agreement that the applicant could end the payment on the 31 March 2013 and it was assumed that there would be further discussions between the parties and that the Main Agreement would be complied with.

[22] On11 March 2013, the applicant was advised by SARBPAC that the Main Agreement set minimum standards and that no existing benefits enjoyed prior to the promulgation of this agreement could be reduced to the level of the agreement if it was better. Despite that and the provisions of the Main Agreement, the applicant purported to give notice to the union on 14 March 2013, that it would implement its unilateral changes with effect from the 1 April

2013. The applicant did, in fact, cease making payment of the meal allowance and Sunday Payment with effect from the 1 April 2013.

[23] The applicant failed to comply with the requirement that it did not implement the proposed changes to terms and conditions of employment within 48 hours of the referral and thus, in terms of section 64 (3) read with section 64 (4) of the Act, the employees were entitled to immediately embark upon strike. The applicant was, thus aware of the imminent possibility of strike action since the 25 March 2013, and failed to launch this application until the 7 June 2013. In addition, after a certificate of outcome was issued on the 30 April 2013 reflecting that the matter was unresolved and indicating that strike action was the next step, the respondent took no action until the 24 May 2013 when a letter was received from the applicants requesting an undertaking that the respondents would not strike. No such undertaking was provided and the applicant took no further steps until service of this application on the 7 June 2013. The applicant has clearly not acted with any expedition and this matter is clearly not urgent.

Evaluation

[24] While parties have categorised the dispute between them in their terms, it is the court's duty to ascertain the true or real issue in dispute[2]. In doing so, the court is obliged to look at the substance of a dispute, and not the form in which it is presented. Nor is the characterization of a dispute by any of the parties decisive. Note must, however, be taken of what parties say. The approach adopted by the respondent amounts to an allegation that this matter concerns a dispute about a unilateral change of the employees' terms and conditions of employment which is a right dispute in respect of which a strike would be permissible under the Act because it is not hit by the provisions of section 65 (1) (c) of the Act. The approach adopted by the applicant is that the provisioning of the meals allowance and Sunday pay is covered by the Main Agreement and that any excess payment in that regard, falls within the applicant's prerogative as a work practice, in respect of which it can exercise discretion to withdraw.

[2] See *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 924 (LAC) at para 16..

[25] In respect of a dispute about a unilateral change of conditions of employment Court in *Maritime Industries Trade Union of SA and Others v Transnet Ltd and Others*[3] held, inter alia, that:

> 'However, if a dispute about a unilateral change of conditions of employment can properly fall within the provisions of item 2 (1) (b) of Schedule 7, it will nevertheless be arbitrable**.** 'Strikeable' and arbitrable disputes do not necessarily divide into watertight compartments. Although in relation to dispute resolution the Act contemplates the separation of disputes into those that are resolved through arbitration, those that are resolved through adjudication and those that are resolved through power-play, there are disputes in respect of which the Act provides a choice between power-play on the one hand, and arbitration, on the other, as a means for their resolution.'

[26] In the case of *Apollo Tyres South Africa (Pty) Ltd v Numsa and Others*[4] (*Apollo1*) the applicant sought a declarator that its proposed changes to its shift patterns at its Durban factory did not constitute a unilateral change to the second and further respondent's terms and conditions of employment. In the event that it was decided that the change did not constitute a unilateral change to their terms and conditions of employment the second and further respondents were to be interdicted from embarking on a strike until they had complied with the provisions of section 64 of the Act. This Court, per Gush J, approvingly relied on two previous decisions of this Court and said that:

> 'In two recent decisions of this Court,[5] the Court has accepted that a change to shift systems does not in itself (sic) amount to (my added correction) a unilateral change to an employee's terms and conditions of employment but merely a change to the employer's work practice. In both matters, the court held that in the absence of a contractual right to work the previously agreed shift pattern the regulation of shift times constituted a work practice and fell within management's prerogative to change.'

[27] The Court then held that:

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[3] (2002) 23 ILJ 2213 (LAC) at para 106.. Note that item 2 of Schedule 7 referred to has since been abolished by sec 55 (a) of Act 12 of 2002.
[4] [2012] 6 BLLR 544 (LC) at para.16.
[5] *Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers Union and Others* (2011) 32 ILJ 1107 (LC) and *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 1722 (LC).

