THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG JUDGMENT

Reportable

Of interest to Other Judges

Case no: J 877/13

In the matter between:

SAMWU **Applicant**

And

CITY OF TSHWANE **First Respondent**

MUNICIPAL MANAGER: CITY OF TSHWANE **Second Respondent**

Date heard: 07 May 2013

Date delivered: 30 May 2013

Summary: Changes in the shift system. Consequences of unilateral changes in shifts system. Provisions of collective agreement incorporated into individual employment contract. Implication of changing shift system entrenched in the contract of employment. Does change in the shift system change the work performed by employees.

JUDGMENT

Molahlehi J

Introduction

[1] The applicant seeks a declarator on an urgent basis to the effect that, the provisions of section 64 (4) and section 64 (5) of the Labour Relations Act of 1985 (the LRA) are applicable to the Tshwane Metro Police Department (TMPD). The applicant further seeks an order directing the respondents to restore the terms and conditions of employment of the employees of TMPD that applied prior to the alleged unilateral changes to the shift system effected by the respondent. The applicant seeks the restoration of the terms and conditions for a period of 30 days from the date of the referral of the dispute to the South African Local Bargaining Council (SALGBC) or pending conciliation of the dispute between the parties.

[2] In the alternative the applicant seeks an order interdicting and restraining the respondent from implementing the new shift system pending the resolution of the dispute between the parties through compulsory arbitration.

The background facts.

[3] It is common cause that during 2006 the parties concluded a collective bargaining agreement at the Local Labour Forum (LLF). In terms of the collective agreement provision was made for three different types of shifts at the respondent's workplace. The collective agreement further made provision for its extension at the end 30 June 2011. The agreement was at the end of its life span extended to 30 April 2013 and this was the outcome of the negotiations between the parties.

[4] The negotiations regarding the changes to the shift system failed and as a result the Mayoral Committee of the first respondent resolved that a new shift system should be introduced. The new shift system, which was supposed to have been implemented on 1 February 2013, was put on hold until April 2013.

[5] During March 2013, the respondent issued letters to members of the TMPD indicating that the new shift system would be implemented as from 1 May 2013. Thereafter, the applicant lodged an internal grievance which went through the various stages and the last stage took place on 18 April 2013. The dispute remained unresolved.

[6] The case of the applicant is also based on the referral of the dispute concerning the unilateral change in the shift system to the bargaining council by one of the employees affected by the changes in the shift system. Although, the applicant contends that it assisted the employee in referring the matter to the bargaining council, it is not cited as a party neither is the first respondent. The referral was made on 19 April 2013.

[7] The respondents contend that there is no unilateral change to the shift system because the previous system that governed the shift system came to an end when the 2006 collective agreement lapsed in April 2013. In other words the contention of the respondents is that there could be no changes to the provisions of a collective agreement that has lapsed.

[8] The respondent argued that, in the alternative, should it be found that there was a change in the terms of the collective agreement, then such did not have the fundamental impact to the nature of the work performed by the affected members. In this respect the respondent relied on a number of cases dealing

mainly with changes to the work arrangement or work practices by an employer.

[9] In A *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others*[1], the Labour Appeal Court in dealing with this issue held that:

> 'A description of the work to be performed as that of operator should not be construed inflexibly provided that the fundamental nature of the work to be performed is not altered. Employees do not have a vested right to preserve the working obligations completely unchanged as from the moment when the first begin work. It is only if the changes are so dramatic that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner.'

[10] In *Metropolitan Bus Services v SAMWU and Others*[2], the parties concluded a collective agreement in terms of which the shifts where not to exceed 13 ½ hours and based on seniority, employees were entitled to pick a shift..

[11] During December 2010, the employer introduced the scheduling of the shifts to change the routes and the times when shifts were to be worked. In relying on a number of authorities the Court found that SAMWU had not been able to point to any term contained in a collective agreement or in the bus drivers' contracts of employment that accorded them a vested right to a specific shift schedule. The court found that they had vested rights with regard to maximum working hours and the right to pick shifts according to seniority. The court further held that:

[1] 1995 (16) ILJ 349 (LAC)
[2] unreported case number J2276/10

> 'The changes implemented by Metrobus comprised 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 the terms and conditions of employment in terms of section 64 (4) of the LRA.'

[12] The above case is distinguishable from the present in that whilst provision was made for the maximum working hours, no provision was made for a shift system as was the case prior to the lapse of the collective agreement in the present instance.

