REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 179/2015

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD	**First applicant**
MUNTASHE TRAINING AND HR SERVICES (PTY) LTD	**Second applicant**
and	
NUMSA	**First respondent**
PERSONS LISTED ON ANNEXURE "A"	**Second and further respondents**

Heard: **2 April 2015**

Delivered: **2 April 2015**

Summary: Strike interdict –LRA s 64(4) - whether strike unprotected – unilateral change to terms and conditions of employment or change to work practices.

JUDGMENT

STEENKAMP J

Introduction

[1] The first applicant, Intercape, obtained a rule *nisi* in the following terms on Friday, 20 March 2015:

> "Declaring:
>
> 1. the strike of which the first respondent [NUMSA] initially gave notice on 16 March 2015 and which is due to commence at 05h00 on 21 March 2015 to be not in compliance with the [Labour Relations] Act and unprotected; and
> 2. the additional tasks set out in annexure "B" hereto that are required to be performed by the second and further respondents who are drivers used by the applicants (because of the phasing out of the applicants' cabin attendant/hostess roles and the duties not being allocated to other employees or dispensed with in toto), do not constitute a change to the terms and conditions of employment of the said drivers."

[2] The first respondent, the National Union of Metalworkers of South Africa (NUMSA), has now anticipated the return day on 24 hours' notice on the eve of the Easter weekend.

[3] The pleadings comprise 550 pages. This judgment has been prepared under severe time constraints. It is unfortunate that the union waited for 10 days to anticipate the return day on 24 hours' notice, expecting an immediate judgement from the court.

Applicants' alleged failure to comply with section 68 (2)

[4] Before turning to the merits, the court has to address a submission by the respondents that the applicants did not comply with section 68 (2) when they brought the initial application on an urgent basis on 19 March 2015. The application was heard at 12:00 on 20 March 2015. The respondents say that the applicant did not apply for condonation for its failure to give 48 hours' notice of the application as required by section 68(2)(b).

[5] But as part of its application for urgent interim relief on 19 March, the applicants sought condonation for non-compliance with the rules and asked that the matter be disposed of as a matter of urgency in accordance with section 68(2). The grounds for urgency were set out in the founding

papers. The Court [per Rabkin-Naicker J] granted this relief in terms of paragraph 1 of the interim order which is not part of the rule nisi, and therefore is not part of the order which is to be revisited on the anticipated return day. That order stands.

Background facts

[6] Intercape used to employ cabin attendants or hostesses on its buses. It no longer does. As a result, bus drivers now have to perform some of the duties that the cabin attendants did previously. The union says this amounts to a unilateral change to terms and conditions of employment. The company says it is merely a change to work practice.

[7] There are two drivers on each trip. They drive for shifts of four hours at a time. While the one drives, the other rests. One of the issues in this case is whether the new way of working either impinges upon drivers' resting time; or on the driving duties of the active driver, thus endangering their and their passengers' safety.

[8] This court is in the unenviable position that it has to decide upon matters of fact on affidavit and under severe time constraints. Comprehensive founding, answering and replying affidavits have been filed, setting out the drivers' duties in detail. In attempting to decide where the truth lies, and more importantly, whether the company has unilaterally changed the drivers' terms and conditions of employment, the court bears in mind the principles set out in *Plascon-Evans*[1] and in *Wightman t/a JW Construction v Headfour (Pty) Ltd*[2]:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635C.

[2] 2008 (3) SA 371 (SCA) para 13,

> party and no basis is laid for disputing the veracity or accuracy of the adjournment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

[9] In this regard the court has to take into account the factual basis for changes in the drivers' duties as set out by the applicants, as against the union's version, which is essentially based on the affidavit of one of the drivers and his difficulties on one trip. The court also has to consider the provisions of the drivers' contract of employment. But first, the legal framework.

The legal principles

[10] Mr *Doble*, for the respondents, made it clear that they rely on the right to strike in terms of s 64(4) of the LRA.[3] That subsection 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."

[11] That is what the union has done in this case. The respondents argue, therefore, that they 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.

[3] Labour Relations Act 66 of 1995.

[12] This court dealt with the provisions of s 64(4) in *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU*.[4] 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, Grogan[5] 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*[6] that, in that case, there was no unilateral change to terms and conditions of employment. "For this reason, the strike called by the union is unprotected." With reference to the comments by Grogan[7], though, he noted that this is not an uncontested position.

[15] Some two weeks later, Van Niekerk J again dealt with Metrobus and SAMWU.[8] Subsequent to this court's earlier judgement 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

[4] (2011) 32 *ILJ* 1107 (LC); [2011] 3 BLLR 231 (LC).