'[30] In the circumstances, I am satisfied that in respect of those respondents other than those employed in the applicant's "truck and radial [tyre] department" the new shift patterns do not constitute a change to their terms and conditions of employment and that the applicant was entitled to change the shift patterns. Regarding those respondents employed in the "truck and radial [tyre] department" the applicant, by virtue of clause 12 of the collective agreement, was entitled to change the shift patterns despite the fact that they constituted terms and conditions of employment.

[31] Accordingly, the 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.

[32] 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.

[28] In yet another matter of *Apollo Tyres SA (Pty) Ltd v CCMA and Others*[6] (*Apollo2*) Court dealt extensively with what constitutes "benefit" by virtue of section 186 (2) of the Act, and whether such "benefit" is limited only to an entitlement which arises *ex contractu* or *ex lege*. The approach which had hitherto been generally accepted, with exceptions, as pronounced in *Hospersa and Another v Northern Cape Provincial Administration*[7] was departed from. In *Hospersa* the Court had the following to say:

'[9] It appears to me that the legislature did not seek to facilitate, through item 2(1) (b), the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b). It simply sought to bring under the residual unfair labour practice jurisdiction disputes about benefits to which an employee is entitled ex contractu (by virtue of the contract of employment or a collective agreement) or ex lege (the Public Service Act or any other applicable Act). The appropriate example of

[6] Case No DA1/11dated 21 February 2013 (LAC).
[7] (2000) 21 ILJ 1066 (LAC).

such benefits cited by Mr Tip is that of an employer who has established a provident fund for the benefit of his employees and who for one reason or another decides to deny his employees the benefits of such a provident fund or to terminate some employees' membership or to deny membership to new employees notwithstanding the fact that it is a condition of their employment that they would automatically qualify for membership and the benefits flowing from it. In those circumstances an employee would have a right to the benefits in question which she or he would be entitled to enforce in terms of item 2(1)(b) . The dispute relating to what the second appellant claims seems to be a dispute of interest whereas item 2(1) (b) was designed only for disputes of right. As I shall presently demonstrate the second appellant has not established any right to the acting allowance.

[10] A dispute of interest should be dealt with in terms of the collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated in terms of item 2(1) (b) read with item 3(4) (b) under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject-matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself. (See by way of example *Public Servants Association & others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA) at 1669C-E and 1674D-E.) If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined. The following extract as well as the definition not only explain the meaning of a dispute of interest and a dispute of right, but also highlights the correct procedure to be followed in their resolution.

[11] Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or ‘economic disputes') concern the creation of fresh rights, such as higher wages,

modification of existing collective agreements, etc. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests, while adjudication is normally regarded as an J appropriate method of resolving disputes of right." Rycroft & Jordaan A Guide to *SA Labour Law* (Juta 1992) at 169. This is consistent with what I have said above.'

[29] In *Apollo 2*, Court examined the issue whether the benefit must be an entitlement which arises *ex contractu or ex lege* thus:

'[44] This issue, whether the benefit must be an entitlement which arises *ex contractu or ex lege* was considered by the Labour Court in *Protekon (Pty) Ltd v CCMA and Others.* The Labour Court correctly stated that *Hospersa* is authority for the view that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided for by the employer. The Labour Court then stated that it does not follow from this that an employee may have recourse to the CCMA's unfair labour practice jurisdiction only in circumstances in which he/she has a cause of action in contract law.[8]

[45] The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit schemes. In many instances employers enjoy a range of discretionary powers in terms of their policies and rules. The Labour Court further pointed out that section 186 (2) (a) is the legislature's way of regulating employer conduct by super imposing a duty of fairness irrespective whether that duty exists expressly or implicitly in the contractual provisions that establishes the benefit. The court continued and stated that the existence of an employer's discretion does not by itself deprive the CCMA of jurisdiction to scrutinize employer conduct in terms of the provisions of the section. It concluded that the provision was introduced primarily to permit scrutiny of employer discretion in the context of employee benefits. I agree with this conclusion.

[46] I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with

[8] At paragraphs 32 and 33.

a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.