[13] The Court in *SA Police Union and Another v National Commissioner of SA Police Service and Another,*[3] in dealing with a situation where the unions had challenged what it referred to as a unilateral change to the terms and conditions of employment, the Court held that:

> 'In short, it was not a term of the contract of employment that employees working 12 hours shift would always be entitled to do so. Without express, 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 employee been required to perform a different job thereby enticing 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. This shift system was accordingly merely a work practice and not a term of employment.'

[3] 2005 (26) ILJ 2403 (LC),

[14] An issue similar to the present was dealt with in *Apollo Tyres South Africa (Pty) Ltd v NUMSA*[4],. However, the difference between this matter and that case, is that although the agreement made provision for the shift system, it also made provision for the employer to change the system on consultation with the union. In dealing with the broad principle governing the changes in the shift patterns, the Court held that :

> ' 28. It is clear that unless specifically entrenched contractually, the right to regulate shift patterns is the prerogative of the employer.'

[15] In *Ram Transport (SA) (Pty) Ltd v SA Transport and Allied Workers Union and Others*[5], the Court held that:

> 'changes to an existing shift system does not on its own amount to a unilateral change to the employees' terms and conditions of employment but merely change to employer's work practice.'

[16] In my view the general principle from the above authorities is that an employer has a prerogative to change the shift system unless the shift system is entrenched in the collective agreement or the contract of employment. The prerogative is however limited to changes, that do not materially affect the nature of the work performed by the employees.In the present instance it is undisputed that the expired collective agreement made provision for a shift system.

[17] In theory the respondent is correct that it cannot be accused of a unilateral change to the terms and condition of the agreement that has lapsed, however in practice it would seem to me that the answer is not as simple as that.

[4] unreported case number D 68/12
[5] (2011) 32 ILJ 1722 (LC),

[18] It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees' contract of employment.[6] It is therefore my view that even though the 2006 collective agreement lapsed, its provisions having been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees' employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individuals' contracts.

[19] The issue that then needs to be determined is whether the shift system as set out in the contracts of employment created a vested right that preserved the shift system as part of the working conditions of the members. The other related question is whether the changes in the shift system introduced at the

[6] See Wallis: Labour and Employment Law, at page 7-10 paragraph 44. The basis for incorporation of the substantive terms of the Collective Agreement into individual employment contract is set out by Rideout Principles of Labour law 5 and 36 quoted by Wallis at footnote1 page 7-16, as follows:'The justification for incorporation of the collective agreement in an individual's contract of employment is that the parties to the contract regardless of union membership, expect employment to be regulated in this way.See also Mngomezulu v khutala Mining Services (Pty) ltd 1994 ILJ 374 (IC) at 380 D'where it was held: It would be contrary to the interests of sound labour law relations and labour peace were this court to allow an individual employee to appoint a union to negotiate working conditions and procedures with management on his behalf and thereafter permit such employee to ignore with impunity the provisions of the ensuing agreements reached. Indeed, inasmuch as the union purports to represent the collective in negotiating such agreements, some would argue that collective considerations require the recognition and enforcement by this court of ensuing collective agreements on the strength of their having been mandated by a majority of the members concerned and not necessarily by all union members to whom their provisions would become applicable'

beginning of May 2013 are so fundamental that it can be said that the job function of the members has changed.

[20] The issue to deal with before answering the above questions is whether the applicant has satisfied the requirements of an urgent interdict. The respondent argued in this regard that should the Court find that the matter was urgent then it should be allowed to present evidence detailing the explanation of the new system. In dealing with this submission the Court directed that the parties should file their respective affidavit concerning the working of the system and its implications, which would be considered if it was found that the matter was urgent. It has not become necessary to consider the affidavits submitted because of the conclusion reached at the end of this judgment.

[21] The requirements for an interim relief are: (a) a clear right or a *prema facie* right, that may be open to some doubt; (b) well-grounded apprehension of irreparable harm; (c) the balance of convenience favours the granting of the relief; and (d) absence of other satisfactory remedy.