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

[6] (2011) 32 *ILJ* 1722 (LC).

[7] *Supra.*

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

> employment for the purposes of section 64 (4) of the LRA. This much is apparent from the quote from the judgement 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*:[9]

> "[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 procedures in section 64 (1) and adhering to the time periods prescribed in that subsection.[10]

[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 Intercape has indeed unilaterally changed the drivers' terms and conditions of employment.

<u>The facts of this case: unilateral change to terms and conditions of employment or change to work practices?</u>

[19] The starting point in order to consider whether the drivers' terms and conditions of employment have been altered, is to consider what they were before. The following issues are common cause:

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

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

19.1 the individual respondents were employed as professional drivers;

19.2 their tasks are set out in their contracts of employment;

19.3 their contracts of employment require them to do more than simply drive buses;

19.4 drivers are responsible for dealing with passengers in a professional and courteous manner and be "accommodative of their needs";

19.5 drivers are responsible for ticket inspection;

19.6 drivers had to ensure the tidiness and cleanliness of the bus;

19.7 the drivers received training in terms of a training manual and were informed of their duties;

19.8 in terms of certain letters of employment the possibility of changes to conditions of employment were envisaged and agreed to.

The contracts of employment

[20] Drivers are employed in four categories:

20.1 those appointed by Intercape under its original written conditions of service or "old contracts";

20.2 those appointed by Intercape under new written conditions of service or "new contracts";

20.3 those appointed by the second applicant (Munashe) under its written conditions of service but working for Intercape; and

20.4 those working for Intercape in terms of oral agreements.

Intercape drivers employed under old contracts

[21] Those drivers appointed by Intercape under its original written conditions of service are contractually obliged to:

21.1 transport passengers;

21.2 load luggage in a safe and secure manner;

21.3 meet the needs and requirements of passengers;

21.4 ensure tidiness/cleanliness of the bus;

21.5 ensure the safety and reliability of the service;

21.6 ensure comfort of passengers;

21.7 comply with company guidelines;

21.8 perform various pre-trip, *en route* and post trip duties;

21.9 give reports of incidents as per company policy;

21.10 inform passengers of late arrivals/departures; and

21.11 inform passengers of non-permissible cargo.

Intercape drivers employed under new contracts

[22] These drivers are contractually obliged to:

22.1 accept that the employer may include or exclude any task that may be necessary in the interests of the employer at its discretion in the spectrum of services and duties they have to perform; and

22.2 comply with all Intercape's reasonable and lawful instructions.

Munashe's employees

[23] Those drivers employed my Munashe but working for Intercape:

23.1 accepted that "it is possible that changes may occur in the business over a period of time which may make it necessary for changes to be made in conditions of employment and management reserves the right to make such changes as they become necessary";

23.2 had to do pre-trip inspections and preparation of the vehicle;

23.3 were contractually obliged to secure loading (tagging of luggage) and offloading luggage (controlling the tagged luggage and passengers);

23.4 how to do cleaning of the vehicle inside and outside;

23.5 had to do pre-and post-trip administration;

23.6 had to collect fares.

Changes in work

[24] The changes to the duties which the drivers must now perform comprise the following:

24.1 drivers must assist with seat allocations and check documents that are referred to as “manifests” for passengers who embark *en route*;

24.2 on some occasions drivers will have to issue tickets to those passengers who had not pre-booked;

24.3 drivers have been trained to do those aspects of the work previously done by cabin attendants that are still required;

24.4 drivers have to ensure that the bus is neat and clean, but the company would appoint cleaners at stop-off points along routes to do the cleaning previously done by hostesses;

24.5 drivers have to make or play certain recorded announcements.

Objections raised by NUMSA

[25] The union and the drivers have raised a number of objections, both in the consultation process which preceded the introduction of the changes and in these proceedings. These objections include:

25.1 that cabin attendants would no longer be able to keep the drivers alert;

25.2 drivers would now have to deal with misbehaving passengers;

25.3 drivers will have to deal with emergencies;

25.4 an increased workload;

25.5 drivers will have to assist passengers;

25.6 drivers will have to communicate with passengers on double-decker coaches;

25.7 the revised duties will be complex, time-consuming and unlawful to the extent that they would require a driver to work in excess of the

maximum hours permitted in terms of the Basic Conditions of Employment Act.[11]

[26] The respondents also say that the following categories of work are not covered by the contract of employment:

26.1 cleaning the bus;

26.2 selling water to passengers;

26.3 making lengthy announcements;

26.4 dealing with problematic passengers;

26.5 completing the manifest;

26.6 making credit card impressions; and

26.7 completing on-board sales (refer to as OBS).