[47] The first instance is in sync with the *Hospersa* approach. The second instance calls for qualification. Mr. Pretorius argued that the effect of the judgment is that there must be contractual terms even in instances where the employer exercises a discretion. If that is indeed what the Labour Court meant, then I cannot agree with it. I am of the view that the Labour Court used the words "contractual terms" loosely. It did not mean that the source of the discretion must be found in a contract. It is in my view clear that if one has regard to the context of the whole judgment and the Labour Court's conclusion that it actually meant when the employer exercises a discretion under the terms of the scheme conferring the benefit. Therefore even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits such conduct will be subject to scrutiny, by the CCMA, in terms of section 186 (2) (a).'

[30] Accordingly, employees will have an election to strike or to take the arbitration or adjudication route in respect of many rights disputes. As held in *Apollo 2*[9] the better approach is to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu or ex lege,* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion.

[31] Clause 7 of the Main Agreement regulated the Sunday pay by stating that employers have the right to schedule employees for all ordinary hours of work in any day and/or week at ordinary rates of pay. Clause 9 (9.1 and 9.2) provide for the payment to employees of R350.00 per night and R5.00 per hour respectively of special hire or charter or absence from workplace. The applicant provided its employees with similar but better allowances. The applicant sought to exercise its discretion by reducing the allowance to the standard as contained in the Main Agreement. The additional allowance provided by the applicant is not regulated by the Main Agreement. Nor is it

[9] See paragraph 50.

catered for by the contract of employment. It is therefore not part of the terms and conditions of employment. Operational requirements could justify the withholding of the allowance, provided the applicant engaged the respondent in consultations prior to the exercise of that discretion.[10] This was a matter falling within the dispute of interest and not one of right.

[32] The parties did have deliberations on the matter and agreed to defer the implementation date of the said clauses to 1 April 2013 in a written agreement.

[33] On or about 25 March 2013, the union then referred a dispute to SARPBAC concerning unilateral change to terms and conditions of employment in that the employer intended to withdraw meal allowance and Sunday payment without applying for exemption or consulting with labour. On or about 29 March 2013, SARPBAC attempted to resolve the dispute with no success and a certificate of outcome was issued on 30 April 2013.

[34] The description of the dispute, as concerning a unilateral change to terms and conditions of employment, was incorrect in the circumstances of this matter. Contrary to what the respondent declared, there had been consultations on the issue between the parties. Notwithstanding the incorrect description of the dispute, the respondent did refer a dispute pertaining to the withdrawal of an allowance paid to employees which the applicant could legitimately exercise discretion on. The moment for the power play has come. Section 64 (1) of the Act has been duly complied with by the respondent, with the exception of the strike notice.

[35] What also tends to militate against the granting of the declaratory orders sought is what the respondent describes as the current clause 30 of the Main Agreement. The respondent quoted clause 30 without attaching it to its papers. Nor was I able to confirm these provisions within the time limitations I had. The provision referred to reads:

> 'Status Quo

[10] See *Apollo 1* for a similar approach.

> All substantive terms and conditions of employment and benefits that were applicable at an employer as at the effective date of this agreement and are not regulated by the agreement, shall remain in force and effect. Further, any substantive terms and conditions of employment and benefits that were applicable as at the effective date of this agreement at a level higher/better than regulated in the agreement, such higher/better terms and conditions of employment and benefits shall continue to apply.
>
> Therefore no employer shall reduce such substantive conditions of employment and benefits to the level of what is contained in the Main Agreement.'

[36] The effect of this provision is clearly to deprive the applicant of its otherwise discretionary powers to withhold the allowance.

[37] The application was brought on urgent basis cases. In the light of the approach adopted in various cases by this Court, including the matter of Apollo 1, [11]I am of the view that the applicant has shown that the matter is somewhat urgent.

[38] Accordingly, the applicant had not shown that it is entitled to the declaratory and interdictory order prayed for in the notice of motion. Parties are in a continuous relationship. The applicant has not been vexatious in bringing this application which involved interesting principles of labour law. Therefore:

1. The application is dismissed.
2. No costs order is made.

[11] See also Pikitup Johannesburg (Soc) Ltd v SAMWU and Others (J920/2013) [2013 ZALCJHB 75 (15 May 2013).

_____ _____

Cele J.

Judge of the Labour Court of South Africa.

Appearances

For the applicant	:	Mr P Mosebo
Instructed by	:	Maserumule Inc. Attorneys.
For the respondent	:	Ms R Edmonds of Ruth Edmonds Attorneys.