[22] In my view the present matter turns on whether the applicant has other appropriate remedies that could address its dispute. It follows from the above analysis that the shift system having been incorporated into the employment contracts of the individual members, the respondent in changing the shift system could be said to be in breach of those contracts. Whether the breach of the contracts is material, to be said to have materially the nature of the work performed by the members is not an issue to be determined by this court at this stage. The issue of materiality in this regard goes to the question of whether the changes introduced by the respondents did fundamentally change the nature of the work performed by the affected individuals. It may

well be that this issue is dealt with in the affidavit submitted but as indicated above the issue is not dealt with for the simple reason that the requirement of urgency have not been satisfied. The affidavit may probably play a role if the applicant was intent on pursuing the matter.

[23] The remedy available to the applicant if it believes that there is a breach which is material is to institute proceedings in this court in terms of section 77 of the Basic Conditions of Employment Act (the BCEA) or approach the High Court. In this respect the applicant on behalf of its members has an election to make, either to accept the repudiation or hold the respondent to the contract. If the applicant holds the respondent to the contract then its remedy may lie in referring the matter to compulsory arbitration as provided for in section 74 of the LRA. The provisions of section 74 can of course only be evoked subsequent to compliance with the provision of section 64(4) of the LRA.

[24] It follows from the above that the applicant, acting on behalf of its members could evoke the provisions of section 64 (4) of the LRA. Section 4 (4) of the Labour Relations Act reads as follows:

> '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)-
>
> > require the employer not to implement unilaterally the change to terms and conditions of employment; or 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.'

[25] The respondent contends that the provisions of 74 of the LRA[7] do not apply to dispute concerning parties involved in essential services. In this respect the respondent relies on the decision of the Labour Appeal Court in *PSA obo Members v National Prosecuting Authority and Another* [8] where the Court held that:

> 'In the normal course of mutual interest disputes such as this one was alleged to be, upon the failure of conciliation, industrial action in the form of a strike or lockout would have ensued. However no strike action was initiated as the employees of the NPA involved in this matter are precluded from engaging in strike action as they have been designated in terms of section 71 of the LRA to be engaged in an essential service. Compulsory arbitration in terms of section 74 is the option available to such employees instead of strike action. It is for this reason that this dispute went that route.' (footnotes not included

[26] I do not agree with the contention that section 64 (4) does not apply to employees employed in essential services. The employees employed in a sector declared essential have all the rights that all other employees enjoy in terms of the LRA except for those rights which are expressly excluded by the legislation. In the context of this case before resorting to the provisions of section 74, the applicant would have to satisfy the requirements of section 64 (4) of the LRA.

[7] Section 74 deals with Disputes in Essential Services and provides as follows:
(1) Any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to
  (a) a council, if the parties to the dispute fall within the registered scope of that council; or
  (b) the Commission, if no council has jurisdiction
(2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.
(3) The council or the Commission must attempt to resolve the dispute through conciliation.
(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission.'

[8] 2012 (8) BLLR 765 at para 13

[27] There is nothing in section 64 (4) of the LRA, that denies the right of the essential services employees to process the complaints about alleged unilateral changes to the terms and conditions through the processes set out in section 64 (4) of the LRA. Of course if the dispute remains unresolved, the essential services employees unlike employees in other sectors are prohibited from embarking on a strike. The option available to employees in the essential services sector would be to refer the matter to arbitration as indicated earlier.

[28] The other remedy available to the applicant is to approach this Court in terms of section 77 of the basic Conditions of employment Act to have the Court declare the unilateral change in the terms and conditions of employment to be a material breach, by showing that the change materially and fundamentally changed the work performed by its members.

Conclusion

[29] I find that although the provisions of the collective agreement dealing with the shift system have lapsed with the expiry of the collective agreement at the end of April 2013, I am, however, of the view that at that stage the provisions of the collective agreement had already been incorporated into the employment contracts of the individual employees. There is no provision in the collective agreement that provided for the automatic lapsing of the terms incorporated in the employment contracts on the expiry of the collective agreement. It follows that the shift system set out in the lapsed collective agreement has remained in the individual employees' employment contract.

[30] I am, however, despite the above ,of the view that the applicant has failed to satisfy one of the requirements of an urgent application and it is on that

ground alone that the application stands to fail. There are other remedies available which the applicant could have utilised rather than jumping the queue and filing an urgent application.

[31] And finally, in arriving at the conclusion that costs should not follow the results, I have taken into account the relationship between the parties.

Order

[32] In the premises, the applicant's application is struck of the roll with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate JL Basson instructed by Maenetja Attorneys

For the Respondent: Advocate WP Bekker instructed by Hugo & Ngwenya Attorneys