[27] In response, the applicants say that most of these duties are part of the drivers' terms and conditions of employment; and in so far as they have had to take on additional duties, they are not onerous and demand to know more than changes in work practice. And in any event, drivers will be compensated for the extra work brought about by the changes.

[28] Intercape accepts that there will be some "teething problems". With regard to specific complaints, it points out that:

28.1 Drivers are allowed to sell water to passengers for the own account if they wish to do so, but there is no obligation on them.

28.2 Drivers are required to assist passengers but not to get into debates with them.

28.3 Drivers will be given cell phone charging facilities in the cabin and hands-free kits are to be installed.

28.4 The announcements are mostly pre-recorded. And even if the drivers were required to read out the announcements next to the answering affidavit, the most lengthy announcement would take a driver less than one and a half minutes to deliver.

[11] Act 75 of 1997 (the BCEA).

[29] Intercape has presented an extensive document to the court setting out the tasks to be performed; the action required; the links between the drivers' existing knowledge and tasks and the new tasks; the time and effort required for each task; and similar existing tasks of the drivers. An employee physically performed each of those tasks in order to put a time to each task.

[30] With regard to the manifests and ticketing tasks, the applicants point out that:

30.1 On-board sales are very rare, usually two to three per trip.

30.2 Most passengers travel from the main depot to the arrival depot, rather than embarking *en route*.

30.3 At those depots, manifests and tickets sales are not the responsibility of drivers.

[31] The applicants further say that the drivers on duty (active service) are not expected to perform the jobs of two people or to take on substantial, onerous new duties that change the nature of their employment. The assistant drivers (when in active or resting) are not required to do anything. Most of the tasks relating to completing manifests are done before the bus departs. The manifest duties at the major point of departure performed by non-drivers at these centres. The same applies to the bulk of the cleaning duties. Only a limited number of manageable administrative tasks are being taken on by the drivers and the range of the services to passengers provided by those thesis previously are simply falling away.

[32] Concerning alleged contraventions of the BCEA, the applicant submit that once the bus is in motion, the on duty driver's primary function is driving. The extra tasks are attended to by that driver during his working time (e.g. at stops) and not the driver who is resting. Therefore, there is no violation of BCEA working hours limitation. And in any event, the drivers' terms and conditions are governed by the SARPBAC main agreement.

The requirement that drivers communicate with passengers via intercom

[33] An intercom system has been installed that enable passengers to communicate with the driver. The intercom handset is situated to the right of the driver. The respondents say that is a contravention of regulation 308A(1) of the National Road Traffic Act[12] which provides that a person may not drive a vehicle on a public road while holding a communication device. They say that this is a change to the drivers' terms and conditions of employment that require them to adhere to national traffic rules and regulations.

[34] The applicants say that they will reverse this change; but they have not done so within 48 hours. However, Intercape's CEO, Mr Johann Ferreira, has stated under oath that drivers are not required nor supposed to make regular use of the intercom system. The intercom is intended to be accessible for use in exceptional circumstances for passengers to let the driver know if there's a problem. The driver can then pull off the road and deal with the issue. This is the *status quo* until Intercape introduces a hands-free intercom system "in the near future".

[35] The requirement to use an intercom from time to time does not change the nature of the job. It is a mere change to the drivers' way of working. And if it contravenes any law, the drivers' contracts of employment make it clear that the law prevails.

Using cell phones

[36] The respondents raise the same argument concerning the requirement that drivers must receive urgent cell phone calls and SMS messages.

[37] Intercape says that it has been and remains the case that no driver is expected or required to read text messages whilst driving or sleeping. And all drivers are required to have a hands-free kit for the mobile phone as a condition of employment. This does not constitute a change to terms and conditions of employment.

[12] Act 93 of 1996.

Performance incentive

[38] Intercape has offered the drivers a performance incentive if they performed certain tasks to management's satisfaction. Even though this is to their benefit, the drivers say that this is also a unilateral change the terms and conditions of employment that gives them the right to strike. As Clive Thompson[13] points out, "not only changes that derogate from existing rights but also those that benefit employees are covered by the remedy [in section 64 (4)]."

[39] Firstly, the respondents raised this aspect for the first time in argument. Secondly, it appears from the question and answer sessions between the drivers and management that they requested increased compensation. And thirdly, the letter to drivers makes it clear that this is a once-off incentive payment of R500 and not a change to terms or conditions of employment. No-one refused it.

Deductions

[40] The respondents further submit that, in terms of the new arrangements, drivers face deductions from their salaries for "the water they are required to sell" and for losses incurred if the taking of a credit card impression does not result in full payment. They say that this constitutes a breach of section 34 (1) of the BCEA.

[41] As I've pointed out above, the drivers are not "required" to sell water. It is up to them to do so or not. But any deductions that are not permitted in terms of a law, collective agreement, court order or arbitration award would indeed be unlawful. The question remains, though, whether it constitutes a change to the drivers' terms and conditions of employment.

[42] Mr *Stelzner* pointed out that the drivers' contract of employment specify that:

> "Should any term of this contract be in conflict with any existing or future law, sectoral determination or collective agreement, such law, determination or agreement shall be binding in respect of the said provision

[13] Thompson and Benjamin, *South African Labour Law* AA1-320.

only and all other terms of this contract shall remain valid and binding upon the parties."

[43] The applicants have thus undertaken that no unlawful deductions will be enforced; and in any event, for at least the following two months, no funds will be deducted from a driver's remuneration a full payment is not received following the taking of a credit card impression.

Application of the law to the facts

[44] In *Johannesburg Metropolitan Bus Services*[14] the court referred to *NUMSA v Lumex Clipsal (Pty) Ltd*[15] where the court held that additional tasks assigned to machine operators and a revised shift system did not amount to a unilateral change to terms and conditions of employment. That court, in turn, referred to *CDM (Pty) Ltd v Mine Workers Union of Namibia*[16] where the Labour Court of Namibia held that a unilateral change will be illegitimate where it is "so fundamental as to amount to a change in contract". In that case it was held that it fell within the managerial prerogative to determine the methods by which jobs were to be performed and was envisaged by the relevant contract of employment and collective agreement for the company to require its drivers to also operate a satellite tracking device. The employer discussed the new system with the operators and they were trained to use it. The court held that this was a permissible change to the company's methods of operation which fell within the employer's prerogative to implement.

[45] That court also cited with approval the dictum in the English case of *Creswell v Board of Inland Revenue* [17] where it held that "...an employee did not have a vested right to preserve his working conditions completely unchanged and must adapt himself to new methods and techniques". In *Creswell* it was held that:

[14] *Supra* paras 38-39.

[15] J 1070/98 (24 August 2000).

[16] 1997 (2) LLD 65 (LCN),

[17] (1984) (2) AER 713 (CHD).

> "… An employee was expected to adapt to new methods and techniques in performing his duties provided the employer arranged for him to receive the necessary training in the new skills and the nature of work did not alter so radically that it was outside the contractual obligations of the employee; that it was a question of fact whether the introduction of new methods and altered the nature of the work to such a degree that it was no longer the work that the employee had agreed to perform under the terms of his contract."

[46] The Labour Appeal Court considered a similar issue in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA*.[18] Workers were instructed to operate two machines instead of one. The court held as follows:

> "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*, par 45 p7-19. I agree with the view expressed by the learned author at p7-23 fn 9 that employees do not have a vested right to preserve their 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.

[47] On the evidence before me, it does not appear that the additional obligations imposed on the drivers "are so dramatic as to amount to a requirement that [they have to undertake] an entirely different job". The new tasks amount to a variation of work practice occasioned by compelling operational reasons that led to the retrenchment or redeployment of the cabin assistants. They are not overly onerous or time-consuming and they do not constitute a change to the drivers' terms and conditions of employment as set out in their contracts of employment.

[18] [1995] 4 BLLR 11 (LAC), cited in *Johannesburg Metropolitan Bus Services (supra).*

Conclusion

[48] In conclusion, I find that the additional duties to be undertaken by the drivers do not amount to a change in terms and conditions of employment enabling them to strike in terms of section 64(4) without following the process prescribed in section 64(1) of the LRA. The changes required are not of such a degree that it is no longer the work that the drivers had agreed to perform under the terms of their contracts of employment.

[49] With regard to costs, I take into account that there is an ongoing relationship between the parties. I also take into account that the drivers will have to undertake additional duties and that they will have to make some compromises in order to assist the employer and to ensure the survival of the business. And lastly, I take into account that the union did follow the prescribed procedure in terms of section 64 (4) in circumstances where it believed that it was entitled to do so. In law and fairness, I do not consider a costs order to be appropriate.

Order

The rule *nisi* issued on 20 March 2015 is confirmed.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	R G L Stelzner SC Instructed by Edward Nathan Sonnenbergs.
RESPONDENTS:	Grant Doble of Cheadle Thompson and Haysom.